

Petition For Writ of Certiorari To The Court of Appeals

The State of South Carolina

In The Supreme Court

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S.C. Supreme Court

Appeal From Richland County

Court of Common Pleas

Casey L. Manning, Circuit Court Judge

WARREN Russell @
Petitioner

petitioner,

v.

State of South Carolina

Respondent

Appellate Case # 2012-213313

Petition For Writ of Certiorari

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Bishopville, SC. 29010

Brief of Appellant
The State of South Carolina
In The Supreme Court

Appeal From Richland County
Court of Common Pleas
Casaj L. Manning, Circuit Court Judge
Case No. 2012-213313

WARREN BUSSELLO

Petitioner

v.

State of South Carolina

Respondent

Initial Brief of Appellant

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Statement of Issue on Appeal

Did petitioner knowingly and intelligently waive his right to a direct appeal?
Was trial counsel ineffective for failing to inform petitioner about the advantages and or disadvantages of his direct appeal, when petitioner requested counsel to file said appeal?

Statement of The Case

Petitioner completed the the hazards of a full trial on eight (8) indictments, all stemming from one chain of events. The jury returned a guilty verdict on one count, said verdict was acknowledge on record by the trial court, the jury was then locked on the other seven (7) counts. Subsequently the first Allen charge was given, the jury agains return dead locked on the same seven (7) counts, and reveals it numerical division and decisional disagreement of 11-1. Trial counsel fails to object. Subsequently, the trial court has ex-parte communications with the sole hold out. Then gives a Second Allen charge. While the jury is out deliberating, trial court stops the trial to initiate a plea, the amount of time petitioner is to serve and voices its opinion, her reasoning "this jury is not gonna reach a verdict, and it would be hard for any jury to do so."

Facts

It was because of these many errors, plain upon the face of the record that petitioner requested trial counsel to file a direct appeal. However, because those issues relate to trial counsels ineffectiveness at trial resulting in an involuntary and unintelligent plea, that counsel failed to file said direct appeal.

Argument

Petitioner seeks a Writ of Certiorari to review an order denying his application for Post-Conviction Relief, and granting him a belated appeal of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E. 2d, 35 (1974) and Davis v. State, 288 S.C. 290, 342 S.E. 2d 60 (1986). Petitioner, respectfully prays that this court grant petitioner's Writ of Certiorari, dispense with further briefing and proceed with a review of all direct appeal issues.

Petitioner alleges that trial counsel was constitutionally deficient in failing to file a requested direct appeal. For the petitioner to have waived his right to a direct appeal, he must make a "knowing and intelligent" decision not to pursue his appeal. See Exhibit, PIR transcript pg# 49, 69, and 70, Lines 1-25. In this case at bar, petitioner and counsel had every reason to file an appeal from his original conviction, but counsel failed to consult or timely file an appeal, when these errors was placed upon the face of the record. Counsel has a constitutionally imposed duty to consult with petitioner about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or there are now frivolous grounds for an appeal, (2) when defendant demonstrated that he was interested in appealing. Counsel must advise petitioner about the advantages and or disadvantages of an appeal and make reasonable efforts to ascertain petitioner wishes. It must be clear that counsel's failure to for consult and or file, flow in the face of his duties, and prejudiced petitioner.

Petitioner argues that an indigent defendant must have the effective assistance of counsel when raising an ineffective assistance claim in collateral attack, *MACKEA V. MURRAY*, 109 F.3d 987, 962-63.

MARTINEZ V. RYAN, *supra*, held an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default. For if the attorney is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claim. *FRASIER V. STATE*, held that all defendants who have been found guilty of a crime have a right to be informed of the possibility of appeal and the method for taking an appeal. *CHERRY V. STATE*, *supra*, *WHITE V. STATE*, *supra*, and *DAVIS V. STATE*, *supra*, retained counsel possess the express duty to assist their clients to properly perfect their appeals.

A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. If counsel has consulted with the defendant, the question of deficient performance is easily answered; counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. As in this case at bar, if counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary question: "Whether counsel's failure to consult with defendant itself constitutes deficient performance." Said failure to consult was a complete denial of counsel during a critical stage of a judicial proceeding and mandates a presumption of prejudice because the adversary process itself has been denied, presumptively irreparable. This is serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Petitioner asserts that it was counsel's deficient performance which actually caused the forfeiture of defendant's appeal, and the defendant has made out a successful ineffective assistance of counsel claim, entitling him to an appeal. (See, *BOE V. FLORES-ORTEGA*, 120 S.Ct. 1029 (2000); *PENSON V. OHIO*, 488 U.S. 75, 88-89, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *SMITH V. MURRY*, 477 U.S. 527, 535-536, 106 S.Ct. 2661, 91 L.Ed.2d 484 (1986); *SMITH V. ROBBINS*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)).

Accordingly, this case should be reversed for determination of whether petitioner was prejudiced by his attorney's deficient performance at this critical stage in failing to file a direct appeal.

LOFFER V. COOPER, 132 S.Ct. 1376 (2010); *PADILLA V. KENTUCKY*, 559 U.S. 336, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); *FISHER V. LEE*, 215 F.3d 488, 443 (4th Cir. 2000); *ACOSTA V. KELLY*, 178 F.3d 634-639 (2d Cir. 1999); *EVITT V. LUCY*, 469 U.S. 387, 396 (1985). It would be unfair to require an indigent, perhaps pro-se, defendant to demonstrate that his hypothetical appeal might have merit before any advocate has ever reviewed the record of the case, in search of a potentially meritorious grounds for relief. Petitioner inquired, thereby "triggering" a duty to consult and file a direct appeal. *U.S. V. CRUEL* (CA 7, SC 2001) 21 Fed Appx. 142 2001 WL 1261936.

Furthermore, because trial counsel cannot be expected to assert his own incompetence on direct appeal, is the reasons he failed to consult or file said appeal. *U.S. V. RICHARDSON*, 195 F.3d 192, 198. The record is plain on its face that trial counsel allowed and/or participated in the many trial errors which is the cause to why petitioner felt forced to plea, involuntarily and unintelligently due to ineffective assistance of counsel. *HILL V. LOCKHART*, *supra*.

Issues

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| (9): Subject Matter, and personal jurisdiction challenges | pg# 48-55 |

Conclusion

Petitioner asserts that most of these issues are in fact direct appeal issues plain on the face of the record, and all caused by trial counsel deficient performance. PCR counsel was clearly made aware and also failed to protect these issues in PCR court by way of belated appeal. It was plain error for the PCR court and PCR attorney to fail to advise petitioner of the advantages and disadvantages of a direct appeal when petitioner clearly stated that he did not wish to waive said direct appeal right. This error substantially effected the outcome of the proceeding, because petitioner was denied his right to have his direct appeal issues adjudicated on its merits. *U.S. v. Olano*, 507 U.S. 725.

A defense counsel's role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly lawless, after conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. In this case at bar, Counsel abandoned petitioner direct appeal altogether. When the PCR court affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, initial record collateral counsel was supposed to raise the federal participation and successive Allen charge issues, and the Rule 11 violation with all other PCR issues petitioner seeks to have reviewed. Counsel at trial testified that he objected to these issues, thus the evidence shows they were meritorious or viable issues for appeal. Nevertheless, trial counsel, and PCR counsel sufficiently or adequately, addressed the issues regarding belated appeal. See *Tonnes v. State*, 382 S.C. 589, 677 S.E. 2d 20 (2009). All in violation of petitioner 6th 12th and 14th Amendment to the U.S. Constitution.

Statement of Issue on Appeal

Was the State Court decision based on an unreasonable determination of the facts presented as evidence
Was the State Court decision "Contrary" to or involved an "Unreasonable application of clearly established Federal Law

Statement of the Case

Petitioner, is alleging that his trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Therefore, because of Counsel's unreasonable standard of representation, he was severely prejudiced. For a petitioner to be granted Post-Conviction Relief as a result of ineffective assistance of counsel, he must show first, that his counsel's failure to render reasonably effective assistance under prevailing professional norms, and secondly, that his counsel's actions caused him prejudice. See, *Lafayette v. Cooper*, 132, S.Ct. 1376 (2012); *Caiting Strickland v. Washington*, 466 U.S. 668, 104, S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Butler v. State*, 286 S.Ct. 441, 334 S.E.2d 31, 3 (1995); *Perf. denied*, 474 U.S. 1094 (1986); and *Hill v. Lockhart*, 474, U.S. 52, 56 (1985). Furthermore this court can only sustain the PCP Judge's factual findings and conclusions only if there is any probative evidence to support those findings. *Cherry v. State*, 300 S.Ct. 115, 386 S.E.2d 624 (1989).

Petitioner, alleges that the record and evidence presented in whole, does not contain any probative evidence that could support the States factual findings and conclusions. The Court appears to have based its factual findings on the following: Petitioner, did knowingly and intelligently waive his right to a belated appeal, trial counsel was not ineffective, petitioner was not prejudiced by such, trial court did not mitigate said plea, said plea was voluntary and intelligently entered, and that there was never a jury verdict reached, and acknowledged on the record before the plea was entered. However, Petitioner has shown those fact to be erroneous by clear and convincing evidence from the complete record and evidence.

Petitioner, states that courts have held that § 2254(D)(1)'s language to cause requires the rejection of a State Court's decision which were substantially different from the relevant precedent of the Supreme Court, then it considered the situation in which a state court recently identifies the applicable Supreme Court precedent and standards contained in that precedent, but applies them unreasonably to the facts of the case. The courts hold that this situation requires relief under § 2254(D)(1). The AEDPA does not require State or Federal court to wait for some nearly identical pattern before a legal rule must be applied. *Carey v. Musladin*, Supra, Nor does it prohibit a federal court from finding an approximation of a principle was announced. *Lockyer v. Andrade*, 539, U.S. 63. The statute requires, to the contrary, that even a general standard may be applied in an unreasonable manner. *Williams v. Taylor*, 529, U.S. 362, finding a state court decision both contrary to and involving an unreasonable application of the standards set forth in *Strickland v. Washington*, Supra, or *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007); *Lafayette v. Cooper*, 132, S.Ct. 1376 (2012).

In addition to the situation where a State court decision is "contrary to" or an "unreasonable application" of clearly established Federal Constitutional Law, 28 U.S.C. § 2254(D)(2), provides that a State court decision must be reversed, and relief must be granted if the state court proceeding resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. As such the situation is in the case before this court. The application of this standard has been discussed in *Miller-El v. Cockrell*, 537, U.S. 322. Finally, if a legal issue has not been considered by the State Court on the merits, the Federal Court must decide those issues de novo. See, *Wolfe v. Johnson*, 565 F.3d 140, quoting *Wiggins v. Smith*, 539 U.S. 510, *Mendez v. Angelone*, 323 F.3d 286. The deferential standard of review applies even when the State Court fails to identify the prevailing Federal standards and principles to address the claim, *Fullenwood v. Lee*, 290, F.3d 663, *Williams v. Taylor*, supra.

Therefore because the State court proceeding resulted in a decision that was clearly based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding, petitioner is challenging the state court decision, both in their recognition of established legal standards for determining counsel's effectiveness, and in their factual conclusion that the "entire record viewed as a whole" and cumulative of mitigating evidence presented "did not" raise a reasonable probability.

that the results of the proceeding would have been different.

Facts

Petitioner completed the records of a full trial on eight (8) indictments, two non-violent, the other six (6) violent. All eight stemming from one chain of events, all eight counts were properly submitted to the jury at the close of the trial for deliberation. Subsequently, the jury returned a guilty verdict on only one indictment, and was deadlocked on the other seven indictments. The trial court acknowledged the existence of the jury's guilty verdict several times on record, thus all parties was aware of this one jury verdict. The trial court then gives the first Allen charge, and again the jury returns deadlocked on the other seven indictments, and again returns the one guilty verdict on record. Then the jury reveals to the court its numerical division and decisional disagreement of 11 to 1. The trial court then has ex-parte communication with the sole hold out, juror # 120 outside the courtroom. Subsequently, the trial court gives the second Unconstitutionally Coercive Allen charge, directed at the sole hold out voter on the jury. While the jury is not deliberating from the second Allen charge, the trial court, on its own initiative, calls all parties to a bench conference, informs the plea discussed and offers the defendant the amount of time to be served, states its opinion that this jury is unable to reach a verdict, and it would be hard for any jury to reach a verdict.

Ground One

Ineffective Assistance of Counsel

A), Counsel was ineffective for failing to object to the guilty verdict returned by the jury, its revelation in secret, failing to move and/or investigate the mitigating circumstances of said jury verdict, failed to appreciate the meaning of applicable law and court procedures. Petitioner asserts that he was prejudiced as elements of ineffective assistance of counsel, by counsel's deficient performance, because counsel was aware of the jury verdict on one indictment, but still advised petitioner to plead guilty to a charge the jury already returned a guilty verdict on, failed to explain to petitioner and request to the court, that said jury verdict must be set aside, and failed to protect petitioner's right to have the trial regulated by the jury of his choice. All of which is below the professional norm of a "competent" attorney. See, *Harden v. Davis*, 878 F.2d 1341 (11th Cir 1989); (Holding that an attorney's "silence" at the point the verdict was reached against his client was so likely to prejudice the cost of litigating its effect is unjustified and prejudice is presumed." Ed at 1345; citing *CRONK*, *Supra*; *Hill v. Lockhart*, *Supra*; *Brinkins v. Alabama*, 365 U.S. (1969); *McCarthy v. United States*, 394 U.S. 459, 446 (1964); *Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000); *Bollison v. State*, 346 S.C. 506, 552 S.E.2d 340 (SC 2001) and *State v. Rikard*, 371 S.C. 295, 301, 639 S.E.2d 72, 75 (4th app 2006); (guilty plea "may not be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"); (However, the courts must ensure that the defendant "understands the charges and consequences of the plea" and the Record reflects a factual basis for the plea). See, Exhibits, Trial transcript pg# 42, Lines 11 to 17, plea transcript, pg# 2, Lines 15 to 25, and PCR transcript pg# 66, Lines 18 to 25, pg# 73 Lines 1 to 10, and pg# 74, Lines 1 to 10. See, *Lafler v. Cooper*, *Supra* and U.S.C.A Const. Amend 6th.

B), Counsel was ineffective in failing to object to the jury's revelation of its numerical division and decisional disagreement of 11 to 1, after the first Allen charge. Petitioner asserts that he was prejudiced as elements of ineffective assistance of counsel, by counsel's deficient performance in failing to object, or request that the jury not reveal its numerical division and decisional disagreement in the future, failed to respond to the exigencies of the moment, or help to craft a meaningful response to the jury inquiry. All of which is below professional norm of a "competent" attorney. See, *Brasfield v. United States*, 212 U.S. 448, 450, 47 S.Ct. 135, 136, 71 L. Ed 345 (1926); (Even when the foreman only reveals the numerical division of the jury, without specifying which number favors conviction, there is reversible error. Ed. See, *United State v. Hotz*, 620 F.2d 5, 7 (1st Cir 1980). Clearly said failure of counsel to particularize an exception to the

jury's revelation of its numerical division and decisional disagreement "does not" preclude this court from correcting this error. See, Exhibits, trial transcript pg # 37, 38, Lines 1-25, and PIR transcript pg # 66 Lines 18 to 25.

C), Counsel failed to object to the trial court's ex-parte communication with the sole held out, JUDGE # 120. Petitioner asserts that he was prejudiced, as elements of ineffective assistance of counsel, by counsel's deficient performance in failing to object, remaining silent and in fact agreeing to said improper ex-parte communication with the sole held out, either knowingly or unknowingly the potential prejudice of such ex-parte communication at this critical stage of the trial. Petitioner asserts that it is because of counsel's deficiencies during the course of his trial, that petitioner felt forced to plea, because of counsel showing that he was not competent enough to protect any of petitioner's trial rights. See, Exhibit, trial transcript pg # 42, Lines 8-10. See, Moore v. Knight, 368 F.3d 936 No # 02-4-257, May 30th 04, said ex-parte communication was inappropriate and interfered with petitioner's constitutional rights guaranteed to a fair trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Ellsworth v. Levenhagen, 248 F.3d 634, 640 (7th Cir 2001); and United States v. Gagnon, 470 U.S. 502, 506, 105 S.Ct. 1492, 84 L.Ed.2d 486 (1985). (Specifically, we look to see if the communication had a prejudicial effect on the defendant and rendered the trial "fundamentally unfair". In this case at bar it was said ex-parte communication informed the judge that this judge was unable to reach a verdict, and caused the initiation of said plea. The Supreme Court considered the contention that ex-parte communication off the record could "NEVER be harmless error". Specifically, after knowing the numerical division and decisional disagreement of 11 to 1, the Supreme Court has stated "In criminal cases, any private communication, contact, or tampering directly or indirectly with a jury or juror during trial about a matter pending before the jury is for 'obvious' reasons deemed presumptively prejudicial, and the burden rest 'heavily' upon the government to establish that such contact was harmless to the defendant. See, Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Finally, any discrepancy as to what the judge said to the jury is wholly due to counsel's and the court's failure to make a record of the communication. This court should be hesitant to punish Mr. Russell for any ambiguities created by the lack of record. See, Payne v. State, 290 Ga. App. at 591, 592, (4); Peterson v. State, 284 Ga. 275, 279, 663 S.E.2d 164 (2003); (Thus the appellate court of this state have emphasized the importance of trial courts not engaging in any ex-parte communications.

D), Counsel failed to object properly to the court's Second Unconstitutionally Coercive Allen Charge directed at the minority voters on the jury. Petitioner asserts that he was prejudiced, as elements of ineffective assistance of counsel, by counsel's deficient performance in failing to object to the court's Second Allen Charge, after knowing the numerical division and decisional disagreement of 11 to 1. Petitioner points out that this same South Carolina Supreme Court in DAWSON V. State, 352 S.C. 15, 572 S.E.2d 445 (2002) stated given the trial judge confirmed the existence of one minority voter immediately before giving the Second Allen Charge, and concluded that the unbalanced language was clearly directed at the minority, sole held out, and under those circumstances was coercive, threatening, trial counsel's failure to object to said charge was unreasonable. But for counsel's failure to object, there is a reasonable probability the outcome would have been different. Further, because the PIR court's error by holding counsel was not ineffective for failing to object to the Allen Charge, this court REVERSED. See, Exhibit, trial transcript pg # 42, Lines 11 to 25. Petitioner has shown by clear and convincing evidence that trial counsel did not put forth a proper objection which would preserve this issue for appellate review, and counsel further stated and explained to the trial court that he did not fully understand the statute. Obviously, if the lawyer does not have a grasp of either the law or the facts, counsel will be unable to give petitioner an informed opinion in such case, therefore counsel will be unable to accomplish his function and will not be providing assistance of counsel. Counsel's unfamiliarity with the facts and the law relevant to petitioner's

made counsel so ineffective that petitioner's guilty plea could not have been knowing and voluntarily entered. See VON MOINE V. GILES, 332 U.S. 709, 721, McCarthy V. U.S., *supra*, Wofford V. Wainwright, 749 F.2d 1505, cert. denied, 454 U.S. 1109, and Walker V. Caldwell, 476 F.2d 213. As follows, See Jenkins V. United States, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) (per curiam) holding that under all the circumstances a supplemental instruction that the jury must reach a verdict was erroneous; Jones V. Norvell, 472 F.2d 1185 (6th Cir.) cert. denied, 411 U.S. 986, 93 S.Ct. 2275, 36 L.Ed.2d 964 (1973); (holding that under all the circumstances a state judges numerical inquiry and Allen charge warranted habeas relief).

