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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Certiorari to the Court of Common Pleas
Appeal from Berkeley County
Honorable R. Kirk Griffin, Post-Conviction Relief Judge

Appellate Case No. 2024-001521

EMORY W. ROBERTS, #373393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

SUPPLEMENTAL APPENDIX

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Q2B-0217-T
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during deliberations, please know that there will be a delay in our response because there's a process that I have to follow in answering your questions. So know if you have a question, don't think we are ignoring you. We are simply following that procedure.

Again, ladies and gentlemen, your verdict must be a unanimous one, which means all twelve of you must agree.

And, Madam Forelady, any notes provided to the Court should never make reference to any of the jury's deliberative process or to any numerical breakdown that may exist between the jury.

Ladies and gentlemen, I'm going to ask that you return to your jury room. But do not yet begin your deliberations. I have some matter of law to take up with counsel that may require further instruction or clarification of an instruction. However, if there's no further instruction, we will send in the evidence, the verdict forms and your notepads. And at that time, we will excuse the alternates. We have also made arrangements for your lunch today. I think it's pizza. Mr. Marvin went to pick it up for us. It is probably here. So we will get you set up for lunch and we will secure a separate room for the alternates to enjoy their lunch as well. If you would go with the bailiffs for me, please, and do not yet begin your deliberations.

(Whereupon, the jury leaves open court at 12:36 p.m.)

THE COURT: Any exceptions from the State?

MS. GORDON: None, Your Honor.

THE COURT: From the defense, Mr. Griffith?

MR. GRIFFITH: No, Your Honor.

THE COURT: From the defense, Ms. Johns?

MS. JOHNS: No, Your Honor.

THE COURT: If y'all could indulge me just one more second and make sure all of the evidence in place.

MR. ROBERTS: When you say the evidence for the jury, are they going to go through it?

THE COURT: Yeah. And we need some gloves too for them. They also need a clean computer.

MR. UNDERWOOD: We have a clean computer that they can use. There's nothing on it, but operating software.

THE COURT: Perfect. As soon as I get the jury situated, I will let y'all get some lunch as well.

(Whereupon, the alternate enters the courtroom.)

THE COURT: Thank you for your time and attention to this case. We know being an alternate is completely thankless, but if someone was not able to go forward by illness or otherwise, you would have taken that place of that jury. And it's such an important service that you provide to the jury. We are going to situate you in an

alternate jury room. No pun intended. It's just a room that's over on the other side. And I'm going to give you lunch so you can take your time and eat. After that, you are welcome to hang out with us or go on about your day. You are welcome to discuss the case if you want, but I ask you not do that until the entire panel is released. Sometimes lawyers ask to get feedback on the case.

We will destroy your notes for you, unless you want to do that, but the bailiffs are pretty adept at destroying notes, unless you just want to keep them. I hope y'all have a wonderful weekend. And thank you again so very much for your service. I hope it's been educational. And I will turn it over to the hands of the bailiff so you are situated to have your lunch. Thank you very much.

THE COURT: Now I need you to get the evidence and the notes and go ahead and take that into the jury for me so I can note a time that they've begun their deliberations.

The record will reflect that the jury began its deliberations at 12:41.

(Whereupon, the jury deliberates at 12:41.)

(Court's Exh. 3, Jury note, was marked for identification.)

THE COURT: We have a note from the jury. And it reads as follows, I've had it marked as a Court's exhibit: Could you please clarify the distinction between

distribution and trafficking.

I will reinstruct them on distribution and trafficking. Any exception from the State?

MR. UNDERWOOD: None, Your Honor.

THE COURT: From the defense?

MR. GRIFFITH: None, Your Honor.

MS. JOHNS: No, Your Honor.

THE COURT: All right. Please bring in the jury.

(Whereupon, the jury returns to open court at 1:42 p.m.)

THE COURT: Ladies and gentlemen, in response to your note, could you please clarify the distinction between distribution and trafficking, I will reinstruct you as follows. The defendant Hunter is charged in counts 1, 2 and 3, and the defendant Roberts in Counts 1 and 14 with trafficking in heroin. The State must prove beyond a reasonable doubt that the defendants knowingly sold, manufactured, cultivated, delivered, purchased, brought in to this state, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this state, was knowingly in actual or constructive possession, knowingly attempted to become in actual or constructive possession of heroin. The State must also prove beyond a reasonable doubt that the amount of heroin or any mixture containing heroin

was 4 grams or more but less than 14 grams, 14 grams or more but less than 28 grams, and 28 grams or more.

Actual possession means that the heroin was in the actual physical custody of the defendants.

Constructive possession means that the defendants had dominion and control or the right to exercise dominion or control over either the heroin itself or the property on which the helper was found.

Mere presence at the scene where drugs were found is not enough to prove actual or constructive possession.

Actual knowledge of the presence of the heroin is strong evidence of the defendant's intent to control its disposition or use.

The defendant's knowledge of possession may be inferred when a substance is found on the property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight, value and affect you decide it should receive.

Two or more persons may have joint possession of a drug.

"To deliver" means to actually, constructively or attempt to transfer the drug.

"Manufacture" means to produce, prepare, convert, process, plant, cultivate, grow or harvest a drug naturally

or actually.

"Manufacturing" includes any packagings or repackagings of the drug or labeling or relabeling of the drug's container.

In order to prove a conspiracy, the State must prove beyond a reasonable doubt that the defendant or defendants combined with one or more persons for the purpose of committing an unlawful act or of committing a lawful act by unlawful means. There must be a mutual understanding, agreement or common intention and plan. Mere passive knowledge of or consent to the criminal conduct of another is not enough to make a person a conspirator. There must be guilty knowledge and participation. Similarly, the mere fact that the defendant may have associated with another person or met with another person and discussed common names in interest does not necessarily establish proof of the existence of a conspiracy or that the defendant was involved in a conspiracy.

On the other hand, it is not necessary that the agreement be a formal one, that it be in writing, that the persons hold a meeting and expressly state the terms of the common plan, or that the agreement be stated in words between them. The agreement of a conspiracy may come into being through an implied mutual understanding. The willful, intentional and knowing adoption by two or more persons of a

common plan is sufficient. Overt acts need not be to shown to establish a conspiracy.

A conspiracy may be shown by circumstantial evidence and the conduct of the parties. In order to convict the defendant or defendants of conspiracy, the State must prove beyond a reasonable doubt not only that the defendant or defendants knew of the unlawful conduct, but that the defendant or defendants agreed to combine with the other person or persons for the purpose of accomplishing the unlawful conduct.

In count 4 and 5, defendant Hunter in count 4 and 5, and defendant Roberts in count 11, 12 and 13, are charged with distribution of heroin. The State must prove beyond a reasonable doubt that the defendants distributed heroin.

"Distribute" means to deliver or to actually, constructively or attempt to transfer a drug other than by administering or dispensing.

"Deliver" means to actually, constructively or attempt to transfer a drug. A transfer can involve an exchange for money, a barter or a gift. There does not have to be anything given in exchange for the drugs for a transfer to constitute distribution.

And in count 6, the defendant Hunter is charged with distribution of methamphetamine. The State must prove beyond a reasonable doubt that the defendant distributed

methamphetamine.

"Distribute" means to deliver or to actually, constructively or attempt to transfer a drug other than by administering or dispensing.

"Deliver" means to actually, constructively or attempt to transfer a drug. A transfer can involve an exchange for money, a barter or a gift. There does not have to be anything given in exchange for the drugs for a transfer to constitute distribution.

Please let me know if you need anything further. If you will return to your jury room and resume your deliberations.

(Whereupon, the jury leaves open court at 1:49 p.m.)

THE COURT: Any exceptions from the State?

MR. UNDERWOOD: None, Your Honor.

THE COURT: From the defense, Mr. Griffith?

MR. GRIFFITH: None, Your Honor.

MS. JOHNS: No, Your Honor.

THE COURT: Thank you. We will await further instruction.

(Whereupon, a recess transpired.)

(Whereupon, the defendant is present.)

THE COURT: Bring in the jury.

(Whereupon, the jury returns to open court at 2:22

p.m.)

THE COURT: Madam Forelady, is it correct that the jury has reached a verdict?

THE FOREPERSON: Yes.

THE COURT: Give the verdict forms to the bailiff, please.

The verdicts are as follows: The State of South Carolina vs. Emory Warren Roberts, Indictment 2016-GS-47-0002, as to count one, we the jury unanimously find the defendant guilty of trafficking in illegal drugs, heroin, 28 grams or more and conspiracy.

Ladies and gentlemen, if this be your verdict, please indicate by raising your right hand.

Let the record reflect all 12 raised their right hand. You can put your hands down.

As to count 11, we the jury unanimously find the defendant guilty of distribution of heroin.

As to count 12, we the jury unanimously find the defendant guilty of distribution of heroin.

As to count 13, we the jury unanimously find the defendant guilty of distribution of heroin.

As to count 14, we the jury unanimously find the defendant guilty of trafficking in illegal drugs, heroin, 4 to 14 grams.

As to count 15, we the jury unanimously find the

defendant guilty of possession of a firearm during the commission of or attempt to commit a violent crime.

And as to count 16, we the jury unanimously find the defendant guilty of possession with intent to distribute methamphetamine.

Ladies and gentlemen, if this be your verdicts, please indicate by raising your right hands.

Let the record reflect that all 12 raised their right hand. You can put your right hand down.

Sir, you may take your seat.

As to the State vs. Justin Gordon Hunter, we the jury, as to count 1, Indictment No. 2016-GS-47-00002, we the jury unanimously find the defendant guilty of trafficking in heroin, 28 grams or more.

As to count 2, we the jury unanimously find the defendant guilty of trafficking in heroin, 4 to 14 grams.

As to count 3, we the jury unanimously find the defendant guilty of trafficking in heroin, 14 to 28 grams.

As to count 4, we the jury unanimously find the defendant guilty of distribution of heroin.

As to count 5, we the jury unanimously find the defendant guilty of distribution of heroin.

And as to count 6, we the jury unanimously find the defendant guilty of distribution of methamphetamine.

Ladies and gentlemen, if this be your verdicts,

please indicate by raising your rights hands.

Let the record reflect that all 12 raised their right hands. The verdicts are taken and the verdicts will stand.

Is there any request to poll the jury from the State?

MR. UNDERWOOD: None, Your Honor.

THE COURT: Mr. Griffith?

MR. GRIFFITH: No, Your Honor

MS. JOHNS: No, Your Honor.

THE COURT: Ladies and gentlemen, we thank you for your time and your attention. We know that jury service is thankless. I hope, however, that it has been educational for you and you've learned that real court is nothing like what you see on television. I hope you know how very vital your service is to our system. Our system is the only kind in the world where 12 ordinary citizens listen to the facts of a case, apply the law to those facts, and render verdicts.

You are welcome to stay with us if you would like for sentencing. By the same token, if you would like, you are excused for the remainder of the court term. If you need a work excuse, we can provide that to you before you leave. Otherwise, we will mail that to you along with your checks.

Are there any members of the panel that wish to remain for sentencing? If so, if you would raise your hand. Those who wish to remain, if you would stay in your seats. Those who do not wish to remain, you are excused with the Court's profound thanks.

(Whereupon, the jury is excused.)

THE COURT: Do you all have the sentencing sheets?

While we are doing that, are there any post-trial motions?

MR. GRIFFITH: Your Honor, we would ask for reconsideration of a new trial, verdict notwithstanding.

MS. JOHNS: We join in, Your Honor.

THE COURT: Okay. Both motions are denied. There is more than ample evidence to have supported the verdicts in this case. The standard is if there's any evidence to support the jury's findings in a case, and there are more than ample facts to have supported the verdict. And, therefore, the motions are denied.

The Court will reincorporate all of its contemporaneous findings regarding any motions made and contemporaneously preserved for the record.

All right. Do you all have some sentencing sheets for me? Does Mr. Hunter have any record?

MR. UNDERWOOD: He does, Your Honor.

THE COURT: If you will publish that for me,

please.

MR. UNDERWOOD: From that state of New York, 2005, criminal possession, narcotic drug, fourth degree.

THE COURT: Do you know what drug that is?

MR. UNDERWOOD: I do not, Your Honor.

MS. JOHNS: Yes, Your Honor. May I approach?

THE COURT: Yes.

(Whereupon, a bench conference takes place off the record.)

MR. UNDERWOOD: Your Honor, that may have been two counts. Then going to 2007, also from the state of New York, another criminal possession narcotic drug, fourth degree.

And 2009, criminal mischief with intent to damage property, aggravated harassment, second degree, communicating in a manner likely to cause alarm. And, again, those are also in the state of New York, Your Honor.

2011, assault, third degree, attempt to cause physical injury.

2013, from the State of New York, disorderly conduct, creating hazard or physically offensive condition. Criminal possession of a controlled substance, third, narcotic drug with intent to sell -- excuse me, Your Honor, that last charge was dismissed. That's the extent of his convictions, Your Honor.

THE COURT: As I understand, on the conspiracy to traffic, that's a mandatory 25.

MR. UNDERWOOD: It is, Your Honor.

THE COURT: What's the maximum penalty?

MR. UNDERWOOD: 40 years, Your Honor.

THE COURT: And the trafficking 4 to 14 is -- is that 7 to -- what is that?

MR. UNDERWOOD: 4 to 14 would be a second offense, Your Honor, which would make it a mandatory 25. And I do have sentencing sheets for Mr. Hunter.

THE COURT: Count 3, which is 14 to 28 grams --

MR. UNDERWOOD: Also 25, Your Honor.

THE COURT: Because it's a second.

MR. UNDERWOOD: Count 4, which is distribution of heroin, is 0 to 15, or 5 to 30 if it's a second.

MR. UNDERWOOD: 5 to 30 as a second offense, Your Honor.

THE COURT: Do you contest the enhancement of your client's situation, Ms. Johns?

MS. JOHNS: No, Your Honor, not at this time.

THE COURT: The distribution of methamphetamine, that would also be -- is that in the same category as meth, crank, ice, crack, all the same category?

MR. UNDERWOOD: I'm sorry, Your Honor.

THE COURT: I said methamphetamine, distribution

second, is the same as cocaine, crack, all that is in the same category, same schedule?

MR. UNDERWOOD: Yes.

THE COURT: That's 5 to 30 as well?

MR. UNDERWOOD: Yes, Your Honor.

THE COURT: Okay. We will come back to Mr. Hunter in a moment. You can approach and hand me the sentencing sheets.

THE DEFENDANT: Can I address the appeals?

THE COURT: Pardon me? Actually, sir, you don't have to do that. What will happen, if you wish to appeal, Mr. Griffith will file a motion to appeal. And Indigent Defense will step in and take over and they'll be in touch with you.

THE DEFENDANT: Can I do it myself though?

THE COURT: You don't want to do that. They have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you.

The DEFENDANT: So what happens if it's not done in 10 days.

THE COURT: It's going to be done probably by Monday. Yeah. They can do it quicker than you can. They know where to send it and they know what to do. And Mr. Griffith will send you a copy.

While we are waiting on the State to complete that paperwork, Mr. Roberts's range of penalty on count 1 is 25 to 40, clarified as violent and serious and a strike; count 11 is 5 to 30. Is this -- would this count as a second for him? His record, as I recall was --

MR. UNDERWOOD: Prior conviction was outside the time frame, Your Honor.

THE COURT: So these are not seconds? They are firsts, correct?

MR. UNDERWOOD: Yes, Your Honor.

THE COURT: So then his on all three distributions is 0 to 15, trafficking 7 to 25, and the possession of a weapon is a mandatory 5, PWID methamphetamine is 0 to 15 and/or 25,000.

Glad to hear from you, Mr. Underwood, regarding Mr. Roberts.

MR. UNDERWOOD: Your Honor, Mr. Roberts does have a criminal history from the state of New York. The convictions consist of menacing, second degree, with a weapon.

THE COURT: What year was that?

MR. UNDERWOOD: That was 1996. Petty larceny from 1997; another petty larceny from 2000; assault, third degree, with intent to cause physical injury from 2002, along with a trespass, and what appears to be a second count

of assault, third degree.

THE COURT: What year, same, 2000?

MR. UNDERWOOD: Yes, Your Honor. Violation of an order of protection from the same year as well, Your Honor.

THE COURT: I also have that there was a criminal mischief charge, what year was that, and damaging property?

MR. UNDERWOOD: I'm going through, Your Honor. I apologize. Also 2002, criminal possession of narcotic drug, fourth degree, reckless endangerment, second degree, criminal possession of controlled substance, fifth degree, with intent to sell, criminal possession of a weapon, third.

THE COURT: What years are all these?

MR. UNDERWOOD: Your Honor, these are from 2002.

THE COURT: Okay.

MR. UNDERWOOD: Separate cycle, but the same year.

I apologize. I'm trying to make sure there's no repeats.

THE COURT: That's okay.

MR. UNDERWOOD: In 2006, aggravated harassment, second degree, communicating to cause alarm, aggravated -- appears to be two counts, Your Honor.

2007, criminal mischief with intent to damage property, appears to be one count.

2009, assault, third degree, with intent to cause

physical injury. Also in 2009, criminal contempt, second degree, disobeying a court. And in 2009 as well, aggravated criminal contempt, violating an order of protection, criminal possession of a weapon, third, criminal mischief, third degree, damaging another person's property, and another count of criminal possession, third degree. Appears to be a different cycle.

2013, criminal contempt, second degree.

2014, another criminal trespass, third degree, two counts.

And, Your Honor, I believe that is the extent of his criminal conviction history. And those are all from the state of New York.

THE COURT: Mr. Griffith, is that accurate, to the best of your knowledge?

MR. GRIFFITH: To my knowledge, Your Honor, that is accurate.

THE COURT: Mr. Underwood, glad to hear from you.

MR. UNDERWOOD: Your Honor, Mr. Roberts was a key person involved in this drug trafficking organization. As Your Honor is aware, he was in possession of numerous firearms, both handguns and long guns, shotguns and assault rifles. Several of those weapons were stolen.

Your Honor, he is considered by law enforcement to be a very dangerous individual, a very culpable individual

in this case. And we feel that based on his criminal history, his conduct which led to these charges and his propensity for violence, we feel it would be appropriate for him to have a sentence far greater than the mandatory minimum.

THE COURT: Well, you need to quantify that so Mr. Griffith knows what he's responding to.

MR. UNDERWOOD: Your Honor, for whatever amount of bearing the Court would give to it, also the incident occurring during this incarceration prior to trial, the assault on a detention officer, just to show the nature of this particular defendant, we would ask for a sentence exceeding 30 years.

THE COURT: Mr. Griffith, glad to hear from you.

MR. GRIFFITH: Your Honor, Mr. Roberts is 38 years old. He has gotten wrapped up into some -- with some bad folks. But, Your Honor, I have had the opportunity to sit here and talk to him. I still believe, Your Honor, as when I asked for that evaluation, I truly believe that there is something going on. I really think that he needs some help. And that at some point with the right kind of help, he could be a citizen and a productive citizen, Your Honor.

I would ask that the Court show some leniency as allowed by statute, Your Honor. But Mr. Roberts, I don't think, even if he receives the minimum, Your Honor, he won't

be getting out --

THE COURT: He will be 60 almost.

MR. GRIFFITH: As far as his age, by that time, it's unlikely he would return to a life of crime by that time.

THE COURT: Does he need any drug treatment while --

MR. GRIFFITH: Your Honor, he's indicated to me that he was not addicted to drugs and did not use the drugs.

THE COURT: Okay. I just wanted to make sure. They will evaluate him in R and E, but if I needed to make that designation, I wanted to make sure.

MR. GRIFFITH: Thank you, Your Honor.

THE COURT: You're welcome.

Anything further from the State?

MR. UNDERWOOD: Nothing, Your Honor.

THE COURT: Mr. Roberts, anything you want to say for the record on your own behalf?

THE DEFENDANT: Yeah. I have two children, 8 and 14.

THE COURT: Where are they, sir?

THE DEFENDANT: In New York.

THE COURT: Who are they with?

THE DEFENDANT: Their mothers.

THE COURT: They have different moms? What kind of

contact do you have with the kids?

THE DEFENDANT: Now?

THE COURT: Well, in general.

THE DEFENDANT: I only could talk to them on the phone.

THE COURT: You made mention of your mother. Is she here in South Carolina?

THE DEFENDANT: No.

THE COURT: She's in New York as well? How old is your mother?

THE DEFENDANT: 61.

THE COURT: Do you have any other siblings?

THE DEFENDANT: Yes.

THE COURT: And how many siblings do you have?

THE DEFENDANT: Three.

THE COURT: How old are they?

THE DEFENDANT: 21, my sister is 23 today, and I have an older sister, 39.

THE COURT: She's 39?

THE DEFENDANT: Yeah.

THE COURT: Where are they all located?

THE DEFENDANT: New York.

THE COURT: Do you have any contact with them?

THE DEFENDANT: Yeah.

THE COURT: Just so the record is clear, while

there may be some concerns that Mr. Griffith has articulated regarding Mr. Roberts's need for potentially an evaluation of some type to see if he needs counseling, medication or otherwise, I have no concern about his ability to have assisted in his representation, to understand the nature of these proceedings. It is clear to the Court that he's been cognizant of place and time, that he is well aware of the nature of these proceedings. And due to the breadth of his criminal history, I have no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights of attendant constitutionally to him, as he has more than on many events during the course of this trial articulated for the Court.

I believe initially he refused to cooperate with his lawyer, because to some extent, I think he thought he knew more than Mr. Griffith about the system. And I think some of that is tainted by the environment at the detention center, which I think when you are in a desperate situation, you will listen to anyone. And if you have any level of intelligence, you can become a hostage to your own intelligence, which is I think what happens when people listen to the -- and I say sovereign citizens, because basically they come into the heading of those individuals who indoctrinate them to believe that the Constitution is

not valid, that they are not particularly citizens, that the United States is a corporation, and all those other rules that apply to the UCC that simply don't apply in this context.

But I think they take advantage of people because they know they have a hostage audience, so to speak. And I think to some extent, he got caught up in that initially. But once faced with the specter of a trial, he then -- I observed him during the trial. And he has been more than active and adamant in his representation. And I think he has communicated with you. And you have taken heed of what's he's asked of you and done lots of those things. And y'all have had vigorous discussions about strategy. So I have no concern about his ability to understand these proceedings, and even more importantly, to understand the nature of the right from wrong, moral and legal. So I have no concerns about his competence.

But he will, once at the institution, go through R and E, and they will evaluate him. And if he makes them aware of what he needs, they will provide it for him, whether that be mental health from a psychologist or psychiatrist or if he needs any other physical treatment, they will provide it to him at the institution.

Sir, if you will stand for me, please, for sentencing.

Sir, as to count one, you're sentenced to the State Department of Corrections for a mandatory period of 25 years.

On each count of distribution of heroin, you're sentenced to State Department of Corrections for 15 years and a fine -- well, actually, I need to go back because on count one, there's a mandatory imposition of $250,000 fine, which this Court will suspend upon the service of his 25 years.

On each count of distribution of heroin, sir, you are sentenced to the State Department of Corrections for a period of 15 years and $25,000, suspended upon the service of 15 years.

The trafficking heroin, 4 to 14 grams, sir, you're sentenced to the State Department of Corrections for a period of 15 years and $50,000, which will be suspended upon the service of 15 years.

Possession of weapon, your sentenced to the mandatory period of five years.

And possession with intent to distribute methamphetamine, you are sentenced to 15 years and $25,000, suspended upon the service of 15 years.

Thank you very much. And you will get credit for any time that you've served. And I will run these sentences concurrent with one another.

Now, Ms. Johns, when a person is tried in their absence in South Carolina, they are sentenced, their sentences are sealed. They are not published for the purpose of any court record. When he's picked up on the bench warrant that I've already issued, he will then be sentenced.

Is there anything that you wish to present to the Court in mitigation so that Mr. Underwood can then respond?

MS. JOHNS: No, Your Honor. I don't have any mitigation at this time.

THE COURT: Is there any argument you want to make regarding sentencing of your client at this time?

MS. JOHNS: Your Honor, I would just point out the facts that the attorney general has presented to this Court with regard to his specific conduct. And I would note for the record that he has family in New York, along with a daughter. And without talking any further, I have nothing else I can give you at this time.

THE COURT: Have you had any contact with him?

MS. JOHNS: Not since Tuesday, the night before our motions, which were last week. And I don't know -- I don't remember the date. I think it was July 16th, but I'm not sure of that.

THE COURT: And did he indicate to you whether he intended to appear or not?

MS. JOHNS: He did, Your Honor. In my last conversation with him little, voice-to-voice conversation was around 9:30 p.m. on Tuesday night. I had text messaged him several times without any responses. My last text message was for him to call me immediately. About an hour later, he did call. I said, I'm calling to remind you that you need to be in court tomorrow morning, which would be Wednesday, at 9 a.m., are you aware of that? And he said, yes, I will be there at 9. That's my last conversation.

THE COURT: And you checked all the institutions to make sure he's not incarcerated somewhere?

MS. JOHNS: No, I have not done that, Your Honor.

THE COURT: Does the State have any indication he's incarcerated anyplace else?

MR. UNDERWOOD: No, Your Honor. However, there is on his NCIC report a wanted posting for some sort of a fraud charge out of the state of Georgia, Your Honor. But no indication he's actually been picked up.

THE COURT: Have we heard anything from the bonding company?

MR. UNDERWOOD: No, Your Honor.

MS. JOHNS: I will inform the Court that the bonding company has contacted my office and asked if we had heard from him. And, of course, I was not there, but my office responded in the negative. I have attempted to

contact him since the inception of this trial numerous occasions by telephone and text messages with negative results.

THE COURT: Okay. Glad to hear from the State regarding sentencing of Mr. Roberts.

MR. UNDERWOOD: You mean Mr. Hunter?

THE COURT: I'm sorry, I meant to say Mr. Hunter.

MR. UNDERWOOD: Your Honor, he has a conviction from 2005 from the state of New York, possession of narcotic drugs, fourth degree, two counts.

THE COURT: I think you told me his record. Yeah, you told me his record, uh-huh.

MR. UNDERWOOD: Your Honor, this defendant, Justin Gordon Hunter, also known as Mo, as Your Honor heard throughout the course of the trial, this is the individual that was leading this drug trafficking organization. He is the head of this organization and has the fullest culpability imaginable, Your Honor. He is the one person responsible for bringing this heroin to our state. The State would ask for the maximum sentence on count one, Your Honor.

THE COURT: Anything, Ms. Johns, you would like to say in response?

MS. JOHNS: Yes, Your Honor. I don't think the State has any evidence showing that heroin was being

transported to this state from any other state.

THE COURT: Well, did your client say he met folk in New York and he would meet at the hotel and then bring the drugs back here?

MS. JOHNS: I was going to say, Your Honor, with the exception of the statement that the agent received from Mr. Hunter at the time that they executed the search warrant on the apartment in Patriot Boulevard, but as far as confirming any of that, I don't believe the State has that.

THE COURT: All right. Thank you very much. I will impose sentence that will be sealed. That will remain in his file. The time he's picked up, I assume the Court will notify you, Ms. Johns, and you can be here for the imposition of any sentence of your client, as well as the State.

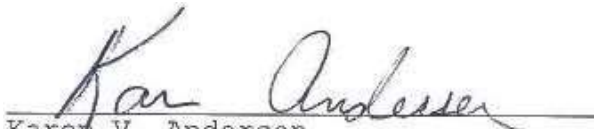
Thank you all very much. It was a pleasure. Hard work this week. And I appreciate it.

(Whereupon, proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.



Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

NOTICE OF APPEAL FROM A SENTENCE IMPOSED BY THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

The Honorable Deadra L. Jefferson, Circuit Court Judge

Indictment No(s): **2016-GS-47-02, 2016-GS-47-03**

The State, Respondent,

v.

Emory Warren Roberts, Appellant.

NOTICE OF APPEAL

Emory Warren Roberts appeals his conviction and sentence in this case. The sentence was imposed by The Honorable Deadra L. Jefferson, on July 24, 2017.

July 31, 2017

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SC Court of Appeals

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

The Honorable Deadra L. Jefferson, Circuit Court Judge

Indictment No(s):
2016-GS-47-02, 2016-GS-47-03

The State,

Respondent,

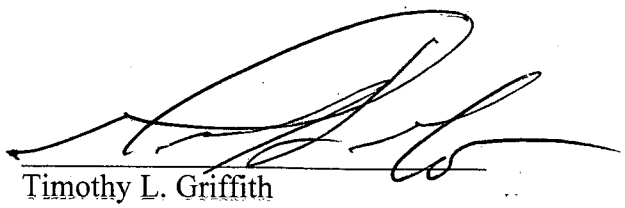
v.

Emory Warren Roberts, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Joshua Underwood, Esquire Assistant Attorney General by personally delivering a copy of it to Respondent's attorney of record, Joshua Underwood, Esquire, at his office at SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211-1549 , on July 31, 2017.

July 31, 2017



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Attorney for Appellant

I received a copy of the Notice of Appeal on this ____ day of _____, 2017

_____
Joshua Underwood, Esquire

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SC Court of Appeals

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July 31, 2017

Clerk of Court, South Carolina Court of Appeals

State of South Carolina v Emory Warren Roberts.

Please see the included Notice of Appeal. I have also forwarded by separate mail copies to:

The State Grand Jury Clerk of Court
Assistant Attorney General Joshua Underwood
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appeals Division, South Carolina Commission on Indigent Defense

Please file the included NOTICE OF APPEAL for the case captioned.

I was appointed under 608 on this case and will not be handling the appeal. The Defendant just notified me today that he would like to appeal.

Thank You,

Timothy L. Griffith, Esquire

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

RECEIVED
OCT 04 2018
SC Court of Appeals

APPELLATE CASE NO. 2017-001676

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether Appellant's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*?

STATEMENT OF THE CASE

In a multi-count, multi-defendant indictment, the state grand jury indicted Appellant for trafficking in heroin in the amount of twenty-eight grams or more, three counts of distribution of heroin, trafficking in heroin between four and fourteen grams, possession of a firearm during the commission of a violent crime, and possession with intent to distribute methamphetamine (2016-GS-47-02) on April 12, 2016. R. 907-916. The jury found Appellant guilty as charged. R. 885, l. 7 – R. 886, l. 9. Judge Jefferson sentenced Appellant to twenty-five years imprisonment for trafficking heroin in the amount of twenty-eight grams or more, fifteen years for each count of distribution of heroin, fifteen years for trafficking heroin between four and fourteen grams, five years imprisonment for the firearm, and fifteen years imprisonment for possession with intent to distribute methamphetamine. R. 899, ll. 1-22; R. 917-923. She ordered all sentences to be served concurrently. R. 899, ll. 24-25; R. 917-923.

On July 31, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (citing United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2000)). Appellate courts review "a circuit judge's findings of historical fact for clear error," but "review the denial of the right of self-representation based upon those findings of fact de novo." Id. When reviewing a trial judge's refusal to permit an individual to proceed *pro se*, the appellate court "must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request." Id. (citing United States v. Singleton, 107 F.3d 1091, 1097 (4th Cir. 1997)).

ARGUMENT

Appellant's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*.

Relevant facts

On July 19, 2017, Appellant moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. R. 2, ll. 9-18. The judge indicated she would not appoint new counsel, but she would allow Appellant to retain new counsel as long as counsel was ready for trial on the following Monday. R. 2, ll. 16-24. Thereafter, trial counsel indicated he had some concerns about Appellant's competency. R. 3, ll. 17-21. Trial counsel explained that Appellant refused to cooperate with him, resulting in trial counsel asking a doctor to evaluate Appellant. R. 3, l. 23 – R. 4, l. 4. Trial counsel expressed "concerns about his capability to understand really what's going on." R. 5, ll. 3-6.

The doctor indicated that Appellant refused a formal evaluation. R. 6, ll. 2-8. Appellant "stated that he ha[d] the UCC-1308 code" as the "reason for his refusal." R. 6, ll. 7-15. The doctor indicated Appellant could not work with his attorney and the doctor did not think that it was "all volitional on his part." R. 6, ll. 22-24; R. 8, ll. 11-12. However, the doctor was unable to render any opinion. R. 6, ll. 17-18. According to the doctor, Appellant "pays attention" and has "understanding of some legal proceedings." R. 10, ll. 23-25. According to the doctor, Appellant was "cognitively" "able to represent himself or stand trial." R. 12, ll. 9-11. The doctor noted Appellant had "the cognitive capacity to pay attention and assist," but she explained there was "a paranoid flavor" to his relationship with counsel. R. 12, ll. 16-19. The doctor was unsure if it were "a pathological one" or "functional given some of his views." R. 12, ll. 19-21.

Appellant displayed "good eye contact" with the doctor and was able to communicate. R. 12, l. 23 – R. 13, l. 1. The doctor recommended the appointment of a guardian *ad litem* if Appellant were to continue with the same attorney. R. 14, ll. 7-13.

When the judge explained that she would not permit Appellant to represent himself *and* have counsel represent him simultaneously, she told Appellant that if he wanted to represent himself, he could talk all he wanted. R. 11, ll. 14-15. She also told Appellant that he would have to waive counsel with his "eyes wide open knowing that everything [he said] can be used against [his] best interest." R. 11, ll. 15-17.

At the conclusion of the presentation regarding competency, the judge stated she did "not perceive that he is incompetent." R. 22, ll. 1-2. In her estimation, Appellant had "a more than adequate understanding of the system." R. 22, ll. 2-3. In the judge's estimation, Appellant "probably ha[d] a better grasp of it than others." R. 22, ll. 3-4. She perceived his refusal to cooperate with counsel and the doctor as "dilatory." R. 22, ll. 4-6. The judge did "not perceive" that Appellant had "some cognitive deficits that prevent him from doing what he needs to do." R. 23, ll. 8-9. Regarding, his intelligence, the judge opined he was "probably average standard if not slightly above average I.Q." R. 23, ll. 10-12.

The judge then encouraged Appellant to take advantage of trial counsel's representation. R. 24, ll. 8-15. However, if Appellant chose not to avail himself of representation that was "fine" by the judge. R. 24, ll. 16-17.

At the start of trial, the judge asked trial counsel if Appellant desired a formal arraignment. R. 116, ll. 7-10. When trial counsel indicated Appellant wanted to represent himself, the judge remarked that was "fine," but she required trial counsel to remain as "shadow counsel." R. 116, ll. 9-12. Thereafter, the judge inquired of Appellant personally regarding an

arraignment, his request for a bond, his desire for minutes from the statewide grand jury proceedings, and access to audio/visual elements of the discovery materials. R. 116, l. 23 – R. 131, l. 7. During the discussions of those matters, Appellant requested "a moment" and the judge agreed. R. 126, ll. 12-14. Then Appellant asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" R. 126, l. 15. The judge responded:

> Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record.

R. 126, ll. 16-23. When Appellant protested that trial counsel was not working in his interest, the judge responded that he was working in Appellant's interest and that he would not risk losing his law license to collaborate with the state. R. 126, l. 24 – R. 127, l. 9.

After these preliminary matters were discussed, the judge asked trial counsel if he were ready to proceed with jury selection. R. 133, ll. 6-7. Trial counsel indicated Appellant was prepared to go forward as his own lawyer. R. 133, ll. 8-9. The judge responded that she was not going to relieve trial counsel "at this late stage or juncture." R. 133, ll. 10-11. She did not think it was "prudent to relieve [trial counsel] as counsel." R. 133, l. 12. Recognizing Appellant's constitutional right to act as his own counsel, the judge stated she did not "perceive" that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, ll. 17-21. Thus, she refused to relieve trial counsel and permit Appellant to represent himself. R. 133, ll. 20-21. Despite Appellant's protestations, the judge refused to permit him to proceed *pro se*. R. 133, l. 22 – R. 134, l. 15.

Even at the start of jury selection, Appellant continued to express his desire for self-representation, but he was rebuffed. R. 134, ll. 12-14; R. 143, l. 23 – R. 144, l. 8; R. 145, ll. 11-

12. The judge threatened to remove Appellant and his lawyer from the courtroom if he made "any other outbursts." R. 144, ll. 9-12. The judge explained she had denied Appellant's motion for self-representation because she did not believe that he understood "the significant jeopardy" that he was placing himself in by invoking his constitutional right to self-representation. R. 145, ll. 14-16. She did "not perceive" that Appellant had "any grasp of the rules of evidence or procedure." R. 145, ll. 17-18. According to Judge Jefferson, self-representation "would be a substantial constitutional deprivation of [his] rights." R. 145, ll. 18-20. Therefore, she denied his motion for self-representation, stating he did not "understand the consequences of [his] decision to proceed without a lawyer." R. 145, ll. 20-23. The judge then returned to some matters discussed during pre-trial hearings. "Contrary to what Dr. Maddox observed," the judge "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior." R. 146, ll. 1-3. She determined Appellant was "more than qualified and adaptable and aware of what [was] going on." R. 146, ll. 3-4. She was confident that Appellant had "more than adequate ability to assist [his] counsel." R. 146, ll. 4-5. Per her observations, Appellant had "been involved in all the proceedings" and had "more than the ability to communicate" with trial counsel. R. 146, ll. 5-8.

Throughout the course of the trial, Appellant continued to press his desire for self-representation, explaining his need to protect the record for appeal. R. 392, ll. 22-25; R. 393, ll. 7-8; R. 393, ll. 11-12; R. 393, ll. 24-25. Judge Jefferson re-iterated that South Carolina did not permit "hybrid representation" and that if "something" needed "to be protected," trial counsel would "do that." R. 393, ll. 1-6.

At the conclusion of the trial, Appellant still expressed his desire for self-representation. R. 890, l. 9; R. 890, l. 15. After the jury found Appellant guilty, Appellant asked if he could

represent himself on appeal. The judge responded that if he wanted an appeal, trial counsel would file "a motion to appeal." R. 890, ll. 11-12. Thereafter, "Indigent Defense" would "step in and take over." R. 890, ll. 12-13. When Appellant reiterated his desire for self-representation, the judge told him he did not "want to do that" because "[t]hey have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you." R. 890, ll. 16-19.

During the sentencing portion, trial counsel echoed his sentiments from pre-trial proceedings: "I still believe, Your Honor, as when I asked for that evaluation, I truly believe that there is something going on. I really think that he needs some help. And that at some point with the right kind of help, he could be a citizen and a productive citizen, Your Honor." R. 894, ll. 18-22. The judge responded that while trial counsel may have "concerns" regarding Appellant's "need for potentially an evaluation of some type to see if he needs counseling, medication, or otherwise," she had "no concern about his ability to have assisted in his representation, to understand the nature of these proceedings." R. 897, ll. 1-6. It was "clear" to the judge that Appellant had been "cognizant of place and time," and that he was "well aware of the nature of these proceedings." R. 897, ll. 6-8. Furthermore, "due to the breadth of his criminal history," the judge had "no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights attendant constitutionally to him, as he has more than on many events during the court of this trial articulated for the Court." R. 897, ll. 8-14.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014)(citing State v.

Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining "[a]n accused may waive the right to counsel and proceed *pro se*" and "[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial"). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975); see also McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(explaining "Faretta's holding was based on the long-standing recognition of a right of self-representation in federal and state courts, and on the language, structure and spirit of the Sixth Amendment"); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)(stating "the Sixth Amendment implicitly provides an affirmative right to self-representation").[1] According to the Fourth Circuit, the right to self-representation is "mutually exclusive" of the right to counsel. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005).

The right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

---

[1] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)(explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)(quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.; see also United States v. Stanley, 739 F.3d 633, 345 (11th Cir. 2014)(noting the "ideal method" for determining an exercise of the right to self-representation is to conduct a pre-trial hearing, informing the defendant of the charges, basic trial procedures, and the hazards of self-representation).

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)); see also United States v. McBride, 362

F.3d 360, 366 (6th Cir. 2004)(explaining the Sixth Circuit's "model inquiry" for courts to use when confronted with a request for self-representation).

However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

According to the Fourth Circuit Court of Appeals, an assertion of the right to self-representation must be (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. See United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015); United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Recently, the South Carolina Supreme Court adopted this three-part test as well. City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017).

Clear & unequivocal invocation

"The right to appear *pro se* must be clearly asserted by the defendant before trial." State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995)(invocation of right to self-representation must be clear and unequivocal); United States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991)(explaining the request must be unequivocal to avoid a "cat and mouse" game).

Prior to the trial, Appellant invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. Appellant clearly and unequivocally requested to exercise his constitutional right to self-representation, and the judge appeared to agree that Appellant could represent himself when she explained it was "fine" with her if Appellant chose not to avail himself of appointed counsel. Nevertheless, the pre-trial hearings continued with trial counsel acting as Appellant's advocate.

When the parties reconvened on the day of trial, trial counsel indicated Appellant wanted to represent himself, and again, the judge appeared to agree that Appellant could do so. Her only caveat was that appointed counsel would have to act as "shadow counsel." After directly engaging on legal matters with Appellant, the judge then insisted that appointed counsel was Appellant's advocate for the proceedings and she would not permit Appellant to invoke his right to self-representation. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that Appellant did not have "sufficient grasps of the rules such that he would be able to protect his own interests." She re-iterated her view that Appellant did not have "any grasp of the rules of evidence or procedure." According to the judge, Appellant's decision to waive counsel placed him in "significant jeopardy." Yet, he did *not* waver from his desire to represent himself. See People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977)(holding a defendant's invocation unequivocal even when the "the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself ... was unequivocal and unconditional"); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975)(finding a defendant's invocation clear where on the day of trial, the defendant moved to represent himself because he had been deceived by everyone, including his lawyer, but his explanation on this point "was vague, to say the least").

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Appellant in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Appellant's request for self-representation was made knowingly, intelligently, and voluntarily.

"In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to

determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Appellant had significant contacts with the criminal justice system as indicated by his criminal record. R. 891, l. 17 – R. 893, l. 13. In fact, Appellant had been convicted of an offense just three years prior to his trial. R. 893, ll. 9-10. The judge aptly explained that "due to the breadth of his criminal history," Appellant understood "the legal process" and his constitutional rights. R. 897, ll. 8-14. According to the judge, Appellant was "well aware of the nature of the[] proceedings." R. 897, ll. 6-8.

Appellant was thirty-eight years old at the time of the trial. R. 894, ll. 15-16. Appellant had a family, including two children. R. 895, ll. 19-20. According to the trial judge, Appellant exhibited average or above average intelligence. R. 23, ll. 10-12. During the sentencing, the judge

remarked that Appellant had "articulated" his rights to the court over the course of his trial. R. 897, ll. 8-14. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Appellant's invocation as knowing, intelligent, and voluntary.

At one point in the trial, Appellant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed Appellant was engaged in criminal activity in South Carolina. R. 632, ll. 10-14. Appellant indicated his counsel was "fighting against" him regarding presenting that evidence. R. 632, l. 14. When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open[] the door." R. 635, ll. 21-22. The judge indicated the evidence was "a double-edge" sword. R. 635, l. 23. Appellant explained that the charges against him were "by far the worst" of any prior accusations or convictions. R. 635, ll. 24-25. Trial counsel indicated he had been discussing with Appellant that the jury had "no idea who he" was at that point, but that if Appellant "open[ed] the door" to allow the state to introduce "his entire record," then the jury would have a "preconceived mind." R. 636, ll. 2-6.

In response, the judge told Appellant the evidence of his incarceration in another state when alleged drug purchases were being made from him would be "prejudicial" to him. R. 636, l. 7. The judge told Appellant that as long as he were silent, there was nothing the state could say. R. 636, ll. 12-13. She informed Appellant that he could not "just get on the stand and say, I was in Nassau County." R. 636, ll. 15-16. If Appellant took the stand, the state would "get to ask [him] about everything else." R. 636, ll. 16-17. She opined that was "a dangerous road to go down. It's a rabbit hole." R. 636, ll. 17-18. She agreed with trial counsel that it was "not in [his] interest." R. 636, ll. 18-19. Despite trial counsel's and the judge's indication that presentation of the evidence was not in

Appellant's best interest, Appellant's desire to present the evidence of an alibi showed he had an understanding of the charges against him and the defenses available to him.

The judge's factual findings regarding Appellant's prior criminal history, intelligence, and understanding of the proceedings supported Appellant's request to make a knowing, voluntary, and intelligent waiver of counsel. Yet, the trial judge refused to permit Appellant to waive counsel because she did not believe it was "prudent to relieve" trial counsel and she did not perceive that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, l. 12; R. 133, ll. 17-21. Just as the trial judge in Samuel noted "how intelligent and articulate she found Samuel to be," Judge Jefferson repeatedly noted Appellant's intelligence and clear understanding of the legal proceedings. See Samuel, 422 S.C. at 604, 813 S.E.2d at 491. Also, like Samuel, Appellant repeated expressed his desire for self-representation despite the judge's "persistent attempts to dissuade him." See id.

While the trial judge never found that Appellant's motion to waive counsel was an attempt to manipulate the proceedings, any argument to that effect would be meritless. Appellant expressed his understanding of the statutory scheme governing the state grand jury and requested the state be required to abide by that scheme. For example, Appellant requested the "minutes" from the state grand jury proceedings. R. 119, ll. 5-6. When the judge indicated Appellant would not be able to learn of anything during the grand jury proceedings, the state acknowledged that although the transcript from the state grand jury was not a public record, Appellant was permitted to read it according to the statute and controlling case law. R. 119, ll. 14-18. When Appellant informed the judge he had been trying to order the transcript from Court Administration, the judge informed him he had been requesting the transcript from the wrong entity. R. 119, l. 19 – R. 122, ll. 9.

When the judge questioned what Appellant believed he would learn from the documents related to the grand jury, Appellant indicated he hoped to prove that "no State Grand Jury even occurred." R. 123, ll. 11-12. To this, the judge explained the grand jury met as evidenced by the indictments. R. 123, ll. 13-14. Without question, Appellant's desire to view the documents related to the grand jury proceedings was well-founded in the law. See Evans v. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, Appellant explained he had questions about his indictments not being "certified." R. 123, ll. 21-23. Appellant explained that during a pre-trial hearing, the judge indicated the indictments were not certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. R. 21, ll. 10-20; R. 123, ll. 17-23. The judge told Appellant that "once something is in a court order, sir, it's already certified." R. 123, ll. 24-25. She told Appellant that only documents going out of state would need to be certified. R. 124, ll. 1-2. According to the judge, "never, under any circumstances," would an individual receive "certified indictments." R. 124, ll. 2-4. Certainly, Appellant's request for certified indictments was not unreasonable or an attempt at manipulation in light of the statutory requirement that an indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

Later when Appellant expressed his concerns that his right to a speedy trial had been violated, the judge told him that the issue was "moot" because a trial date had been set. R. 160, ll. 6-11. According to the judge, "[t]he only remedy for a speedy trial motion is to set a trial

date." R. 160, ll. 9-11. After explaining that other people were in jail awaiting trial for much longer than Appellant, the judge remarked that she denied demands for speedy trial "all the time" because the case law was not in the defendants' favor. R. 160, ll. 12-23. She further told Appellant that "the remedy for a speedy trial is to set a trial date," and there was "no other remedy." R. 160, ll. 23-25. Specifically, she told Appellant that the "[r]emedy for speedy trial is *not* to *dismiss* [the] charges. Doesn't make them go away. Purpose of speedy trial is to get [the defendant] in front of a court and get [the defendant] to trial. Cases don't get away or get *dismissed* on a speedy trial motion." R. 161, l. 25 – R. 161, l. 4 (emphasis added). Later, when the judge was discussing the state's plea offers with Appellant and Appellant's concerning about a guilty plea waiving his right to pursue matters on appeal, the judge again told Appellant that a violation of his right to speedy trial would not result in a dismissal. R. 296, ll. 15-23.