E), Counsel's failure to object to the trial courts efforts to coerce a guilty plea. Petitioner asserts, that he was prejudiced as elements of ineffective assistance of counsel, by counsel's deficient performance in failing to object to the trial court on its own initiative, calling all parties to a bench conference, while the jury was still out deliberating after the second Allen charge, to initiate the plea discussions and amount of time to be served by petitioner, and then states the court opinion "that this jury is unable to reach a verdict and it would be hard for any jury to reach a verdict." Trial counsel's failure to object is below the professional norm of a competent attorney. See, Exhibit, PCR transcript pg# 67 lines 8 to 17, and pg# 69, lines 1 to 5. Petitioner was prejudiced as elements of ineffective assistance of counsel, by counsel's deficient performance in remaining silent at this critical stage, failing to object, appreciate the meaning of applicable law, failing to request the jury to continue its deliberations, requesting a direct verdict of not guilty, requesting a mistrial, or a partial verdict. Clearly after the judge expressed its opinion, either of the above requested action would have been granted, creating a reasonable probability that the outcome would have been different. The Supreme Court has emphasized that in circumstances like this one, where counsel was not deprived of the opportunity to object, it is fair to expect him to "participate" in preserving his clients valued right to have the trial completed by a particular tribunal. What should be "most obvious" to this court, is even after counsel was armed with the trial courts personal opinion "that this jury is unable to reach a verdict" counsel still advised petitioner to plead guilty to all of the deadlocked charges, to include the charge the jury already returned a guilty verdict. Furthermore, based on the jury's inability to reach a verdict on the deadlocked charges, based on the lack of evidence, even on the lesser included offenses, created a reasonable probability that the state would have declined to re-prosecute in the event of a direct verdict mistrial, or a partial verdict. At the least counsel, armed with the trial courts personal opinion, should have made an attempt to negotiate a more favorable plea to the lesser included charges, and on a sentence of less prison time. Clearly any amount of additional jail time has Sixth Amendment significance. See, Padilla V. Kentucky, *supra*, and Missouri V. Frye, *Supra*.

F), failing to properly advise petitioner of the consequences of future constitutional rights to be waived with the participation of Community Supervised Program.

G), failed to object to the knowing presentation of perjured testimony.

H), Ineffective Assistance of counsel in initial review of collateral proceedings

I), Involuntary and Unintelligent guilty plea See, Ground Three

J), Judicial Initiation of guilty plea See, Ground Four

K), Double Jeopardy See, Ground five

L), Manifest Necessity for a mistrial / Abuse of discretion trial court, See, Ground Six

M), Unconstitutionally Coercive Allen charge / Abuse of discretion trial court, See, Ground Seven

N), Lack of probable cause

O), Impermissible per judicial closing argument

Argument

The adversarial process is protected by the Sixth Amendment, and requires that the accused have "competent" counsel acting in the role of an advocate. The record in this case shows that the State courts' decision is plain error of law, because counsel failed to make any attempts to put the State's case to a meaningful adversarial testing, which makes the process itself presumptively unreliable. "Cronic, 466 U.S. at 659, 104 S.Ct. at 2047. Counsel stood by and remained silent at this critical stage, while the petitioner's Constitutional rights were "plea bargained" away because of counsel's deficiencies.

Conduct of counsel prior to the entry of a guilty plea may be examined in evaluating the extent to which the prior representation influenced the voluntary and intelligent character of the guilty plea entered. The history of counsel's representation should be explored to determine if counsel's assistance was so ineffective as to render the plea involuntary. A guilty plea does not bar collateral review of allegations of ineffective assistance of counsel in so far as the alleged ineffectiveness bears on the voluntariness of the guilty plea. *Hill v. Lockhart*, supra; *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010) (citing *Strickland v. Washington*, supra; *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Marshall v. Lonberger*, 459 U.S. 422; *U.S. v. Patterson*, 739 F.2d 191a).

Where allegations of ineffective assistance of counsel are made, the question becomes, whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial and/or plea may not be relied on as having produced a just result." See, *Butler*, supra (citing *Strickland*, supra). As such, courts evaluate allegations using a two-pronged test. See, *Cronic*, 302 S.Ct. at 112, 336 S.Ct. at 625. First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of "reasonableness" under this prong. "The proper measure of an attorney's performance remains simply reasonableness under prevailing professional norms." Secondly, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that but for counsel's errors there is a reasonable probability that the results of the proceedings would have been different. "A reasonable probability is sufficient to undermine confidence in the outcome," *Hill v. Lockhart*, supra.

Petitioner, is requesting this court, in assessing prejudice, to consider all of the instances of ineffective assistance of counsel, and to review these errors under the cumulative error doctrine, which states that the cumulative effects of counsel's ineffectiveness is so persuasive as to render a particularized prejudice inquiry unnecessary. See, *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 834 (2007); *Frett v. State*, 298 S.C. 54, 378 S.E.2d (1988); *State v. John SON*, 334 S.C. 78, 512 S.E.2d 795 (1999); and in this court in *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (1st App 1995). In *Cargile v. Mullin*, 317 F.3d 1196 (10th Cir 2003), the court found prejudice both because of numerous instances of ineffective assistance of trial counsel. See also, *Harris ex Rel. Remseyer v. Ward*, 64 F.3d 1432, 1434 (9th Cir 1995), Defense counsel's many deficiencies cumulative prejudiced the defense. *Mark v. Blodgett*, 970 F.2d 614, 622-25 (9th Cir 1992). (Cumulative errors requiring prejudice).

Further, petitioner, asserts in reviewing the plain error of defects affecting substantial rights may be noticed although they were not brought to the attention of the courts. *U.S. v. Olano*, 507 U.S. 725, states under the plain error review the court may notice an error that was not preserved by timely objection if petitioner can demonstrate: 1) That the error occurred, 2) that it was plain error and 3) that the error was material or affected petitioner's substantial rights and seriously affected the fairness, integrity or public reputation of the judicial proceedings. Fed R Crim. P. Rule 52(b) *U.S. v. Young*, 470 U.S. 1, quoting *U.S. v. Atkinson*, 297 U.S. 157. *Chapman v. California*, 386 U.S. 18, acknowledged that certain Constitutional rights are so basic to a fair trial that their infractions can never be treated as harmless.

CONCLUSION

Petitioner has shown that the State court decision is based on erroneous factual findings. Petitioner points out that he has in fact gone before the State Court by way of two additional hearings, in an attempt to have these erroneous facts brought to the courts attention for correction. However, the courts have remained silent to petitioner attempts. See, Record from 10/30/10, and 7/26/11, hearing and by way of petitioner (SCRPC 6D(6)) motion. Nevertheless at each stage of these judicial proceedings, petitioner has been impeded by these officers of the court, resulting in a complete break down of the South Carolina Judicial system, the U.S. Constitution, and a miscarriage of justice. See Appendix pg# 294-295-267, and pg# 294-321

Finally, the State's final order of dismissal implied the consent to the presentation of each and every allegation raised by petitioner consent in all pleadings, document and motions. Furthermore, because of the State's implied consent pursuant to SCRPC Rule 13(b) issues not raised by the pleadings but raised by consent of both parties shall be treated by the courts as if they had been raised in the original pleading. Therefore, any of the State's allegations of perjury, or by fraud representation has been put to rest by the implied consent in the State's final order of dismissal.

Furthermore, all issues raised by petitioner in his proposed order granting relief were never adjudicated by the State court on their merits, and thus: 1) the merits of factual dispute were not resolved in state hearing, 2) State's factual determination is not fairly supported by the record as a whole, 3) fact finding procedure employed by the State court was not adequate to afford a full and fair hearing, 4) Material facts were not adequately developed at State Court hearing, 5) the State's order of fact did not afford petitioner full and fair fact hearing. See U.S.C.A. § 2254(c) and habeas court will apply a de-novo standard of review. See 28 U.S.C.A. § 2254(d) on all of petitioner's issues that were properly raised, or raised by implied consent of both parties, but never adjudicated on their merits.

See Townsend v. Sain, 372 U.S. 293, 312, 93 S.Ct. 745 9 L.Ed.2d 770 (1963) and Fisher v. Lee, 315 F.2d 433, 454 (4th Cir. 2000), cert. denied, 531 U.S. 1096, 121 S.Ct. 822, 148 L.Ed.2d 706 (2001). See Exhibit 1, The State's Final Post trial motion pg# 2, Appendix pg# 362-363. All in violation of petitioners 4th, 5th, 6th, 10th 14th U.S. Constitutional Rights.

Statement of Issues on Appeal

Was counsel ineffective for failing to inform petitioner that the State's Community Supervision Program contained statutory provisions whereby a new and additional one year prison sentence would be imposed by the court without the petitioner having the benefit of a notice, indictment, appointment of counsel, or jury trial, or that successive prison sentence could be imposed for successive violations offenses, which could act to double the sentence originally imposed and beyond the maximum advised by the plea court.

Statement of The Case

Petitioner argues that his plea was involuntary, and unintelligently entered because counsel or not the trial court did not or off the record informed petitioner of the crucial elements, or the consequences of said Community Supervision Program, or the Constitutional Rights he would be waiving by such program.

Facts

Petitioner plead guilty after completion of trial on which the jury returned a guilty verdict on only one count of eight charges presented to the jury for deliberation, on the advice of trial counsel. However, the record is void of counsel informing petitioner of any of his rights to be waived from said Community Supervision Program participation. Petitioner admits to counsel only addressing the fact that after petitioner completes his sentence of 15 years, from said plea that petitioner would have to serve Community Supervision Program, but failed to inform of any of the Constitutional waiver of rights involved, or that said program could act to double the sentence originally imposed and beyond the maximum advised by the plea court. Petitioner asserts that if he was informed of these facts he would have never agreed to plea, and but for counsel's ineffectiveness there is a fair probability that the result of the proceedings would have been different.

ARGUMENTS

Petitioner presents legal questions of law concerning the State's Community Supervision Program, (hereafter "CSP"), neither argued nor explicitly discussed in the Jackson, holding. Specifically, applicant's "PCR" application argues that counsel was ineffective for failing to advise, prior to guilty plea, that any sentence imposed by the court must include a mandatory term of Community Supervision Program which contained statutory provisions whereby a new and additional one year prison sentence would be imposed by the courts without petitioner having the benefit of a notice, indictment, appointment of counsel, or jury trial. That successive prison sentence could be imposed for successive violation offenses, which could act to double the sentence original imposed and beyond the sentence imposed and advised by the plea court. Furthermore, the determination of whether to impose a CSP violation sentence of up to one year would be made by the court through revocation proceedings during which the defendant would not be afforded an indictment, trial by jury, or counsel. See, Section 5-24-21-560 and Mills at 752. (Petitioner's J. dissenting)

In this case, petitioner contends that his guilty plea was entered into involuntarily and unknowingly because he was not advised that his sentence would include a mandatory term of CSP which in operation acted to automatically forfeit his Constitutional and Statutory rights in all future revocation proceedings.

Trial by Jury

Under the six Amendment, criminal defendants have a right to trial by impartial jury in state criminal prosecution. See *Duncan v. LA*, 391 U.S. 145, 149 (1968). This right to trial by jury exists only in prosecution for serious crimes. *Blanton v. N. Las Vegas*, 489 U.S. 538, 542 (1989). See also *Duncan* 391 U.S. 159-61. In whether a crime is "serious" for Sixth Amendment purposes the court will look at the severity of the maximum authorized penalty. See *Wainwright v. U.S.*, 518 U.S. 322, 325-26 (1996); *U.S. v. Linney*, 134 F.3d 274, 280 (4th Cir 1998). The United States Supreme Court has held that any crime punishable by a prison sentence ultimately greater than six months triggers the right to trial by jury, regardless of the sentence ultimately imposed. See, *Blanton*, 489 U.S. 566, also *FRANK v. U.S.*

395 U.S. 147, 149-50 (1969); *Baldwin v. New York*, 394 U.S. 66, 69 (1970). No offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment of more than six months is authorized. *Duncan*, supra (right to trial by jury where defendant sentenced to 60 days in jail). Clearly, the U.S. Constitutional law provides that any time a defendant is exposed to the possibility of a prison sentence in excess of six months the right to trial by jury attaches.

South Carolina, cannot butfully guarantee petitioner's Sixth Amendment right to a jury trial by process of labeling a CSP term of incarceration a violation offense. The fact is that any CSP violation sentence would be in addition to and outside the original sentence imposed for guilty plea. A CSP violation term of incarceration is still a prison sentence no matter what its called. Therefore, either the court or defense counsel was required to advise petitioner before entry of guilty plea, that any sentence imposed for convictions would include a mandatory term of CSP which includes provisions forfeiting petitioner's rights to jury trial in all potential revocation proceedings where he faced the possibility of being sentenced to a new one year term of incarceration. See, Federal Rules of Criminal Procedure, Rule 11(B)(1), Rule 11(B)(1)(H) and Rule 11(B)(1)(G). The waiver of a constitutional or statutory right (jury trial), cannot be implied or forced, and requires a showing on the record that a defendant made a knowing and intelligent waiver. See, *State v. Auther*, 269 S.C. 485, 374 S.E.2d 291 (1988); *Citing Patton v. U.S.*, 381 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 834 (1970) as the *landmark case*). Here the record is void of any advice offered to petitioner concerning the State's "CSP" or its mandatory provisions which in operation would act to deprive him of the right to trial by jury in any and all potential revocation proceedings.

Right to Counsel

The Sixth Amendment provides that, in all criminal prosecutions, the accused shall enjoy the right... to have the assistance of Counsel for his defense. U.S. Const. Amend. VI. In *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) the Court recognized the Sixth Amendment's guarantee of Counsel, "as a fundamental and essential to a fair trial." Id. at 342, 83 S.Ct. at 796. The United States system of Justice suggest that any amount of actual jail time or prison time has Sixth Amendment significance. See, e.g. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 530 (1972) (holding that assistance of counsel must be provided when a defendant is tried for a crime that results in a sentence of imprisonment).

Both the Plain wording of the amendment and the reading of *Gideon* would support the guarantee of counsel in "All" criminal prosecutions, petty or serious, whatever their consequences. See, *Scott v. Illinois*, 440 U.S. at 376, 379, 99 S.Ct. at 1163 (Brennan J. dissenting). Although the court has never read the guarantee of "counsel" that broadly, one principle has been plain "NO" imprisonment may be imposed on the basis for an unrepresented conviction. Thus in *Argersinger* the court rejected a formalistic distinction between petty and non-petty offenses and applied *Gideon* to "Any criminal trial, where an accused is deprived of his liberty. Id. at 33, 92 S.Ct. at 2010; Id. at 41, 92, 92 S.Ct. at 2014, 2015 (Burger C.J. concurring in result) because "ANY" deprivation of liberty is a serious matter, no individual "can be imprisoned unless he is represented by counsel."

In this case, the State's CSP statute contains provisions that appear to deprive petitioner of both his rights to trial by jury and the accompanying right to appointment of counsel, which denies petitioner due process and equal protection. Specifically, CSP provides that the court may impose a new sentence of up to one year for violation offenses without petitioner being provided with a trial by jury or counsel. The loss of the right to counsel in proceedings where the court may impose a new one year violation sentence is a serious matter, involving the loss of constitutional rights involving the denial of U.S. Constitutional Amendment Six and South Carolina Article 1 § 14.7 which should have been explained to petitioner before entry of the guilty plea. The loss or waiver of the Constitutional right to counsel must be entered into knowingly and intelligently. See, e.g. *U.S. v. Singleton*, 107 F.3d 1091, 1095 (4th Cir. 1997); *Citing Brady v. United States*, 397 U.S. 833, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)

; and *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1014, 1024-25, 82 L.Ed. 1461 (1938). The waiver cannot be implied because representation by counsel is indispensable to fair administration of criminal justice, see, *Brewer v. Williams*, 430 U.S. 387, 404 (1977). (Powell J. Concurring) (expressing disapproval of implied waiver of constitutional right).

UNKNOWNING AND INVOLUNTARY PLEA

The due process clause of the United States Constitution requires that a guilty plea must be entered voluntarily and knowingly. *Brinkin v. Alabama*, 365 U.S. 238, 59 S.Ct. 1709 (1961). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. *State v. Hazel*, 275 S.C. 392, 271 S.E. 622 (1980); *Doner v. State*, 314 S.C. 433, 405 S.E. 2d 391 (1991). In this case, petitioner contends that his guilty plea was involuntarily and unknowingly entered, because counsel failed to advise him that after completion of sentence he was also required to serve a mandatory term of community supervision and that in all revocation proceedings for community supervision violation offenses, petitioner would not be afforded the right to trial by jury, appointment of counsel, or indictment; even though he faced a potential violation sentence of up to one year. Additionally, that repeated community supervision violations could result in successive one year violation sentences being imposed and which could actually double the sentence originally imposed. Under the provisions of S.C. Code Ann. § 24-21-561 (1) (Supp. 2003), state's CSP, participation is a mandatory condition of release after completion of sentence.

Section § 24-21-561, further provides in pertinent part: (c), If the department determines that a prisoner has violated a term of the CSP and the community supervision should be revoked, a probation agent must initiate a proceeding in General Session Court. If the court determines that a prisoner has willfully violated a term or conditions considered appropriate and may continue the prisoner on community supervision, or the court may impose a sentence of up to one year for violation of the community supervision program...

(d), If prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for revocation, the prisoner must also complete a community supervision program of up to two years as determined by the department pursuant to Subsection (B) when he is released from incarceration.

Accordingly, a prisoner who is sentenced to successive revocations of community supervision program may be required to serve terms of incarceration for successive revocations as provided in section 24-21-561(c) and may be required to serve additional periods of community supervision for successive revocations as provided in section § 24-21-561(d). The maximum aggregate amount of time the prisoner may be required to serve when sentence for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense." See, e.g., *State v. Mills*, 360 S.C. 621, 602 S.E. 2d 750 (S.C. 2004). The court determined that CSP violations could result in successive violation sentences which could operate to double the original sentence imposed for convictions. Therefore, either the plea court or defense counsel was required to advise petitioner before entry of said guilty plea, that CSP required a mandatory waiver of his constitutional right to counsel in all future revocation proceedings. Clearly the record supports that this was never done in this case at bar.

Right to indictment

In *State v. Gentry*, 363 S.C. 93, 610 S.E. 2d 494 (2005), our Supreme Court held that an indictment is a "Notice document" required by State Constitution and Statute. See, S.C. Const. Art. 15(1) and Art. V 322. S.C. Code § 17-19-10 (2003). No person should be held to answer in any court for an alleged crime or offense, unless upon indictment by grand jury... (except in specified exceptions, not applicable here).

Further, a criminal defendant has the right to make contemporaneous objections to a defective indictment.

See S.C. Code Ann. § 17-19-90. As shown above, states CSP appears to deprive applicant of his right to an indictment. See, *Mills*, on any potential violation offense which a sentence of up to one year may be imposed. Applicant's right to indictment protected by both the S.C. Constitution and the Constitution, See, *Gentry*. Thus, either the court or defense counsel was required to advise petitioner that his guilty plea would operate as a waiver of his right to indictment. Again, the waiver of a Constitutional or Statutory right must be entered into knowingly and intelligently. See, *State v. Arthur*, and cannot be implied by silence or record. Therefore, based on the fact that neither the trial court or counsel advised petitioner that his guilty plea would result in a loss of the right to indictment, this court should find the plea unknown and involuntary, See, e.g. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969).

MAXIMUM SENTENCE

Constitutional due process requires that before accepting a guilty plea, the court must determine petitioner understands the statutory - defined maximum penalty which may be imposed for commission of the crimes charged. See, *State v. Mize*, 275 S.C. 392, 271 S.E.2d 402 (1980); *U.S. v. Gains*, 51 F.3d 400, 403-05 (4th Cir 1995).

In this case of here, petitioner was never informed or placed on the record of any of the Constitutional or Statutory right to be heard involving "CSP", or that said participation would act to double the sentence imposed by the court. See Section § 24-21-540 and *Mills*.

Although not absolutely inevitable, petitioner is still exposed to the possibility that his sentence could be doubled through imposition of successive one year violation sentence up to an additional 15 years other than the original 15 years equalling a 30 year sentence. This action are cruel and unusual punishment. Therefore, in this case petitioner's actual sentence exposure with the State's mandatory "CSP" incorporated into the plea is 30 years and well excess of the 15 years conviction and plea advised or informed to petitioner by counsel. A court's failure to inform a criminal defendant that his sentence would include a term of supervised release, and its failure to inform a criminal defendant that his sentence of supervised release include such fundamental Constitutional matters has been found to be in error. See, *U.S. v. Thorne*, 153 F.3d 130, 133 (4th Cir 1998) (Court's failure to inform defendant of additional supervised release term was reversible error because defendant faced total penalty in excess of advised maximum penalty); *U.S. v. Syah*, 963 F.2d 900, 905-07 (6th Cir 1992); (Court's failure to notify defendant of supervised release terms constituted reversible error because defendant faced possible restraint on liberty in excess of advised maximum penalty); *U.S. v. Osment*, 13 F.3d 1240, 1243 (8th Cir 1994) (same); *U.S. v. Cugat*, 147 F.3d 1193 (10th Cir 1998) (Same).

Conclusion

Accordingly before accepting petitioner's guilty plea the court was suppose to ^{assure} itself that petitioner's plea was knowingly and intelligently made with the full consequences of the plea and the Constitutional rights he is waiving. Petitioner asserts that because the court, neither counsel never informed petitioner that "CSP" contained provisions which could operate to double any sentence imposed by the court, and involved the waiver of fundamental Constitutional rights, that said plea could not have been voluntary and intelligently made. Conduct of counsel prior to entry of a plea, may be examined in evaluating the extent to which the prior representation influenced the voluntary and intelligent character of the guilty plea entered. The history of counsel's representation should be explored to determine if counsel's assistance was so ineffective as to render the plea involuntary. A guilty plea does not bar collateral review of allegations of ineffective assistance of counsel in so far as the alleged ineffectiveness bears on the voluntariness of the guilty plea. *Hill v. Lockhart*, supra, *Padilla v. Kentucky*, supra, *Missouri v. Frye*, supra, *Laffer v. Cooper*, supra, *Marshall v. Lonberger*, 459 U.S. 422; *U.S. v. Patterson*, 739 F.2d 191. Held that a judge reliance on testimony of the accused and his attorney, rather than personally reading, inquiring or explaining, and satisfying itself of the defendant's appreciation of the nature of the charges, would constitute an entire failure to address a due concern. It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly, *Lamb v. Beto*, 423 F.2d 85, *Walker v. Caldwell*, 476 F.2d 213, *Colson v. Smith*, 438 F.2d 646. It is counsel's job to provide petitioner an understanding of the charges in relation to the facts.

Statement of Issue of Appeal Amendment to Ineffective Assistance of Counsel

On February 20th and 21st of 2008, the prosecution presented four (4) new indictments to the Grand Jury by way of direct presentment. Indictments No. 2008-GS-40-1681-1684, all of which was amended on the 21st 2008. However, pursuant to SC Code § 14-5-670, which states the additional terms for certain matters will be set forth "without prices" to be "equity matters" and all matters "not requiring jury trials" and such terms are as follows: Richland County, on the (3rd) Third Monday in February, May, and October each for one week. Clearly there can be no dispute that these indictments were presented during these additional term for certain matters. Nevertheless, in reviewing the plain and unambiguous language of SC Code § 14-7-1550 to 1570, it is clear that the S.C. legislature, did not nor could not under Article I, Section 8 of the S.C. Constitution, empower the Chief Justice, or Administrative Judge to convene a Grand Jury outside a term of general session court. See, *Gilfilin v. Gilfilin*, 344 S.C. 404, 544 S.E. 2d 929 (2001). Further, the record reflects that the petitioner was convicted on indictment No. 1681 and 1683. It is for that reason that I direct attention to indictments No. 1682 and 1684, the original and amended. See Exhibits 2008-GS-40-1681-1684 original and amended.

Upon a closer examination of these indictments, specifically the bodies, there appears to be no identifiable last name of these alleged victims on indictment No. 1682, and 1684, the originals, and on the amended ones the name is Ira James Holloway. Petitioner is alleging that Ira James Holloway at the time of these alleged crimes were in the Richland County Detention Center, and the State prosecution was aware of this as a fact. Counsel failed to call Mr. Holloway as a witness to corroborate this fact and failed to challenge any of these indictments before the jury was sworn in as is required. These facts would and do show that the proceeding before the Grand Jury was not regular and reflects clear evidence to the contrary. See, *State v. Thompson*, 409 S.E. 2d 420 (21 App 1991). See, Exhibit, PCR transcript pg# 61, Lines 4-18, Counsel's testimony shows that the prosecution was aware and that the witness before the Grand Jury Investigator David McRoberts, never actually talked with these alleged victims, the witness before the Grand Jury had no personal knowledge, did not have reliable hearsay knowledge, never confirmed these alleged victims identity and never confirmed that these alleged victims was in fact victimized at all. There is no warrant or statements on record for any of these alleged victims. Nevertheless, the State prosecution presented these four (4) indictments allegedly to the Grand Jury in violation of SC Code § 14-5-670, Article I, Section 8 of SC Constitution, falsified grand jury documents, falsified Investigator David McRoberts name as a witness, and as suborn Investigator David McRoberts to present fabricated, prepared, and unsubstantiated testimony before official court agencies. Said actions by the State's prosecution are in direct violation of 5th and 14th Amendment to the Constitution, due process and equal protection, and in direct violation of Statute 18 USC A § 1623, false declaration before the grand jury, and statute 18 USC A § 1621, perjury. Not only was these violations committed on February 20th 2008, but again on the 21st, making it clear, that said actions were a "conscious wrongdoing" that can only be characterized as a "deliberate scheme to defraud. Further more, these prosecutors, whom are officers of the court, conspired to circumvent my 5th Amendment

and 14th Amendment, conspired with Investigator David Roberts to present perjured testimony, conspired to falsify documents, and presented it to the courts, with the intent to deprive and deprive petitioner of life, liberty and property with out due process, that is provided upon the court.

Furthermore, the PIR testimony reflects that these actions were perpetrated in the investigative stages of this proceedings, thus making these prosecutors and the Attorney General's office liable under Statute 42 U.S.C.A. § 1983. Clearly it is this fabrication of false evidence by these prosecutors that is the constitutional violation of its self, compounded with the intent of using this fabricated evidence to cause the petitioner harm at trial, which in fact did occur. See, *Thompson v. Connick*, 131 S.Ct. 1350 (2011). Mr. Russell points out that in assessing prejudice, this court must consider all of the instances of prosecutorial misconduct and ineffective assistance of counsel in which the court finds to have been established together. In *White v. Roper*, 416 F.3d 728 (5th Cir 2005), cert. denied 546 U.S. 1157 (2005), the court found prejudice from counsel's ineffectiveness in failing to investigate. In *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir 2003), the court found prejudice both because of numerous instances of ineffective assistance of trial counsel and because of prosecutorial misconduct. See, also *Harris ex Rel. Ramseyer v. Wood*, 64 F.3d 1432, 1434 (9th Cir 1995) Defense counsel's many deficiencies cumulatively prejudiced the defendant. In *Mark v. Blodgett*, 970 F.2d 614, 622, 624-25 (9th Cir 1992) (Cumulative errors requiring reversal). Cumulative prosecutorial misconduct also can merit relief, *Kyles v. Whitely*, 514 U.S. 419, 437 (1995); *Vincent v. Sarabold*, 226 F.3d 681, 690 (6th Cir 2000) (errors in trial, taken together, were not harmless); *Deputy v. Anderson*, 311 F.3d 742, 751 (6th Cir 2002) (Cumulatively, it is clear that these [prosecutorial misconduct] errors are not harmless.); *Jenkins v. Artuz*, 294 F.3d 284 (2nd Cir 2002) (Cumulative effect of prosecutor's presenting false testimony requires reversal). Thus, even if no one instance of prosecutorial misconduct or ineffective assistance is found to require relief, they must be considered in the aggregate. This court must consider the totality of the circumstances, which includes not only the evidence actually offered at trial, but the evidence that was presented in post conviction proceedings.

Furthermore, the States final order of dismissal implied the consent to the presentation of each allegation raised in petitioner's SCRP Rule 59(c)(2) and 60(x3) and proposed order granting PIR relief. Further, because of said implied consent pursuant to SCRP Rule 56(b) issues not raised by the pleadings but tried by consent of both parties shall be treated by the courts as if they had been raised in the original pleadings. Nevertheless, if a legal issue has not been considered by the state court, the Federal court must review it de novo. See, *Wiggins v. Smith*, 539 U.S. 510, 531 (2003); *Taylor v. Maddox*, 366 F.3d 992, and if the lower courts applied harmless error review in an objectively unreasonable manner, *Lockyer v. Dominguez Benitez*, 542 U.S. 74. *Lockyer v. Andrade*, 539 U.S. 63. Also when the state trier of fact did not afford the petitioner a full and fair fact hearing or is inconsistent with fair procedure and if the violations rises to the level of a fundamental defect which inherently results in a complete miscarriage of justice, *Townsend v. Sain*, supra, *Reed v. Farley*, 512 U.S. 339, 348, *Wainwright v. SKYLKES*, 433 U.S. 72, *Engle v. Issec*, 456 U.S. 107. or the "cause" and "prejudice" test, *Coleman v. Thompson*, 501 U.S. 722, pursuant to 28 U.S.C. § 2254(d).

Petitioner asserts the issue of prosecutorial misconduct is controlled by *Miller v. Pate*, U.S. 1 (1967). The court held "more than 30 years ago that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle."

See exhibits PIR transcript pg# 24, 25, 29, 32, 63 and 64, Lines 1-25, and PIR Exhibit # 9

Statement of Issue of Appeal

Was trial counsel ineffective for making impermissible prejudicial statements closing argument, has said comments prejudicial to petitioner's defense, and did it change the outcome of the proceedings, Was the State Court decision "Contrary" to or involved "an Unreasonable" application of clearly established Federal Law.

Statement of the Case

Petitioner, contends that he was denied his right to the effective assistance of Counsel because his court appointed attorney conceded in his argument to the jury that "they should not waste their time deliberating on the drug offense and to just check the box that says guilty, and petitioner was a drug dealer, that's how he makes his living. See, PCR transcript pg # 68, Lines, 12 - 20, and trial transcript

Facts

Petitioner completed the hazards of a full trial on eight (8) indictments, two non-violent, the other six (6) violent. All eight indictments stemming from one chain of events, all eight counts were properly submitted to the jury at the close of the trial for deliberation. In trial counsel's closing argument, counsel made impermissible prejudicial comments. Subsequently, the jury returned a guilty verdict because of counsel's prejudicial comments on only one indictment, the jury was hopelessly deadlocked on the other seven (7) most serious indictment.

Argument

"Whether a defendant received ineffective assistance of counsel is a legal question reviewed de novo." *Smith v. Ylst*, 826 F.2d 873, 875 (9th Cir. 1987), cert denied 488 U.S. 829, 109 S.Ct. 83, 102 L.Ed.2d 59 (1988). The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel ~~because~~ for his defense." The Supreme Court has instructed that "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984).

Although ineffective assistance of counsel claims are frequently presented in collateral attacks on judgments in criminal matters, we are not prevented from considering such contentions on direct appeal where "the record is sufficiently complete to allow us to decide the issue." *United States v. O'Neal*, 910 F.2d 663, 668 (9th Cir. 1990). Furthermore, in cases where the petitioner has plead guilty and alleges his plea was due to counsel's ineffective assistance of counsel, and said plea was involuntary and unintelligent, petitioner still enjoys the Sixth Amendment protections and is entitled to the full record which lead up to said plea. See, *Hill v. Lockhart*, 474 U.S. 52 (1985); *Lafier v. Cooper*, 132 S.Ct. 1376 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 130, S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); and *Missouri v. Frye*, 132, S.Ct. 1399 (2012). In pursuing this claim of ineffective assistance of counsel, Russell relies on the trial record and the PCR Record Reported statements made by trial counsel during final argument. Accordingly, the record is sufficient for a review of the merits of Russell's constitutional claim on his belated appeal. Under these circumstances, this court is required to resolve the effectiveness of counsel claim now.

The Government will argue that Russell is not entitled to a belated appeal, because he waived his rights. However, the record clearly reflects just the opposite, and Russell never at any point knowingly or voluntarily waived his right to such appeal. In fact Russell's Original PCR briefs, and PCR testimony

Reveals that Russell asserted his rights to such an appeal, and therefore is entitled to the trial record and said appeal to have this issue and any other issues that may be discovered. See ~~Appendix pg. 192 and~~ ~~Per transcript pg. 192 and 193~~. A direct appeal was not filed only because of counsel's failure to do so, Russell requested, thus counsel was obligated to file, and said failure to file was ineffective.

That Counsel's closing argument was prejudicial under the test established by the Supreme Court in *Strickland*, supra. In *Strickland*, the court held that a defendant is required to show (1) deficient performance by counsel, and (2) prejudice to the defense. Id. at 697, 104 S.Ct. at 2064. In *United States v. Cronk*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), decided on the same date as *Strickland*, "the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." *Stano v. Dugger*, 921 F.2d 1125, 1152 (11th Cir. 1991). (en banc) (citing *Cronk*, 466 U.S. at 653, 104 S.Ct. at 2064). "Cronk presumes prejudice where there has been an actual breakdown in the adversarial process at trial." In *Cronk*, the Supreme Court stated: "The adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders v. California*, 386 U.S. 738, 743 E. 917 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. A criminal defendant is also protected from unfairness in criminal process by due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Spencer v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); and *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). When a defense attorney concedes that there is no reasonable doubt concerning a factual issue in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty.

The Supreme Court recognized in *Cronk* that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. Id. at 659, 104 S.Ct. at 2047. The Supreme Court stated that "[C]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Id. at 659-60, 104 S.Ct. at 2047.

The *Strickland* test, requiring a showing of prejudice caused by counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an attempt to present a defense, or (2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a more favorable ruling. See, e.g., *Harding v. Lewis*, 834 F.2d 853, 859 (9th Cir. 1987); *McInerney v. Puckett*, 919 F.2d. 350, 353 (5th Cir. 1990); *Woodard v. Collins*, 848 F.2d 1027, 1029 (5th Cir. 1990); and *Gardner v. Ponte*, 917 F.2d 183, 187 (1st Cir.). Proof of prejudice is also required where the fundamental fairness of the challenged proceeding has not been affected and the integrity of the legal process has not been jeopardized.

Nevertheless, petitioner asserts that after review of the record this court must be persuaded that trial counsel's conduct caused a breakdown in the adversarial system of justice in this case that compels an

application of Cronic exception to the Strickland Requirement of a showing that the outcome of the trial would have been different without counsel's error or omission. Even if we were to consider trial counsel's concessions in his argument to the jury to find petitioner guilty, in the presentation of his client's case as a strategy to gain a favorable result that misfired, petitioner was still prejudiced under Strickland because out of the eight counts presented to the jury for deliberation, the only count that the jury returned a guilty verdict on, was the one trial counsel told the jury to find petitioner guilty of. The other seven most serious charges, the jury was helplessly deadlocked. Furthermore, the trial court, and trial counsel used this verdict to induce and coerce petitioner to an illegal plea of guilty. Petitioner asserts that there is a reasonable probability that if not for counsel's deficiencies, petitioner would have been acquitted on all charges, or at least only convicted on that one. Instead, trial counsel's statements lessened the Government's burden of persuading the jury of Mr. Russell's guilt. The Supreme Court instructed in Cronic that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment Rights that makes the adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659, 104 S.Ct. at 2047. Trial counsel's closing argument was a complete abandonment of the defense of his clients at a critical stage of the criminal proceeding. In Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the Supreme Court recognized the importance of the closing arguments to a criminal defendant.

A lawyer who informs the jury that it is his view of the evidence, that there is no doubt that his client is guilty, don't waste your time deliberating, just check off the guilty box, has utterly failed to "subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659, 104 S.Ct. at 2047. The Tenth Circuit has recognized that "an attorney who adopts and acts upon a belief that his client should be convicted 'fails to function in any meaningful sense as the Government's adversary.' Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) (quoting Cronic, 466 U.S. at 666, 104 S.Ct. at 2051). Trial counsel's statement conveyed to the jury his belief that his client was guilty. Trial counsel failed to function as the Government's adversary during his summation to the jury.

It is not necessary that a defendant demonstrate that a deprivation of the assistance of counsel at a critical stage of a criminal proceeding resulted from Government action. In FAVOR v. United States, 724 F.2d 831 (9th Cir. 1984), we held that "When an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." Id. at 833. See, GREEN v. ARN, 809 F.2d 1257 (6th Cir.) vacated on other grounds, 484 U.S. 806, 103 S.Ct. 52, 98 L.Ed.2d 17 (1987); SIVERSON v. O'LEARY, 764 F.2d 1208, 1217 (7th Cir. 1985); and HARDING v. DAVIS, 928 F.2d 1341 (11th Cir. 1989). In each of these cases prejudice was presumed, because of an actual or constructive denial of the assistance of counsel during a critical stage of the criminal proceedings. See, Strickland, 466 U.S. at 692, 104 S.Ct. at 2067 ("Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice.")

The circumstances presented in this matter demonstrate the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Mr. Russell's court appointed attorney told the jury "don't waste your time deliberating, just check off the guilty box, he is a drug dealer, that's what he does for a living", he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" *Osborn*, 861 F.2d at 624 (quoting *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 931, 935, 83 L.Ed.2d 921 (1985)). Instead of serving as his client's advocate during closing argument, trial counsel abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Mr. Russell sold drugs.

Trial counsel's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. See *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), a defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction, suffers from an obvious conflict of interest. Such an attorney, like unimpaired counsel, "represents" the defendant only through a tenuous and unacceptable legal fiction." *Faretta v. California*, 422 U.S. 826, 831, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interest and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Furthermore, the Government has failed to identify any strategy that may justify trial counsel's betrayal of his client. We cannot envision a situation more damaging to a defendant than to have his own attorney tell the jury "don't waste your time deliberating, just check off the guilty box." We recognize that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt to one or several charges. See, *United States v. Bradford*, 588 F.2d 999, 900 (9th Cir. 1975). Nevertheless, even if this court was to consider this concession as a trial strategy, the fact remains that out of eight indictments submitted for deliberation, the jury only returned a guilty verdict on the indictment trial counsel stated it was guilty of, and on the other seven more serious charges the jury was hopelessly deadlocked out, to include the lesser included offenses. See, *Strickland*, and the clear prejudice if not for counsel's closing argument, there is a reasonable probability that Russell may have been acquitted of all charges. Clearly, this deadlocked jury raises grave doubts as to the straightness of the Government's case against Russell, thus making trial counsel's closing arguments so prejudicial. If not for said prejudicial statement, there would have been nothing for the courts and counsel to use to induce and coerce Mr. Russell into an involuntary and unintelligent guilty plea. Leaving no dispute that counsel was ineffective, for using the jury verdict to coerce petitioner to plea guilty to the jury verdict of guilty and the deadlocked charges as well. "NO" competent attorney would have advised his client to plead guilty to a charge that counsel knew his client was already convicted of at trial, namely because of counsel's prejudicial comments in closing arguments. But for trial counsel's inflammatory and prejudicial comments to the jury, that so infected petitioner's trial causing a farce mockery of justice and a denial of petitioner's right to due process, and is one of the reasons petitioner felt forced to plea.

Statement of Issue on Appeal

This counsel ineffective for failing to challenge the lack of probable cause for the initial warrantless arrest
was counsel ineffective for failing to challenge the lack of prompt judicial determination of probable cause
This counsel ineffective for failing to challenge the arrest warrants for like wise lack of probable cause determination.