Certainly, Appellant's interest in asserting his right to a speedy trial could not be deemed an attempt at manipulation. Rather, it showed Appellant's understanding of the legal process and his understanding of possible legal remedies he could pursue. Contrary to the judge's assertion that the remedy for a speedy trial violation was not dismissal of the charges, the South Carolina Supreme Court and the United States Supreme Court held the only remedy for a speedy trial violation is dismissal of the charges. See Barker v. Wingo, 407 U.S. 514, 522 (1972)(holding that if a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the only possible remedy"); State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016)(same).

In addition to all the evidence in the record indicating Appellant was not attempting to manipulate the criminal justice system when he moved to waive counsel, "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-

representation." Samuel, 422, S.C. at 606, 813 S.E.2d at 492 (citing State v. Barnes, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015)).

All of the judge's factual findings regarding Appellant's intelligence, ability to understand, and comprehension of the legal proceedings are supported by the record. However, those factual findings militate in favor of concluding Appellant's invocation was knowing and voluntary. Thus, the judge's factual findings, which must be accorded deference, support a legal conclusion that Appellant's request to waive counsel was made with his "eyes wide open." The judge's legal conclusion, which must be reviewed de novo, was error.

Timely invocation

Appellant's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Pierce v. State, 209 S.W.3d 364, 371 (Ark. 2005)(holding a defendant timely asserted his right to self-representation when he invoked his right prior to trial in chambers); Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984)(finding invocation of self-representation time when made prior the empaneling of the jury); Barnes, 528 S.W.2d at 372-373 (Ark. 1975)(finding a defendant's invocation timely where on the day of trial, the defendant moved to represent himself). Just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id. Not only did Appellant moved to represent himself

on the day of trial, but he made his request the week prior to trial when the parties were gathered for the pre-trial hearings. According to the judge, this was the first hearing in Appellant's case; thus, it was the first time that Appellant could invoke his right to self-representation. See R. 7, ll. 4-5.

The judge's comment that she would not relieve counsel at that late "stage or juncture" was belied by the record because the judge appeared to grant the motion and permit Appellant to discuss several legal matters. See R. 116, ll. 9-12. In fact, on the day of the pre-trial hearing, the judge told Appellant that it was "fine" by her if he wanted to represent himself at trial. R. 24, ll. 16-17. The judge stated she was "comfortable" with "whatever" Appellant felt was "acting in [his] best interest." R. 24, ll. 17-19. Again, the judge reiterated that she was "fine" if Appellant "plan[ned] to represent [himself]" and that "[w]hatever decision [he] ma[d]e [was] on [him]." R. 25, ll. 3-4.

Adequate hearing

The inquiry that followed Appellant's request had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether Appellant's decision to waive counsel was "prudent" and whether Appellant sufficiently grasped the rules "such that he would be able to protect his own interests." R. 133, ll. 12-21. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that by waiving counsel he risked "inadvertently incriminate[ing]" himself, the judge did not engage in a colloquy with Appellant to determine if decision to waive was knowingly and voluntarily made. See R. 126, ll. 16-23. While the judge's benevolent and paternalistic instincts are laudable, they have no place in determining whether an individual may waive his right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (explaining "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one"); see also, Frazier-El, 204 F.3d at 558 (re-iterating a

long-standing principle that a request to waive counsel must be honored without regard to whether the defendant would benefit from the advice of counsel).

Conclusion

The trial judge failed to honor Appellant's clear and unequivocal invocation of his right to self-representation as required by the state and federal constitution. The right to self-representation must be honored with no regard to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Appellant's invocation. Nevertheless, the evidence in the record demonstrates Appellant knowingly, voluntarily, and intelligently waived his right to counsel. The judge's factual findings regarding Appellant's ability to comprehend in general, and his ability to comprehend the legal proceedings specifically, supported a conclusion that Appellant was waiving counsel knowingly, voluntarily, and intelligently. Despite those factual findings, the judge erred when she denied Appellant's motion based upon her perception that Appellant could not act in his own best interest and did not have a good enough grasp of the rules. This Court should reverse his convictions and remand for a new trial in light of the trial judge's erroneous denial of Appellant's right of self-representation.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of October, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 4, 2018

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-001676

THE STATE,

Respondent,

v.

EMORY WARREN ROBERTS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly refused to allow Appellant to represent himself when his request was not unequivocal and where Appellant demonstrated that if he were allowed to represent himself, he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol?

STATEMENT OF THE CASE

In April 2016, the State Grand Jury indicted Appellant for one count of trafficking in heroin of twenty eight grams or more, three counts of distribution of heroin, one count of trafficking in heroin between four and fourteen grams, one count of possession with intent to distribute methamphetamine, and one count of possession of a firearm during the commission of a violent crime. Multiple co-defendants were also indicted along with Appellant. On July 24-28, 2017, Appellant and co-defendant Justin Hunter (Hunter) proceeded to trial before a jury on all counts in the Berkeley County Court of General Sessions with the Honorable Deadra L. Jefferson, presiding. Appellant was represented by Timothy L. Griffith, Esq. Respondent (the State) was represented by Assistant Attorneys General Joshua Underwood and David Fernandez of the South Carolina Attorney General's Office. Hunter was not present for trial and was tried in his absence with Theresa Johns, Esq. representing him.

At the conclusion of trial, the jury convicted Appellant of all counts. Following the verdict, the trial judge sentenced Appellant to twenty-five years' imprisonment for trafficking in heroin of twenty eight grams or more, fifteen years' imprisonment for each count of distribution of heroin, fifteen years' imprisonment for trafficking in heroin four grams to fourteen grams, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifteen years' imprisonment for possession with intent to distribute methamphetamine. All of Appellant's sentences ran concurrent to each other, resulting in an aggregate total of twenty-five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Appellant participated in a multistate drug conspiracy and trafficking operation with five other co-defendants. The operation involved trafficking heroin and methamphetamine from the state of New York into South Carolina. Eleanor Cleary was originally appointed as counsel for Appellant on May 18, 2016. (R. 904). Cleary, however, was relieved as counsel on November 18, 2016. (R. 905). Thereafter, Timothy Griffith was appointed as counsel on November 21, 2016 (R. 906). A pretrial hearing took place on July 19, 2017. Among the issues considered at this hearing were the admissibility of statements made by Hunter, Hunter and Appellant's motion to suppress the results of a search warrant, and Appellant's competency to stand trial.

At the beginning of this hearing, Griffith informed the trial judge that Appellant wanted a different attorney appointed. (R. 2). Griffith alleged Appellant would not communicate with him or otherwise assist him in Appellant's defense. (R. 3-4). Griffith also expressed concerns with Appellant's competence and requested the trial judge appoint a doctor to evaluate him. (R. 5). Appellant was originally scheduled to be evaluated at the Medical University of South Carolina (MUSC), but after Appellant assaulted a correctional officer, Appellant's appointment was cancelled and Dr. Maddox was appointed to evaluate him at the Berkeley County Detention Center. (R. 5). Appellant refused to be evaluated by Dr. Maddox and cited section 1308 of the Uniform Commercial Code as his reason for refusal[1]. (R. 6, 63). Despite Appellant's refusal, Dr. Maddox still opined that he was competent to stand trial. (R. 12).

[1] Appellant was possibly referring to Uniform Commercial Code § 1-308 which provides the following: (a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient. (b) Subsection (a) does not apply to an accord and satisfaction. U.C.C. § 1-308 (2017).

As the trial judge attempted to communicate with Appellant to discern his wishes for representation, the following exchange occurred:

> The Court: What is your name, sir?
>
> Appellant: Excuse me?
>
> The Court: What is your name?
>
> Appellant: They call me W.
>
> The Court: I need to know your legal name, your government name as the guys would say.
>
> Appellant: This Court doesn't have jurisdiction over me, Your Honor. I don't give the court jurisdiction. I don't—
>
> The Court: sir, we already have jurisdiction over you; you've been indicted. So what I need to know is your full name Emory Warren Roberts?
>
> Appellant: That is what is located on the charging instrument.
>
> The Court: Is that on your birth certification?
>
> Appellant: That's a legal fiction. That's an article of commerce, Your Honor.

(R. 15-16, lines 15-6).

The aforementioned exchange is representative of several similar exchanges between Appellant and the trial judge during the pre-trial hearing. The trial judge also sought to obtain basic information from Appellant such as his age, work history, and educational background. (R. 20). Appellant responded to the trial judge's inquiries by asserting her questions were "immaterial" or that "The Court is lacking in jurisdiction." (R. 20, lines 11, 15, 17). Notably, Appellant never asked to represent himself at the pre-trial hearing, but rather requested that an attorney other than Griffith be appointed to represent him. At the conclusion of her colloquy with Appellant, the trial judge noted "I perceive [Appellant] is being dilatory hoping that this will in some way delay these proceedings." (R. 22, lines 4-6). The trial judge also noted:

> The Court: [Appellant] has a very competent lawyer who has been appointed to represent him and The Court is not going to appoint someone else. This is the second appointment in his case and I perceive that the next person will be unsuitable as well as the next person and the next person and I'm not going to indulge in that folly.

(R. 24, lines 2-7). The trial judge further explained that Appellant could represent himself if he wished. Appellant did not indicate he wanted to represent himself but continued to tell the trial judge he didn't understand what was going on. (R. 25-29). The trial judge found Appellant's answers to her questions were "disingenuous, that they are not accurate and that they are designed to try and delay these proceedings." (R. 29, lines 6-8).

One week later at trial, Griffith informed the trial judge that Appellant wished to represent himself. (R. 116). The trial judge responded to Griffith by declaring that she would leave him "as shadow counsel." (R. 116, lines 11-12). After the trial judge instructed Griffith to act as shadow counsel, Appellant indirectly addressed the status of his representation three times. First, Appellant asked the trial judge whether Griffith was supposed to "shadow him." (R. 126, line 15). In response to Appellant's question, the trial judge recommended that Appellant keep Griffith as his attorney. (R. 126). Appellant responded to the trial judge's suggestion by denigrating Griffith and claiming that Griffith was not working in his interest. (R. 126-27). Rather than asserting that he wanted to represent himself, Appellant next questioned the jurisdiction of the court and the status of his bond. (R. 127-31). Second, when the trial judge ultimately declined to relieve Griffith as counsel, Appellant did not request to represent himself but rather complained that Griffith would incapacitate him and would "be destroying my questions to mean something else." (R. 133, 134, lines 3-4).

Finally, with Griffith acting as his appointed counsel during jury selection, Appellant attempted to speak with the jury when he was introduced to the panel. (R. 142). Appellant was

chastised by the trial judge and advised to remain silent. (R. 142). Griffith moved for a mistrial because of Appellant's outburst before the jury. Griffith's motion was denied. (R. 143-44). In denying Griffith's mistrial motion, the trial judge cautioned Appellant that any further outburst would result in Appellant and Griffith being sequestered to another room for the duration of the trial. (R. 144). After again arguing the court did not have proper jurisdiction, Appellant stated: "All right. Constitutionally, I can represent myself" but he did not ask to represent himself. (R. 145, lines 11-12). Appellant also complained that he felt threatened by Griffith. (R. 147). The trial judge denied Appellant's equivocal request to represent himself upon finding that Appellant's assertion regarding Griffith threatening him was "a dilatory attempt to delay these proceedings." (R. 147, lines, 14-15). At the conclusion of trial, the jury found Appellant guilty of all charges.

STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). Appellate courts review a circuit judge's findings of fact for clear error, but the appellate court reviews "the denial of self-representation based upon those findings of fact de novo." Id.

ARGUMENT

I.

The trial court properly refused to allow Appellant to represent himself when his request was not unequivocal and when Appellant demonstrated that if he were allowed to represent himself he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol.

Appellant contends the trial judge violated his Sixth Amendment right to self-representation by refusing to allow him to proceed *pro se*. Specifically, Appellant contends his invocation of his right to self-representation was (1) unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. Appellant's argument is without merit. Appellant never expressed any desire to represent himself until after jury selection had taken place and even then his request was not unequivocal. (R. 145). Prior to that, Appellant had only requested that alternate counsel be appointed. (R. 2). Because Appellant did not invoke his right to self-representation until after the trial began, his request was not timely. Finally, Appellant's request was not knowing, intelligent, and voluntary because by refusing to engage with the trial judge regarding his background and his understanding of courtroom proceedings, Appellant was unable to make this showing. Assuming for the sake of argument that Appellant appropriately invoked his right of self-representation, the trial judge nevertheless properly refused to allow Appellant to represent himself because Appellant attempted to delay the proceedings, made frivolous arguments, and would not comply with the rules of the courtroom. Appellant acted in a classic dilatory manner. Appellant's convictions and sentences should be affirmed.

A criminal defendant has a fundament right to self-representation under the Sixth Amendment of the United States Constitution. Faretta v. California, 422 U.S. 806, 819-21 (1975). However the right of self-representation is not absolute. United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000). "The government's interest in ensuring the integrity and efficiency

of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez v. Court of Appeal of California, 528 U.S. 152, 162 (2000).

The right to counsel is mutually exclusive of the right to self-representation. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005). "The right to counsel is preeminent and hence, the default position." United States v. Ductan, 800 F.3d 642, 649 (4th Cir. 2015) (quoting United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997)). The right to counsel is so important that courts should "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977).

To properly assert the right of self-representation, an assertion must be "(1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely." Frazier-El 204 F.3d at 558. (internal citations omitted). The right of self-representation must "be asserted at some time before meaningful trial proceedings have commenced and thereafter its exercise rests within the sound discretion of the trial court." United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Faretta 422 U.S. at 834. "The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 790 (2017). "A trial court may refuse to permit a criminal defendant to represent himself when he or she is not able and willing to abide by rules of procedure and courtroom protocol." Unites States v. Lopez-Osuna, 242 F.3d 1191, 1200 (9th Cir. 2000). "A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." Assa'ad-Faltas, 420 S.C. at 45, 800 S.E.2d at 791.

Equivocal

Appellant did not unequivocally invoke his right to self-representation. In Appellant's pre-trial hearing, Griffith informed the trial judge that Appellant did not want Griffith to represent him. (R. 2). Specifically, Griffith stated that Appellant wanted another attorney appointed, but in the alternative, Appellant's family may be able to hire private counsel. (R. 2). For the duration of the pre-trial hearing, Appellant continued to object to Griffith acting as his lawyer but Appellant never asserted that he wanted to represent himself.

At trial, Griffith informed the trial judge that Appellant wanted to represent himself, and though he later spoke directly to the court, Appellant himself never made this request. (R. 116). The trial judge initially told Griffith and Appellant that Griffith would remain as a shadow counsel. (R. 116). Appellant later asked for clarification on the status of his counsel. (R. 126). The trial judge clarified that she recommended Appellant keep Griffith as his attorney. (R. 126). At this point, Appellant did not request to represent himself, but rather he complained that Griffith was hostile to him and not working in his interest. (R. 126-27). Appellant then raised other frivolous arguments regarding his bond and the jurisdiction of the court before the trial judge informed Appellant that Griffith was not being relieved as counsel. (R. 127-33).

To the extent Griffith's comments to the Court at the start of trial can be construed as a request for self-representation, Appellant effectively walked back that request in his own exchange with the court. After challenging the jurisdiction of the court an additional time, Appellant made the following statement: "All right. Constitutionally, I can represent myself." (R. 145, lines 11-12). Appellant's statement is somewhat ambiguous as it is not so much a request as it is a declaration of Appellant's rights. Appellant correctly states that he has a constitutional right to represent himself, but he does not unequivocally request to do so. Even assuming that

Appellant's statement was a request to represent himself, the trial judge properly treated Appellant's request with skepticism. Considering that Appellant frequently complained about his lawyer and wanted new counsel appointed throughout the pre-trial hearing and the early part of trial, the trial judge rightfully did not accept Appellant's request as being unequivocal. Appellant only half-heartedly invoked his right to counsel after it was clear the trial judge would not appoint him a new attorney. The trial judge appropriately exercised her discretion by keeping appointed counsel in place for Appellant. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 800 S.E.2d 782 (2017). Appellant's convictions and sentences should be affirmed.

Not Knowing, Intelligent, and Voluntary

Assuming for the sake of argument that Appellant's invocation of his right to self-representation was unequivocal, Appellant's behavior made it so the trial judge was unable to determine if his decision was knowing, intelligent, and voluntary. The trial judge could not determine whether Appellant's request to represent himself was knowing, intelligent, and voluntary because Appellant refused to engage with the trial judge as she inquired about his age, educational background, and work history. A party cannot complain of an error which his own conduct induced. See State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989).

At the beginning of Appellant's pre-trial hearing, Griffith expressed concerns about Appellant's competence and Appellant's unwillingness to speak with him. (R. 3-5). The court heard testimony from Dr. Maddox that Appellant refused to be evaluated. (R. 6). Appellant stated that his reason for refusing evaluation was section 1308 of the Uniform Commercial Code. (R. 6). After hearing testimony from Dr. Maddox, the trial judge attempted to obtain basic information from Appellant such as his name, work history, and educational background. (R. 15-

20). Appellant refused to answer the trial judge's questions. The following exchange between Appellant and the trial judge is instructive:

> The Court: Sir, how old are you?
>
> Appellant: That's immaterial, Your Honor.
>
> The Court: How old are you? It is material. It goes to your competency and whether you understand what is going on and whether your age and discretion to understand where you are and what you are doing (sic). How old are you?
>
> Appellant: The court is lacking jurisdiction, Your Honor. It's immaterial—

(R. 20, lines 4-12).

The preceding exchange exemplifies the difficulty the trial judge faced in determining whether Appellant's decision was knowing, intelligent, and voluntary. The trial judge explained to Appellant the purpose of her questions and yet Appellant did not provide any meaningful answers. Appellant continued to challenge the jurisdiction of the court and insisted the proceedings were governed by the uniform commercial code. When faced with Appellant's intransigence and lack of cooperation with Dr. Maddox or herself, the trial judge was unable to determine whether Appellant knowingly, intelligently, and voluntarily invoked his right to self-representation. Appellant's convictions and sentences should be affirmed.

Untimely

Assuming that Appellant's invocation of his right to self-representation was unequivocal and knowing, intelligent, and voluntary, Appellant still failed to properly invoke his right of self-representation, because his invocation was not timely. Appellant never asserted his desire to proceed *pro se* during his pre-trial hearing despite being told that he had a right to do so. (R. 25-26). Griffith did say that Appellant wished to represent himself at the beginning of his trial and Griffith was told to remain with Appellant as shadow counsel. However, the trial judge

ultimately changed her mind after Appellant continued to present frivolous arguments to the court. After the trial judge informed Appellant that Griffith would remain as his counsel, Appellant complained about Griffith being his attorney but otherwise did not request that he be allowed to represent himself. Appellant did not talk about his constitutional right to represent himself until after the trial had already begun and jury selection had taken place. (R. 145). The trial judge appropriately exercised her discretion in denying Appellant's request to proceed *pro se* because his request was not timely. Appellant's convictions and sentences should be affirmed.

Appellant's Dilatory Motive

Even if Appellant had properly invoked his right to self-representation, the trial judge still properly refused to allow Appellant to proceed *pro-se* because of his lack of cooperation with the court and the likelihood that Appellant would fail to comply with court rules and would present improper arguments. Before Appellant's trial even began, Appellant demonstrated that he would present frivolous arguments to the court by refusing a formal evaluation from Dr. Maddox based on the Uniform Commercial Code. (R. 6, 63). At the pre-trial hearing Appellant continued to advance the same frivolous argument that the court did not have jurisdiction over him. (R. 15). After the trial judge explained to Appellant that the Uniform Commercial Code had no relevance in criminal court, Appellant asserted "That's not my name. That's an article—that's a straw man, a legal fiction and he can't represent me unless it's for a whole settlement and closure in a transaction." (R. 16, 19-20, lines 25-1). Thus, Appellant demonstrated that he would continue to advance this improper argument if he were allowed to represent himself. The trial judge recognized this when she noted:

> The Court: [Appellant] is no different than anyone else who has convinced themselves that the uniform commercial code is applicable in a criminal situation when it is not, hoping that that will somehow salvage or delay the proceedings and prevent the court from proceeding.

(R. 23, lines 19-23).

At trial, Appellant continued his effort to present frivolous arguments by claiming he had a letter indicating he had no outstanding charges with the State Grand Jury. (R. 122). In actuality, Appellant presented the trial judge with a letter from the Department of Public Safety which said Appellant did not have outstanding charges with that agency. (R. 122-25). Appellant then attempted to prove the State Grand Jury never met to true bill the indictments charging him with the crimes for which he stood trial, despite the fact the trial judge presented Appellant with his certified indictments. (R. 123). After Appellant's initial arguments failed, Appellant argued that the Attorney General's Office was corrupt. (R. 148). To prove his theory, Appellant asked the trial judge if he could call the Assistant Attorney General prosecuting the case as a witness. (R. 148).

In addition to consistently presenting frivolous arguments, Appellant also displayed a lack of respect for courtroom rules and procedure. Appellant interrupted the trial judge while she was speaking, interrupted the direct examination of a State's witness, and attempted to speak directly to the jury during jury selection. (R. 22, 40-41, 142). The trial judge also appropriately recognized Appellant's attempts to delay the proceedings. Appellant not only refused evaluation by Dr. Maddox, but was unable to even be transported to MUSC because he assaulted a prison guard who was attempting to transport him. (R. 5-6, 63, 894). Appellant was working with his second appointed attorney after Appellant's first counsel was relieved of representing Appellant at Appellant's request. (R. 905). At trial, Appellant claimed to have not received discovery, despite Griffith telling the court that he had received and shared all discovery with Appellant. (R. 118).

The current case is very similar to the factual scenario considered by the Fourth Circuit Court of Appeals in United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000). In Frazier-El, the Fourth Circuit considered whether the trial court properly required Frazier-El to proceed with appointed counsel rather allowing Frazier-El to represent himself. Frazier-El's attorney moved for a psychiatric evaluation to determine Frazier-El's competence. Frazier-El 204 F3d at 556. After being found competent to stand trial, Frazier-El moved to have his attorney relieved because his attorney was not working in his interest and refused to file motions on his behalf asserting the court did not have jurisdiction over Frazier-El because he was "an officer in the Moorish Science Temple." Frazier-El, 204 F.3d at 557. Frazier-El admitted that he would continue to argue that the court did not have jurisdiction over him if he were allowed to represent himself. Frazier-El also admitted he would continue to request a different attorney if replacement counsel did not make the same argument. Frazier-El, 204 F.3d at 557-58. The Fourth Circuit held that Frazier-El's request to represent himself was an attempt to manipulate the court system rather than a genuine desire to represent himself. Frazier-El, 204 F.3d at 560.

Here, like Frazier-El, Griffith had concerns about Appellant's competence and moved for an evaluation. Like Frazier-El, Appellant was deemed competent to stand trial. (R. 12). Frazier-El and Appellant both said that their attorney was working against their interest and both men sought to present frivolous arguments challenging the jurisdiction of the court. This Court should reach the same conclusion the Fourth Circuit did in Frazier-El. The trial judge appropriately recognized that Appellant's request for self-representation was intended to delay his trial. In the alternative to the trial being delayed, Appellant intended to present frivolous arguments and otherwise refuse to abide by courtroom rules and protocol. The trial judge's refusal to allow Appellant to proceed *pro se*, and Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BY: Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 20, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 20 2018
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-001676

THE STATE,

Respondent,

v.

EMORY WARREN ROBERTS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BY: Scott Matthews
Scott Matthews
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-001676

THE STATE,

Respondent,

v.