Statement of the Case

On April 20th 2007, defendant was stopped, detained and then arrested from a warrantless arrest. The Alleged probable cause for this warrantless arrest was generated from an citizen informant whom alleged that the defendant is a suspect in a kidnapping.

Facts

On the above-mentioned date, at this initial stop, the alleged victim was a passenger in the car with the defendant. At this initial investigatory stop, the alleged victim never made any comments, accusations, statements or allegations that she was being held against her will and or kidnapped. Law enforcement never asked any like wise questions to confirm that the passenger was a victim to being kidnapped. Therefore at the time of this initial investigatory stop law enforcement could not and did not corroborate their probable cause for initiating this stop, in spite of law enforcement's independent investigation at the scene. Petitioner was not charged at that time with kidnapping.

Argument

Petitioner asserts that in order to establish an informant's credibility, law enforcement should determine the following: 1) Basis of knowledge, 2) Whether the officer's observed conduct directly involving criminal activity which the informant gave information on. However, it is the informant's call to the police alleging that the defendant was a suspect in a kidnapping, which was the sole probable cause for the initial investigatory stop. This informant could not and did not give law enforcement any information regarding defendant i.e., identification, make, model, color or year of car he was driving. Nothing indistinguishable to support the informant's basis of knowledge, credibility or reliability, and even after law enforcement did their own independent investigation, still could not and did not corroborate the information provided, and the defendant was not arrested or charged with anything relating to the probable cause for this investigatory stop, for kidnapping.

Petitioner asserts, that these facts above stand to show that at the time of this investigatory stop, and after their independent investigation on the scene, law enforcement did not have sufficient, reliable, trustworthy or credible information which would warrant a prudent objective officer to believe that said alleged offense of kidnapping was committed, even when the alleged victim was on the scene. The courts have stated that the standards applicable to factual bases supporting a police officer's probable cause assessment at the time of a warrantless arrest were at least as stringent as the standards applied with respect to a magistrate's assessment in connection with an application for an arrest warrant. Further, after making a warrantless arrest, an officer must promptly secure a judicial determination of probable cause. Which means a judicial hearing must be held as soon as reasonably feasible, within 48 hours after arrest. In this case at bar, such determination was delayed for 14 day for the purpose of gathering additional evidence against the defendant, and motivated by ill will in violation of the promptness requirements.

County of Riverside v. McLaughlin, 500 U.S. 44 (1991). On May 7th 2007, the defendant was then charged with the allegation of kidnapping, which stemmed from the April 20, 2007, investigatory stop.

Nevertheless, On May 5, 2007, 14 day after the initial investigatory stop, these alleged victims was allowed to walk into Law enforcement office, with corroborated statements, prepared in advance, with a docket number the defendant's pending 2005 offense. Without any mitigating independent questioning, law enforcement signed these statements attesting to their

veracity. However, at this critical stage of the investigation law enforcement only interviewed and received statements from two of the alleged victims, but yet they initiated warrants for an alleged third victim, which they never spoke with, and this alleged victim, never made a complaint, was questioned or interviewed at this time. Resulting now in five (5) warrants initiated on May 7th 2007, by the same officer. Nevertheless, these five warrants were strategically divided up and presented to three (3) different magistrate judges for the probable cause determination, for the sole purpose to mislead, omit and/or circumvent this clear obvious lack of probable cause. Why else would officers have a need to separate five warrants and present to three different magistrates' judges. Furthermore, this clearly shows that this alleged third victim was not formally interviewed until May 10, 2007, 3 days after securing the arrest warrants on May 7, 2007. See Exhibit, Warrant's which clearly shows law enforcement's deliberate attempt to obstruct justice, mislead each magistrate as to the probable cause and a violation of S.C. Code Ann § 17-13-140, Warrant Requirements. All of which leaves no doubt of the lack of probable cause for the initial investigatory stop on April 20, 2007.

Petitioner, asserts that Law enforcement presented false statements in these affidavits, and is in fact like not having an affidavit at all. State v. Austin, 409 S.E.2d 811, as in this case the warrants were defective, resulting from the fact that these affidavits did not contain any information sufficient for issuing magistrate to make a determination of probable cause. Thus, the reason for five warrants to three different magistrate judges, and these affidavits contained no information, circumstantial or otherwise, regarding the reliability of the information supplied by the alleged informant, nor did these affidavits say anything about said information being corroborated, or even how this information was obtained. In complete violation of S.C. Code Ann § 17-13-140, Warrant Requirements.

The Supreme Court has stated that in order for an arrest warrant to be valid, an officer not only must have probable cause for the arrest but also must sufficiently allege such probable cause when he or she applies for the warrant. It has been held that since probable cause for an arrest must exist prior to the occurrence of the arrest, such probable cause may not properly be based upon information derived from a search which is not conducted until after the arrest, and it has been held that where an unreasonable search has been conducted, knowledge derived from it cannot be used as a basis for furnishing probable cause for an arrest. Thus, the petitioner has shown by clear and convincing evidence, that at the initial investigatory stop, even after law enforcement's independent investigation, still lacked probable cause to support petitioner as a suspect in a kidnapping, resulting in not being charged at the time. However, subsequently, it lead to illegal drugs being found. Thus, petitioner asserts that this initial stop was unconstitutional, and all evidence derived from it is inadmissible. U.S. v. Monteiro, 442 F.3d, 39, 44, 48 (1st Cir 2006); U.S. v. Brown, 448 F.3d 239, 252 (3rd Cir 2006); U.S. v. Peck, 312 F.3d 754, 756-57 (7th Cir 2003)

Petitioner, asserts that his original PCR attachments address this issue in full, and the records reflects that petitioner requested legal counsel to address these defects in these warrants, and lack of probable cause early in counsel's representation in this case. See Exhibit, Check of Court Record, petitioner § 2254, Habeas Corpus challenging probable cause. Nevertheless, counsel remained silent regarding these issues pre-trial, and at trial. Failed to do basic legal research, failed to familiarize himself with readily available documents and necessary to understanding of this case, lack of preparation and research, and this failure cannot be considered as a result of deliberate, informed trial strategy, and this kind of incompetent performance, instead being based on ignorance, rather than misunderstanding of the facts and law. Counsel's own PCR testimony is the best evidence I could present.

See, Exhibit PCR transcript pg # 14, 15, 19, 56, 57, 58, 59, Lines 1-25, and PCR Exhibit # 5

See also 04/20/2007 warrant initial probable cause # K-196773, and 5/07/2007, five warrants to three different magistrates # I-916766, J-557078, J-557079, J-557081, and J-557089

See, dates statements were taken and signed by law enforcement. May 5th and 10th 2007.

Petitioner asserts that because trial counsel never challenged the evidence obtained by this unconstitutional illegal stop, the charge charge was the only charge the jury returned a guilty verdict on out of the eight charges presented to it. There fore, prejudice is assumed, and but for counsel's failure to request that this illegal evidence be inadmissible, there is a reasonable probability that the result of the proceedings would have been different. Without, said illegal charges being introduced to the jury there is a reasonable probability petitioner would have been found not guilty, based on the jury's hopelessly dead locked on all other counts to include the lesser offenses.

Conclusion

Petitioner asserts that the record and documents revealed clear and convincing evidence which in fact shows law enforcement's skillfully misled three different Magistrate Judges, by omission into believing that probable cause existed. Withholding evidence that was favorable to the defendant, and presenting evidence that they knew were false. Such an omission by law enforcement to present exculpatory evidence can be termed an intentional subversion of the process. However, this lack of evidence in defendant's case was recognized early in this investigation and presentation of information by the prosecution. Nevertheless, these errors were deliberately papered over, resulting in prejudice to defendant at each step of future proceedings. Thus, these flaws and errors were Ratified rather than exposed and presented by the State prosecution.

Therefore, our system of administration of justice suffers when any accused is treated unfairly. However, when the State prosecution learned that the evidence is weak and that mistakes were made, it was vital that prosecution for the State, act promptly and forcefully. The worst thing is to do is nothing and hope that no one discovers what happened. Since petitioner has shown, and proven that the prosecution for the State, knew of and willfully participated in these inappropriate actions, and did nothing, it is almost a guarantee that not only might the conviction be reversed, and also the State prosecution may face further disciplinary actions.

This improper conduct was initiated by law enforcement and the State prosecution, whom labored extensively to obscure the truth, entirely on unsupported evidence. Law enforcement and prosecution, equipped only with improper hearsay testimony, used in a corrupted manner of polluted due process and decedent law enforcement subterfuge.

Evidence and facts, as the esteemed guideposts of truth and justice, in an American courtroom, were not given due considerations in petitioner's contested matter, these officers of the court, deemed their personal opinions and philosophies more worthy of resolving petitioner's guilt or innocence than the procedural operation of weighing all the evidence on the scales of justice, held at arms length by a blindfolded lady liberty. Resulting in a complete miscarriage of justice.

Statement of Issue on Appeal

Was counsel ineffective on petitioner's initial-review-of-collateral proceedings

Is petitioner entitled to effective assistance of counsel in his initial-review-of-collateral proceedings

Statement of the Case

Petitioner is alleging pursuant to *Martinez v. Ryan*, 132 S.Ct. 464 (2012) that his initial Review of Collateral proceeding counsel was ineffective. Petitioner did not knowingly or intelligently waive his right to a direct appeal, and said PCR was his initial-review of collateral proceeding. PCR counsel provided inadequate assistance of counsel at this initial Review of collateral proceeding, and is the cause of any of petitioner's procedural defaults to claims of ineffective assistance of trial counsel.

Facts

Petitioner requested PCR counsel to file a SCRP Rule 59(a)(2)(b) motion to challenge an order denying petitioner's request for the complete trial transcript. Counsel failed to do so, because Counsel filed the order which denied petitioner the complete trial transcript, and therefore, could not challenge the order. Subsequently at the PCR evidentiary hearing, the court stated that said request for the complete trial transcript has been waived by counsel's failure to appeal said ruling. Petitioner requested PCR counsel to file numerous motions, i.e., Proposed order Granting PCR Relief, with findings of facts, and conclusions of law. The State failed to give answer. Subsequently a Summary Judgment was then filed, the state failed to respond, and subsequently a default judgment was filed, against the State failed to defend. Counsel failed to edit, type or modify any of these filings but she signed and adopted them in compliance with Rule SCRP 11, but because of her failure to edit, type or modify these pleadings the state interpreted them as pro-se and as hybrid and failed to address them. Further, counsel failed to adequately inform petitioner of his rights and options to a belated appeal, failed to present and prepare any direct appeal issues to the PCR court, even after petitioner stated on Record that he did not wish to waive his rights to a direct appeal. All of which falls below the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

ARGUMENT

In this case at bar, where the initial Review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective assistance claim, the collateral proceeding is the equivalent of a prisoner's direct appeal as to that claim, and defendant's "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. *Halbert v. Michigan*, 546 U.S. 605, 617, 123 S.Ct. 2382, 162 L.Ed.2d 582. An attorney's error during an appeal on direct Review may provide cause to excuse a procedural default: for if the attorney appointed by the State is ineffective, the prisoner has been denied fair process and the opportunity to comply with State's procedures and obtain an adjudication on the merits of his claims. "Without adequate representation in an initial Review collateral proceedings, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial claim. A prisoner's inability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system. It thus follows that, when a state requires a prisoner to raise a claim of ineffective assistance of trial counsel in a collateral proceeding, a prisoner may establish cause for a procedural default of such claim in two circumstances: 1) Where the state courts did not appoint counsel in the initial Review collateral proceedings; and, 2) Where appointed counsel in the initial Review proceedings was ineffective under *Strickland*, supra.

Petitioner asserts that his appointed counsel in the initial Review collateral proceeding was ineffective under *Strickland*, supra for the following reasons: Petitioner made it clear to counsel that he only plead because of trial counsel failure to protect petitioner's rights at trial, that he would need the complete trial record, so that he could allege all constitutional violations at trial which lead into the involuntary and unintelligent plea, and so that he could have his one fair bite at the apple to present his ineffective assistance claims.

See Exhibits, Original PCR attachments, petitioner's request for discovery, and PCR counsel's amendments. On September 2, 2009, a discovery hearing was held in which petitioner was only granted partial trial - (Appendix pg # 97-110)

transcript and denied use of subpoena, and was questioned against hybrid representation. Petitioner requested to file a SCRAP Rule 59(a) (a)(1) motion to challenge this denial of the complete trial transcript, but counsel failed to do such. Subsequently at the PCR evidentiary hearing the court ruled that because counsel failed to appeal said denial of the complete trial transcript, said request has been waived. Following said evidentiary hearing, I expressed my concerns to counsel, how her failure to challenge said order caused the following prejudice, and said I will file a complaint. Only then did counsel make an attempt to correct the problem by informing the courts that she was instructed by the administrative judge to file said order denying the complete trial transcript, discovery, use of Subpoena, and to question her own client against hybrid representation. See Exhibits, counsel documents to the court given explanation, and petitioner's fax to counsel to appeal said order.

Clearly, said action by counsel was below the standard of professional norm, it was in vain for counsel to pretend to argue for the complete trial transcript at this discovery hearing. Knowing the importance of said information to support ineffective assistance of trial counsel allegations, and then propose an order denying me access to this information. Clearly that is not the actions of a "negotiant" attorney, and a competent attorney would have never proposed such an order against their client, who rights she should protect. Further, even if the administrative judge did instruct counsel to file such a motion and "competent" attorney would have put forth a legal, sound, and rational reason for not doing such because of the clear prejudicial disadvantage to their client. In fact said action by counsel in proposing the order of denial was the equivalent of acting as an agent for the state, and is the sole reason for petitioner not having the complete trial transcript to ensure that all issues of ineffective assistance of trial counsel claims could not be raised, thus resulting in petitioner's denial of his own fair bite at the apple. The record is clear petitioner put forth "good cause" for the requested discovery, explained that it was because of trial counsel's failure to protect my rights at the trial, is what lead into the involuntary plea. Hill v. Lockhart, supra. Absent the complete trial transcript, petitioner has been denied the fair process and opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claims. Clearly it is because of counsel's delinquency, at this initial review collateral proceeding, where these claim should have been raised and therefore, counsel was ineffective under Strickland, supra.

Counsel was further ineffective in this initial review collateral proceeding, because without the complete trial transcript counsel could not properly present the PCR issues of ineffective assistance of trial counsel. Failure to file a client appeal, judicial initiation of the plea, lack of factual basis for the plea, failure to be given notice of the details for the negotiation of the plea, along with any other issues that may have been discovered from the complete record, and presented to the courts for adjudication. However, because of ineffective assistance of counsel in the initial collateral review in proposing the order denying the complete record, discovery, use of Subpoena, and questioning her own client against by hybrid representation, the state failed to adjudicate and address these numerous issues presented before the courts for adjudication. Nevertheless, there can be no dispute to the fact that these pleadings were properly filed and signed and adopted by counsel in compliance with SCRAP Rule 11, and the state never requested that they be stricken from the record. It is because of counsel's language informing the courts that these pleadings were prepared by her client, submitted in good working, never edited or modified, that gave the state the opportunity to intercept them as pro-se or hybrid representation and thus these issues were never adjudicated on their merits. Counsel was fully aware that the petitioner was ill equipped to represent himself, and that the sole purpose was to express to counsel in the best of his ability, with supposition rose law, the course of action he wanted counsel to take. It is the diligence of the petitioner, which clearly shows just how ineffective his initial collateral review counsel really was. Counsel failed in her obligation under PCR and the six amendment to protect these issues properly so that they could be fairly presented to the courts for adjudication, and this alone failure to do so is the "cause" as to these issues possibly not being addressed in the state court. Whether by counsel's ineffectiveness for not editing typing or recrafting said pleadings, or because of the state's deliberate attempts to misrepresent the facts of said issues, these issues were never properly adjudicated on their merits. Whether, they are procedurally defaulted because of counsel's ineffectiveness, or the state's court division involves an unreasonable application of clearly established Federal law. Petitioner has shown "cause" and "prejudice" and his initial collateral review counsel was ineffective under Strickland, supra.

Clearly no "competent" attorney would have just forwarded a client's hand written notes to the court, even if they were signed and adopted by counsel. Clearly showing that these pleadings were in fact meritorious and counsel therefore should have protected those issues. Even if petitioner's pleadings were in the proper form and did not need to be edited or modified, at the least counsel should have typed and/or presented these issues in a more professional manner. This fact in of its self shows that counsel's performance was below the standard of professional norm.

Furthermore, counsel was ineffective by failing to inform petitioner of his rights and options relating to a belated appeal at said PCR hearing. Petitioner, from the early beginning stress to PCR counsel the importance of said direct appeal, and the necessity of the complete trial transcript to show that it was only because of trial counsel's deficiencies that petitioner was forced to make this unintelligent and unknowingly plea. Further, PCR counsel was clearly aware that most of petitioner's PCR issues were in fact direct appeal issues apparent on the face of the record, I.E. trial counsel's impermissible prejudicial comments in closing argument, instructing the jury to find petitioner guilty of the drug charges, don't waste your time deliberating, failure of trial counsel to object to successive Allen charge after knowing the numerical division and decisional disagreement of 11 to 1, Federal invitation of the plea, lack of factual basis for the plea, abuse of discretion in failing to allow a mistrial, and double jeopardy. What makes PCR counsel's errors so profound is that even after petitioner stated on record at the PCR evidentiary hearing that "he did not wish to waive his rights to a belated appeal." See PCR transcript pg # 49, lines 1-23, and pg # 70, lines 1-23, PCR counsel failed to set forth on the record, any attempts to consult, or advise petitioner of any of those belated appeal issues. In - stead counsel remained silent, in fact the court remained silent and petitioner belated appeal issues was abandoned by counsel's incompetence. There can be no dispute that PCR counsel was unprepared and/or unwilling to champion any of petitioner's meritorious direct appeal issues, and the prejudice resulted in the denial of said issues being adjudicated on their merits. Nevertheless, the deficiencies of petitioner's initial collateral review counsel fell well below a professional standard under Strickland, supra, and there is a fair probability the results would have been different.

Furthermore, when counsel proposed said order denying her own client the complete trial transcript, said action was in fact an actual conflict of interest, which in fact breached counsel's duty of loyalty. Said actions clearly shows that counsel's loyalties was so conflicted that counsel no longer functioned as the counsel guaranteed by the Sixth Amendment, and there can be no dispute that counsel's proposal of said order, was more for the benefit of, and with more apparent sympathy towards the prosecution than the client she was supposed to be defending. Petitioner has shown a clear actual conflict of interest, and that said conflict adversely affected petitioner's PCR attorney's performance. See, Full - Wood v. Lee, 240 F.3d 663 (4th Cir 2002). This conflict of interest, prevented petitioner from bringing his claims of ineffective assistance of trial counsel, and prevented petitioner of his rights to go beyond the plea, to show why he was forced to plea because of trial counsel's failure to protect petitioner's trial rights. See, Hill, supra, Padilla, supra, Missouri, supra, and Strickland, supra.

Statement of Issue on Appeal

This issue is raised as a Continuation of ineffective assistance of initial review collateral counsel.

Petitioner states that he was denied due process due to ineffective assistance of counsel under the (PCR) mandate SC Code Ann. § 17-27-20 through 160, by counsel's failure to raise adequately and sufficiently petitioner's meritorious claims to withstand Strickland and Hill v. Lockhart for appellate review...

In a Post conviction Relief action, Petitioner has the burden of proving his allegations in the application to demonstrate a violation, Rule 21.1(e), SCRPC; Butler v. State, 334 S.E. 2d 813. Where ineffective assistance of counsel is alleged as grounds for relief, petitioner must prove that counsel conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result, Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. Petitioner must overcome this presumption to receive relief, Cherry v. State, 386 S.E. 2d 624, where petitioner has pleaded guilty, petitioner must prove that counsel's performance and representation fell below the standard of reasonableness and that, but for counsel's performance and unprofessional errors there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial, Hill v. Lockhart, 474 U.S. 52, 58-59; Alexander v. State, 402 S.E. 2d 484.