EMORY WARREN ROBERTS,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This twentieth day of September, 2018.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Honorable Jenny Abbott Kitchings
Clerk of Court

4-8-19

RECEIVED
APR 11 2019
SC Court of Appeals

Re: Motion To Relieve Appointed Counsel
(Susan B. Hackett)

The court notes exceptions to the rule for pro se motions seeking to relieve counsel and for a party's right to file a pro se brief pursuant to Anders and Johnson. I.D. at 58, 508 S.E. 2d at 565.

I ask for an order relieving appointed Counsel, and for this court to comply with the procedure in Anders V. California.

Sincerely
Emory W. Roberts Jr.

Jenny A. Kitchings 4-8-19
Clerk of Court
Court of Appeals

I would also request that you may send to me "A copy" of my petition for a writ of mandamus and all attachments/enclosures dated 3-26-19, that was sent to you by the Supreme Court, doesnt have to be stamped or filed, I would just like a copy, thanking you in advance.

Sincerely,
Emory W. Roberts

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APR 11 2019
SC Court of Appeals

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APR 22 2019

SC Court of Appeals SC Court of Appeals (4-16-19)

(Original Copy of 3)

(Order Relieving Counsel/Termination Of Lawyer-Client Relationship

"Defendant submits motion to relieve counsel in this matter, the court notes exceptions to the rule for pro se motions seeking to relieve counsel and for a party's [right] to file a pro se brief pursuant to Anders And Johnson. (Id. at 58, 508 S.E. 2d at 565) Rule 1.16 (C), RPC, Rule 407, SCACR

Appellant ASK's that the procedures in Anders V. California be applicable to Appellant, and ASK that the SC Court of Appeals establish record of request and respond.

This is my second request to the SC Court Of Appeals to exercise my right to file A pro se brief, my first Appeal is dated 3-26-19.

Emory W. Roberts Jr.

RECEIVED
APR 23 2019
SC Court Of Appeals SC Court of Appeals

(4-18-19)

Honorable Clerk of Court (Original Copy of 3)

"Termination of Lawyer - Client Relationship/Ineffective Assistance of Counsel".

In addition to Appellate Defender's attempts to unconstitutionally deprive defendant/Appellant of his statutory right to a direct Appeal to collaborate with the Attorney Generals office and Trial Court, Appellate Defender is ineffective assistance of counsel. Appellant has corresponded with Appellate Defender numerous times in regards to the "substance/issue's" concerning "Initial Brief OF Appellant". Appellant had provided correspondence from Court Administration dated October 23, 2017, and November 6, 2017 to Appellate Defender in regards to "Subject Matter Jurisdiction", which may be raised at any time. Appellate Defender constantly refused to protect Appellants rights concerning his unlawful incarceration, nor had Appellate Defender challenged subject matter jurisdiction in the "alleged" filing of "Initial Brief OF Appellant, thereby constituting ineffectiveness/collusion in collaborating with the "State". Appellant is in possession of numerous correspondence "to and from" Appellate Defender to support his claims, therefore, Appellant request that Appellate Defender be relieved as counsel.

Please Stamp and return copy, thanking you in advance.

I, Emory W. Roberts Jr., being duly sworn upon my oath, depose and say that All herein is true under the penalty of perjury.

Emory W. Roberts Jr.

RECEIVED
MAY 23 2019
S.C. SUPREME COURT

Attachments

5/20/19

1. Correspondence by defendant to Court Admin. dated 10/16/17
2. Correspondence to defendant from Court Admin. dated 10/23/17
3. Correspondence by defendant to Court Admin. dated 10/31/17
4. Correspondence to defendant from Court Admin. dated 11/6/17
5. Document from Clerk of Court, Mary P. Brown Filed 1/31/18
6. Document from Clerk of Court, Mary P. Brown Filed 7/6/16

RECEIVED
MAY 23 2019
SC Court of Appeals

The Supreme Court of S.C.
(Case No. 2016-GS-47-02/03)

State Grand Jury Of South Carolina
State Of South Carolina
Vs.
Emory Warren Roberts Jr.,
Defendant.

Re: Pro Se Motion/Petition For Redress of Grievances, Article III of Constitution.

Before: The Supreme Court Of South Carolina
Appearance: Emory Warren Roberts Jr. (Pro-Se)

Dear Honorable Clerk Of Court,

Please Clock, Date, Stamp, File And Return Copy To Defendant, Thank You.
Date: 5/20/19

C.C. Office of the Attorney General
Joshua Underwood, Post Office Box 11549
Columbia, South Carolina 29211-1549
Placed in U.S. Mail on 5/20/19, in regards to service.

RECEIVED
MAY 23 2019
SC Court of Appeals

Statement Of Issue

① "Whether "extraordinary circumstances" exist for this Court to entertain original jurisdiction of defendants case when facts support the proof of the violations of Article 15. (State Grand Jury Act)., pursuant to section 14-7-1720(D), by Assistant Attorney General., Joshua Underwood?

② "Whether A.A.G. committed "Fraud on the Court" when pursuant to section 14-7-1750, twelve or more state grand jurors had not met to find that probable cause existed for indictments 2016-GS-47-02/03 and still commenced prosecution under fraudulent indictments?

③ "Whether A.A.G. is in violation of section 14-7-1650. (Duties and Obligations of Attorney General)., when A.A.G. did not "examine witnesses"., and "draft indictments" and "reports" upon the direction of a state grand jury., as well as "present evidence"?

④ "Whether A.A.G. commenced state prosecution in bad faith or to harass, creating a threat of "irreparable injury" both "great and immediate" to defendant in regards to his unlawful imprisonment and violation of civil liberties?

⑤ "Whether a defendant has a right under the State Constitution to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him?

(2A)

Argument

1. Assistant Attorney Generals for the State violated defendant's rights to the Fifth Amend. to the U.S. Constitution, Art. 1. § 11, and Art. 5. § 22 of State Constitution, and the provisions of Article 15. State Grand Jury Act causing "irreparable injury" to defendant both great and immediate.

2. Loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes "irreparable injury" of Kind required to permit issuance of preliminary injunction, it is the right of defendant to "Petition For Redress of Grievances.

Relevant Facts

On April 12-13, 2016, Assistant Attorney Generals did not Comply with the laws, statues, and provisions applicable to Article 15. State Grand Jury Act. Defendant was held for trial in the Berkeley County Court Of General Sessions on July 24-28, 2017. At trial, pursuant to statue, before a jury being sworn, defendant requested "impanelment documents from the State Grand Jury. (Tr. Date July 24, 2017, Page 15, Lines 5-6, see also: Page 19, Lines 8-12). Upon request of the minute's from State Grand Jury proceedings, defendant was "denied" impanelment documents" by the trial judge. (Tr. Date July 24, 2017, Page 15, Lines 7-9).

A.A.G. then stated: "The defendant is able to read them. However, we do not give them a copy. They would have to get them from the court reporter who takes those transcripts." When defendant explained to the trial judge that he had wrote to Court Administration in regards to attempt to obtain the transcript, and that Court Admin. responded that "no court reporter was assigned to record grand jury proceedings, therefore "no transcript was available, the trial judge told defendant that he was requesting transcript from the wrong entity. (Tr. Date July 24, 2017, Page 15, Lines 15-18; Lines 19-25; Page 16, Lines 1-25.) See Also: Page 17, Lines 1-25). See Also: Page 18, Lines 1-5 (emphasis added). (Also See: Correspondence from Desiree Allen (Court Reporter Manager) date October 23, 2017 and November 6, 2017.) (Enclosed). On date's of "alleged" indictments (April 12-13, 2016) there was no court reporter that had been assigned to record any grand jury proceedings in reference to indictment numbers 2016-GS-47-02/03. See Enclosure.

Discussion

"A defendant has a right under the State Constitution to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him. Const. Art. 1. § 11; Art. 5. § 22.

There is no denial of equal protections of the laws in constitutional or statutory provisions relating to jury and grand jury. U. S. C. A. Const. Amend. 14.

Pursuant to Article 15. S. G. J. Act, Section 14-7-1650. (Duties and the obligations of Attorney General), which states: "The Attorney General or his designee shall "examine witnesses", "present evidence", and draft indictments and reports upon the direction of a state grand jury." A. A. G. being in violation of provisions of Article 15. Section 14-7-1720 (D) had not complied with Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure. (See Correspondence from Court Admin. dated October 23, 2017 and Nov. 6, 2017).

As there was no court reporter assigned to record grand jury proceedings on date's of defendants "Alleged" indictments, thereby "no transcript being available, A. A. G. violated provision of S. G. J. Act, Section 14-7-1700, which state's: "A court reporter shall record, either stenographically or by use of an electronic recording device, All proceedings except when a state grand jury is deliberating or voting." (See Enclosure)

Further, A.A.G. violated provision/section 14-7-1750. of A State Grand Jury Act, which states: "In order to return a "true bill" of indictment, twelve or more state grand jurors must find that probable cause "exist" for the indictment and vote in favor of it."
In violation of statue, state grand jury had not met to consider criminal allegations against defendant, thereby A.A.G. committing "Fraud on the Court."

Section 14-7-1720.(D) "Penalties", states: "Any person violating the provisions of this section is guilty of a misdemeanor, upon conviction, must be punished by a fine not exceeding five thousand dollars or by a term of imprisonment not exceeding one year or both."

In limiting the judicial power to "case's" and "controversies" Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to [redress] or [prevent] actual or [imminently threatened] [injury] to persons caused by [private or official violation of law.]
Summers V. Earth Island Institute
Supreme Court of the United States, March 03, 2009 555 U.S. 488 129 S. Ct. 1142.
Loss of First Amendment rights, for even minimal periods of time, [unquestionably] constitutes "irreparable injury" of Kind required to permit issuance of preliminary injunction.
Giovani Carandola, Ltd. V. Bason
United States Court of Appeals, Fourth Circuit, August 30, 2002 303 F. 3d 507 2002 WL 1997902.

[Amend. 1. Petition for Redress of Grievance's.]

The question of subject matter jurisdiction is a question of law.
Gantt V. Selph
Supreme Court of South Carolina. May 30, 2018 423 S.C. 333
814 S.E. 2d 523.
Accordingly, [statutory] and, especially, [constitutional elements] of jurisdiction are essential ingredient of separation and equilibration of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. U.S.C.A. Const. Art. 3. § 2, cl. 1.

Assistant Attorney Generals for the State, Joshua Underwood and David Fernandez holds full Knowledge and understanding of the laws of this State. It is a requirement of the high office of a prosecutor. The prosecutor occupies a quasi-judicial position, and must see that justice is done, that no conviction takes place except in [strict conformity with the law.]
See e.g. State V. Quattlebaum, 338 S.C. 441, 527, SE 2d 105 (SC 2000); State V. Durden, 264 S.C. 86, 212 SE 2d 587 (1975); State V. King, 222 S.C. 108, 71 SE 2d 793 (1952).

In addition, "It is the duty of all officials, whether legislative, judicial, executive, administrative, or ministerial, to so perform every official act as not to violate Constitutional

provisions." Montgomery V. State, 55 FLA. 97, 45 So. 879.

Conclusion

Article III of the Constitution allows for a Petition for redress of grievances to prevent actual or imminently threatened injury to persons caused by private or official violation of law. A.A.G. being in violation of the provisions of a State Grand Jury Act, as well as Constitution, statue, and rule has caused irreparable injury to defendant of kind required to permit issuance of preliminary injunction. The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the State, and is fundamental. On April 12-13, 2016, the dates of defendants "alleged" indictments, defendant presents exculpatory evidence from Court Administration that a state grand jury had not convened in order to return true-billed indictments against defendant. Assistant Attorney Generals failed to comply with statutory and constitutional law, jurisdictional in nature, specifying the manner and means for lawful return of true-billed indictments. A.A.G. commenced state prosecution in bad faith or to harass, creating a threat of "irreparable injury" "both great and immediate" to defendant in regard to his unlawful imprisonment, wherein a greater danger to personal security is posed, and violation of civil liberties. Defendant asks this Court to vacate judgment in strict conformity to the laws of this State.

Desiree Allen
Court Reporter Manager

10/16/17

Hello, how are you? Im writing to you to obtain a transcript/or name of Court Reporter that may have been appointed to record a "State Grand Jury" proceeding that may have occurred on the dates of April 12-13, in Richland County.

(State Grand Jury Of South Carolina Vs. Emory W. Roberts Jr.)
(Case No. 2016-GS-47-02/2016-GS-47-03)

I would like the name of the Court Reporter so that I may purchase a transcript if one for those dates are available, thanking you kindly for your time concerning this matter, looking forward to your reply A.S.A.P., thanks again, enjoy your day.

I Ask that you may provide the Court Reporters Name And Address so that I may request transcript And Obtain the cost that I may make the funds available, thank you.

Sincerely
Emory W. Roberts Jr.

RECEIVED
MAY 23 2019
SC Court of Appeals

Hill Finklea Detention Center
I.D. Number
2016003071

Shows I've Written while In County Jail Requesting State Information

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1220 SENATE STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

October 23, 2017

Emory W. Roberts #2016003071
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

I am writing in response to your letter dated October 16, 2017, requesting a copy of a transcript from a State Grand Jury proceeding that "may have occurred on the dates of April 12-13, in Richland County." In order for me to assist you in obtaining the transcript of record from your proceedings, please provide the following information:

1) **presiding judge;**
2) **exact date (with year) of hearing.**

This information is required in order for us to assist you. When this information is received we will forward the request to the court reporter, who will then contact you to make arrangements for payment and delivery of the transcript. Please be advised that court reporters have 60 days to prepare a transcript after satisfactory payment arrangements have been made. Please contact this office at your earliest convenience with this required information.

Sincerely,

Désiree Allen
Court Reporter Manager

Desiree Allen
Court Reporter Manager,

10/31/17

I am writing to you in response to your letter dated October 23, 2017, requesting a copy of a transcript from a "State Grand Jury" proceeding that "may have occurred on the dates of April 12-13, 2016 in Richland County.

Presiding Judge: Newman, C - Of State Grand Jury
Date: April 12-13, 2016
Warrant Numbers: 2016-GS-47-02
2016-GS-47-03

> Were These Warrant #'s submitted To A State Grand Jury For Indictment

If, indeed there was a transcript for those dates, and my request has been forwarded to the Court Reporter, as a courtesy will you make me aware of the existence of the transcript, and as you have done with my previous correspondence make a copy of my request and send back to me? This way I can be in anticipation of recieving/or Knowing if the transcript will be available within the next sixty days, and I'll have a copy of my dated request, thanking you in advance, please enjoy your day.

Thanks Again!

Sincerely
Emory W. Roberts Jr.

South Carolina Court Administration

South Carolina Supreme Court

Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

November 6, 2017

Emory W. Roberts, Jr. #373393
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

Your inquiry has been received by this office. The convening of the State Grand Jury is not dependent upon a term of General Sessions court and often does not meet at the same time as General Sessions terms. You are requesting a transcript from State Grand Jury proceedings. This is to advise that there is no court reporter assigned to record Grand Jury proceedings, and therefore, there is no transcript available.

I am sorry that we are unable to assist you further.

Sincerely,

Desiree Allen
Court Reporter Manager

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY
GENERAL SESSIONS COURT
POST OFFICE BOX 219
MONCKS CORNER, SOUTH CAROLINA 29461-0219
(843) 719-4400 (843) 567-3311 (843) 723-3800

TO: Emory Roberts

RE: _____

The enclosed document is being returned for the following reason(s):

___ This Order needs to be sent to Berkeley County General Sessions Administrative Judge for Signature.

___ Requires original signature.

___ This document is a copy. We must file original.

___ We do not do criminal records check.

X This is not a Berkeley County Case.

___ Please provide case number.

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FOR LEGAL USE ONLY

The South Carolina Court of Appeals

The State, Respondent,

v.

Emory Warren Roberts, Appellant.

Appellate Case No. 2017-001676

ORDER

After careful consideration, Appellant's motion to relieve counsel is denied. *State v. Roberts*, 364 S.C. 583, 588–89, 614 S.E.2d 626, 629 (2005) ("Appellant clearly does not have a federal constitutional right to proceed pro se in this appeal from his criminal conviction. We also find there is no state constitutional provision which confers such a right. . . . Moreover, appellate counsel has no duty to raise every non-frivolous issue presented by the record and must be allowed to exercise reasonable professional judgment.").

FOR THE COURT

Columbia, South Carolina

cc:
Emory Warren Roberts, Jr., 373393
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Jonathan Scott Matthews, Esquire

FILED
May 23, 2019

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Emory Warren Roberts, Appellant.

Appellate Case No. 2017-001676

Appeal From Berkeley County
Deadra L. Jefferson, Circuit Court Judge,

Unpublished Opinion No. 2020-UP-017
Submitted January 1, 2020 – Filed January 29, 2020

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia, for Respondent.

PER CURIAM: Emory Warren Roberts appeals the trial court's denial of his motion to proceed pro se. On appeal, Roberts argues the trial court violated his Sixth and Fourteenth Amendment rights when it denied his request to proceed pro se. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) ("Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo."); *id.* (holding the appellate court reviews the trial court's findings of historical fact for clear error, but review of the denial of a motion to proceed pro se based on those findings of fact are reviewed de novo); *City of Columbia v. Assa'ad-Faltas*, 420 S.C. 28, 45, 800 S.E.2d 782, 790 (2017) ("A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments." (quoting *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015), *rev'd* 422 S.C. 596, 813, S.E.2d 487 (2018))); *United States v. Frazier-El*, 204 F.3d 553, 599 (4th. Cir. 2000) ("[R]ight to self-representation is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" (quoting *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 153 (2000))); *Assa'ad-Faltas*, 420 S.C. at 45, 800 S.E.2d at 791 (holding the trial court may refuse to allow a criminal defendant to proceed pro se when "he is 'not able and willing to abide by rules of procedure and courtroom protocol'" (quoting *Samuel*, 414 S.C. at 212, 777 S.E.2d at 401)); *id.* at 45, 800 S.E.2d at 790 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.'" (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975))); *id.* at 45, 800 S.E.2d at 791 (requiring that an effective waiver to the right to counsel be "(1) clear and unequivocal; (2) knowing, intelligent, and voluntary; and (3) timely" (quoting *Frazier-El*, 204 F.3d at 558)); *Faretta*, 422 U.S. at 835 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942))); *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("The trial [court] has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel."); *id.* ("The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding.").

AFFIRMED.[1]

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THOMAS, GEATHERS, and HEWITT, JJ., concur.

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

APPELLATE CASE NO. 2017-001676

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2020-UP-017

PETITION FOR REHEARING

On January 29, 2020, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020). Appellant challenged the trial judge's denial of his request for self-representation. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to significant points that were overlooked or misapprehended by this Court in arriving at its decision.

This Court's opinion suggested the trial judge's decision to deny Appellant his constitutional right to self-representation was correct because "'the government's interest in

ensuring the integrity and efficiency of the trial ... outweigh[ed] the [Appellant]'s interest in acting as his own lawyer.'" State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020) (quoting United States v. Frazier-El, 204 F.3d 553, 599 (4th Cir. 2000)). Further, this Court's opinion suggested Appellant's request was denied because he was not able and not willing to abide by the rules of procedure and courtroom protocol. Id. Finally, this Court's quotation that the right to self-representation "is not a license to abuse the dignity of the courtroom" nor a license to "not comply with relevant rules of procedural and substantive law" suggested this Court affirmed the trial judge's decision based upon a belief that Appellant was abusive to the court or refused to comply with the rules.

Appellant respectfully requests this Court rehear the matter because the record does not support these conclusions. Further, although this Court correctly stated the standard of review, this Court failed to apply the correct standard. In fact, this Court substituted its own view of the record for the trial judge's findings of fact.

The trial judge's ruling

The trial judge, who "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior" never indicated she was denying Appellant's right to self-representation because Appellant was not able or willing to abide by the rules of procedure or courtroom protocol. See R. 146, ll. 1-3. The trial judge never expressed any fear that Appellant was abusive to the dignity of the courtroom or would fail to comply with the rules of court. Instead, the judge repeatedly indicated she was denying Appellant's request because she did not find that he had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, ll. 17-21; R. 145, ll. 17-18. Later, she reiterated that her ruling was based upon her finding that Appellant did not understand "the significant jeopardy" that he was placing himself in by

invoking his right to self-representation. R. 145, ll. 14-16. In fact, the judge found that relieving trial counsel and permitting Appellant to represent himself "would be a substantial constitutional deprivation of [his] rights." R. 145, ll. 18-20. Contrary to any concerns about Appellant abusing the court, the judge denied the request because she determined Appellant did not "understand the consequences of [his] decision to proceed without a lawyer." R. 145, ll. 20-23. This Court must afford due deference to the trial judge's findings of fact, which included no findings that Appellant was abusive to the court or that he would engage in abusive conduct.

The right to self-representation

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (explaining "[a]n accused may waive the right to counsel and proceed *pro se*" and "[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial"). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975); see also McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) (explaining "Faretta's holding was based on the long-standing recognition of a right of self-representation in federal and state courts, and on the language, structure and spirit of the Sixth Amendment"); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997) (stating "the Sixth Amendment implicitly provides an affirmative right to self-representation").[1] According to the Fourth Circuit, the right to self-

[1] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

representation is "mutually exclusive" of the right to counsel. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005).

The right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and

intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.; see also United States v. Stanley, 739 F.3d 633, 345 (11th Cir. 2014) (noting the "ideal method" for determining an exercise of the right to self-representation is to

conduct a pre-trial hearing, informing the defendant of the charges, basic trial procedures, and the hazards of self-representation).

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)); see also United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004) (explaining the Sixth Circuit's "model inquiry" for courts to use when confronted with a request for self-representation).

However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

Invocation of the right to self-representation

According to the Fourth Circuit Court of Appeals, an assertion of the right to self-representation must be (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. See United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015); United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Recently, the South Carolina Supreme Court adopted this three-part test as well. City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017).

Clear & unequivocal invocation

"The right to appear *pro se* must be clearly asserted by the defendant before trial." State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also Fields v. Murray, 49 F.3d 1024, 1029

(4th Cir. 1995) (invocation of right to self-representation must be clear and unequivocal); United States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991) (explaining the request must be unequivocal to avoid a "cat and mouse" game).

Prior to trial, on July 19, 2017, Appellant moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. R. 2, ll. 9-18. The judge indicated she would not appoint new counsel, but she would allow Appellant to retain new counsel as long as counsel was ready for trial on the following Monday. R. 2, ll. 16-24.

Later when the subject was addressed again, the judge explained that she would not permit Appellant to represent himself *and* have counsel represent him simultaneously, however, she told Appellant that if he wanted to represent himself, he could talk all he wanted. R. 11, ll. 14-15. She also told Appellant that he would have to waive counsel with his "eyes wide open knowing that everything [he said] can be used against [his] best interest." R. 11, ll. 15-17. The judge encouraged Appellant to take advantage of trial counsel's representation. R. 24, ll. 8-15. However, if Appellant chose not to avail himself of representation that was "fine" by the judge. R. 24, ll. 16-17.

At the start of trial, the judge asked trial counsel if Appellant desired a formal arraignment. R. 116, ll. 7-10. When trial counsel indicated Appellant wanted to represent himself, the judge remarked that was "fine," but she required trial counsel to remain as "shadow counsel." R. 116, ll. 9-12. Thereafter, the judge inquired of Appellant personally regarding an arraignment, his request for a bond, his desire for minutes from the statewide grand jury proceedings, and access to audio/visual elements of the discovery materials. R. 116, l. 23 – R. 131, l. 7. During the discussions of those matters, Appellant requested "a moment" and the

judge agreed. R. 126, ll. 12-14. Then Appellant asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" R. 126, l. 15. The judge responded:

> Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record.

R. 126, ll. 16-23. When Appellant protested that trial counsel was not working in his interest, the judge responded that he was working in Appellant's interest and that he would not risk losing his law license to collaborate with the state. R. 126, l. 24 – R. 127, l. 9.

After these preliminary matters were discussed, the judge asked trial counsel if he were ready to proceed with jury selection. R. 133, ll. 6-7. Trial counsel indicated Appellant was prepared to go forward as his own lawyer. R. 133, ll. 8-9. The judge responded that she was not going to relieve trial counsel "at this late stage or juncture." R. 133, ll. 10-11. She did not think it was "prudent to relieve [trial counsel] as counsel." R. 133, l. 12.

Even at the start of jury selection, Appellant continued to express his desire for self-representation, but he was rebuffed. R. 134, ll. 12-14; R. 143, l. 23 – R. 144, l. 8; R. 145, ll. 11-12. The judge threatened to remove Appellant and his lawyer from the courtroom if he made "any other outbursts." R. 144, ll. 9-12.

Throughout the course of the trial, Appellant continued to press his desire for self-representation, explaining his need to protect the record for appeal. R. 392, ll. 22-25; R. 393, ll. 7-8; R. 393, ll. 11-12; R. 393, ll. 24-25. Judge Jefferson re-iterated that South Carolina did not permit "hybrid representation" and that if "something" needed "to be protected," trial counsel would "do that." R. 393, ll. 1-6.

At the conclusion of the trial, Appellant still expressed his desire for self-representation. R. 890, l. 9; R. 890, l. 15. After the jury found Appellant guilty, Appellant asked if he could represent himself on appeal. The judge responded that if he wanted an appeal, trial counsel would file "a motion to appeal." R. 890, ll. 11-12. Thereafter, "Indigent Defense" would "step in and take over." R. 890, ll. 12-13. When Appellant reiterated his desire for self-representation, the judge told him he did not "want to do that" because "[t]hey have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you." R. 890, ll. 16-19.

Appellant moved for self-representation prior to trial. Appellant moved for self-representation again when his case was called for trial. Appellant moved for self-representation throughout the trial and into the sentencing proceeding. Nevertheless, he was denied this basic constitutional right because the judge determined it would not be in Appellant's best interest for him to act as his own lawyer. When Appellant clearly and unequivocally invoked his right to self-representation, the judge failed to conduct the proper inquiry as required by law. Although Appellant's requests for self-representation were coupled with expressions of dissatisfaction with trial counsel, Appellant did *not* waver from his desire to represent himself. See People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977) (holding a defendant's invocation unequivocal even when the "the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself ... was unequivocal and unconditional"); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975) (finding a defendant's invocation clear where on the day of trial, the defendant moved to represent himself because he had been deceived by everyone, including his lawyer, but his explanation on this point "was vague, to say the least").

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Appellant in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Appellant's request for self-representation was made knowingly, intelligently, and voluntarily.

"In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Regarding Applicant's competency, the judge stated she did "not perceive that he is incompetent." R. 22, ll. 1-2. In her estimation, Appellant had "a more than adequate understanding of the system." R. 22, ll. 2-3. In the judge's estimation, Appellant "probably

ha[d] a better grasp of it than others." R. 22, ll. 3-4. She perceived his refusal to cooperate with counsel and the doctor as "dilatory." R. 22, ll. 4-6. The judge did "not perceive" that Appellant had "some cognitive deficits that prevent him from doing what he needs to do." R. 23, ll. 8-9. Regarding, his intelligence, the judge opined he was "probably average standard if not slightly above average I.Q." R. 23, ll. 10-12.

The trial judge indicated that she "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior." R. 146, ll. 1-3. She determined Appellant was "more than qualified and adaptable and aware of what [was] going on." R. 146, ll. 3-4. She was confident that Appellant had "more than adequate ability to assist [his] counsel." R. 146, ll. 4-5. Per her observations, Appellant had "been involved in all the proceedings" and had "more than the ability to communicate" with trial counsel. R. 146, ll. 5-8.

Appellant had significant contacts with the criminal justice system as indicated by his criminal record. R. 891, l. 17 – R. 893, l. 13. In fact, Appellant had been convicted of an offense just three years prior to the instant trial. R. 893, ll. 9-10. The judge aptly explained that "due to the breadth of his criminal history," Appellant understood "the legal process" and his constitutional rights. R. 897, ll. 8-14. The judge had "no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights attendant constitutionally to him, as he has more than on many events during the court of this trial articulated for the Court." R. 897, ll. 8-14.

Appellant was thirty-eight years old at the time of the trial. R. 894, ll. 15-16. Appellant had a family, including two children. R. 895, ll. 19-20. According to the trial judge, Appellant exhibited average or above average intelligence. R. 23, ll. 10-12. During the sentencing, the judge remarked that Appellant had "articulated" his rights to the court over the course of his trial. R. 897,

ll. 8-14. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Appellant's invocation as knowing, intelligent, and voluntary.

At one point in the trial, Appellant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed Appellant was engaged in criminal activity in South Carolina. R. 632, ll. 10-14. Appellant indicated his counsel was "fighting against" him regarding presenting that evidence. R. 632, l. 14. When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open[] the door." R. 635, ll. 21-22. The judge indicated the evidence was "a double-edge" sword. R. 635, l. 23. Appellant explained that the charges against him were "by far the worst" of any prior accusations or convictions. R. 635, ll. 24-25. Trial counsel indicated he had been discussing with Appellant that the jury had "no idea who he" was at that point, but that if Appellant "open[ed] the door" to allow the state to introduce "his entire record," then the jury would have a "preconceived mind." R. 636, ll. 2-6.

In response, the judge told Appellant the evidence of his incarceration in another state when alleged drug purchases were being made from him in South Carolina would be "prejudicial" to him. R. 636, l. 7. The judge told Appellant that as long as he were silent, there was nothing the state could say. R. 636, ll. 12-13. She informed Appellant that he could not "just get on the stand and say, I was in Nassau County." R. 636, ll. 15-16. If Appellant took the stand, the state would "get to ask [him] about everything else." R. 636, ll. 16-17. She opined that was "a dangerous road to go down. It's a rabbit hole." R. 636, ll. 17-18. She agreed with trial counsel that it was "not in [his] interest." R. 636, ll. 18-19. Despite trial counsel's and the judge's indication that presentation of

the evidence was not in Appellant's best interest, Appellant's desire to present the evidence of an alibi showed he had an understanding of the charges against him and the defenses available to him.

The judge's factual findings regarding Appellant's prior criminal history, intelligence, and understanding of the proceedings supported Appellant's request to make a knowing, voluntary, and intelligent waiver of counsel. Yet, the trial judge refused to permit Appellant to waive counsel because she did not believe it was "prudent to relieve" trial counsel and she did not perceive that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, l. 12; R. 133, ll. 17-21. Just as the trial judge in Samuel noted "how intelligent and articulate she found Samuel to be," Judge Jefferson repeatedly noted Appellant's intelligence and clear understanding of the legal proceedings. See Samuel, 422 S.C. at 604, 813 S.E.2d at 491. Also, like Samuel, Appellant repeatedly expressed his desire for self-representation despite the judge's "persistent attempts to dissuade him." See id.

All of the judge's factual findings regarding Appellant's intelligence, ability to understand, and comprehension of the legal proceedings are supported by the record. However, those factual findings militate in favor of concluding Appellant's invocation was knowing and voluntary. Thus, the judge's factual findings, which must be accorded deference, support a legal conclusion that Appellant's request to waive counsel was made with his "eyes wide open." The judge's legal conclusion, which must be reviewed de novo, was error.

Timely invocation

Appellant's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*").

Pierce v. State, 209 S.W.3d 364, 371 (Ark. 2005) (holding a defendant timely asserted his right to self-representation when he invoked his right prior to trial in chambers); Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984) (finding invocation of self-representation time when made prior the empaneling of the jury); Barnes, 528 S.W.2d at 372-373 (Ark. 1975) (finding a defendant's invocation timely where on the day of trial, the defendant moved to represent himself). Just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id. Not only did Appellant move to represent himself on the day of trial, but he made his request the week prior to trial when the parties were gathered for the pre-trial hearings. According to the judge, this was the first hearing in Appellant's case; thus, it was the first time that Appellant could invoke his right to self-representation. See R. 7, ll. 4-5.

The judge's comment that she would not relieve counsel at that late "stage or juncture" was belied by the record because the judge previously appeared to grant the motion and permit Appellant to discuss several legal matters. See R. 116, ll. 9-12. In fact, on the day of the pre-trial hearing, the judge told Appellant that it was "fine" by her if he wanted to represent himself at trial. R. 24, ll. 16-17. The judge stated she was "comfortable" with "whatever" Appellant felt was "acting in [his] best interest." R. 24, ll. 17-19. Again, the judge reiterated that she was "fine" if Appellant "plan[ned] to represent [himself]" and that "[w]hatever decision [he] ma[d]e [was] on [him]." R. 25, ll. 3-4.

The trial judge sent what can only be described as "mixed messages" to Appellant. At times, the judge appeared to permit Appellant to represent himself, but at other times, she refused. After the judge informed Appellant that hybrid representation was not allowed, she then – in direct contradiction of her disavowal of hybrid representation – inquired of Appellant and trial counsel regarding various matters. During the pre-trial hearing, the judge seemed to permit Appellant to represent himself. However, when the trial started the judge refused to allow Appellant to continue representing himself. Even the cold record revealed the surprise by all parties at the sudden turn of events.

Adequate hearing

The inquiry that followed Appellant's request had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether Appellant's decision to waive counsel was "prudent" and whether Appellant sufficiently grasped the rules "such that he would be able to protect his own interests." R. 133, ll. 12-21. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that by waiving counsel he risked "inadvertently incriminate[ing]" himself, the judge did not engage in a colloquy with Appellant to determine if decision to waive was knowingly and voluntarily made. See R. 126, ll. 16-23.

While the judge's benevolent and paternalistic instincts are laudable, they have no place in determining whether an individual may waive his right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (explaining "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one"); Fuller, 337 S.C. at 241 (explaining the right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel"); Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (the decision to

proceed pro se must be honored out of respect for the individual and a determination that the accused lacks legal knowledge does not justify a denial of the right to self-representation); Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (explaining that the "only proper inquiry is that mandated by Faretta" when a defendant invokes his right to self-representation); see also, Frazier-El, 204 F.3d at 558 (re-iterating a long-standing principle that a request to waive counsel must be honored without regard to whether the defendant would benefit from the advice of counsel).

Not manipulation

While the trial judge never found that Appellant's motion to waive counsel was an attempt to manipulate the proceedings, any argument to that effect would be meritless. If this Court's opinion rested upon a determination that Appellant was attempting to manipulate the judicial proceedings, it is not supported by the record and violates the standard of review.

The South Carolina Supreme Court explained that when a defendant invokes his right to self-representation before trial, "the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." State v. Samuel, 422 S.C. 596, 603, 813 S.E.2d 487, 491 (2018). According to the Court, "once a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right" for manipulative behavior. Id. at 605 n.4, 813 S.E.2d at 492 n.4. Trial courts are not required "to suffer 'mischief' or disruptive behavior in the courtroom with no recourse." Id. In fact, "a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case." Id. "[H]owever, that inquiry is separate from ... the trial court's initial decision to permit a defendant to waive his right to counsel and proceed *pro se*." Id.

The trial judge never found Appellant's desire for self-representation was anything but sincere. More precisely, the judge never found Appellant's request for self-representation was a manipulative effort in order to present frivolous and baseless arguments rather than a genuine desire to proceed *pro se*. Had the judge made such a finding, the record would not support the conclusion.

Appellant expressed his understanding of the statutory scheme governing the state grand jury and requested the state be required to abide by that scheme. For example, Appellant requested the "minutes" from the state grand jury proceedings. R. 119, ll. 5-6. When the judge indicated Appellant would not be able to learn of anything during the grand jury proceedings, the state acknowledged that although the transcript from the state grand jury was not a public record, Appellant was permitted to read it according to the statute and controlling case law. R. 119, ll. 14-18. When Appellant informed the judge he had been trying to order the transcript from Court Administration, the judge informed him he had been requesting the transcript from the wrong entity. R. 119, l. 19 – R. 122, ll. 9.

When the judge questioned what Appellant believed he would learn from the documents related to the grand jury, Appellant indicated he hoped to prove that "no State Grand Jury even occurred." R. 123, ll. 11-12. To this, the judge explained the grand jury met as evidenced by the indictments. R. 123, ll. 13-14. Without question, Appellant's desire to view the documents related to the grand jury proceedings was well-founded in the law. See Evans v. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005) (explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, Appellant explained he had questions about his indictments not being "certified." R. 123, ll. 21-23. Appellant explained that during a pre-trial hearing, the judge indicated the indictments were not certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. R. 21, ll. 10-20; R. 123, ll. 17-23. The judge told Appellant that "once something is in a court order, sir, it's already certified." R. 123, ll. 24-25. Seemingly inconsistent, however, she subsequently told Appellant that only documents going out of state would need to be certified. R. 124, ll. 1-2. According to the judge, "never, under any circumstances," would an individual receive "certified indictments." R. 124, ll. 2-4. Certainly, Appellant's request for certified indictments was not unreasonable or an attempt at manipulation in light of the statutory requirement that his indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

Later when Appellant expressed his concerns that his right to a speedy trial had been violated, the judge told him that the issue was "moot" because a trial date had been set. R. 160, ll. 6-11. According to the judge, "[t]he only remedy for a speedy trial motion is to set a trial date." R. 160, ll. 9-11. After explaining that other people were in jail awaiting trial for much longer than Appellant, the judge remarked that she denied demands for speedy trial "all the time" because the case law was not in the defendants' favor. R. 160, ll. 12-23. She further told Appellant that "the remedy for a speedy trial is to set a trial date," and there was "no other remedy." R. 160, ll. 23-25. Specifically, she told Appellant that the "[r]emedy for speedy trial is *not* to *dismiss* [the] charges. Doesn't make them go away. Purpose of speedy trial is to get [the defendant] in front of a court and get [the defendant] to trial. Cases don't get away or get *dismissed* on a speedy trial motion." R. 161, l. 25 – R. 161, l. 4 (emphasis added). Later, when the judge was discussing the state's plea offers with Appellant and Appellant's concerning about

a guilty plea waiving his right to pursue matters on appeal, the judge again told Appellant that a violation of his right to speedy trial would not result in a dismissal. R. 296, ll. 15-23.

Certainly, Appellant's interest in asserting his right to a speedy trial could not be deemed an attempt at manipulation. Rather, it showed Appellant's understanding of the legal process and his understanding of possible legal remedies he could pursue. Contrary to the judge's assertion that the remedy for a speedy trial violation was not dismissal of the charges, the South Carolina Supreme Court and the United States Supreme Court held the *only* remedy for a speedy trial violation is dismissal of the charges. See Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding that if a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the *only* possible remedy") (emphasis added); State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (same).

In addition to all the evidence in the record indicating Appellant was not attempting to manipulate the criminal justice system when he moved to waive counsel, "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." Samuel, 422 S.C. at 606, 813 S.E.2d at 492 (citing State v. Barnes, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015)). As the Supreme Court explained, "[i]n most cases where a court has found a defendant to be manipulative, the defendant was clearly attempting to dispense with counsel in order to make impermissible arguments or raise invalid defense at trial – in effect, to 'beat the system' – rather than to waive the benefits of counsel." Id. at 606, 813 S.E.2d at 493.

Application of the proper standard of review coupled with the guidance provided by the Supreme Court in Samuel regarding how to analyze the question on appeal requires reversal of

Appellant's convictions and sentences due to the trial judge's failure to honor his sincere request for self-representation.

Conclusion

Appellant respectfully requests rehearing of this matter in order to analyze the question presented using the proper standard of review and the guidance from the Supreme Court provided in Samuel.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 13th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Emory Warren Roberts, #373393, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of February, 2020.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: December, 31, 2029

The South Carolina Court of Appeals

The State, Respondent,

v.

Emory Warren Roberts, Appellant.

Appellate Case No. 2017-001676

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Jonathan Scott Matthews, Esquire
The Honorable Deadra L. Jefferson

FILED
March 27, 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Apr 24 2020

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Berkeley County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2020-UP-017 (S.C. Ct. App. filed January 29, 2020)

2016-GS-47-02

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

PETITIONER

APPELLATE CASE NO. 2017-001676

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 27, 2020.

QUESTION PRESENTED

Whether Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*?

STATEMENT OF THE CASE

In a multi-count, multi-defendant indictment, the state grand jury indicted Petitioner for trafficking in heroin in the amount of twenty-eight grams or more, three counts of distribution of heroin, trafficking in heroin between four and fourteen grams, possession of a firearm during the commission of a violent crime, and possession with intent to distribute methamphetamine (2016-GS-47-02) on April 12, 2016. R. 907-916. The jury found Petitioner guilty as charged. R. 885, l. 7 – R. 886, l. 9. Judge Jefferson sentenced Petitioner to twenty-five years imprisonment for trafficking heroin in the amount of twenty-eight grams or more, fifteen years for each count of distribution of heroin, fifteen years for trafficking heroin between four and fourteen grams, five years imprisonment for the firearm, and fifteen years imprisonment for possession with intent to distribute methamphetamine. R. 899, ll. 1-22; R. 917-923. She ordered all sentences to be served concurrently. R. 899, ll. 24-25; R. 917-923.

On July 31, 2017, Petitioner served his notice of appeal. Undersigned counsel represented Petitioner before the Court of Appeals. Petitioner challenged the trial judge's denial of his request for self-representation. On January 29, 2020, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020). Thereafter, Petitioner filed a petition for rehearing, which was denied on March 27, 2020. Petitioner now files this petition for writ of certiorari.

ARGUMENT

Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*.

Reasons to grant certiorari

As mentioned, Petitioner challenged the trial judge's denial of his request to exercise his constitutional right to self-representation. It is axiomatic that a criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014); see also Faretta v. California, 422 U.S. 806, 819 (1975); McKaskle v. Wiggins, 465 U.S. 168, 174 (1984); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Thus, there is a substantial constitutional issue directly involved. See Rule 242(b)(4), SCACR.

In its opinion affirming the trial court's decision to deny Petitioner his constitutional right to self-representation, the Court of Appeals violated the standard of review established by this Court. See Rule 242(b)(3), SCACR. "Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 E.2d 487, 490 (2018). Appellate courts review "a circuit judge's findings of historical fact for clear error," but "review the denial of the right of self-representation based upon those findings of fact de novo." Id. When reviewing a trial judge's refusal to permit an individual to proceed *pro se*, the appellate court

"must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request." Id.

The Court of Appeals held the trial judge's decision to deny Petitioner his constitutional right to self-representation was correct because "'the government's interest in ensuring the integrity and efficiency of the trial … outweigh[ed] the [Petitioner]'s interest in acting as his own lawyer.'" State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020) (quoting United States v. Frazier-El, 204 F.3d 553, 599 (4th Cir. 2000)). Further, the Court determined Petitioner's request was denied because he was not able and not willing to abide by the rules of procedure and courtroom protocol. Id. Finally, the Court's quotation that the right to self-representation "is not a license to abuse the dignity of the courtroom" nor a license to "not comply with relevant rules of procedural and substantive law" suggested the Court affirmed the trial judge's decision based upon a belief that Petitioner was abusive to the court or refused to comply with the rules.

The record does not support these conclusions. Although the Court of Appeals correctly stated the standard of review, the Court failed to apply the correct standard. In fact, the Court substituted its own view of the record for the trial judge's findings of fact, contrary to controlling case law from this Court regarding how appellate courts must review historical facts, which is for clear error. See Rule 242(b)(3), SCACR.

The trial judge, who "deliberately" made "a conscious and concerted effort to observe" Petitioner's "behavior" never indicated she was denying Petitioner's right to self-representation because Petitioner was not able or willing to abide by the rules of procedure or courtroom protocol. See R. 146, ll. 1-3. The trial judge never expressed any fear that Petitioner was abusive to the dignity of the courtroom or would fail to comply with the rules of court. Instead,

the judge repeatedly indicated she was denying Petitioner's request because she did not find that he had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, ll. 17-21; R. 145, ll. 17-18. Later, she reiterated that her ruling was based upon her finding that Petitioner did not understand "the significant jeopardy" that he was placing himself in by invoking his right to self-representation. R. 145, ll. 14-16. In fact, the judge found that relieving trial counsel and permitting Petitioner to represent himself "would be a substantial constitutional deprivation of [his] rights." R. 145, ll. 18-20. Contrary to any concerns about Petitioner abusing the court, the judge denied the request because she determined Petitioner did not "understand the consequences of [his] decision to proceed without a lawyer." R. 145, ll. 20-23. The Court of Appeals failed to afford due deference to the trial judge's findings of fact, which included no findings that Petitioner was abusive to the court or that he would engage in abusive conduct.

For these reasons, this Court should grant the petition for writ of certiorari.

Relevant facts

On July 19, 2017, Petitioner moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. R. 2, ll. 9-18. The judge indicated she would not appoint new counsel, but she would allow Petitioner to retain new counsel as long as counsel was ready for trial on the following Monday. R. 2, ll. 16-24. Thereafter, trial counsel indicated he had some concerns about Petitioner's competency. R. 3, ll. 17-21. Trial counsel explained that Petitioner refused to cooperate with him, resulting in trial counsel asking a doctor to evaluate Petitioner. R. 3, l. 23 – R. 4, l. 4. Trial counsel expressed "concerns about his capability to understand really what's going on." R. 5, ll. 3-6.

The doctor indicated that Petitioner refused a formal evaluation. R. 6, ll. 2-8. Petitioner "stated that he ha[d] the UCC-1308 code" as the "reason for his refusal." R. 6, ll. 7-15. The

doctor indicated Petitioner could not work with his attorney and the doctor did not think that it was "all volitional on his part." R. 6, ll. 22-24; R. 8, ll. 11-12. However, the doctor was unable to render any opinion. R. 6, ll. 17-18. According to the doctor, Petitioner "pays attention" and has "understanding of some legal proceedings." R. 10, ll. 23-25. According to the doctor, Petitioner was "cognitively" "able to represent himself or stand trial." R. 12, ll. 9-11. The doctor noted Petitioner had "the cognitive capacity to pay attention and assist," but she explained there was "a paranoid flavor" to his relationship with counsel. R. 12, ll. 16-19. The doctor was unsure if it were "a pathological one" or "functional given some of his views." R. 12, ll. 19-21. Petitioner displayed "good eye contact" with the doctor and was able to communicate. R. 12, l. 23 – R. 13, l. 1. The doctor recommended the appointment of a guardian *ad litem* if Petitioner were to continue with the same attorney. R. 14, ll. 7-13.

When the judge explained that she would not permit Petitioner to represent himself *and* have counsel represent him simultaneously, she told Petitioner that if he wanted to represent himself, he could talk all he wanted. R. 11, ll. 14-15. She also told Petitioner that he would have to waive counsel with his "eyes wide open knowing that everything [he said] can be used against [his] best interest." R. 11, ll. 15-17.

At the conclusion of the presentation regarding competency, the judge stated she did "not perceive that he is incompetent." R. 22, ll. 1-2. In her estimation, Petitioner had "a more than adequate understanding of the system." R. 22, ll. 2-3. In the judge's estimation, Petitioner "probably ha[d] a better grasp of it than others." R. 22, ll. 3-4. She perceived his refusal to cooperate with counsel and the doctor as "dilatory." R. 22, ll. 4-6. The judge did "not perceive" that Petitioner had "some cognitive deficits that prevent him from doing what he needs to do."

R. 23, ll. 8-9. Regarding his intelligence, the judge opined he was "probably average standard if not slightly above average I.Q." R. 23, ll. 10-12.

The judge then encouraged Petitioner to take advantage of trial counsel's representation. R. 24, ll. 8-15. However, if Petitioner chose not to avail himself of representation that was "fine" by the judge. R. 24, ll. 16-17.