This cannot be established in (P.C.R.) unless petitioner is appointed effective assistance of counsel to demonstrate petitioner's due process claims of ineffective assistance of counsel. All counsel must perform up to professional standards in all criminal proceedings, even on collateral review under U.S. Supreme Court ruling in Martinez v. Ryan, 2012 WL 912850.

Petitioner and the record reflect that the reasons no constitutional violation or deprivation claims was raised sufficiently and adequately at the (PCR) hearing that would entitle petitioner to relief is because counsel was completely ineffective in attempting to develop, investigate, ascertain, or elicit any of petitioner's due process violations raised in petitioner's Amended (PCR). Petitioner is a layperson and cannot be held responsible for inadequately presenting claims when counsel is the professional in presenting these claims. The test for judging effectiveness of counsel is not whether representation is so poor as to make a fair trial, but whether representation is within range of competence demanded of attorneys in criminal cases. However, at this case at bar, counsel's ineffectiveness in fact met a fair trial of that proceeding. The test to measure an attorney's conduct by comparison with competence generally found in professional norms, thus, requires an objective assessment of counsel's adequacy; sources which may be referred to in determining adequacy include precedent from state and federal courts, state bar opinions, American Bar Association standards relating to defense functions, and in some instances, expert testimony or particular conduct at issue.

However, in this case at bar, the record is completely void of any attempt by initial review collateral counsel to sufficiently and adequately develop, investigate, ascertain or elicit any of petitioner's meritorious claims of due process violations. Such a blatant failure by counsel at this critical stage was outside the range of competence expected of an attorney in criminal cases, and, hence, operated to deny petitioner effective assistance of initial-review-collateral counsel.

Counsel for an indigent defendant should be appointed promptly and, aside from being afforded a reasonable opportunity to prepare to defend an accused, should confer with his client without undue delay and as often as necessary to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses ~~are~~ are not, or are available, and should conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed and to allow himself/herself enough time for reflection and preparation. U.S.C.A. Const. Amend. 6, and 14. Petitioner expressed to counsel in writing and verbally that the only reason he plead after a full trial, that he jury returned a guilty verdict on, was because of the Judicial intention of the plea, and counsel's ineffectiveness in protecting any of petitioner's trial rights. Counsel answered petitioner's P.C.R. applications to include all these issues, nevertheless, none of them were sufficiently or adequately addressed by counsel at said hearing. In further add insult to injury, these issues were only presented to the courts because petitioner presented them in a proposed order to the court requesting Relief, in which counsel was not even sure if she could file. See documentation, and proposed order from petitioner. Therefore petitioner's initial review collateral counsel was fully aware, or should have been fully aware that all petitioner's claim related to the involuntary and unintelligent plea, and the many trial errors by trial counsel which was the cause of said plea, and that in order to address any of these issues, counsel must first establish that said plea was ~~unintelligent~~, thus attacking said plea. Nevertheless, the PCR Record is void of any questions relating to said plea being unknowing or of meeting any of the prongs in Strickland, Supra, or Hill, Supra, and as of how the outcome would have been different. In fact the record is completely void of petitioner's initial review collateral counsel's attempt to develop, investigate, ascertain, question, or elicit any facts, evidence or potential defense to attacking the voluntariness of said plea, or counsel's errors leading up to the plea. Again the reason why petitioner was denied a fair opportunity to sufficiently and adequately, present his numerous claims at his (PCR) hearing is because of this impediment of ineffective assistance of counsel. Morville v. State of MD, 561 F.2d 540 (1977)

Petitioner asserts that at this hearing counsel made no attempts to sufficiently and adequately present any of the issues she herself brought to the courts. Below is a list of the things she half heartedly addressed:

- (1) PCR (counsel) filed a proposed order waiving my rights to discovery, the complete trial transcript, and use of subpoena. See PCR transcript pg # 7 and # Lines 1-25
- (2) Counsel failed to inform petitioner of the advantages or disadvantages of requesting in PCR a direct appeal even after petitioner stated that he did not wish to waive his right to a direct appeal. See PCR transcript pg # 49, lines 1-10, and had meritorious issues of Subsequent Petition Change, Judicial participation and double jeopardy.
- (3) Petitioner introduced 16 Exhibits into the Record, however counsel never stated to the courts sufficiently or adequately that these exhibits were to show the prejudicial effects of trial counsel cumulative errors which lead into said plea.
- (4) Counsel ask questions about, preliminary hearing, probable cause, tipster, pre-trial continuance, double jeopardy, Prosecutorial Misconduct, and indictments, knowing full well that these issues would never be addressed without first attacking the unconstitutionality of said plea. See PCR transcript pg # 11-31. In fact the record is clearly that counsel spent more time on these secondary issues than she did addressing the voluntariness

of said plea. Further the PIR Record reflects on pg. 41-42, 66-77, that trial counsel testified that he did raise no objection to the second Allen charge after the jury's review of the numerical division and numerical disagreement of 11-1. Nevertheless, he did not file an appeal. This shows that petitioner had a cautious choice for direct appeal, however, PCR counsel ^{failed to} address this direct appeal issue sufficiently and adequately, and should have, like any competent attorney would have, address this issue in the PCR. Again PCR counsel remained silent, and failed to present any direct appeal issues of ineffective assistance of counsel, which is well below the performance standards of competent counsel.

Petitioner asserts that because his ~~procedural~~ issues were abandoned by his initial collateral review counsel's incompetence at the (PCR) hearing, he did not receive his one fair bite at the apple. The Supreme Court in *Martinez v. Ryan*, supra held that: (1) ineffective assistance of counsel at initial-review collateral proceeding may establish cause for a prisoner's procedural default of claim of ineffective assistance at trial; (2) Antiterrorism and Effective Death Penalty Act (AEDPA) did not bar petitioner from using ineffectiveness of his post conviction attorney to establish "cause" for his procedural default; and (3) Remand was required to determine whether petitioner's attorney in the first state collateral proceeding was ineffective, whether underlying ineffective assistance of trial counsel claims was substantial.

An attorney's error during an appeal or direct review may provide "cause" to excuse a procedural default; if the attorney appointed by the state to pursue the direct appeal is ineffective, the state prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claims U.S.C.A. Const. Amendment 6.

Petitioner asserts that his initial-review collateral attorney's ineffectiveness, establishes "cause" to excuse a procedural default which reflects an equitable judgment that one who a prisoner is impaired or obstructed in complying with the states established procedures with a federal habeas court excuse the prisoner from the usual sanction of default. When a state requires a prisoner to raise an ineffective-assistance of trial counsel claim in a collateral proceeding, a prisoner may establish "cause" for a default of an ineffective assistance claim in two circumstances: the first is where the state courts did not appoint counsel in the initial-review collateral proceedings for a claim of ineffective assistance at trial; the second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under *Strickland*, U.S.C.A. Const. Amendment 6. However, for Mr. Russell to overcome procedural default arising when an ineffective assistance of trial counsel claim is not raised in first state collateral review proceedings due to collateral proceeding counsel's error or the absence of an attorney, Mr. Russell must demonstrate that underlying claims are "substantial" which is to say that the Mr. Russell must demonstrate that his claims has some merits.

Petitioner, respectfully request that this court review petitioner's issues presented in his proposed motion granting relief, pro-se briefs, trial record, plea record and PCR record, which will demonstrate substantial constitutional violation which makes petitioner's plea unconstitutional. Here, where the initial-review collateral proceeding is the first designated proceeding for Mr. Russell to raise his ineffective assistance claim, the collateral proceeding is the equivalent of a direct appeal

as to these claims because the State habeas court decides the claim's merits. No other court has addressed the claim, and defendants "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. *Halbert v. Michigan*, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.Ed. 2d 552. Therefore, if counsel is ineffective, and did not ensure that petitioner's constitutional claims were sufficiently and adequately raised so that they may be given proper consideration, said representation was below professional standard of competent attorney. As the record clearly reflects counsel failed seriously to sufficiently and adequately present, develop, investigate, ascertain or elicit any communication regarding attacking the unconstitutionality of petitioner's involuntary plea from ineffective assistance of counsel. By way of Federal participation, coercion, lack of factual basis, successive *Alton Chang*, *Ex-parte* communication, revelation of state's numerical division and decisional disagreement of 11-1, and the fact that all parties was aware that the state had already returned a guilty verdict. *Hill*, *supra*; *Stickleland*, *supra*; *Laffler*, *supra*; and *Padilla*, *supra*.

Petitioner asserts his initial-review collateral counsel's performance was so deficient that its actions prevented/pimped petitioner from receiving a full and fair evidentiary hearing in which to present his meritorious issues of trial counsel's many errors, misadvice, and the probability of a different outcome. Said initial collateral review counsel failed to comply with S.C. Code Ann. § 17-27-80 and § 17-27-90. The Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, stated that Federal courts can habeas corpus must hold a evidentiary hearing if applicant did not receive a full and fair evidentiary hearing in state court either at time of trial or in collateral proceedings, 28 U.S.C.A. § 2243, if (1) Merits of factual dispute were not resolved in state hearing; (2) State factual determination is not fairly supported by the record as a whole; (3) fact-finding procedure in state court was not adequate to afford a full and fair hearing; (4) there is substantial allegation of newly discovered evidence; (5) Material fact were not adequately developed at state court hearing; or (6) for any reason it appears that state trial of fact did not afford applicant a full and fair fact hearing. 28 U.S.C.A. § 2243.

Petitioner meets all prongs of *Townsend* except for number (4). Nevertheless, even where procedure employed does not violate constitutional standards, if it appears to be seriously inadequate for ascertainment of truth, it is federal judge's duty on habeas corpus, or at the States Supreme Court to disregard state's findings and take evidence anew. When a evidentiary hearing is required because of unresolved factual dispute, state court record of criminal prosecution is competent evidence, and either party may choose to rely solely upon evidence thereon, but petitioner and state must be given opportunity to present other testimonial and documentary evidence relevant to disputed issues. Petitioner has in fact presented other testimonial and documentary evidence by way of petitioner's proposed *coram* granting relief, and all parties implied consent to this filing and the courts stated its intention to consider these issues *in the future*. However, the courts did not address them at all, but they were all preserved by way of S.C.R.P. Rule 59(a) and (c) motions.

Therefore, petitioner asserts there could not have been even the semblance of a full and fair hearing unless the state court actually "reached" and "decided" the issues presented or by implied consent by the parties. If initial-review collateral counsel was ineffective, then complainant would be impermissible, and would constitute "cause" under this standard. Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the state interest which is responsible for the denial as a constitutional matter, must bear the cost of any resentencing

default and the harm to state interest that federal habeas review entails. In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor imputed to the state.

This court has made it clear that Fourteenth Amendment obligates a state "to assure that indigent defendants have an adequate opportunity to present his claims fairly in the context of state's appellate process. In Coleman v. Thompson, 111 S.Ct. 2516 (1991) stated clearly that "cause" under cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him. However, because Mr. Russell is a layperson and cannot be expected to know how to develop, ascertain and or elicit a sufficient and relevant claim of his ineffective assistance of trial counsel at PCR court. In Miller v. Harvey, 566 F.2d 874 (1977), the court held that appellant failed to exhaust his state remedies in regard to all but one issue where he failed to seek relief under the State Uniform Post-Conviction Relief Act S.C. Code Ann. § 17-601. In Patterson v. Leck, 556 F.2d 1168 (4th Cir. 1977) we held that S.C. prisoners whose cases have not been reviewed on direct appeal must first pursue the remedy afforded by South Carolina's Uniform (PCR) Act, before applying to district court for habeas corpus relief.

Therefore, petitioner has sought a direct appeal and has pursued the remedies afforded in S.C. Uniform PCR Act § 17-601 and has been impeded by ineffective assistance of counsel at each of these critical stages. In Evitts v. Lucey, 469 U.S. 387, 11 S.Ct. 1001, XIV guarantees a criminal defendant the right to counsel on "his first appeal" as of right, and guarantees a criminal appellant pursuing his first appeal as of right certain minimum safeguards necessary to make the appeal adequate and effective; among those safeguards is the right to effective counsel. Furthermore, because the right to counsel is so fundamental to a fair trial, the constitution cannot tolerate trials in which counsel, through present in nature, is unable to assist the defendant to obtain a fair decision on the merits. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. The result is hardly novel. The petitioner in both Anders v. California, 386 U.S. 738 (1967), and Entsminger v. Iowa, 386 U.S. 748 (1967) claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required. Just like these cases, because of counsel ineffectiveness, counsel in the initial collateral review "waived" petitioner's right to a full transcript, and rendered the subsequent judgment against the petitioner unconstitutional. Furthermore, for initial review collateral counsel to direct petitioner PCR applications to include petitioner issues, and inadequately and insufficiently raise them at the PCR evidentiary hearing shows the following:

- (1) Petitioner's issues were meritorious; and (2) Counsel was ineffective for failing to raise them sufficiently and adequately at said hearing.

Conclusion

To further protect prisoners with potentially legitimate claims of ineffective assistance of counsel at trial, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post conviction proceeding does not qualify as cause to excuse a procedural default. This opinion in *Martinez* now recognizes a narrow exception to *Coleman*: that is inadequate assistance of counsel at initial-review-collateral-proceedings may establish "Cause" for a prisoner's procedural default claims of ineffective assistance at trial.

Petitioner, asserts that because the record is conclusive that petitioner did not knowingly or intelligently waive his rights to a belated direct appeal, thus makes petitioner PCR, his initial Collateral Review. As such, it is within the context of State procedural frame work that counsel's ineffectiveness in an initial collateral review proceeding qualifies as "Cause" and "prejudice" for a procedural default. See, *Martinez v. Ryan*, (2012) WL 912950.

Statement of Issues on Appeal

Was trial counsel ineffective for failing to make sure the Record reflects a factual basis for the Plea?

Was it error for trial court to enter a judgment upon a guilty plea without making such inquiry as shall satisfy that there is a factual basis for the Plea?

If the superior court Record contains no documents which would support the factual basis for said plea, is that a due process deprivation claim based on no Reviewable Record for appeal?

Statement of The Case

Petitioner, is challenging the voluntariness of the guilty plea based on the lack of factual basis for said plea, and for not being put on notice of the details of the negotiations for the plea.

FACTS

The Court did not recite any facts from the case at the plea hearing. Counsel testified "there were no facts presented at the plea." Counsel further testified when asked "Was Mr. Russell put on notice of the exact details for the negotiations that were incorporated in the plea?" Counsel answered "No he was not." See, Exhibit, plea transcript, pg # 7, Lines 1-25, and PCR transcript pgs # 73, 74, Lines 1-10.

ARGUMENTS

In all pleas the Judge shall develop "ON the Record" the factual basis for a plea. Any general reference by the Judge to the fact that they heard evidence at another trial, which related to this charge and this defendant, but without specifying precisely what evidence they had in mind, is insufficient for this court to consider that entire trial as being part of this Record. However, the Rule requires that whatever the Judges consider in making this determination must appear on the Record, and what is on the Record in this instant case, is insufficient to establish the factual basis required by the Constitutional due process Requirement for pleas. See, *HARDEN V. State*, 302 S.E.2d 692 (1983) which follows: Standard 14-3.3, Pleas of Guilty, Responsibilities of the trial judge, 14-1.7, Record of the proceedings, 14-1.4, Court's advice to the defendant, 14-1.5, waiver into the voluntariness of the plea, and 14-1.6, Factual basis of the plea. Further, if the only documents which would support the factual basis for the plea are not contained in the Superior Court files or Record on appeal, odds are that the Court taking the plea did not Review them. In such a case, appellate counsel could argue that since the trial court did not review them, the court of appeal can not either, and any attempt to require that the trial court considered them, even if they are not part of the files, should and is countered by the petitioner as a due process deprivation claim based on there being no Reviewable Record for appeal. A courts Recitation to incorporate facts from the trial as the factual basis and or a plain reading of the indictments without explanation of the elements of the offense, the courts have ruled that either approach is inadequate. The Court must when a plea is reached by the parties "on Record disclose the terms of said plea agreement in open court" at the time the plea is entered. See, *Boykins v. Alabama*, 365 U.S. 239 (1969) (guilty plea "can not be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"); *In Re, Kasper*, 145 V.1. 117, 119 (1984) (Juries merely summarized the charge, no recitation of underlying allegation).

Waiver of Constitutional Rights not only must be voluntary but must be knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. See *U.S. v. Frontero*, 452 F.2d 406 (1971) (Because there was not, on Record an adequate factual basis for acceptance of the guilty plea, he must be allowed to plead anew. *McCarthy v. United States*, (1969) 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, *Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000); *Rollison v. State*, 346 S.C. 506, 552 S.E.2d 290 (SC 2001) (quoting *Robinson v. State*, 2010 (All that is required before the plea may be accepted is that the defendant understands the nature and "material elements" of the charges, the consequences of the plea and the constitutional right he is waiving and "the Record reflect a factual basis for the Plea. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 603

(1980), *State v. Rikard*, 371 S.C. 295, 301, 638 S.E. 2d 72, 75 (Cl. App. 2005); (quoting *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E. 2d 889, 897 (1975)). As petitioner points out, in cases in which a guilty plea has been improperly induced, most defendants would be expected to deny any impropriety during the Rule 11 hearing. It is for this reason that the courts have generally concluded that the Rule 11 Record is "evidential" on the issue of voluntariness ^{and is} ~~not~~ ^{not} ~~conclusive~~.

Petitioner makes the material claim that the lower courts applied an unreasonable, unduly rigid Rule of law instead of testing the voluntariness of the plea by determining whether a realistic litany of the factual legal elements of the offense was read to petitioner. The court should now examine the totality of all the circumstances around this plea and determine whether the substance and technical elements were properly conveyed to petitioner. *Henderson v. Morgan*, 426 U.S. 637. The lawyer must make an informed opinion about what plea petitioner should enter. It is on the basis of counsel's informed opinion, petitioner then decides how to plead. Obviously, if the lawyer does not have a grasp of either the law or the facts, counsel will not be able to provide assistance or counsel advice. Counsel's unfamiliarity with the facts and the law relevant to petitioner's case made counsel so ineffective that said guilty plea was not knowingly and voluntarily entered, because petitioner without an understanding of the law in relation to the facts will by definition be unable to make a decision informed by counsel advice. See *Von Moltke v. Guries*, 332 U.S. 708, 721; *McCarthy v. U.S.*, supra; *Wofford v. Mainwright*, 748 F.2d 1505 (CA-11, 1984), denied, 434 U.S. 1109; *Walker v. Caldwell*, trial courts have a similar duty as to guilty plea context to ensure that petitioner's plea is made knowingly, intelligently, and voluntarily. As the Supreme Court held in *Boykin v. Alabama*, supra, the due process clause of the Fifth Amendment, allows a state court to accept a guilty plea only if it is entered knowingly, intelligently, and voluntarily, this being independent of the requirement's for effective representation by a lawyer, the state has a duty to ensure that petitioner's plea satisfies the mandate of due process and to intervene. See - Spunk by not accepting the plea if it does not satisfy that mandate. The court's duty is triggered under due process, the moment petitioner stands to tender the plea. In order for due process to be accorded, the court ^{must} establish and record the prerequisites of a valid waiver. If the Record fails to demonstrate these prerequisites, then the reviewing court ^{must} presume prejudice and set aside the conviction.

Conclusion

Since the Record is void of any factual basis for the plea, any attempt by the State to argue that the trial court considered said factual basis from the trial, even when it is not part of the file or Record. Petitioner is properly claiming a due process deprivation violation based on there being no Reviewable Record for appeal.