At the start of trial, the judge asked trial counsel if Petitioner desired a formal arraignment. R. 116, ll. 7-10. When trial counsel indicated Petitioner wanted to represent himself, the judge remarked that was "fine," but she required trial counsel to remain as "shadow counsel." R. 116, ll. 9-12. Thereafter, the judge inquired of Petitioner personally regarding an arraignment, his request for a bond, his desire for minutes from the statewide grand jury proceedings, and access to audio/visual elements of the discovery materials. R. 116, l. 23 – R. 131, l. 7. During the discussions of those matters, Petitioner requested "a moment" and the judge agreed. R. 126, ll. 12-14. Then Petitioner asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" R. 126, l. 15. The judge responded:

> Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record.

R. 126, ll. 16-23. When Petitioner protested that trial counsel was not working in his interest, the judge responded that he was working in Petitioner's interest and that he would not risk losing his law license to collaborate with the state. R. 126, l. 24 – R. 127, l. 9.

After these preliminary matters were discussed, the judge asked trial counsel if he were ready to proceed with jury selection. R. 133, ll. 6-7. Trial counsel indicated Petitioner was prepared to go forward as his own lawyer. R. 133, ll. 8-9. The judge responded that she was not

going to relieve trial counsel "at this late stage or juncture." R. 133, ll. 10-11. She did not think it was "prudent to relieve [trial counsel] as counsel." R. 133, l. 12. Recognizing Petitioner's constitutional right to act as his own counsel, the judge stated she did not "perceive" that Petitioner had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, ll. 17-21. Thus, she refused to relieve trial counsel and permit Petitioner to represent himself. R. 133, ll. 20-21. Despite Petitioner's protestations, the judge refused to permit him to proceed *pro se*. R. 133, l. 22 – R. 134, l. 15.

Even at the start of jury selection, Petitioner continued to express his desire for self-representation, but he was rebuffed. R. 134, ll. 12-14; R. 143, l. 23 – R. 144, l. 8; R. 145, ll. 11-12. The judge threatened to remove Petitioner and his lawyer from the courtroom if he made "any other outbursts." R. 144, ll. 9-12. The judge explained she had denied Petitioner's motion for self-representation because she did not believe that he understood "the significant jeopardy" that he was placing himself in by invoking his constitutional right to self-representation. R. 145, ll. 14-16. She did "not perceive" that Petitioner had "any grasp of the rules of evidence or procedure." R. 145, ll. 17-18. According to Judge Jefferson, self-representation "would be a substantial constitutional deprivation of [his] rights." R. 145, ll. 18-20. Therefore, she denied his motion for self-representation, stating he did not "understand the consequences of [his] decision to proceed without a lawyer." R. 145, ll. 20-23. The judge then returned to some matters discussed during pre-trial hearings. "Contrary to what Dr. Maddox observed," the judge "deliberately" made "a conscious and concerted effort to observe" Petitioner's "behavior." R. 146, ll. 1-3. She determined Petitioner was "more than qualified and adaptable and aware of what [was] going on." R. 146, ll. 3-4. She was confident that Petitioner had "more than adequate ability to assist [his] counsel." R. 146, ll. 4-5. Per her observations, Petitioner had

"been involved in all the proceedings" and had "more than the ability to communicate" with trial counsel. R. 146, ll. 5-8.

Throughout the course of the trial, Petitioner continued to press his desire for self-representation, explaining his need to protect the record for appeal. R. 392, ll. 22-25; R. 393, ll. 7-8; R. 393, ll. 11-12; R. 393, ll. 24-25. Judge Jefferson re-iterated that South Carolina did not permit "hybrid representation" and that if "something" needed "to be protected," trial counsel would "do that." R. 393, ll. 1-6.

At the conclusion of the trial, Petitioner still expressed his desire for self-representation. R. 890, l. 9; R. 890, l. 15. After the jury found Petitioner guilty, Petitioner asked if he could represent himself on appeal. The judge responded that if he wanted an appeal, trial counsel would file "a motion to appeal." R. 890, ll. 11-12. Thereafter, "Indigent Defense" would "step in and take over." R. 890, ll. 12-13. When Petitioner reiterated his desire for self-representation, the judge told him he did not "want to do that" because "[t]hey have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you." R. 890, ll. 16-19.

During the sentencing portion, trial counsel echoed his sentiments from pre-trial proceedings: "I still believe, Your Honor, as when I asked for that evaluation, I truly believe that there is something going on. I really think that he needs some help. And that at some point with the right kind of help, he could be a citizen and a productive citizen, Your Honor." R. 894, ll. 18-22. The judge responded that while trial counsel may have "concerns" regarding Petitioner's "need for potentially an evaluation of some type to see if he needs counseling, medication, or otherwise," she had "no concern about his ability to have assisted in his representation, to understand the nature of these proceedings." R. 897, ll. 1-6. It was "clear" to the judge that

Petitioner had been "cognizant of place and time," and that he was "well aware of the nature of these proceedings." R. 897, ll. 6-8. Furthermore, "due to the breadth of his criminal history," the judge had "no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights attendant constitutionally to him, as he has more than on many events during the court of this trial articulated for the Court." R. 897, ll. 8-14.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014)(citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (explaining "[a]n accused may waive the right to counsel and proceed *pro se*" and "[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial"). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975); see also McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(explaining "Faretta's holding was based on the long-standing recognition of a right of self-representation in federal and state courts, and on the language, structure and spirit of the Sixth Amendment"); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)(stating "the Sixth Amendment implicitly provides an affirmative right to self-representation").[1] According to the Fourth Circuit, the right to self-

[1] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right … to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

representation is "mutually exclusive" of the right to counsel. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005).

The right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and

intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.; see also United States v. Stanley, 739 F.3d 633, 345 (11th Cir. 2014) (noting the "ideal method" for determining an exercise of the right to self-representation is to

conduct a pre-trial hearing, informing the defendant of the charges, basic trial procedures, and the hazards of self-representation).

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)); see also United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004) (explaining the Sixth Circuit's "model inquiry" for courts to use when confronted with a request for self-representation).

However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

According to the Fourth Circuit Court of Appeals, an assertion of the right to self-representation must be (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. See United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015); United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Recently, the South Carolina Supreme Court adopted this three-part test as well. City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017).

Clear & unequivocal invocation

"The right to appear *pro se* must be clearly asserted by the defendant before trial." State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (invocation of right to self-representation must be clear and unequivocal); United

States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991) (explaining the request must be unequivocal to avoid a "cat and mouse" game).

Prior to the trial, Petitioner invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. Petitioner clearly and unequivocally requested to exercise his constitutional right to self-representation, and the judge appeared to agree that Petitioner could represent himself when she explained it was "fine" with her if Petitioner chose not to avail himself of appointed counsel. Nevertheless, the pre-trial hearings continued with trial counsel acting as Petitioner's advocate.

When the parties reconvened on the day of trial, trial counsel indicated Petitioner wanted to represent himself, and again, the judge appeared to agree that Petitioner could do so. Her only caveat was that appointed counsel would have to act as "shadow counsel." After directly engaging on legal matters with Petitioner, the judge then insisted that appointed counsel was Petitioner's advocate for the proceedings and she would not permit Petitioner to invoke his right to self-representation. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that Petitioner did not have "sufficient grasps of the rules such that he would be able to protect his own interests." She re-iterated her view that Petitioner did not have "any grasp of the rules of evidence or procedure." According to the judge, Petitioner's decision to waive counsel placed him in "significant jeopardy." Yet, he did *not* waver from his desire to represent himself. See People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977) (holding a defendant's invocation unequivocal even when the "the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself … was unequivocal and unconditional"); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975) (finding a defendant's invocation clear where on the day of trial, the defendant moved to represent himself

because he had been deceived by everyone, including his lawyer, but his explanation on this point "was vague, to say the least").

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Petitioner in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Petitioner's request for self-representation was made knowingly, intelligently, and voluntarily.

"In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Petitioner had significant contacts with the criminal justice system as indicated by his criminal record. R. 891, l. 17 – R. 893, l. 13. In fact, Petitioner had been convicted of an offense just three years prior to his trial. R. 893, ll. 9-10. The judge aptly explained that "due to the breadth of his criminal history," Petitioner understood "the legal process" and his constitutional rights. R. 897, ll. 8-14. According to the judge, Petitioner was "well aware of the nature of the[] proceedings." R. 897, ll. 6-8.

Petitioner was thirty-eight years old at the time of the trial. R. 894, ll. 15-16. Petitioner had a family, including two children. R. 895, ll. 19-20. According to the trial judge, Petitioner exhibited average or above average intelligence. R. 23, ll. 10-12. During the sentencing, the judge remarked that Petitioner had "articulated" his rights to the court over the course of his trial. R. 897, ll. 8-14. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Petitioner's invocation as knowing, intelligent, and voluntary.

At one point in the trial, Petitioner explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed Petitioner was engaged in criminal activity in South Carolina. R. 632, ll. 10-14. Petitioner indicated his counsel was "fighting against" him regarding presenting that evidence. R. 632, l. 14. When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open[] the door." R. 635, ll. 21-22. The judge indicated the evidence was "a double-edge" sword. R. 635, l. 23. Petitioner explained that the current charges against him were "by far the worst" of any prior accusations or convictions. R. 635, ll. 24-25. Trial counsel indicated he had been discussing with Petitioner that the jury had "no idea who he" was at that point, but that if Petitioner "open[ed] the door" to allow

the state to introduce "his entire record," then the jury would have a "preconceived mind." R. 636, ll. 2-6.

In response, the judge told Petitioner the evidence of his incarceration in another state when alleged drug purchases were being made from him would be "prejudicial" to him. R. 636, l. 7. The judge told Petitioner that as long as he were silent, there was nothing the state could say. R. 636, ll. 12-13. She informed Petitioner that he could not "just get on the stand and say, I was in Nassau County." R. 636, ll. 15-16. If Petitioner took the stand, the state would "get to ask [him] about everything else." R. 636, ll. 16-17. She opined that was "a dangerous road to go down. It's a rabbit hole." R. 636, ll. 17-18. She agreed with trial counsel that it was "not in [his] interest." R. 636, ll. 18-19. Despite trial counsel's and the judge's indication that presentation of the evidence was not in Petitioner's best interest, Petitioner's desire to present the evidence of an alibi showed he had an understanding of the charges against him and the defenses available to him.

The judge's factual findings regarding Petitioner's prior criminal history, intelligence, and understanding of the proceedings supported Petitioner's request to make a knowing, voluntary, and intelligent waiver of counsel. Yet, the trial judge refused to permit Petitioner to waive counsel because she did not believe it was "prudent to relieve" trial counsel and she did not perceive that Petitioner had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, l. 12; R. 133, ll. 17-21. Just as the trial judge in Samuel noted "how intelligent and articulate she found Samuel to be," Judge Jefferson repeatedly noted Petitioner's intelligence and clear understanding of the legal proceedings. See Samuel, 422 S.C. at 604, 813 S.E.2d at 491. Also, like Samuel, Petitioner repeatedly expressed his desire for self-representation despite the judge's "persistent attempts to dissuade him." See id.

Despite the Court of Appeals affirming the trial judge's refusal to permit Appellant to represent himself based upon its view of the facts that Petitioner was attempting to manipulate the proceedings, the trial judge made no such findings. Further, the record simply does not support such a contention. Petitioner expressed his understanding of the statutory scheme governing the state grand jury and requested the state be required to abide by that scheme. For example, Petitioner requested the "minutes" from the state grand jury proceedings. R. 119, ll. 5-6. When the judge indicated Petitioner would not be able to learn of anything during the grand jury proceedings, the state acknowledged that although the transcript from the state grand jury was not a public record, Petitioner was permitted to read it according to the statute and controlling case law. R. 119, ll. 14-18. When Petitioner informed the judge he had been trying to order the transcript from Court Administration, the judge informed him he had been requesting the transcript from the wrong entity. R. 119, l. 19 – R. 122, ll. 9.

When the judge questioned what Petitioner believed he would learn from the documents related to the grand jury, Petitioner indicated he hoped to prove that "no State Grand Jury even occurred." R. 123, ll. 11-12. To this, the judge explained the grand jury met as evidenced by the indictments. R. 123, ll. 13-14. Without question, Petitioner's desire to view the documents related to the grand jury proceedings was well-founded in the law and even conceded by the prosecution. See Evans v. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005) (explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, Petitioner explained he had questions about his indictments not being "certified." R. 123, ll. 21-23. Petitioner explained that during a pre-trial hearing, the judge indicated the

indictments were not certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. R. 21, ll. 10-20; R. 123, ll. 17-23. The judge told Petitioner that "once something is in a court order, sir, it's already certified." R. 123, ll. 24-25. She then told Petitioner that only documents going out of state would need to be certified. R. 124, ll. 1-2. According to the judge, "never, under any circumstances," would an individual receive "certified indictments." R. 124, ll. 2-4. Certainly, Petitioner's request for certified indictments was not unreasonable or an attempt at manipulation in light of the statutory requirement that a state grand jury indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

Later when Petitioner expressed his concerns that his right to a speedy trial had been violated, the judge told him that the issue was "moot" because a trial date had been set. R. 160, ll. 6-11. According to the judge, "[t]he only remedy for a speedy trial motion is to set a trial date." R. 160, ll. 9-11. After explaining that other people were in jail awaiting trial for much longer than Petitioner, the judge remarked that she denied demands for speedy trial "all the time" because the case law was not in the defendants' favor. R. 160, ll. 12-23. She further told Petitioner that "the remedy for a speedy trial is to set a trial date," and there was "no other remedy." R. 160, ll. 23-25. Specifically, she told Petitioner that the "[r]emedy for speedy trial is *not* to *dismiss* [the] charges. Doesn't make them go away. Purpose of speedy trial is to get [the defendant] in front of a court and get [the defendant] to trial. Cases don't get away or get *dismissed* on a speedy trial motion." R. 161, l. 25 – R. 161, l. 4 (emphasis added). Later, when the judge was discussing the state's plea offers with Petitioner and Petitioner's concern about a guilty plea waiving his right to pursue matters on appeal, the judge again told Petitioner that a violation of his right to speedy trial would not result in a dismissal. R. 296, ll. 15-23.

Certainly, Petitioner's interest in asserting his right to a speedy trial could not be deemed an attempt at manipulation. Rather, it showed Petitioner's understanding of the legal process and his understanding of possible legal remedies he could pursue. Contrary to the judge's assertion that the remedy for a speedy trial violation was not dismissal of the charges, this Court and the United States Supreme Court held the only remedy for a speedy trial violation is dismissal of the charges. See Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding that if a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the only possible remedy"); State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (same).

In addition to all the evidence in the record indicating Petitioner was not attempting to manipulate the criminal justice system when he moved to waive counsel, "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." Samuel, 422, S.C. at 606, 813 S.E.2d at 492 (citing State v. Barnes, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015)).

All of the judge's factual findings regarding Petitioner's intelligence, ability to understand, and comprehension of the legal proceedings are supported by the record. However, those factual findings militate in favor of concluding Petitioner's invocation was knowing and voluntary. Thus, the judge's factual findings, which must be accorded deference, support a legal conclusion that Petitioner's request to waive counsel was made with his "eyes wide open." The judge's legal conclusion, which must be reviewed de novo, was error.

Timely invocation

Petitioner's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing

the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Pierce v. State, 209 S.W.3d 364, 371 (Ark. 2005) (holding a defendant timely asserted his right to self-representation when he invoked his right prior to trial in chambers); Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984) (finding invocation of self-representation time when made prior the empaneling of the jury); Barnes, 528 S.W.2d at 372-373 (Ark. 1975) (finding a defendant's invocation timely where on the day of trial, the defendant moved to represent himself). Just as in Fuller, Petitioner's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Petitioner "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Petitioner's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id. Not only did Petitioner moved to represent himself on the day of trial, but he made his request the week prior to trial when the parties were gathered for the pre-trial hearings. According to the judge, this was the first hearing in Petitioner's case; thus, it was the first time that Petitioner could invoke his right to self-representation. See R. 7, ll. 4-5.

The judge's comment that she would not relieve counsel at that late "stage or juncture" was belied by the record because the judge appeared to grant the motion and permit Petitioner to discuss several legal matters. See R. 116, ll. 9-12. In fact, on the day of the pre-trial hearing, the judge told Petitioner that it was "fine" by her if he wanted to represent himself at trial. R. 24, ll. 16-17. The judge stated she was "comfortable" with "whatever" Petitioner felt was "acting in [his] best interest." R. 24, ll. 17-19. Again, the judge reiterated that she was "fine" if Petitioner "plan[ned] to represent [himself]" and that "[w]hatever decision [he] ma[d]e [was] on [him]." R. 25, ll. 3-4.

Adequate hearing

The inquiry that followed Petitioner's request had little do to with the *only* inquiry that mattered – whether Petitioner was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether Petitioner's decision to waive counsel was "prudent" and whether Petitioner sufficiently grasped the rules "such that he would be able to protect his own interests." R. 133, ll. 12-21. Although the judge agreed with Petitioner that he had a constitutional right to self-representation and advised Petitioner that by waiving counsel he risked "inadvertently incriminate[ing]" himself, the judge did not engage in a colloquy with Petitioner to determine if decision to waive was knowingly and voluntarily made. See R. 126, ll. 16-23. While the judge's benevolent and paternalistic instincts are laudable, they have no place in determining whether an individual may waive his right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (explaining "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one"); see also, Frazier-El, 204 F.3d at 558 (re-iterating a long-standing principle that a request to waive counsel must be honored without regard to whether the defendant would benefit from the advice of counsel).

The trial judge failed to honor Petitioner's clear and unequivocal invocation of his right to self-representation as required by the state and federal constitution. The right to self-representation must be honored with no regard to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Petitioner's invocation. Nevertheless, the evidence in the record demonstrates Petitioner knowingly, voluntarily, and intelligently waived his right to counsel. The judge's factual findings regarding Petitioner's ability to comprehend in general, and his ability to comprehend the legal proceedings specifically, supported a conclusion that Petitioner was waiving counsel knowingly, voluntarily, and intelligently. Despite those factual

findings, the judge erred when she denied Petitioner's motion based upon her perception that Petitioner could not act in his own best interest and did not have a good enough grasp of the rules.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition, but does not order briefing, Petitioner respectfully requests this Court reverse Petitioner's convictions and remand for a new trial.

Respectfully Submitted,

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2020.

RECEIVED

May 06 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2020-000646

THE STATE, Respondent,

v.

EMORY WARREN ROBERTS, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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The Court of Appeals correctly affirmed the trial judge's refusal to allow Petitioner to represent himself when his request was not unequivocal and when Petitioner demonstrated that if he were allowed to represent himself he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol.

CONCLUSION 16

STATEMENT OF ISSUE ON CERTIORARI

Whether the Court of Appeals properly affirmed the trial judge's refusal to allow Petitioner to represent himself when his request was not unequivocal and where Petitioner demonstrated that if he were allowed to represent himself, he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol?

STATEMENT OF THE CASE

Procedural History

In April 2016, the State Grand Jury indicted Petitioner for one count of trafficking in heroin of twenty eight grams or more, three counts of distribution of heroin, one count of trafficking in heroin between four and fourteen grams, one count of possession with intent to distribute methamphetamine, and one count of possession of a firearm during the commission of a violent crime. Multiple co-defendants were also indicted along with Petitioner. On July 24-28, 2017, Petitioner and co-defendant Justin Hunter (Hunter) proceeded to trial before a jury on all counts in the Berkeley County Court of General Sessions with the Honorable Deadra L. Jefferson, presiding. Petitioner was represented by Timothy L. Griffith, Esq. The State was represented by Assistant Attorneys General Joshua Underwood and David Fernandez of the South Carolina Attorney General's Office. Hunter was not present for trial and was tried in his absence with Theresa Johns, Esq. representing him.

At the conclusion of trial, the jury convicted Petitioner of all counts. Following the verdict, the trial judge sentenced Petitioner to twenty-five years' imprisonment for trafficking in heroin of twenty eight grams or more, fifteen years' imprisonment for each count of distribution of heroin, fifteen years' imprisonment for trafficking in heroin four grams to fourteen grams, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifteen years' imprisonment for possession with intent to distribute methamphetamine. All of Petitioner's sentences ran concurrently with each other, resulting in an aggregate total of twenty-five years' imprisonment. Petitioner appealed his convictions and sentences. On January 29, 2020, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed January 29, 2020). On February 13, 2020,

Petitioner filed a Petition for Rehearing with the Court of Appeals. The Court of Appeals denied the Petition for Rehearing on March 27, 2020. Petitioner then filed a petition for a writ of certiorari with this Court on April 24, 2020.

Factual History

Petitioner participated in a multistate drug conspiracy and trafficking operation with five other co-defendants. The operation involved trafficking heroin and methamphetamine from the state of New York into South Carolina. Eleanor Cleary was originally appointed as counsel for Petitioner on May 18, 2016. (R. 904). Cleary, however, was relieved as counsel on November 18, 2016. (R. 905). Thereafter, Timothy Griffith was appointed as counsel on November 21, 2016 (R. 906). A pretrial hearing took place on July 19, 2017. Among the issues considered at this hearing were the admissibility of statements made by Hunter, Hunter and Petitioner's motion to suppress the results of a search warrant, and Petitioner's competency to stand trial.

At the beginning of this hearing, Griffith informed the trial judge that Petitioner wanted a different attorney appointed. (R. 2). Griffith alleged Petitioner would not communicate with him or otherwise assist him in Petitioner's defense. (R. 3-4). Griffith also expressed concerns with Petitioner's competence and requested the trial judge appoint a doctor to evaluate him. (R. 5). Petitioner was originally scheduled to be evaluated at the Medical University of South Carolina (MUSC), but after Petitioner assaulted a correctional officer, Petitioner's appointment was cancelled and Dr. Maddox was appointed to evaluate him at the Berkeley County Detention Center. (R. 5). Petitioner refused to be evaluated by Dr. Maddox and cited section 1308 of the

Uniform Commercial Code as his reason for refusal[1]. (R. 6, 63). Despite Petitioner's refusal, Dr. Maddox still opined that he was competent to stand trial. (R. 12).

As the trial judge attempted to communicate with Petitioner to discern his wishes for representation, the following exchange occurred:

> The Court: What is your name, sir?
>
> Petitioner: Excuse me?
>
> The Court: What is your name?
>
> Petitioner: They call me W.
>
> The Court: I need to know your legal name, your government name as the guys would say.
>
> Petitioner: This Court doesn't have jurisdiction over me, Your Honor. I don't give the court jurisdiction. I don't—
>
> The Court: sir, we already have jurisdiction over you; you've been indicted. So what I need to know is your full name Emory Warren Roberts?
>
> Petitioner: That is what is located on the charging instrument.
>
> The Court: Is that on your birth certification?
>
> Petitioner: That's a legal fiction. That's an article of commerce, Your Honor.

(R. 15-16, lines 15-6).

The aforementioned exchange is representative of several similar exchanges between Petitioner and the trial judge during the pre-trial hearing. The trial judge also sought to obtain basic information from Petitioner such as his age, work history, and educational background. (R. 20). Petitioner responded to the trial judge's inquiries by asserting her questions were

---

[1] Petitioner was possibly referring to Uniform Commercial Code § 1-308 which provides the following: (a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient. (b) Subsection (a) does not apply to an accord and satisfaction. U.C.C. § 1-308 (2017).

"immaterial" or that "The Court is lacking in jurisdiction." (R. 20, lines 11, 15, 17). Notably, Petitioner never asked to represent himself at the pre-trial hearing, but rather requested that an attorney other than Griffith be appointed to represent him. At the conclusion of her colloquy with Petitioner, the trial judge noted "I perceive [Petitioner] is being dilatory hoping that this will in some way delay these proceedings." (R. 22, lines 4-6). The trial judge also noted:

> The Court: [Petitioner] has a very competent lawyer who has been appointed to represent him and The Court is not going to appoint someone else. This is the second appointment in his case and I perceive that the next person will be unsuitable as well as the next person and the next person and I'm not going to indulge in that folly.

(R. 24, lines 2-7). The trial judge further explained that Petitioner could represent himself if he wished. Petitioner did not indicate he wanted to represent himself but continued to tell the trial judge he didn't understand what was going on. (R. 25-29). The trial judge found Petitioner's answers to her questions were "disingenuous, that they are not accurate and that they are designed to try and delay these proceedings." (R. 29, lines 6-8).

One week later at trial, Griffith informed the trial judge that Petitioner wished to represent himself. (R. 116). The trial judge responded to Griffith by declaring that she would leave him "as shadow counsel." (R. 116, lines 11-12). After the trial judge instructed Griffith to act as shadow counsel, Petitioner indirectly addressed the status of his representation three times. First, Petitioner asked the trial judge whether Griffith was supposed to "shadow him." (R. 126, line 15). In response to Petitioner's question, the trial judge recommended that Petitioner keep Griffith as his attorney. (R. 126). Petitioner responded to the trial judge's suggestion by denigrating Griffith and claiming that Griffith was not working in his interest. (R. 126-27). Rather than asserting that he wanted to represent himself, Petitioner next questioned the jurisdiction of the court and the status of his bond. (R. 127-31). Second, when the trial judge

ultimately declined to relieve Griffith as counsel, Petitioner did not request to represent himself but rather complained that Griffith would incapacitate him and would "be destroying my questions to mean something else." (R. 133, 134, lines 3-4).

Finally, with Griffith acting as his appointed counsel during jury selection, Petitioner attempted to speak with the jury when he was introduced to the panel. (R. 142). Petitioner was chastised by the trial judge and advised to remain silent. (R. 142). Griffith moved for a mistrial because of Petitioner's outburst before the jury. Griffith's motion was denied. (R. 143-44). In denying Griffith's mistrial motion, the trial judge cautioned Petitioner that any further outburst would result in Petitioner and Griffith being sequestered to another room for the duration of the trial. (R. 144). After again arguing the court did not have proper jurisdiction, Petitioner stated: "All right. Constitutionally, I can represent myself" but he did not ask to represent himself. (R. 145, lines 11-12). Petitioner also complained that he felt threatened by Griffith. (R. 147). The trial judge denied Petitioner's equivocal request to represent himself upon finding that Petitioner's assertion regarding Griffith threatening him was "a dilatory attempt to delay these proceedings." (R. 147, lines, 14-15). At the conclusion of trial, the jury found Petitioner guilty of all charges.

STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). Appellate courts review a circuit judge's findings of fact for clear error, but the appellate court reviews "the denial of self-representation based upon those findings of fact de novo." Id.

ARGUMENT

I.

The Court of Appeals correctly affirmed the trial judge's refusal to allow Petitioner to represent himself when his request was not unequivocal and when Petitioner demonstrated that if he were allowed to represent himself he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol.

Petitioner contends the trial judge violated his Sixth Amendment right to self-representation by refusing to allow him to proceed *pro se*. Specifically, Petitioner contends his invocation of his right to self-representation was (1) unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. Petitioner's argument is without merit. Petitioner never expressed any desire to represent himself until after jury selection had taken place and even then his request was not unequivocal. (R. 145). Prior to that, Petitioner had only requested that alternate counsel be appointed. (R. 2). Because Petitioner did not invoke his right to self-representation until after the trial began, his request was not timely. Finally, Petitioner's request was not knowing, intelligent, and voluntary because by refusing to engage with the trial judge regarding his background and his understanding of courtroom proceedings, Petitioner was unable to make this showing. Assuming for the sake of argument that Petitioner appropriately invoked his right of self-representation, the trial judge nevertheless properly refused to allow Petitioner to represent himself because Petitioner attempted to delay the proceedings, made frivolous arguments, and would not comply with the rules of the courtroom. Petitioner acted in a classic dilatory manner. The petition for a writ of certiorari should be denied.

A criminal defendant has a fundamental right to self-representation under the Sixth Amendment of the United States Constitution. Faretta v. California, 422 U.S. 806, 819-21 (1975). However the right of self-representation is not absolute. United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000). "The government's interest in ensuring the integrity and efficiency

of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez v. Court of Appeal of California, 528 U.S. 152, 162 (2000).

The right to counsel is mutually exclusive of the right to self-representation. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005). "The right to counsel is preeminent and hence, the default position." United States v. Ductan, 800 F.3d 642, 649 (4th Cir. 2015) (quoting United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997)). The right to counsel is so important that courts should "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977).

To properly assert the right of self-representation, an assertion must be "(1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely." Frazier-El 204 F.3d at 558. (internal citations omitted). The right of self-representation must "be asserted at some time before meaningful trial proceedings have commenced and thereafter its exercise rests within the sound discretion of the trial court." United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Faretta 422 U.S. at 834. "The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 790 (2017). "A trial court may refuse to permit a criminal defendant to represent himself when he or she is not able and willing to abide by rules of procedure and courtroom protocol." Unites States v. Lopez-Osuna, 242 F.3d 1191, 1200 (9th Cir. 2000). "A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." Assa'ad-Faltas, 420 S.C. at 45, 800 S.E.2d at 791.

Equivocal

Petitioner did not unequivocally invoke his right to self-representation. In Petitioner's pre-trial hearing, Griffith informed the trial judge that Petitioner did not want Griffith to represent him. (R. 2). Specifically, Griffith stated that Petitioner wanted another attorney appointed, but in the alternative, Petitioner's family may be able to hire private counsel. (R. 2). For the duration of the pre-trial hearing, Petitioner continued to object to Griffith acting as his lawyer but Petitioner never asserted that he wanted to represent himself.

At trial, Griffith informed the trial judge that Petitioner wanted to represent himself, and though he later spoke directly to the court, Petitioner himself never made this request. (R. 116). The trial judge initially told Griffith and Petitioner that Griffith would remain as a shadow counsel. (R. 116). Petitioner later asked for clarification on the status of his counsel. (R. 126). The trial judge clarified that she recommended Petitioner keep Griffith as his attorney. (R. 126). At this point, Petitioner did not request to represent himself, but rather he complained that Griffith was hostile to him and not working in his interest. (R. 126-27). Petitioner then raised other frivolous arguments regarding his bond and the jurisdiction of the court before the trial judge informed Petitioner that Griffith was not being relieved as counsel. (R. 127-33).

To the extent Griffith's comments to the Court at the start of trial can be construed as a request for self-representation, Petitioner effectively walked back that request in his own exchange with the court. After challenging the jurisdiction of the court an additional time, Petitioner made the following statement: "All right. Constitutionally, I can represent myself." (R. 145, lines 11-12). Petitioner's statement is somewhat ambiguous as it is not so much a request as it is a declaration of Petitioner's rights. Petitioner correctly states that he has a constitutional right to represent himself, but he does not unequivocally request to do so. Even assuming that

Petitioner's statement was a request to represent himself, the trial judge properly treated Petitioner's request with skepticism. Considering that Petitioner frequently complained about his lawyer and wanted new counsel appointed throughout the pre-trial hearing and the early part of trial, the trial judge rightfully did not accept Petitioner's request as being unequivocal. Petitioner only half-heartedly invoked his right to counsel after it was clear the trial judge would not appoint him a new attorney.

Not Knowing, Intelligent, and Voluntary

Assuming for the sake of argument that Petitioner's invocation of his right to self-representation was unequivocal, Petitioner's behavior made it so the trial judge was unable to determine if his decision was knowing, intelligent, and voluntary. The trial judge could not determine whether Petitioner's request to represent himself was knowing, intelligent, and voluntary because Petitioner refused to engage with the trial judge as she inquired about his age, educational background, and work history. A party cannot complain of an error which his own conduct induced. See State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989).

At the beginning of Petitioner's pre-trial hearing, Griffith expressed concerns about Petitioner's competence and Petitioner's unwillingness to speak with him. (R. 3-5). The court heard testimony from Dr. Maddox that Petitioner refused to be evaluated. (R. 6). Petitioner stated that his reason for refusing evaluation was section 1308 of the Uniform Commercial Code. (R. 6). After hearing testimony from Dr. Maddox, the trial judge attempted to obtain basic information from Petitioner such as his name, work history, and educational background. (R. 15-20). Petitioner refused to answer the trial judge's questions. The following exchange between Petitioner and the trial judge is instructive:

The Court: Sir, how old are you?

> Petitioner: That's immaterial, Your Honor.
>
> The Court: How old are you? It is material. It goes to your competency and whether you understand what is going on and whether your age and discretion to understand where you are and what you are doing (sic). How old are you?
>
> Petitioner: The court is lacking jurisdiction, Your Honor. It's immaterial—

(R. 20, lines 4-12).

The preceding exchange exemplifies the difficulty the trial judge faced in determining whether Petitioner's decision was knowing, intelligent, and voluntary. The trial judge explained to Petitioner the purpose of her questions and yet Petitioner did not provide any meaningful answers. Petitioner continued to challenge the jurisdiction of the court and insisted the proceedings were governed by the Uniform Commercial Code. When faced with Petitioner's intransigence and lack of cooperation with Dr. Maddox or herself, the trial judge was unable to determine whether Petitioner knowingly, intelligently, and voluntarily invoked his right to self-representation.

Untimely

Assuming that Petitioner's invocation of his right to self-representation was unequivocal and knowing, intelligent, and voluntary, Petitioner still failed to properly invoke his right of self-representation, because his invocation was not timely. Petitioner never asserted his desire to proceed *pro se* during his pre-trial hearing despite being told that he had a right to do so. (R. 25-26). Griffith did say that Petitioner wished to represent himself at the beginning of his trial and Griffith was told to remain with Petitioner as shadow counsel. However, the trial judge ultimately changed her mind after Petitioner continued to present frivolous arguments to the court. After the trial judge informed Petitioner that Griffith would remain as his counsel, Petitioner complained about Griffith being his attorney but otherwise did not request that he be

allowed to represent himself. Petitioner did not talk about his constitutional right to represent himself until after the trial had already begun and jury selection had taken place. (R. 145). The trial judge appropriately exercised her discretion in denying Petitioner's request to proceed *pro se* because his request was not timely.

Petitioner's Dilatory Motive

Even if Petitioner had properly invoked his right to self-representation, the trial judge still properly refused to allow Petitioner to proceed *pro-se* because of his lack of cooperation with the court and the likelihood that Petitioner would fail to comply with court rules and would present improper arguments. Before Petitioner's trial even began, Petitioner demonstrated that he would present frivolous arguments to the court by refusing a formal evaluation from Dr. Maddox based on the Uniform Commercial Code. (R. 6, 63). At the pre-trial hearing Petitioner continued to advance the same frivolous argument that the court did not have jurisdiction over him. (R. 15). After the trial judge explained to Petitioner that the Uniform Commercial Code had no relevance in criminal court, Petitioner asserted "That's not my name. That's an article—that's a straw man, a legal fiction and he can't represent me unless it's for a whole settlement and closure in a transaction." (R. 16, 19-20, lines 25-1). Thus, Petitioner demonstrated that he would continue to advance this improper argument if he were allowed to represent himself. The trial judge recognized this when she noted:

> The Court: [Petitioner] is no different than anyone else who has convinced themselves that the Uniform Commercial Code is applicable in a criminal situation when it is not, hoping that that will somehow salvage or delay the proceedings and prevent the court from proceeding.

(R. 23, lines 19-23).

At trial, Petitioner continued his effort to present frivolous arguments by claiming he had a letter indicating he had no outstanding charges with the State Grand Jury. (R. 122). In actuality,

Petitioner presented the trial judge with a letter from the Department of Public Safety which said Petitioner did not have outstanding charges with that agency. (R. 122-25). Petitioner then attempted to prove the State Grand Jury never met to true bill the indictments charging him with the crimes for which he stood trial, despite the fact the trial judge presented Petitioner with his certified indictments. (R. 123). After Petitioner's initial arguments failed, Petitioner argued that the Attorney General's Office was corrupt. (R. 148). To prove his theory, Petitioner asked the trial judge if he could call the Assistant Attorney General prosecuting the case as a witness. (R. 148).

In addition to consistently presenting frivolous arguments, Petitioner also displayed a lack of respect for courtroom rules and procedure. Petitioner interrupted the trial judge while she was speaking, interrupted the direct examination of a State's witness, and attempted to speak directly to the jury during jury selection. (R. 22, 40-41, 142). The trial judge also appropriately recognized Petitioner's attempts to delay the proceedings. Petitioner not only refused evaluation by Dr. Maddox, but was unable to even be transported to MUSC because he assaulted a prison guard who was attempting to transport him. (R. 5-6, 63, 894). Petitioner was working with his second appointed attorney after Petitioner's first counsel was relieved of representing Petitioner at Petitioner's request. (R. 905). At trial, Petitioner claimed to have not received discovery, despite Griffith telling the court that he had received and shared all discovery with Petitioner. (R. 118).

The current case is very similar to the factual scenario considered by the Fourth Circuit Court of Appeals in United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000). In Frazier-El, the Fourth Circuit considered whether the trial court properly required Frazier-El to proceed with appointed counsel rather allowing Frazier-El to represent himself. Frazier-El's attorney moved

for a psychiatric evaluation to determine Frazier-El's competence. Frazier-El 204 F3d at 556. After being found competent to stand trial, Frazier-El moved to have his attorney relieved because his attorney was not working in his interest and refused to file motions on his behalf asserting the court did not have jurisdiction over Frazier-El because he was "an officer in the Moorish Science Temple." Frazier-El, 204 F.3d at 557. Frazier-El admitted that he would continue to argue that the court did not have jurisdiction over him if he were allowed to represent himself. Frazier-El also admitted he would continue to request a different attorney if replacement counsel did not make the same argument. Frazier-El, 204 F.3d at 557-58. The Fourth Circuit held that Frazier-El's request to represent himself was an attempt to manipulate the court system rather than a genuine desire to represent himself. Frazier-El, 204 F.3d at 560.

Here, like Frazier-El, Griffith had concerns about Petitioner's competence and moved for an evaluation. Like Frazier-El, Petitioner was deemed competent to stand trial. (R. 12). Frazier-El and Petitioner both said that their attorney was working against their interest and both men sought to present frivolous arguments challenging the jurisdiction of the court. This Court should reach the same conclusion the Fourth Circuit did in Frazier-El. The trial judge appropriately recognized that Petitioner's request for self-representation was intended to delay his trial. In the alternative to the trial being delayed, Petitioner intended to present frivolous arguments and otherwise refuse to abide by courtroom rules and protocol. The Court of Appeals correctly affirmed the trial judge's refusal to allow Petitioner to proceed *pro se*, and the petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BY: s/ Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 6, 2020

The Supreme Court of South Carolina

The State, Respondent,

v.

Emory Warren Roberts, Petitioner.

Appellate Case No. 2020-000646

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

October 16, 2020

cc:
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Jonathan Scott Matthews, Esquire
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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October 19, 2020

The Honorable James R. Parks
1000 Assembly Street
Rembert Dennis Building, Suite 519
Columbia SC 29201

REMITTITUR

Re: The State v. Emory W. Roberts
Lower Court Case No. 2016GS4700002, 2016GS4700003
Appellate Case No. 2017-001676

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V Claire Allen

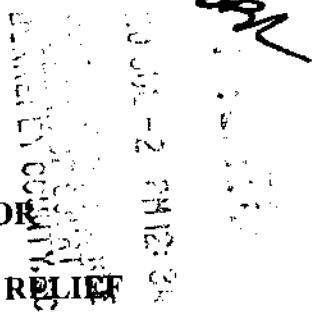
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Jonathan Scott Matthews, Esquire

STATE OF SOUTH CAROLINA)
)
County of Berkeley)
)
Emory W. Roberts Jr. 373393)
Full name and prison number (if any) of Applicant)
)
v.)
)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS



APPLICATION FOR

POST-CONVICTION RELIEF

2020-CP-08-01349

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution

2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) Justin Gordon Hunter, Lassian Dixon Johnson, William Brown, Rosemary Quezada

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2016-GS-47-02, Trafficking in illegal drugs, distribution of

(b) heroin (dist). P.W.I.D. Methamphetamine, Possession of a Firearm during commission of or attempt to commit a violent crime.

CC: E.W. Roberts 7/2/2020

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) July 28, 2017

(b) Sentences to be concurrent

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Denied 6th and 14th Amend. to be informed of nature and cause

(b) Judicial Misconduct, Ineffective assistance of Counsel

(c) Prosecutorial Misconduct

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Denied "Notice", Trial Court exceeded its jurisdiction to impose sentence

(b) Trial judge committed "Fraud on the Court", Trial Counsel conspired with

(c) prosecution on unfounded offenses, Prosecutor imprisoned grand jurys independent role

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition Writ of Mandamus, Motion To Vacate,

ii. 60 B(4) Motion

iii. Motion Newly Discovered Evidence

iv. _____

(b) the name and location of the Court in which each was filed:

i. South Carolina Supreme Court (Columbia), Berkeley County (Moncks Corner)

ii. South Carolina Court of Appeal (Columbia)

iii. _____

iv. _____

(c) the disposition thereof:

i. (Not heard because represented by counsel)

ii. Berkley County stated: Not A Berkley County Case (Court File)

iii.

iv.

(d) the date of each such disposition:

i. N/A

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. (All Grounds)

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Ineffective ~~Assistance~~ Assistance of Counsel (Trial)

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? ✓ Yes

(c) your sentencing? ✓ Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? ✓ Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Timothy L. Griffith
360 West Westmark Blvd, 2nd Floor, Sumter, SC 29150

ii. Eleanor Cleary (Address not Known)

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Timothy L. Griffith (Trial) (Sentencing)

ii. Eleanor Cleary (None)

iii. _____

19. State clearly the relief you seek in filing this application:

For sentence to be vacated and indictment dismissed with prejudice.

Briefs/Motion moving Court pursuant to § 17-27-20 to be heard and charges dismissed

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Ridgeville)

I, Emory W. Roberts Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Emory Warren Roberts Jr.
Emory Warren Roberts

SWORN to and subscribed before me this 15th day of JUNE, 2020

Linda K. Bruton (L.S.)
Notary Public

My Commission Expires: 6-20-26

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Emory W. Roberts Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Emory Warren Roberts Jr.
Applicant

SWORN or affirmed to and subscribed before me this 15th day of June, 2020.

Notary Public

My Commission Expires: 6-20-26

Sentencing Court's Copy

Dated: 6/15/20

Clerk of Court, Leah Guerry Dupree
Berkeley County Court of General Sessions

As I have been prejudiced my first Amendment rights to a "Redress of Grievances" by this Court and Clerk of Court, it should be noted: Pursuant to 42 U.S.C.A. § 1983 "Every person who, under color of any State statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the U.S. to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity."

No local rule of court, administrative order, policy, or other procedure can take precedent over statutory law, which is always controlling. See S.C. Constitution Art. V, § 1, and § 4, also State V. Cottingham, 77 SE 2d 897, 224 SC 81 (1953).

Statues override rules of court if in conflict; State V. Duncan, 264 SE 2d 421 (SC 1980) circuit court rule promulgated by individual Judicial Circuit was unconstitutional and void.

Hence, the Clerk of Court is required to know and obey the legal mandates.

Accordingly, I ask that my "pro se" motion pursuant to § 17-27-20 and 28 U.S.C. § 2255, be clocked, dated, stamped, and filed, and returned the same to petitioner.

C.C. U.S. Court of Appeals for Veterans Claims, with copy of motion pursuant to § 17-27-20 and attachments, as well judicial complaint.

Attachments

1.) Cover Page of Trial transcript.
2.) Trial transcript, page 15.
3.) Trial transcript, page 19.
4.) Correspondence from Court Admin. dated 10/23/17
5.) Correspondence from Court Admin. dated 11/6/17
6.) Letter from "Christina Bass of S.L.E.D." dated June 9, 2016
7.) 4 Briefs

Verification

I, Emory Roberts Jr., being duly sworn upon my oath, depose and say that all herein is true and accurate.

Emory Roberts
Emory Roberts

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 15th DAY OF JUNE
2020
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 6-20-26

State Grand Jury of South Carolina
State of South Carolina
Berkeley County

Berkeley County General Sessions
(Case No. 2016-GS-47-02)

Vs.

Emory Warren Roberts Jr.,
Petitioner

Clerk of Court,
Please Clock, Date, Stamp, File
And Return filed Briefs and
attachments, thank you.

Re: Exercise of First Amendment Right To Petition For A "Redress of Grievances" and §17-27-20. Persons who may institute proceeding; exclusiveness of remedy. Paragraph (A) (1) (2) and (4), Petitioner Moves This Court...

Before: Berkeley County Court of General Sessions
Appearance: Emory Warren Roberts Jr. (Pro se)

C.C. U.S. Court of Appeals For Veterans Claims (Judicial Complaint)
(With Copies of Motions/Briefs and attachments pursuant to §17-27-20)
Department of Justice.

Petioner moves this Court for the exercise of filing this motion pursuant to § 17-27-20. Persons who may institute proceeding; exclusiveness of remedy. Paragraph (A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(4) That there exist evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

...nor shall any State deprive any person of life, liberty, or property without due process of law...

Section 17-19-10 of South Carolina Code of laws state: "Offense shall be prosecuted upon grand jury indictment".

Section 14-7-1750. Indictment by state grand jury states: "In order to return a "true-bill" of indictment, twelve or more state grand jurors must find that probable cause exists for the indictment and vote in favor of it."

S.C. Code Ann. § 17-25-10 states: "no person shall be punished for an offense unless duly and legally convicted thereof, in a court having competent jurisdiction of the cause and of the person".

The Sixth Amendment to the United States Constitution states that defendant has a right to be informed of the nature and cause of the accusation;...

Article I, Section 11 of South Carolina Constitution provides in part: "No person shall be held to answer for any crime unless on a presentment or indictment of a grand jury".

Article V, § 22 provides, in pertinent part: "The grand jury of each county, and the "state grand jury", as the General Assembly may establish by general law, [shall] consist of eighteen members, twelve of whom [must] agree in a matter before it can be submitted to the court - [emphasis added].

Section 14-7-1700 provides in pertinent part: "A court reporter shall record, either stenographically or by use of an electronic recording device, all proceedings except when a state grand jury is deliberating or voting... Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, states: "a defendant has the right to review and to reproduce the stenographically or electronically recorded materials."

§ 17-19-90 = "Every objection to any indictment for any defect apparent on the face thereof shall be taken by "demurrer" or on motion to quash such indictment before the jury shall be sworn and not afterwards" (Tr. Page 15, lines 5-6) (Tr. Page 19, lines 11-12)

Questions presented to the Court: . . .

1.) Whether defendants rights to due process of law and equal protections under the law pursuant to the Fourteenth Amendment and defendant: right to the Sixth Amendment of the United States Constitution to be informed of the nature and cause of accusation violated when no state grand jury convened to consider criminal allegations against him?

2.) Whether defendants right to due process of law pursuant to the Fourteenth Amendment and S.C. Code Ann. § 17-19-10 was violated when he was held for trial and convicted of crimes and offenses without indictment by grand jury?

3.) Whether defendants right to due process of law and equal protections under the law pursuant to the 14th Amendment of the United States Constitution, and Art. 1 § 3, and his right to have the indictment issued by a legally constituted grand jury pursuant to Art. 1 § 11 and Art. 5 § 22 of South Carolina State Constitution violated?

4.) Whether State Grand Jury lacked subject matter jurisdiction based on nullity indictment?

5.) Whether defendants right to due process of law and equal protections under the law pursuant to the 14th Amendment of the United States Constitution and section 14-7-1700 of a State Grand Jury Act was violated when no court reporter was assigned to record grand jury proceedings?

6.) Whether defendants right to due process of law and equal protections under the law pursuant to the 14 Amend. of the United States Constitution and section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure violated when defendant was denied the impanelment documents before a jury being sworn?

7.) Whether defendants right to due process of law and equal protections under the law pursuant to the 14th Amend. to the United States Constitution violated when judge denied defendant impanelment documents and defendant could not prepare a defense? And does the denial constitute a Brady violation?