Statement of Issues on Appeal

- 1) Did said Judicial intervention create the petitioner into a plea that he would have never entered
- 2) Was said Judicial participation/initiation in the plea, consistent with Constitutional Standards

Statement of the Case

Petitioner, argues that the trial Judge's initiation of the plea and amount of time to be served, is in violation of due process constitutional rights. Further the direct participation by way of initiation of the plea agreement and amount of time to be served is inconsistent with Constitutional Standards. Especially, when petitioner never indicated a desire to plea, and the State never offered a plea. Trial courts initiation of the plea negotiations, constituted under these facts an improper and unconstitutionally coercive influence upon petitioner's choice to plea.

Facts

The trial Judge calls all parties to a bench conference, initiates the plea discussions and states the amount of time to be ~~served~~ served, while the jury is out deliberating on its second alternative. See, Exhibit, PCR transcript pg# 57, Lines 1 to 11, pg# 67, Lines 8 to 17, pg# 68, Lines 1 to 17, and pg# 69, Lines 1 to 10.

Arguments

It is at this critical stage in the trial, in which counsel's deficiencies are most obvious, and the prejudice is clear. The action of the trial court, achieved by indirection what the courts are not permitted to do directly, and that is to decide the case is going bad for the State, dismiss the case at trial and re-arrest the defendant by way of plea. Said action cause the following prejudice: Relieved the State from having to prove guilt beyond a reasonable doubt, a withdrawal of the case from the jury, violated defendant's right to a fair trial, and allowed the State to re-formulate its case after a showing of insufficient evidence. Clearly counsel was ineffective for allowing the trial court to initiate said plea, and violating the voluntariness of the subsequent guilty plea. See, The A.B.A. Standard Relating to pleas of guilty § 3.3. at 71-72 (1968). Substituting the word "shall" for "should" and replacing the word "Participation" with "Initiation" Note 4, Supra. So the real question in this case, is whether the trial courts initiation of the plea agreement at that critical stage, coercive to the point that made the plea unconstitutional.

First, this court must recognize that there is great merit in the analysis of the powerful influence of the judge's initiation of the plea, which must be examined within the context of its exercise. Therefore, this does not preclude a finding that a plea in a particular case might be involuntary, depending on the "actions" or "statements" of the judge considered on a case by case basis. In this case at hand the Judge's actions initiated the plea, and her statements was the amount of time to be served. Therefore, petitioner's due process was violated because said guilty plea was coerced by conduct attributable to the State. It is clear that a conviction, whether in State or Federal Courts, based on an involuntary plea of guilty induced by promises, threats or coercion is inconsistent with due process of law. If the plea was the product of coercion, either mental, or physical, or was "unfairly obtained or given through ignorance, fear or inadvertence" it can not be consistent with due process. See, *Kercheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L. Ed. 1009 (1927); the judgment of a conviction which rest upon it is void. See, *Machibada v. United States*, 368 U.S. 487, 493 82 S.Ct. 510, 7 L. Ed. 2d 423 (1962); *Lisenba v. California*, 314 U.S. 280, 290, 86 L. Ed. 166 (1941) (Against the background of Judicial involvement); *United States v. Campbell*, 316 F.2d 7, 9 (4th Cir. 1963); *Enriquez v. United States*, 249 F.2d 283, 294-295 (1st Cir. 1957) (The Court of Appeals concluded, "We think it is clear

that "Statements" and/or "Actions" made by the trial court were reasonably calculated to influence the petitioner to the point of coercion into entering their desired plea of guilty. Id. at 295. There can be no dispute that the sole purpose of the trial courts stopping the trial to initiate the plea was to influence the petitioner into its desired results. Our concept of due process must draw a "distinct line" between, on the one hand, discussion by the judge who ultimately is to determine the length of sentence to be imposed, and from "bargaining" between defense and prosecuting attorneys. Especially true in this case at bar, when the bench conference was ordered by the trial court itself without any apparent request by either party, not to mention the jury was out deliberating on the Unconstitutional Coercive Second Allen Charge.

The safeguard of procedural due process remains adequate only so long as it is "inexorable". See, St. Joseph Stock Yards Co. v. United States, 299 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033 (1936); and Von Moltke v. Gillies, 332 U.S. 708, 729, 68 S.Ct. 316, 325, 92 L.Ed. 309 (1948). Clearly set forth the basic due process requirements: there must be the compacity to make an "understanding choice" and an "absence" of subverting factors, so that the choice is clearly free and responsible. If the choice is bedeviled, whether by duress, coercion or misleading advice, however honestly offered, a plea of guilty accepted is involuntary, and could hardly be called a refusal to put the minor feeling of innocence to a fair test of the law, with an intelligent awareness of the consequences. In this case at bar, here are a list of subverting factors that should be considered: 1) Petitioner completed the hazards of a full trial, 2) The court acknowledged and reversed the jury's guilty verdict ^{ON} one count only, 3) Jury deadlocked on seven (7) counts, 4) Reveals its numerical division and divisional disagreement of 11 to 1, 5) Followed by ex-parte communication by the trial court with the sole bail out, 6) Followed directly by the Unconstitutional Coercive Second Allen Charge directed at the sole bail out, 7) Followed by the trial court's stopping of the trial to initiate the plea and amount of time to be served, while voicing her opinion "that this jury is unable to reach a verdict". See, Exhibit, trial transcript, pg. 37, and 38, Lines 24-25, and Lines, 1 to 25, and pg. 41, Lines 21-25 pg. 42, Lines 1 to 10. The trial courts actions added the element of compulsion which necessarily took from the defendants subsequent guilty plea the voluntariness which our concept of due process requires. See, Stone v. Dugger, 921 F.2d 1125, 1141 (11th Cir.) cert. denied 502 U.S. 835, 112 S.Ct. 116 L.Ed. 2d 85 (1991). Thus, the general voluntary intelligent standard for plea taking is rooted in due process clause of the constitution and is therefore, "Applicable in State Court".

The trial court improperly and unconstitutionally initiated and interpreted itself with the plea process. By doing such the trial court "coerced petitioner into the courts desired results, a plea, and therefore, rendered the plea involuntary as a matter of law. Whether, the trial courts initiation is characterized as "facilitating" or "bludgeoning" a plea bargain, any plea in which the trial courts initiation is unconstitutionally coercive and a denial of due process. Therefore, this court review must be on the judge's action and its probable effect on petitioner's state of mind, "but reasonable inferences can be drawn from all surrounding facts and circumstances". See, United States v. Fatico, 214 F.Supp. 560, 565 (SDNY 1963) (citing by Judge Marshall). We need to look no further than this case at bar to see the reality of the misimpression created by judicial participation in the initiation of the plea. Petitioner, almost thought he was only pleading guilty to the charges the jury was unable to return a verdict on, the seven (7) deadlocked counts. Attorney The Record is void of counsel and the courts explaining to petitioner that the verdict reached by the jury would be set aside. No sound, competent attorney would have advise his client to plead guilty to a charge the jury already reached a verdict on. Furthermore, it is because of this judicial participation that the Record is void of any factual basis or disclosure of any details of the plea negotiations.

Petitioner, asserts that this error can not be considered harmless under S.C.R.P. Rule 61. Said error caused actual prejudice and worked to petitioner "actual and substantial disadvantage". Without this error the Record is alone petitioner would have completed the trial and may have not been found guilty on all eight counts. Said action by the trial court was without a doubt inconsistent with substantial justice and in fact affected the substantial rights of the petitioner. Said judicial participation to this degree is plain error sufficient for this Court to raise the issue. *Sua Sponte* pursuant to F.R.C.P. Rule 52(b). In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest may, at their own motion, notice errors to which no exception has been taken, and the errors are obvious, or if they otherwise, seriously affected the fairness, integrity or public reputation of the judicial proceedings. See, *Silber v. United States*, 370 U.S. 717, 718, 52 S.Ct. 1287, 1288, 8 L. Ed. 2d 798 (1962), quoting *United State v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L. Ed. 555 (1936); *United States v. Mioquiz*, 445 F.2d 963, 966 (5th Cir. 1971); *United States v. Gilligan*, 256 F. Supp. 244 (1966); *ARD v. Cator*, 372 S.C. 313, 331, 642 S.E. 2d 396 (2007); *Silber v. State*, 371 S.C. 554, 640 S.E. 2d 884, 886 (2007); *Harden v. State*, SC. 272 S.E. 2d 692 (1981). It is for these reasons that judicial participation/initiation before plea negotiations is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary. The very presence of the judge at a plea bargaining conference, in its very nature is inherently coercive. A plea, negotiated between a judge and defendant, however free from any calculated pressure to make a plea has "no place in our justice system". Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but all powerful influence. See, *Beaver v. State*, 271 S.C. 381, 247 S.E. 2d 448 (1978); *State v. Cross*, 270 S.C. 44, 240 S.E. 2d 514 (1971). See, *Estell v. McGuire*, 502 U.S. 62, 67, 68, 112, S.Ct. 475, 479-80, 116 L. Ed. 2d 385 (1991); *LoConte*, 847 F.2d at 753; *Lea*, 810 F.2d at 867; (This only where the plea is reversed by verdict fairly attributable to the State that due process clause of the fourteenth Amendment is offended); *United State v. Ex Rel. Brown v. Levalle*, 424 F.2d 457, 460-61 (2d Cir. 1970).

Conclusion

In *Cross*, *Supra*, we held that we approved Rule VI of Federal Rules of Criminal procedure insofar as it dealt with plea bargaining. In so writing, we quoted the relevant portion of the Rule and emphasized by putting it in the last sentence of the portion quoted: "The Court shall not participate in any such (plea bargain) discussion" (270 S.C. at 48, 240 S.E. 2d at 516). We further held that we were determining what was "Constitutionally Required as a matter of fairness" (id.) and we are of the opinion that a Judge "should not initiate" or influence the agreement, nor be a party to the negotiation id.

Further, judicial intervention to this degree was a structural error, which undermined the integrity of the trial, and subsequent plea, thus rendering the entire proceeding inherently unfair. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. See, *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S.Ct. 1246, 1263, 113 L. Ed. 2d 302 (1991). Such a structural error can never be considered harmless, because of its substantial and injurious effect or influence on the outcome of the proceeding. See, *Kotteakos v. United States*, 328 U.S. 750, 276, 66 S.Ct. 1239, 1253, 90 L. Ed. 1557 (1946) and *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993).

This Court in *Jackson* and *Alexander*, held that the undisputed testimony of PCR applicant is sufficient to warrant Relief. Petitioner, stated the trial Court initiated the plea, trial counsel confirmed this to be true in his PCR testimony, thus this fact was undisputed and sufficient to warrant Relief. See, *Alexander v. State*, 303 S.C. 539, 413, 402 S.E. 2d 484, 485-86 (1991); *Jackson v. State*, 342 S.C. 95-97-98, 535 S.E. 2d 926, 927 (2000). (36)

Statement of Issue on Appeal

Was the petitioner put twice in jeopardy in violation of the Fifth Amendment to the Constitution
Was the petitioner subjected to successive prosecution, once by way of jury verdict, and again by way of guilty plea on the same count.

Was Counsel ineffective for allowing the State a second prosecution, after a conviction by way of jury verdict

Statement of the Case

A defendant who pleads guilty to a criminal charge in state court ordinarily is barred from raising a claim on federal court based on Constitutional violations that occurred prior to the guilty plea, even if such claim might have barred a conviction if the defendant had proceeded to trial on the criminal charge. Nevertheless, a defendant who pleads guilty does not forfeit the following Constitutional claims: 1) Procedural defect in the guilty plea procedure, 2) the plea was not voluntary or intelligently made, 3) Ineffective assistance of Counsel, 4) Prosecutorial misconduct; and 5) Double Jeopardy.

Facts

Petitioner, at trial was convicted by the jury on one count of eight presented to the jury for deliberation. The trial court acknowledged said jury verdict on record more than once, all parties were aware, the trial court contemplated keeping the verdict, and on calling a mistrial. Nevertheless, this verdict was never set aside and was then incorporated into the plea. See petitioner's proposed order granting PCR Relief.

Argument

Petitioner contends that said ~~judicial~~ overreaching by the trial judge allowed the State to make repeated attempts to convict petitioner, allowed the state a second chance to enhance the possibility that the petitioner would be found guilty, allowed the state an undue opportunity to renege its case, after the state failed to prove "at trial" to the jurors, the full elements of the alleged crime, based on the lack of evidence, credibility of testimony, and the jury's inability to render a guilty verdict, even on the lesser included offenses. As such, petitioner was subjected to successive prosecution, ~~once at trial~~, and again by way of plea.

Petitioner contends that the second prosecution (the Plea) is unconstitutional, erroneous, illegal and void, and can not be a legal cause for imprisonment. This plea was for all purposes a second prosecution under an unconstitutional statute. This contention falls within the Rule of Blockburger which holds that a guilty plea does not bar those claims which go to the power of the state to invoke criminal process against the defendant, 417 U.S. at 30, 94, S.Ct. 2098. Even if the guilty plea established as a factual matter of the acts alleged, a successful constitutional attack on the statute violated by these acts would undermine the foundation of the criminal prosecution, making those acts non-criminal. The process, if unconstitutional, would be void and the conviction a nullity ab initio. An unconstitutional conviction is void, and is as no conviction at all. Any conviction therefore of, goes to the very authority of the state to take petitioner into court a second time to initiate a invalid plea. See *Menna v. New York*, 423 U.S. 61, 96, S.Ct. 241, 46 L. Ed. 2d 193 (1975); (Mr. Justice Brennan, agrees that "where the state is precluded by the United States Constitution from holding a defendant into court on a charge, federal law requires that a conviction on that charge be set aside, even if that conviction was entered pursuant to a counsel plea of guilty" ante. See, *Gonzalez v. State*, 3rd Cir. No. 1466-93, appellant did not relinquish his right to be free from successive prosecution. The Fifth Amendment double jeopardy protections represents a fundamental

ideal in our constitutional heritage. Benton v. Maryland, 395 U.S. 784, 89, S.Ct. 2062, 23 L.Ed.2d 707 (1969). As a fundamental right, that protection is not subject to the restrictions of the general rule of procedural default and is not subject to waiver. There is no evidence in the record that petitioner did anything that could be interpreted as an affirmative waiver of his right to successive prosecution. See, Albany v. United States, 431 U.S. 651, 663, 97 S.Ct. 2034, 52 L.Ed.2d. 651 (1977); United States v. Stroller, 78 F.3d, 710, 714 (1st Cir 1996). The Double Jeopardy clause ensures that no person be subject for the same offense to be twice put in jeopardy of life or limb. This provision "embodies a firmvire of safeguards, United States v. Ortiz-Alarcon, 917 F.2d 651, 653 (1st Cir 1990), including protection against serial attempts by the government to convict a defendant on a single charge.

The concept behind this branch of the Double Jeopardy is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment and ordeal, and... enhancing the possibility that even though innocent he may be found guilty." See, Thomas v. Brener, 923 F.2d. 1364, 1364 (9th Cir 1991); (Double Jeopardy) - this exception applies only where the government is precluded from hauling the defendant into court on the second prosecution, because the charges are so facially duplicative of the earlier charged offense that the admission contained in the grand, (The Plea) could not conceivably be construed as amounting to more than a redundant confession to a earlier conviction by the jury. See, United States v. Noah, 475 F.2d 685, 693 (9th Cir 1973). In this case at bar the record is clear that the trial judge stated on record that the jury has agreed on a verdict, stating that she could keep the verdict, declare a mistrial on the deathbed counts or give additional jury instructions. Therefore, petitioner asserts that there had to be a legal and binding verdict returned by the jury in order for the trial judge to consider keeping the verdict as an option. The Fifth Amendment Double Jeopardy clause safeguards a defendant from multiple trial, or successive prosecutions, or multiple punishment for the same offense.

Whether two infractions constitute the same offense is determined in the first instance by the legislature through the language of criminal statutes. Byrd v. United States, 598 A.2d 386, 388-89 (DC 1991) (en banc); and Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2721, 53 L.Ed.2d 187 (1977); (The legislature ~~has~~ remains free under the Double Jeopardy clause to define crimes and fix punishment; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial). We use the outlined test in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) as a guide in determining whether the legislature intended for the violations of separate provisions to constitute the same offense under the Double Jeopardy clause. The Supreme Court has for decades, interpreted similar legislature schemes, creating greater and lesser included offense, as intended to preclude both coexisting convictions and successive prosecutions. Holding the double jeopardy clause does not have two different meaning in the context of successive punishment and successive prosecution.

On its face, this presents a pure question of law, as such, it ordinarily would engender de novo review. Can the trial court at a completed trial, after a verdict has been reached and announced on record in open court, stop the trial and initiate a plea? Would said plea based on those circumstances amount to a successive prosecution

See, U.S. v. Broce, 488 U.S. at 569, because I believe it inappropriate for a reviewing court to close its eyes to this constitutional violation and because the basis of petitioner's double jeopardy challenge is obvious from the record, petitioner is entitled to a hearing. Accordingly, if a claim that the Government was without power to prosecute by way of said plea, is apparent on the face of the record a court should not consider the claim to have been waived, and must go to consider its merits. Clearly there can be no dispute of said counsel's deficiencies, for allowing the state a second opportunity to re-prosecute petitioner by way of plea, after the jury has already reached a verdict. Petitioner was prejudiced by counsel's deficiencies by advising petitioner to plead guilty to the verdict already reached by the jury.

Conclusion

Petitioner, argues that the jury's guilty verdict is the first prosecution, and the plea to the same offense is the second prosecution. Furthermore, petitioner asserts that the courts withdrawal of the case from the jury to initiate said plea, sufficiently constitutes an acquittal. The state was allowed to treat the first trial as a dress rehearsal to improve its case and chances for a conviction in the second proceedings. The action of the trial court, advised by instructions that the courts are not permitted to do directly, and that was it decided that the state's case was going bad, and dismiss the case at trial, and re-prosecute by way of a plea. Such action is the definition of successive prosecution. The jury verdict was read in open court in front of the jury, judge, prosecution, and defendant, thus all parties was completely made known of at least one jury guilty verdict. See, Town of Abeth Augusta v. Fennell, 221 S.C. 112, 69 S.E. 2d 121 S.C. 1952. (Verdict of guilty was orally read by foreman, and responded in affirmative whether their verdict was that of guilty, and defendant who was present and represented by counsel raised no objection or question concerning verdict being reduced to writing); (A verdict of jury orally presented in open court, properly published and assented by jury, is legal and binding, although not in writing. Exhibit, Trial transcript pg # 32, and proposed order granting relief Exhibit 4(a), (Please bring the jury in, whereupon the jury came into open court approximately 4:24 pm, Your honor, the jury is present. MR. Foreman, ladies and gentlemen, I have received your Not, and I will give the following instructions in response. And just going back through the Not, you have indicated that you have reached a verdict on one indictment. Exhibit, trial transcript pg # 38, They are still unanimous on one indictment, which means they have reached a verdict on one. I can declare a mistrial on, I'll take the verdict on the one indictment where they reached a verdict and declare a mistrial on the other seven. Thus there can be no dispute the record manifest said verdict was published in open court orally, petitioner, and counsel was present, and petitioner was convicted and prosecuted again by way of plea to all eight indictment. Clearly, properly attached.

Statement of Issue on Appeal

- 1) Did the trial judge abuse the discretion in failing to declare a mistrial?
- 2) At the Point when the trial court expressed her opinion "that this jury was not going to reach a verdict" did "Manifest Necessity" exist?

Statement of the Case

Petitioner, contends that "Manifest Necessity" existed and therefore trial court should have sua sponte declared a mistrial and discharged the jury. After all of the surrounding circumstances, those incidents were so grievous that the prejudicial effects could not be removed in no other way. See, *State v. Berkham*, 334 S.C. 302, 513 S.E.2d 108 (1999).

Facts

The trial court stated its opinion "this jury was not going to reach a verdict" after knowing the numerical division, decisional disagreement of 11 to 1, ex-parte communications with the sole hold out juror #120, and followed by the Second Unconstitutionally Coercive Allen charge. He must look at the length of the trial, the relative simplicity of the questions confronting the jury, the length of deliberation, the fact that the courts already had given a modified Allen charge without success, was clearly prejudicial to petitioner. See, PCR transcript, pg # 67, lines 8 to 17, and trial transcript pg # 42, 37, and 38, lines 1 to 25.

Arguments

The Supreme Court has never required a trial judge, before declaring a mistrial based on the jury deadlocked, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. However, in a case like this, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, "Whenever, on their opinion" taking all the circumstances into consideration, there is a "manifest necessity" for the act, or the ends of public justice would otherwise be defeated. Which was clearly the factor in this case at bar. See, *State v. Garner* 74 Ohio St. 3d, 49, 59 (1995); *Tingue v. State*, 90 Ohio St. 368 (1914).

Petitioner, asserts that trial courts manifests indications its opinion "that this jury was not going to reach a verdict" was a statement directly related to her view of the weight and sufficiency of the evidence, the lack of credibility of the witnesses and to the controverted facts, and was prejudicial. See, *State v. Kennedy* (SC 1978) 272 S.C. 231, 250 S.E.2d 338, Criminal Key 65665. Said error prejudicially affected the merits of the case and the substantial right of petitioner, thus was not harmless. See, *State v. Sabbah*, 13 Ohio App. 3d 124, 137-140 (1982); when a jury indicates its deadlocked after substantial deliberation, or if the jury has been kept together for such time as to render it altogether, improbable that it would or could agree. See, PCR, transcript, pg # 67, lines 8 to 17, which contains "Manifest Necessity" existed in this very extraordinary and striking circumstances demonstrating a high degree of necessity that the trial comes to an end. See, *Ex parte Fierro*, 79 S.W. 3d, 54, 56 (Tex. Crim. App. 2002); (The circumstances must render it impossible to arrive at a fair verdict, to continue the trial, or involve a trial error that would trigger an automatic reversal on appeal if the verdict was returned. Clearly, the Unconstitutionally Coercive Allen Charge, after knowing the numerical division and decisional disagreement of 11 to 1, followed by ex-parte communications with the sole hold out, would have triggered such reversal. Given this mis-en-scene there is every reason for finding that the trial court abused its discretion in refusing to declare a mistrial. We need to go no further, no less an authority than the Supreme Court, which has emphasized that "the trial court is in the best position to assess all the

Manifest Necessity is not a shackle that can be applied mechanically or without attention to the particular problem confronting the trial judge. Whether a mistrial is mandated by "Manifest Necessity" is fact-specific inquiry, given the varying and often unique situations arising during the course of a criminal trial. See, *State v. Prince*, 297 S.C. 30, 33, 301 S.E.2d 471, 472 (1983); *Arizona*, 434 U.S. at 505-06; *Bowland*, 343 S.C. at 457, 539 S.E.2d at 719; *Kirby*, 269 S.C. at 29, 236 S.E.2d at 35 (quoting *Illinois v. Somerville*, 410 U.S. 459, 93 S.Ct. 1066, 35 L.Ed. 425 (1973)); *Sander v. Eastley*, 230 F.3d 679 (4th Cir. 2002). Furthermore, based on the trial courts action in stopping the trial to initiate a plea after all of the above mentioned circumstances must be concluded as exigent which "excludes all attributable fault."

for declaring a mistrial.
Considering what happened here, the length of the trial, the simplicity of the questions confronting the jury, the length of deliberation, the fact the mistrial already given a modified Allen charge without any success, knowing the 11 to 1 split and dissensional disagreement, ex-parte communications, followed by the second Unanimous Verdict Charge, followed by the trial judge's comments, makes the trial court's not to declare a mistrial, but instead initiate a plea is clear error of law. Put another way the second charge sounds a "Manifest Necessity" "high degree" of necessity that is required before the presiding judge lawfully can declare a mistrial. Through use full in certain circumstances, a second modified Allen charge colloquially is not Risk Free. Jurors, particularly those who advocate minority views may feel pressured to relinquish conscientiously held beliefs. See, BARONE, 114 F.3d at 1304. We have warned that "the problem is exacerbated when the charge is given a second time after the jury has already been told to reconsider and again has found itself in deadlock" id. Thus, we have made it pellucid that the giving of successive Allen charges is an extraordinary measure and one that should be shunned absent special circumstances. See, id at 1305. Clearly by the end of these deliberations, the trial court knew from the ex-parte communications, that the prospect for unanimity were insuperable. See, KEENE, 158 F.Supp.2d at 96. Also, the trial court knew that the jurors had deliberated for as long as they heard evidence, that the dispute was sharply focused, that the first Allen charge had proven futile, along with the second, and there were no special circumstances not to declare a mistrial, or for the court to initiate a plea. Whether, an error is harmless depends on the

(41)

circumstances of the particular case, and whether the error caused "actual and substantial" disadvantage" not merely that the error created a "possibility of prejudice." See, *State v. Taylor*, 333 S.C. 159, 508 S.E.2d 820 (1998); *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). No definite rule of law governs this finding. Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. See, *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (Error is harmless when it could not reasonably have affected the result of the trial); *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971) (Error is harmless beyond a reasonable doubt, the conviction be reversed); *State v. Pickens*, 30 S.C. 523, 466 S.E.2d 364 (1990); *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (1992). See, *U.S. v. Brady*, 456 U.S. 152, states if applicant can show state a legal valid reason why an error at trial was not preserved by objection and not raised on direct appeal, constitute reversal.

Conclusion

Petitioner contends that the record is clear from trial counsel's PIR testimony that trial court abused its discretion when said ex-parte communication with the sole hold out, revealed "that this jury was not going to reach a verdict". Those words directly out of the trial court's mouth shows clear "Manifest Necessity" for a mistrial in this case. Trial court was in the best position to make this call, and under these kind of circumstances that what a "Manifest Necessity" requires. The trial court statement was with such certainty, and was so significant in this case because it interfered with petitioner's constitutional rights guaranteed to a fair trial under due process. Further, counsel remained silent and allowed and participated in these constitutional violations, thus was ineffective, and failed to act as an advocate for his client at this critical stage. It is because of counsel's delinquencies that a complete trial, where a verdict was reached and allowed to turn into a plea, which clearly prejudiced petitioner. Furthermore, because of the lack of evidence and creditability of testimony, it counsel would have requested a mistrial there is a reasonable probability that the state would have acquiesced to re-prosecute the states weak case.

Further, the trial court comment revealed the following: 1) The jury had deliberated longer than they heard evidence, 2) The trial court ~~had~~ determined that there was no chance of breaking the impasse, and, 3) the question of defendant's guilt, the strength of the states case, and the lack of chance for re-prosecution. Which make the trial court's decision not to call a mistrial an irrational irresponsible choice. Clearly the trial revealed grave doubts as to defendant's guilt on the most serious crime, to include the lesser included offenses, based on the jurors hopelessly deadlocked on seven of eight counts. The trial judges action was a complete relinquishing of Judicial Responsibility and plan error to initiate the plea, and like wise for trial counsel to advise petitioner to plea, especially knowing there was a factual dispute unresolved by the jury on the most serious offenses. See *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993); *United States v. Young*, 105 S.Ct. 1038 (1985). Also the fact that the trial court initiated the plea shortly after the second Allen charge is further evidence that said plea was coercive. See *Blueford v. Arkansas*, 132 S.Ct. 1044, 135 Ark. 2012 (And this court has never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse - let alone to consider given the court or petitioner a new option for a guilty verdict by way of Alford). See, *U.S. v. Martin Lumen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349 (U.S. Tex 1977). What constitutes an "acquittal" or "guilty verdict" for purposes of application of double jeopardy clause, is not to be controlled by the form of judge's action. Rather, court must determine whether ruling of judge, whatever its label, actually represents a resolution, of some or all of the factual elements of offense charged.

Statement of Issue on Appeal

Was it plain error of law for the trial court to issue a second Allen charge after knowing the jury's numerical division and decisional disagreement of 11 to 1?

Was such an Allen charge Unconstitutionally coercive, not neutral and impermissibly aimed at the minority voter. Was counsel ineffective for failing to object pre-se, requesting the jury not to reveal it again, or asking the court to instruct the jury on a unanimous verdict could not be returned.

Statement of the Case

Petitioner asserts that it was plain error for the trial court to issue a second Allen charge after the jury informed the court by note that they were deadlocked on seven (7) of the eight offense, petitioner was charged with. Furthermore, only Allen charge given by the trial court after such revelation was prejudicially intimidated to the sole hold out that they should unanimously agree upon a verdict despite their expressed inability to decide. See, Exhibit, trial transcript pg # 37, 38 lines 1-25

Facts

Petitioner completed the hazards of a full trial, on eight (8) indictments, two non violent the other six violent. All stemming from one chain of events, all eight counts were properly submitted to the jury at the close of the trial for deliberation. Subsequently, the jury returned a guilty verdict on only one indictment, and was deadlocked on the other seven indictments. The trial court acknowledged the existence of the jury's verdict several times in record, thus all parties was aware of this one jury verdict. The trial court then gives the first Allen charge, then again acknowledges the jury is deadlocked on the same seven indictments, and again acknowledges the one jury verdict reached in record. Then the jury reveals to the court its numerical division and decisional disagreement of 11 to 1. Subsequently, the trial court has ex-parte communication with the sole hold out, juror # 120 outside the court room. Followed directly by the trial court given of the second Unconstitutionally coercive Allen charge, directed at this sole hold out voter on the jury. Further, while said juror is out deliberating from this second Allen charge, the trial court, on its own initiative, calls all parties to a bench conference, initiates the plea discussion and offers the defendant the amount of time to be served, and then states its opinion that this jury is unable to reach a verdict, and it would be hard for any jury to reach a verdict.

Argument

Both the decision to give or not to give a jury instruction and the content of that instruction are reviewed for abuse of discretion. *United States v. Russell*, 471 F.2d 1098, 1107 (4th Cir 1972) cert. denied U.S. 1135 S.Ct. 1013, 132 L. Ed. 2d 161 (1973); *Carter v. Purch*, 34 F.3d 257, 264 (4th Cir 1994); (applying abuse of discretion standard in Allen charge context), cert. denied, *United States v. Hyllton*, 349 F.3d 781, 788 (4th Cir 2003)

Petitioner asserts that the trial court abused its discretion by giving a second Allen charge after the jury revealed its numerical division and decisional disagreement of 11 to 1. Furthermore, Juries generally do not and, of course, should not, disclose the status of their deliberation in responses to the court. Likewise, only Allen charge given after the jury reveals its numerical division is prejudicially intimidated to the hold out that they should unanimously agree upon a verdict despite their expressed inability to decide.

Petitioner asserts that because of the courts knowledge of the jury's numerical division and decisional disagreement of 11 to 1, each use of the word "you" in the second Allen charge was "terribly coercive" to the minority juror. Said charge was not neutral and impermissibly aimed at the minority. In cases like this, the courts have explained language like "On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we have the benefit of collective thought and of collective reasoning, or the qualifying statement sprinkled into the courts charge such as "It's not my duty to try and coerce you" and

I'm not asking anybody to give up a firmly held belief "were not sufficient to remedy the harm done, and this emphasis on the collective, at the expense of the individual determination, was in this context, entirely appropriate.

In short, put simply, the trial court's import of the second Allen charge after knowledge of the numerical division and decisional disagreement of 11 to 1, was that the single juror, whom every member of the jury knew was holding out, should agree with the majority. In South Carolina state courts, Allen charges cannot be directed to the minority voters on the jury panel. *State v. Elmore*, 279 S.C. 417, 308 S.E. 2d 781 (1983). Instead an Allen charge should be given directed, directing both the majority and the minority to consider the others views. *State v. Hughes*, 336 S.C. 585, 521 S.E. 2d 500 (1999); *Brasfield v. U.S.* 272 U.S. 448, 47 S.Ct. 135 U.S. 197.

Counsel's counsel was ineffective in failing to request that the jury not repeat its vote again in the future, pursuant to *State v. Middleton*, 216 S.C. 452, 63 S.E. 2d 163 (1951), failing to object pro se, or for failing to ask the court to instruct the jury on if a unanimous verdict was not returned. Furthermore, if any court acknowledges counsel's comments as a properly preserved objection, the trial was in error with responding to it with *Bull*, 332 S.C. 472, 505 S.E. 2d 360, and SC Code § 14-7-1330, because either of those were not applicable in this case. The objection should have been based on a second Allen charge after knowing the jury's numerical division and decisional disagreement of 11 to 1. However, because counsel was not aware of any of those statutes, he could not challenge the trial judge's incorrect ruling of law, finally because said objection, was not a proper objection, said issue or error of law is not preserved for appeal. However, this error can be reviewed sua sponte by this court, pursuant to Fed R Crim P 52(b). Pursuant to *U.S. v. Oland*, 113 S.Ct. 1270 (1993), said error affected petitioner's substantial right to a fair trial, and is the cause of the illegal plea conviction, and said error was harmless beyond a reasonable doubt.

Conclusion

Petitioner, asserts, the judge's decision to give the second Allen charge after knowledge of the numerical division and decisional disagreement of 11 to 1 was clear error of law. If not for this error of law, petitioner asserts that there is a reasonable probability, that but for counsel's and the courts, the result of the proceeding would have been different. Failure to provide a sufficiently balanced charge will result in reversal. See, *Martin*, 756 F.2d at 326; *United States v. Borges*, 55 F.3d 933 (4th Cir 1995); *Green v. State*, 351 S.C. 184, 569 S.E. 2d 318 (2002); and in *Dawson v. State*, 352 S.C. 15, 572 S.E. 2d 445 (2002). *United State v. Smith*, 353 F.2d 166 (4th Cir 1965); *United States v. Mitchell*, 720 F.2d 370 (4th Cir 1983); *United States v. West*, 877 F.2d 281, 291 (4th Cir 1989); *U.S. v. Rosado* 452 Fed. Appx. 235 C.A. 4 (N.C) 2011.

Although Russell's attorney alleges that he objected to the court giving an Allen charge, he did not object to the content of the proposed supplemental instruction. Also the fact that the trial judge instructed the plea shortly after the second Allen charge is further evidence that said plea was coercive. Said judgment participation "on the face of the record" appears that the trial court is attempting to coerce petitioner to change his plea to guilty and forgo his right to the completion of his trial, when there was a reasonable probability petitioner would have only been found guilty of one of the eight counts. The one the jury already reached a guilty verdict on. See, *U.S. v. Penniegraft*, 641 F.3d 566 C.A.4 (N.C) 2011, It is plain error for a trial court to inquire as to the numerical division of a jury.

Statement of Issue on Appeal

- 1) Did the PCR Court abuse its discretion in setting aside petitioner's default judgment, when the State failed to respond, defend, failed to show good cause as required by law.
- 2) Was the PCR Court decision to set aside default judgment controlled by an error of law, or was it made without any evidentiary support.

Statement of the Case

Petitioner, by way of counsel filed a "Proposed Order Granting Relief" on July 8th 2010. The Attorney's for the State failed to respond, defend, or present a counter claim. Subsequently a "Motion for Summary Judgment" pursuant to S.C.R.C.P. Rule 56, was likewise filed on August 3rd, 2010. Likewise the attorney's for the State failed to respond, defend or deny petitioner's allegations. Subsequently, a "Motion for default Judgment" and a affidavit of Default, pursuant to S.C.R.C.P. Rule 55, was likewise filed on August 26, 2010, again the State failed to respond, defend, or deny any of petitioner's allegations, and failed to present a counter claim.

Facts

The State failed to respond, defend or deny any of petitioner's allegations in The Proposed Order Granting Relief. Failed to request these pleadings be stricken from the Record, and petitioner's counsel attested to these pleadings being filed in compliance with S.C.R.C.P. Rule 11. Furthermore, at the October 20th 2010 default hearing, the State failed to present any reasons for falling into default, or for failing to respond. Petitioner's counsel attested to properly serving on all parties, and clerk of Court the following documentation: A) Summons and Complaint (Summary Judgment), B) Proper proof of legal service on all parties, C) Proper documentation supporting Requested Relief, and D) Affidavit of Default. See, Exhibit 10/20/10 hearing transcript, and Proposed Order Granting Relief, Summary Judgment and Default Judgment. See Appendix pg# 259 - 266

Arguments

Thus, pursuant to S.C.R.C.P. Rule 56(a) and (S.C. Code Ann. § 17-27-70(c)), said summary judgment was appropriate. Furthermore, because the State failed to respond, deny or present a counter claim to petitioner's allegations pursuant to S.C.R.C.P. Rule 55, default judgment is also appropriate. As such a default judgment is conclusive and binding on all parties. If a default judgment is entered against a party they "cannot later try to deny or fight the claims" made against them. In this case at bar, the Record is clear the State was in default, failed to file answer, deny and present a counter claim. If the defendant's are required to respond to a responsive pleading or complaint that have been filed by the plaintiff within the time period set by law, and fails to do so a default judgment may be entered, especially when evidence has been presented to support plaintiff's claim contained in complaint. See, Proposed Order Granting Relief, the courts can render a default judgment against the defendants.

Petitioner is alleging and the Record reflects the State was in fact in default and the PCR Court failed to enter said default, which is a ministerial act which a clerk is required to perform once default is made to appear by affidavit of the moving party. See, *Thynnes v. L-Loyd*, 294 S.C. 152, 153-54, 363 S.E.2d 102, 123 (Ct app 1987); (holding that whether default was actually entered is of no consequences since the entry of default is a purely ministerial act which the clerk is required to perform once the default was made to appear by affidavit of the moving party). If a party has failed to plead or otherwise defend as pursuant to S.C.R.C.P. and that fact is made to appear by affidavit or otherwise the clerk of Court will enter default. This fact is clear on the face of the Record, the State failed to file answer, defend, deny or present a counter claim, within the allotted time of service of Summons and or complaint upon them and they were

technically in default pursuant to S.C.R.C.P. Rule 12(a). As such the State's failure to answer, defend or deny is not a valid pleading as required by this Rule. A plain reading of S.C.R.C.P. Rule 55(a), allows entry of default when a pleading or defense is asserted in a manner non-compliant with the Rule of Civil procedure. To hold otherwise would render the requirement in Rule 12(a), S.C.R.C.P., meaningless. A determination is required based on the evaluation of Rule 55, S.C.R.C.P., regarding default judgment. When interpreting a Court Rule, we apply the same Rules of construction used in interpreting Statutes. Therefore, the words of the Rule must be given their plain and ordinary meaning. Unless an extension is granted, a defendant must serve his answer within 30 days after service of the Complaint upon him. See, S.C.R.C.P., Rule 12(e). Clearly the Record is void of any extension granted or filed by the State, but clearly reflects the State did not answer until October 20, 2010 at the default hearing. Thus, when the State did not answer or otherwise appear, there was no requirement that any notice be given before entering a default judgment. See, S.C.R.C.P., Rule 55(b); *Roche v. Young Brothers, Inc.*, 318 S.C. 207, 456 S.E. 2d 897 (1995).

It is well settled law that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and have conceded liability. See, *Howard v. Holiday Inns, Inc.*, 271 S.C. 258, 246 S.E. 2d 580 (1978); *Schenk v. National Health Care, Inc.*, 322 S.C. 316, 471 S.E. 2d 736 (Ct App 1995); *State ex Rel. Medlock v. Lovesop, Ltd.*, 286 S.C. 486, 334 S.E. 2d 528 (Ct App 1985). Though a defaulting party may be entitled to notice of the damages hearing, the court may conduct such hearing, or order such references as it deems necessary and proper to enter the default judgment. Petitioner, contends that a default hearing was held on October 20, 2010, at this hearing the attorney for the State informed the courts on Record "their Reason for failing to respond, deny or give answer, was because they were waiting on the PCR Court to tell them to respond". The PCR Court then informs the State's attorney that they would have ten (10) days to file a responsive pleading. It is at that point in which the courts advised its clerkship by setting aside said default without any findings of "good cause" which is required by S.C.R.C.P. Rule 55(c). Therefore, the PCR Courts ruling was controlled by an error of law and without any corroboratory support. See, *In Re Estate of Weeks*, 329 S.C. 259, 495 S.E. 2d 454, 459 (Ct App 1997), Rule 55(c) allows the courts to set aside an entry of default for "good cause" shown. In deciding whether good cause exists, the court should consider the following factors: 1) the timing of the defendant's motion for Relief, 2) Whether the defendant has a meritorious defense; and 3) the degree of prejudice to the plaintiff if Relief is granted. See, *Pilgrim v. Miller*, 350 S.C. 637, 640, 567 S.E. 2d 527, 529 (Ct App 2002) cert. dismissed (April 2003).

The Court of appeals held in *Columbia Parks, Inc. v. Galvin*, 288 S.C. 59, 339 S.E. 2d 524 (Ct App 1986), that a "good faith mistakes of facts alone may constitute sufficient grounds for vacating a default judgment. However, in this case at bar, the Record is completely void of any allegations of mistaken facts. Furthermore, this default was caused by the State's failure to monitor the progress of the case, and lack of familiarity with legal proceedings, and is unexcusable and the courts will not hold a layman to any lesser standard than is applied to an attorney. See, *Goodson v. American Bankers Ins. Co. of Florida*, 295 S.C. 410, 368 S.E. 2d 687, 689 (Ct App 1968). Thus, under the circumstances of this case and Mr. Russell's case, we must conclude that the State received adequate notice, and its failure to file a responsive pleading cannot be excused on the basis of mistake, inadvertence, or surprise or excusable neglect, therefore, making S.C.R.C.P. Rule 55(c) and Rule 62(b) nonapplicable. See, *Mitchell Supply Co. Inc. v. Gaffney*, 297 S.C. 106-63, 375 S.E. 2d 321, 322-23 (Ct App 1988); Stating for the purpose of obtaining Relief from judgment on the basis of not inadvertence or mistake, "The Appellate courts of this State have repeatedly held that the acts of the attorney are directly attributable to and binding on the client. See, *Cassady v. Meares*, 266 S.C. 352, 521 S.E. 2d 223, S.E. 2d 191 (1976); *William H. VanVoken* - (46)

burg, 312 S.C. 373, 440 S.E. 2d 408 (Ct App 1994); Greenville Income Partners v. Holman, 308 S.C. 105, 417 S.E. 2d 107 (Ct App 1992); cited therein; Roberts v. Peterson, 292 S.C. 149, 355 S.E. 2d 280 (Ct App 1987).

The general rule undoubtedly is the neglect of the attorney is the neglect of the client, and no mistake, inadvertence or neglect attributable to any attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. See, SIMON v. FLOWERS, 231 S.C. 545, 99 S.E. 2d 39 (1957). In the present case the Record on October 20th 2010, is completely void of any evidence which could support the granting of Relief to the State, and is completely void of any explanation as to why the State's attorneys failed to give answer. See, Consolidated Masonry & Fireproofing, Inc.; 383 F.2d at 251. "Stating that a meritorious defense requires 'a pattern of evidence which would permit a finding for defaulting party on which would establish a valid counter claim.' See, Augusta Fiberglass Coating, Inc. v. Fordor Contracting, Corp, 843 F.2d 808, 812 (4th Cir 1988); Lolately v. Arthur Murry, Inc.; 816 F.2d 951, 953 (4th Cir 1987) of all these factors, the personal responsibility of the movant has received particular consideration in our prior determination involving motions to set aside entries or judgment of default. See, eg, Id Augusta, Supra; United States v. Moradi, 673 F.2d 725, 728 (4th Cir 1982). We have further held in Central Operating Co. v. Utility Workers of America, 491 F.2d 245, 252 (4th Cir 1974) and more recently in Park Corp. v. Lexington, Ins. Co, 812 F.2d 894, 896 (4th Cir 1987), that in addition to showing reasonable diligence, and a meritorious defense, a party seeking to set aside a default judgment must demonstrate that he had an "Acceptable excuse" for lapsing into default.

The Courts of Appeals held in BBT of South Carolina v. Lottic Fleming of Fredrick Fleming, DP-AD; 03-UP-255 S.C. (Ct App 03), that it did not properly preserve the issue of whether the trial court erred in refusing to enter a default judgment because the issue was not raised to the court and is not addressed in the order. Also argues that the court of appeals erred in ruling that the issue was not properly preserved for review. However, in this case at bar, a hearing was held on October 20, 2010, and Federal Notice objecting to the PCR Court setting aside default was subsequently filed. See Exhibit, Judicial Notice. Nevertheless, the courts and the State failed to address this issue in their order of dismissal, despite petitioner's diligent efforts to have it addressed. Given the fact that Mr. Russell took all the proper steps to present and preserve this issue, and was unsuccessful only because the courts and the State's lack of cooperation, therefore, this court must hold that this issue is properly preserved for appellate review and must be addressed accordingly. Furthermore, this court should find that the PCR Court "for whatever reasons" in entering, clearing or setting aside default judgment, or addressing it in their order, is based on no evidentiary support and on error of law.

Conclusion

It is for the above reasons that the State's order of dismissal is void. These default judgments are procedurally barred by the defense of waiver, abandonment, and laches. See Appendix pg # 204-253-267

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Warren Russell, 316802

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2008-CP-40-7960

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Tricia A. Blanchette, Bar No. 74904 Address: PO Box 12725 Columbia, SC 29211 phone: 803-988-0008 fax: 803-988-8070 e-mail: blanchettelaw@gmail.com other:		Defendant's Attorney: Brian Petrano, Bar No. Address: PO Box 11549 Columbia, SC 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant		November 18, 2011 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____			
☐ CONTESTED - AMOUNT DUE: _____			



LAW OFFICE OF TRICIA A. BLANCHETTE

November 18, 2011
VIA HAND DELIVERY

Richland County Clerk of Court
ATT: Common Pleas
PO Box 2766
Columbia, SC 29202

RE: Warren Russell v. State, Docket No.: 2008-CP-40-7960

Dear Sir or Madam:

For filing on behalf of my appointed client, attached please find an original Affidavit of Statement of Facts and Judicial Notice of Adjudicated Facts prepared by my appointed client. A Certificate of Service is attached.

As a courtesy, I am sending a copy of this Affidavit and Judicial Notice to the Honorable L. Casey Manning.

Thank you for your assistance with this matter. Please contact me if you need any additional information.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Honorable L. Casey Manning
Brian Petrano, Assistant Attorney General
Warren Russell

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | f: 803.988.8070 | e: blanchettelaw@gmail.com

Statement of Issue on Appeal

If petitioner requested a preliminary hearing in compliance with SC Code § 22-5-320 and the solicitor defeated said hearing by way of Super indictment would general session lack jurisdiction.

Was counsel ineffective for allowing the prosecution to defeat petitioner's right to a preliminary hearing by obtaining a True Bill from the Grand Jury after petitioner has requested said hearing but before the proceeding has begun, when the Super indictment is not available to solicitors in South Carolina.

Statement of the Case

Petitioner requested a timely preliminary hearing, the solicitor rushed to the Grand Jury and intentionally circumvented SC § 22-5-320. Thus, jurisdiction in the general session court was precluded until said hearing was held.

Facts

The Super indictment by which prosecutor in some states can defeat the right to a preliminary hearing, by obtaining a "True Bill" from the Grand after the defendant has requested a hearing but before the proceeding has begun is not available to solicitor in South Carolina. ~~Petitioner~~ Petitioner timely requested, however trial counsel waived said hearing. See, Exhibit.

Argument

Petitioner asserts that he made a timely request for a preliminary hearing pursuant to SC Code § 22-5-320, effects of demand for a hearing, which states when a defendant had demanded such hearing which had not been held, it was error for magistrate to transmit the Warrants to the higher court, and although indictments had been given out and true bill found on them, the court had "NO jurisdiction" until said hearing has been held. The Act of a court in a matter over which it has no jurisdiction are void. *State v. Funderburk*, 259 S.C. 256, 191 S.E. 2d 520 (1972).

Nevertheless, this malicious action of the prosecution to circumvent petitioner's Constitutional rights to a preliminary hearing, caused the denial of substantive due process, which is the essence of due process protection from arbitrary and unreasonable action. This lack of respect for procedural due process created some serious constitutional issues that raises to a lack of Subject Matter jurisdiction. Therefore at this critical stage of defendant's defense, he was denied effective assistance of counsel, and the opportunity to take the procedural steps, required by SC § 22-5-320. Said ineffective assistance of counsel, clearly created prejudicial effects in the later proceedings, and the ensuing trial. 40 U.S.C § 2255, with specific reference to interpretive note # 14, which establishes said courts criminal jurisdiction. Petitioner is requesting this court to produce the documentation specified per this statute.

State of South Carolina

County of Richland

In The Court of Common Plea

Case No: 2008-CP-40-7960

Warren Russell C.

Plaintiff

Judicial Notice of Adjudicative Facts

V.

State of South Carolina

Defendants

The Plaintiff now comes before this Honorable Court and the Honorable Judge L. Casey Manning, and hereby challenges the jurisdiction of the Federal Government of the United States, to charge the Plaintiff with said crimes within the State of South Carolina. The Plaintiff, hereby cite the statutory Requirements pursuant to 40 U.S.C. § 255, with specific reference to interpretive note #14, and Plaintiff hereby request that this court under the Department of Justice (D.O.J.) to produce the documentation, specified per this statute to establish their criminal jurisdiction. The Plaintiff is therefore challenging the jurisdiction of the Attorney General, and is requesting this court and the Honorable Judge L. Casey Manning to be an "independent" and "non biased" "Third Party" to order as it must when jurisdiction is formally challenged, for the D.O.J. to produce the documentation as required by this statute.

Further, the Plaintiff is alleging that pursuant to the code of Federal definitions, Section 22(a), 3121(e)(1), 3306(f) and others, states the definition of "United States" when applied to all federal law, specifically excludes the 50 Union States, therefore, all laws enacted by congress do not have general applicability to ~~State~~ Citizens. See *Heaven & Allison Co. v. Evans*, 324 U.S. 652 (1945)

Further, Plaintiff alleges that State and Federal Supreme courts have consistently ruled that one enacting clause is a requirement of any properly enacted law. Clearly these and countless other Supreme Courts have ruled that any law which lacks the required enacting clause is void on its face. As this court and

this Honorable Judge is aware there are several United States Codes and State Revised Statutes that does not contain such enacting clause, and therefore federal and States administrative courts lack personal and subject matter jurisdiction. See *Julliard v. Greenman*, 110 U.S. 421 (1884)

and Supreme Court Justice Field, See *Hale v. Henkel*, 201 U.S. 43 (1905), See, United States Code's Non-positive laws. See, *United States v. Johnson*, 994 F.2d 980, 984-86 (2d Cir 1993) Federal

government may acquire property within a state, but can only acquire jurisdiction over that property if both state and federal governments agree to the transfer, otherwise, does not take jurisdiction.

This sort of Attorney General must establish jurisdiction as it will be something feared. Likewise with this court. "Silence is a species of conduct, and constitutes an implied representation of the existence of facts or questions. When silence is of such character and under such circumstances that it would become a fraud, it will operate as an estoppel." Commonwealth v. Boardman, 411 U.S. 932. "Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. This sort of deception will not be tolerated and if this is the routine it should be corrected immediately." U.S. v. Felt, 550 F.2d 247, 249 (1977) [quoting U.S. v. Prudden, 424 F.2d 1021, 1032 (1970)].

The U.S.C. codifies the Constitutional requirement at Article I, Section 8, Clause 17 and proscribes the procedure and required documentation for the federal government to successfully assert jurisdiction inside one of the fifty States. To wit, 40 USC § 235 (new 311 and 312) plainly and specifically requires that a "Notice of acceptance" is to be filed "with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." "Such lands," of course, referring to those lands that Federal government, through its agents, is claiming exclusive or concurrent jurisdiction over the people living thereon. The text of § 235 concludes with the statement "Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted. See F.R.C.P. Rule 54, Note: There is no reference to the 50 'States', Sec. 15 USC

Obviously, if the requirement of Article I, Section 8, Clause 17 of the Constitution of the United States are not complied with, and/or if the procedural requirements of 40 USC § 235 are not complied with, then no public servant who is acting as an agent of the United States, i.e. the federal government, has any bona fide authority whatsoever to attempt to force compliance with any federal law, rule, regulation, statute, etc. on anyone living in such an area that is not subject to any bona fide jurisdiction of the federal government. In support of this conclusion, the second paragraph of interpretive note # 19 of 40 USC § 235 says "no jurisdiction exists in United States to enforce federal criminal laws, unless and until consent to accept jurisdiction of persons and/or lands acquired has been filed in behalf of the United States. See, Adams v. United States (1943) 319 U.S. 372, 87 L. Ed 1421, 63 S.Ct 1122; See, United States v. Lopez, 514 U.S. 549, 115 S.Ct 1624 (1995). (plaintiff's emphasis) (51)

Furthermore, the Plaintiff alleges that pursuant to the Emergency Banking Act, dated March 9th 1933 (48 Stat 1 Public Law 89-719) and the House Joint Resolution 192 of the 73rd Congress in session June 5, 1933, entitled joint resolution to suspend the Gold Standard and Liberate the Gold clause, created the following lack of subject matter and personam jurisdiction:

1) Dissolved the Sovereign authority of the United States and the official capacities of all United States governmental officers and departments.

2) Suspended the Constitution

3) Declared a State of Emergency

4) Implemented Executive Branch Control

5) Declared the American People enemies of the federal government, and

6) The creation of "War Names" or "NOR DE GUERE". See exhibit # 1 Emergency Banking Act

Therefore, all official courts are now operating under admiralty jurisdiction and are statutory jurisdictions, which is colorable admiralty jurisdiction, not created on the constitution, unlawful, and a nonexistent venue. See, *Atkins v. Lanning*, DC ORI, 415 F. Supp. 186-188. Thus the Plaintiff hereby

request this court to provide the international Maritime Contract which allegedly is in dispute, to be placed into evidence so the Plaintiff could properly challenge its validity. See Rep. James Trecheant Jr., U.S. Congressional Record March 17 1933, Vol. 33, page H-1303.

Further, these government issued "NOR DE GUERE" or "War Names" represents a fictitious entity or a juristic person, thus this court respectfully may have jurisdiction of said juristic person under the color of admiralty Law, but does not have jurisdiction over the living, breathing, flesh-and-blood person. See, Title 1 United States Codes section 1, note b; See, *U.S. v. United Mine Workers*, 330 U.S. 258 91 L. Ed 884 and See, *Bender v. Kasarek*, C97-84 WD and C97-120 WD, U.S. District Court, Western District of Washington, Seattle (June 30 1997) in which this court recognized the difference between a Natural person and a juristic or artificial person. See UCC § 36-1-103, which remains in force except where displaced by the code, See, *North Carolina National Bank v. McCarty & Co.*, 34 NC App 489, 239 S.E.2d 583 UCCRS 455 (1977) UCC section 36-1-103.6. Thus, this court can not have personam or subject matter jurisdiction over the natural living, breathing, flesh-and-blood person, and pursuant to Federal due process rules, challenges to jurisdiction stops all further proceedings until resolved, and as such, this matter is immediately appealable to the next court pursuant to 5 U.S.C. § 555(d). Therefore this Plaintiff respectfully invokes UCC § 36-1-207 next to or directly above his signature on any and all, past and present government or quasi-governmental documents, without limitation to include, all court documents of any kind, all legal citations, IRS forms, bank checks, drivers and other licenses, motor vehicle registration and

See: *Federal Rep Insurance v. Merrill*, 33 U.S. 380 at 391 (1947). See: *Standard v. Olson*, 74 S.Ct 768.
Narrow Plaintiff UCC § 36-1-207 (52)

PUBLIC LAWS OF THE SEVENTY-THIRD CONGRESS

OF THE

UNITED STATES OF AMERICA

Passed at the first session, which was begun and held at the city of Washington, in the District of Columbia, on Thursday, the ninth day of March, 1933, and was adjourned without day on Friday, the sixteenth day of June, 1933.

FRANKLIN D. ROOSEVELT, President; JOHN N. GARNER, Vice President; KEY PITTMAN, President of the Senate *pro tempore*; HENRY T. RAINEY, Speaker of the House of Representatives.

[CHAPTER 1.]

AN ACT

To provide relief in the existing national emergency in banking, and for other purposes.

March 9, 1933.

[H.R. 1491.]

[Public, No. 1.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

National bank-
ing system.
Emergency declared
existing.

TITLE I

SECTION 1. The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed.

Proclamations,
orders, etc., issued
since March 4, 1933; ap-
proval.

Post, p. 343.
Trading with the
Enemy Act. amended.
Vol. 40, pp. 415, 966,
amended.

Foreign exchange, ex-
port or hoarding of
coin, bullion, etc.

Regulatory powers
of President during na-
tional emergency.

SEC. 2. Subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. L. 411), as amended, is hereby amended to read as follows:

"(b) During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or ear-marking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned

Compulsory testi-
mony, etc.

Punishment for vio-
lation.

State of South Carolina
County of Richland

Warren Russell ©
Plaintiff

v.

State of South Carolina

In The Court of Common Pleas
Case No. 2008-CP-40-7960

Affidavit of Statement of Facts
and Service of Affidavit

Personally appearing before me Warren Russell ©, who being duly sworn attests to the fact he requested and sent a Motion for Judicial Notice of Adjudicative facts to Terina Blanchette his court appointed PCR Counsel to submit to the courts in compliance with S.C.R.Cv.P Rule 11 requirements. Further, because said PCR Judge, Manning has not formally ruled on said PCR Motion, and we has not ruled on said S.C.R.Cv.P Rule 59(e) or (e) motion, and on 601(b)(3) motion, said requested Judicial Notice of Adjudicative facts, can still be considered and said additional information can be helpful in said ruling and or decision.

Further, said information in said Judicial Notice is not favorable, plus I have included exhibits and evidence to support said Allegations, said Allegations are directly related to Relevant PCR Issues, and involves Challenges to the jurisdiction of the courts ie, Subject matter and personal jurisdiction. Thus pursuant to Federal process Rules, Challenges to jurisdiction stops all further proceeding until Resolved and such, the matter is immediately appealable to the next court. Thus said Requested Action is legal and ethical, and in MS. Blanchette's clients best interest and should be mandated. If not please provide a legal explanation as to why such Refusal to file is appropriate.

Sent to Law Office of Terina A. Blanchette P.O. Box 18723, Columbia, SC 29211

Subscribed and sworn to on
4 day of Nov. 2011
Notary Public for South Carolina

My Commission Expires 5-16-11

Warren Russell © (54)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Warren Russell, 316802,)
Applicant,)

2008-CP-40-7960

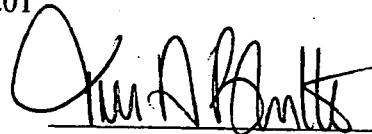
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney for the Applicant, hereby certify that I hand
delivered on the 18th day of November 2011, a copy of a Affidavit of Statement of Facts
and Judicial Notice of Adjudicated Facts to Brian Petrano with the Office of the Attorney
General at:

Richland County Courthouse
1701 Main Street
Columbia, SC 29201



Tricia A. Blanchette
Attorney for the Applicant
PO Box 12725
Columbia, SC 29211

November 16, 2011