8.) Whether defendants right to due process of law and equal protections under the law was violated when prosecutor encouraged false testimony and defendant was accused of crimes not investigated by a grand jury, and A.A.G.'s allowed government agents to make false and misleading statements prejudicing defendant?

9.) Whether the Court lacked subject matter jurisdiction to convict and sentence defendant for offenses for which he was not indicted?

10.) Whether prosecutor's return of fraudulent indictment constitutes "fraud upon the court" and defendants rights?

11.) Whether a State Grand Jury convened, in petitioner case, on the date's of April 12-13, 2016?

(Statement Of Facts)

Relevant Facts:

On April 12-13, 2016, A.A.G.'s for the State, and the Clerk of the State Grand Jury willfully printed and published false and misleading information in its indictment in violation of "constitutional" and "statutory" laws. See Ind. # 2016-GS-47-02/03. see also (Court Admin. Correspondence dated 10-23-17, 11-6-17). Trial judge "colluded" with A.A.G.'s for the State in committing "fraud On the Court" and against petitioners rights.

Pursuant to statue, before a jury being sworn, the defendant moved the trial court for the "production" of the state grand jury minutes (impanelment documents), in order to prove that a state grand jury "had not" investigated, nor indicted defendant for any crimes or offense's (Tr. Page 15, lines 5-6); (Tr. Page 19, lines 11-12). The trial judge "initiated" criminal proceedings against defendant when "she" allowed prosecution to proceed against defendant on "unfounded crimes or offenses" that had not been considered by a legally constituted grand jury. In the judge's "acts" of "judicial misconduct, the trial judge "denied" defendants rights to disclosure (Tr. Page 15, lines 5-9), and in violation of defendants "due process of law" to be entitled to "prepare a defense" and "obtain" impanelment documents infringed on his right to be tried and convicted, if convicted, only on indicted offenses.

On April 12-13, 2016, a state grand jury "had not" met to consider any criminal allegations against defendant, as evidenced by Court Admin. South Carolina Supreme Court. See Correspondence dated 10-23-17 and 11-6-17 (Enclosed). It is "indisputable" that in violation of the South Carolina State Constitution Art. 5 § 22 and Art. 1 § 11 that a state grand jury had not convened and returned an indictment against

defendant in violation of § 17-19-10 and defendants 14th amendment right to "due process of law".

The trial judge was aware that "impanelment documents" did not exist (emphasis), see Court Admin. correspondence dated 10-23-17, and 11-6-17, it is "indisputable" that there was "no court reporter assigned" to "record" grand jury proceedings, and "very clear" that a state grand jury had not convened on dates of defendants indictments (4-12-16/4-13-16). Defendants right to obtain and review impanelment documents was "infringed upon" by the trial court and A.A.G.'s for the State. See Section 14-7-1720(A) and (D) and Rule 5, S.C.R.C.P.; Section 14-7-1700; Tr. Page 15, lines 5-9; trial judge denied defendant due process of law and "preparation of a defense".

In violation of section 14-7-1750, twelve or more state grand jurors had not met to return a true-bill of indictment, in fact, there is "no record" of any state grand jury proceedings occurring on dates of defendants "alleged" indictments, because there was "no court reporter assigned to record grand jury proceedings because a state grand jury did not convene. (See enclosure).

The A.A.G.'s and the trial judge committed "fraud on the Court" and "fraud against petitioner rights. The grand jury and petit jury are seperate and independent, and the petit jury cannot usurp the role of the grand jury.

(Argument)

Discussion: "An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles. See S.C. Const. Art. I §11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury..."); S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...") As was explained in State V. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"An indictment is needed to give "notice" to the defendant of the charges against him." Gentry, 363 S.C. at 102 n. 6, 610 S.E.

The indictment is the charge of the State against the defendant, the pleading by which he is [informed of the fact], and the [nature and scope of the accusation]. When the indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him.

He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters [promptly and properly determined]; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge.

Accordingly, defendant challenged the subject matter jurisdiction based on the indictment, when before a jury being sworn, defendant requested the "minutes" or impanelment documents from state grand jury proceedings to which he was denied by the trial judge, prejudicing defendants right to "prepare a defense." (See Tr. dated July 24-28, 2017, Page 15, Lines 5-6; 7-9.) (emphasis), as well as the prejudice suffered from the infringment of the right to challenge whether a legally constituted grand jury had "indicted" defendant.

A defendant has a constitutional right to demand that a grand jury which is propecly established and constituted under the law consider the criminal allegations against him. See S.C. Const. Art. I § 11 and Art. V § 22. "[O]ne who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instance where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the State constitution. Rector, 158 S.C. at 230, 155 S.E. at 392 (internal quotes omitted).

(This satisfie's the requirement of Section 17-27-20, Paragraph (A)(1)...)

An indictment or "notice document" issued by a grand jury which is established or constituted illegally is deemed a nullity. An indictment which is a nullity would be insufficient, [as a matter of law], to give the required notice to a defendant. In such cases, a defendants challenge "does not assert a disqualification which affects only a member of a body otherwis lawful, nor a mere irregularity in doing [that] which the law requires, which assumes a power to act; but it goes to the [existence] of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity. State V. Edwards, 68 S.C. 318, 322, 47 S.E. 395, 396 (1904)(where legislative act under which grand jury was created and impaneled was later declared unconstitutional, grand jury was an illegal body and thus murder indictment issued was a nullity and incurable.) See also State V. Sanders, 251 S.C. 431, 438, 163 S.E. 2d 220, 224 (1968) (indicating that exclusion of women from grand jury service could cause indictment to be a nullity based on challenge that goes to [existence] of grand jury as a whole, but in this case the male-only grand jury which indicted defendant was proper under then-existing law, as women were

not allowed to serve on juries until state constitutional amendment in 1967 and grand jury system could not undergo fundamental change overnight); State V. Rafe, 56 S.C. 379, 34 S.E. 660 (1900)(stating that if record revealed every grand juror was disqualified or if only twelve grand jurors participated and one of them was disqualified, then the grand jury would be illegal and any indictment issued would be a nullity.) Similarly, and indictment issued by a grand jury in which the jurors were selected in an illegal or discriminatory manner likely would be deemed a nullity and, as a matter of law, would be insufficient to give the required notice to a defendant. See e.g. Campbell V. Louisiana, 523 U.S. 392, 398, 118 S.Ct. 1419, 1423, 140 L.Ed. 2d 551, 559 (1998)(Finding white defendant had standing to raise equal protection challenge to discrimination against black persons in selection of grand jury; "discrimination on the basis of race in the selection of members of a grand jury ... strikes at the fundamental values of our judicial system because the grand jury is a central component of the criminal justice process"); Vasquez V. Hillery, 474 U.S. 254, 263-264, 106 S.Ct. 617, 623, 88 L.Ed 2d 598, 609 (1986)(holding racial discrimination in selection of grand jury is fundamental flaw undermining structural integrity of criminal tribunal itself and, therefore is not subject to harmless error review); Sheppard V. State, 357 S.C. 646, 656-57, 594 S.E. 2d 462, 468 (2004)(affirming denial of defendants timely motion to quash indictment based on claim that racial discrimination infected grand jury selection process because statistical data did not support the claim).

The circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity (Tr. Page 19, lines 8-16) or proves the disqualification of an individual juror. Otherwise, the defendants constitutional right to demand that his case be considered by a grand jury which is [properly established and constituted] under the law would have no force or effect.

In sum, a defendant[is] entitled to review impanelment documents in order to determine, by a timely motion to quash an indictment made before the jury renders its verdict, whether the state grand jury which indicted him was legally established or suffered from any lesser irregularity which implicates the defendant's constitutional right to have his case considered by a grand jury which is [properly constituted under the law.]

Accordingly, defendant requested impanelment documents and was denied by trial judge (Tr. Page 15, lines 5-9)(Enclosed). It is "indisputable" that a state grand jury had not convened, as no court reporter was assigned to record grand jury proceedings on dates of indictment as evidenced by South Carolina Supreme Court (Court Administration). (Enclosed).

Accordingly, impanelment documents ordinarily may be released to a defendant after the state grand jury has issued a true bill of indictment against that defendant. A defendants request should be made prior to trial (Tr. Page 15, lines 5-6)(Enclosed), pursuant to Rule 5, SC Crim. P. If the State should object to releasing all or part of the impanelment documents, a defendant may move to compel discovery (Tr. Pages 15, 16, 17, 18, 19 - Lines 1-25)(emphasis), of the documents. See Rule 5(d), SC Crim. P.

The burden of proof is on the State" to demonstrate why the documents should not be released because only the State possesses the necessary information information to analyze the issue and explain to the court why releasing the documents should be prohibited or delayed. See Rector, 158 S.C. at 228, 155 S.E. at 391 (explaining that requiring a defendant to show he was prejudiced by the presence of a disqualified grand juror, where defendant had no right to inquire into vote of grand jury, "is to demand an impossibility"). The circuit court may, if necessary, conduct an [in camera review] of the impaneling documents to determine whether the [State has met its burden] in either prohibiting or delaying their release.

In violation of defendants right to due process of law, and Rule 5 (d), the trial judge "took away" the States burden of proof to demonstrate why the documents should not be released... See Tr. Pages 15, 16, 17, 18, 19 - Lines 1-25 (emphasis).

Article V, § 22

Article V, § 22 provides, in pertinent part: The grand jury of each county, and the "state grand jury", as the General Assembly may establish by general law, [shall] consist of eighteen members, twelve of whom [must] agree in a matter before it can be submitted to the court. - (emphasis)

In violation of South Carolina Constitution, Art. V, § 22 and the Fourteenth Amendment of the United States Constitution, defendant had not had the required 12-18 jurors to constitute "a body" to consider criminal allegations against him, as evidenced by Court Admin. (Enclosed).

This satisfies the requirements of Section 17-27-20, Paragraph (A)(1).

Court Was Without Jurisdiction To Impose Sentence

Lack of subject matter jurisdiction is fundamental and may not be waived. Hooks V. State, 353 S.C. 48, 577 S.E.2d 211 (2003).

State V. Schmieser, Feb. 26, 2016, 159 Idaho 768

"Since the indictment or information provides subject matter jurisdiction to the court, the court's jurisdictional power depends on the charging document being legally sufficient to survive challenge."

"To be legally sufficient, a charging document must meet two requirements: it must impart jurisdiction and satisfy due process. U.S.C.A. Const. Amend. 14.

A circuit court has s.m.j. to convict a defendant of a criminal offense if: (1) there has been an indictment that sufficiently states the offense, State V. Walton, 603 S.E.2d 873 (S.C. Ct. App. 2004).

U.S. V. Tanner, U.S.C.A., Jan. 9, 2007 1 Fed. Appx. 162

"In order to sustain challenge to trial courts jurisdiction, criminal defendant must establish that indictment does not, by any reasonable construction, charge offense for which he was convicted. Hayle V. United States, 815 F.2d 879, 881-82 (2d Cir. 1987); United States V. Broce, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989).

Accordingly, defendant presents indisputable proof that a state grand jury did not convene, and lacked jurisdiction to convict defendant. this proof is as evidenced by Court Administration's correspondence to defendant dated 10/23/17 and 11/6/17 (Enclosed)

This satisfies the requirement of Paragraph (A) (2).

In a criminal case, the trial court acquires subject matter jurisdiction by way of a valid indictment, and a court lacks subject matter jurisdiction to [convict] and [sentence] a defendant for an offense for which he was not indicted. State V. Johnston (S.C. 1999) 333 S.C. 459, 510 S.E. 2d 423.; "No person shall be punished until legally convicted", § 17-25-10.; State V. Beachum, 288 S.C. 325, 342 S.E. 2d 597 (1986), "In other words, a court lacks subject matter jurisdiction to convict and sentence a defendant for an offense for which he was not indicted - I.D.

A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. Bailey V. State, 392 S.C. 422, 433, 709 S.E. 2d 671 (2011).

The trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury is sworn. Person cannot be convicted of crime with which he was not charged unless it is lesser-included offense of charged offense.

United States V. McDill, U.S.C.A., Eighth Circuit. Sept. 15, 2017 871 F. 3d 628 "A defendant may not be tried on charges that were not made in the indictment".

"It is axiomatic that a defendant may not be tried on charges that were not made in the indictment". United States V. Novak, 217 F. 3d 566, 574 (8th Cir. 2000).

The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State V. Parker (S.C. 2002) 351 S.C. 567, 571 S.E. 2d 288; Joseph V. State (S.C. 2002) 351 S.C. 551, 571 S.E. 2d 280.

Trial court lacked subject matter jurisdiction to convict defendant for Kidnapping where there was no indictment for Kidnapping at the time the jury was sworn, and an indictment, which was true-billed and published by the clerk during a temporary suspension of the trial, did not remedy the s.m. jurisdictional defect. (State V. Beachum (S.C. 1986) 288 S.C. 325, 342 S.E. 2d 597.

There exist errors in the indictment, sentencing, and standard of proof. Moreover, the integrity, fairness, and public reputation of the proceeding were seriously affected by the 6th and 14th Amendments violations in this case. The discretion to correct such systemic errors does not depend on a defendant's innocence or guilt. In accordance with the carefully crafted structure of our criminal process, the government's or States failure to present such evidence to the grand jury and obtain a separate, greater charge in an indictment warrants vacatur of petitioners sentences.

A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4) [SCRCP] Gainey V. Gainey, 382 S.C. 414, 424, 675 S.E. 2d 792 (Ct. App. 2009) "A void judgment is one that, from its inception, is a complete nullity and is without legal effect"... Id.

Fraud on the Court

Where fraud has caused a judgment, it is immaterial whether it be actual or constructive fraud. Either vitiates the judgment and deprives it of any effect as an estoppel. Mangold Vs. Bacon, 299 Mo., p. 487; Clyce Vs. Anderson, 49 Mo. 37. See also Johnson Vs. Waters, 111 U.S., p. 667; Arrowsmith Vs. Gleason, 129 U.S., p. 100.

Fraud upon the Court itself constitutes fraud upon the rights of petitions H.K. Porter Co. V. Goodyear Tire & Rubber Co. 536 F.2d 1115, 1119 (6th Cir. 1976)("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court".)(Emphasis).

The fraud on the court doctrine encompasses conduct: (1) on the part of an officer of the court; (2) directed to the "judicial machinery" itself; (3) involving either willful blindness to, or reckless disregard of, the truth; (4) amounting to a positive averment or a "failure to disclose" where there was a duty to do so; and (5) that "deceives the court."

Accordingly, presented evidence (Court Admin. correspondence dated 10-23-17 and 11-6-17); (Letter from Christina Bass of SLED dated June 9, 2016); (Letter from Mary P. Brown dated/Filed 2018 Jan. 31), will establish that the A.A.G.'s State Grand Jury Clerk, willfully printed and published false and misleading information in its indictment in order to keep secret its violations of statutory law, thus committing the act of perjury, fraud on the court, and fraud on the A.G.'s Office, which renders all judicial proceedings invalid and its indictment null. In the case of (Ind. 2016-GS-47-02-03), Mr. Roberts bill of indictment prints that it was returned "at a court of General Sessions", convened on Apr. 12-13, 2016 - "the grand jurors of Richland County, present upon their oath", the title page of "alleged" indictment prints that it was published at a court of General Sessions term as convened on Apr. 12-13, 2016 in Richland County.

The false return of defendants indictment directed to the "judicial machinery" itself (Berkeley County Court of General Sessions), by an officer of the court, involving reckless disregard of, the truth, perpetrated by Judge Jefferson, and A.A.G.'s for the State and the Clerk of the State Grand Jury, amounting to a positive averment or failure to disclose where there was a duty to do so (Tr. Page 15, Lines 5-9), that deceived the court.

Before the jury was sworn, pursuant to § 17-19-90, petitioner had moved to examine the state grand jury minutes (Tr. Page 15, Lines 5-6), and to dismiss the indictment on the grounds that the state grand jury had not convene to return an indictment against defendant (Tr. Page 19, lines 8-12), as evidenced by correspondence from Court Admin., that no proceedings had taken place because "no court reporter had been assigned to record grand jury proceedings on dates of defendants indictments. Judge Jefferson, in violation of the defendant's right to obtain and review impanelment documents, "being aware that they didnt exist", denied defendant "disclosure", the prosecutor having a duty to do so failed to disclose "impanelment documents" infringed on defendants right to "prepare a defense", in addition, failing to disclose that defendants case had [not] been before the grand jury, constituting "fraud on the court". The prosecutor's [intent] can be considered in some circumstances. See U.S. V. Jackson, 780 F.2d 1305, 1311 n. 4 (7th Cir. 1986) (government's bad faith to suppress evidence indicates that such evidence may be material

See U.S. V. Agurs, 427 U.S. 97, 107-11 (1976) (prosecutors constitutional duty to disclose favorable evidence governed by materiality standard and not limited to situations where defendant has requested favorable evidence). Prosecutor's actions to "deceive the court" constitutes "fraud on or upon the Court". In collusion with the actions of this "fraud upon the Court" was Judge Jefferson. Judge Jefferson stated: "I was assigned this case on May 20th of 2016 (Tr. Page 234, line 1). (emphasis), also see (Tr. Page 28, lines 13-14).

Role of the Grand Jury

The historic role of the grand jury is "to provide a fair method for instituting criminal proceedings," Costello V. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against "abitrary" and "oppressive" governmental action", United States V. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecting [of] citizens against unfounded criminal prosecutions." Branzburg V. Hayes, 408 U.S. 665, 686-87 (1972).

Convening "as a body of lay persons acting in secret," United States V. Hogan, 712 F. 2d 757, 759 (2d Cir. 1983), the grand jury must not only be "independent and informed," but must also "stand between the accuser and the accused... to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." Wood V. Georgia, 370 U.S. 375, 390 (1962).

Public confidence requires that prosecutors respect and abide by the constitutional, statutory and judicial limits imposed on their conduct during the grand jury process. When the purposes of the grand jury are undermined by severe, deliberate and repeated instances of prosecutorial misconduct, the credibility and integrity of the criminal justice system are themselves put at risk.

In re Grand Jury Subpoena John Doe, No. 05 GJ 1318 U.S.C.A., Fourth Circuit Oct. 14, 2009 584 F.3d 175

"The grand jury is responsible for both authorizing criminal prosecutions when probable cause exists and ensuring the protections of citizens against unfounded criminal prosecutions when probable cause is lacking." U.S.C.A. Const. Amend. 4.

Also see., In re Grand Jury, John Doe No. G.J. 2005-2, U.S.C.A. Fourth Cirquit, Feb. 22, 2007 478 F.3d 581.

Due Process

Due process "has to do ... with the denial of that "fundamental fairness, shocking to the universal sense of justice." It deals with neither power nor jurisdiction but with their exercise." Kinsella V. United States, 361 U.S. 234, 246 (1960). The Due Process Clause restrains those arbitrary and unreasonable exertions of power by the States which are not really within the lawful State power, since they are so unreasonable and unjust as to impair and destroy fundamental rights. American Land Co. V. Zeiss, 219 U.S. 47 (1911).

Courts will dismiss indictments for government misconduct outside the indictment process on due process grounds if such conduct is so outrageous that it violates "Fundamental faicness" or is "shocking to the universal sense of justice". U.S. V. Russell, 411 U.S. 423, 432, (1973); See, e.g. U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002).

Supreme Court has held that a defendant must show actual prejudice to warrant dismissal of an indictment with prejudice. See U.S. V. Morrison, 449 U.S. 361, 364-66 (1981).

Accordingly, defendant suffered [prejudice] when he was not able to prepare a defense "against" unfounded charges" that lead directly to the defendants "unlawful conviction". The infringement of defendants right pursuant to § 17-25-10 "No person shall be punished until legally convicted, and defendants right to be tried by grand jury indictment pursuant to § 17-19-10, and the prejudice defendant suffered, i.e., being taken by surprise and hence unable to combat the charges against him. See, State V. Bakes, Supreme Court of South Carolina, Feb. 11, 2015 411 S.C. 583. Defendants incarceration for conduct that does not amount to a violation of S.C. Law establishes prejudice]. Defendant has proved a "fundamental miscarriage of justice, because he is incarcerated for conduct that does not violate S.C. law, and he is, in fact, innocent of the charge upon which he is now imprisoned.

A.A.G.'s for the State infringed on defendants liberty interest. A Liberty interest protected by the Fourteenth Amendments Due Process Clause may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty", or it may arise from an expectation or interest created by [state laws] or [policies.]

1.) Defendant had a right to be indicted by a grand jury pursuant to § 17-19-10, however defendant had not been indicted by a grand jury. See Correspondence (Court Admin)

2) Defendant had a right to challenge whether the "grand jury" which indicted him was legally constituted and established pursuant to Art. I. § 11 of the state constitution, to no avail. (See Tr. Page 15, lines 5-9).

3) Twelve or more state grand jurors had not met or convened to find that probable cause existed for the indictment pursuant to § 14-7-1750, causing A.A.G.'s usurpation of the grand jurys role.

4.) Defendant was [prejudiced] his right pursuant to § 14-7-1720 (A) and D) and Rule 5, South Carolina Rules of Procedure., to review and to reproduce the stenographically or electronically recorded materials because they do not exist, see correspondence from Court Admin. dated 10-23-17 and 11-6-17. (emphasis)

The incidents related are flagrant and unconscionable. Taking adventage of his special position of trust, the A.A.G.'s impaired the grand jurys integrity as an independent body creating [prejudice] and violation to defendants 4th Amendment right to the United States Constitution.

Accordingly, petitioner suffers prejudice, great and immediate due to the repeated violations of constitutional and statutory law.

Substantive Due Process

"The touchstone of substantive due process is protection of the individual against arbitrary action of government. County of Sacramento V. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998).

Prosecutors "egregious" behavior was "fatally" arbitrary, abusing his executive power, or employing it as an instrument of oppression.

For example: Defendant was accused of crimes not investigated by a grand jury, and allowed government agents to make false and misleading statements [prejudicing] defendant. See e.g. U.S. V. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983).

Prosecutor encouraged false testimony. For instance, when defense counsel cross-examined William Brown, defense Counsel questioned: "Were you arrested right then?" (Tr. Page 474, line 14). Mr. Brown replied: "Right then, no." (Tr. Page 474, line 15). In response, defense Counsel asked: "When were you arrested?" (Tr. Page 474, line 16). Mr. Brown then replied: "I [never] was. Cooperated. (Tr. Page 474, line 17). When defense Counsel stated: "OKay. By arrested. Were you taken into custody right then? Did they put you in hand cuffs or sit you down and tell you that you are under arrest? (Tr. Page 474, lines 18-20). Mr. William Brown answered "No" (Tr. Page 474, line 21). (emphasis). Mr. William Brown was [never] arrested and formally charged with any crimes, and yet he was listed on defendants "indictment" as a co-conspiring "co-defendant" and gave "testimony" as such, though false, encouraged by the A.A.G., see also, (Tr. Page 488, lines 11-25; Tr. Page 489, 1-7) (emphasis). (Tr. Page 490, lines 22-25).

Example 2: Being as there were [no warrants] [commitment orders,] or "authentic [indictments] in defendants case, the defendant, in violation of the warrant clause and due process of law was held unlawfully via a [letter] from a "Christina Bass" of SLED dated June 9, 2016 (Enclosed).

Conclusion

An indictment found by a grand jury is indispensable to the power of the court to try defendant for the crime with which he was charged, and a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. Because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a defendant cannot be held to answer for any offense not charged in an indictment returned by a grand jury, a court is without jurisdiction to impose a sentence for an offense not charged in the indictment.

The grand jury and petit jury are separate and independent, and the petit jury [cannot] usurp the role of the grand jury.

Accordingly, the trial court exceeded its jurisdiction in the sentencing of defendant for crimes with which he was never charged, thus depriving defendant of the constitutional right to "answer" only for those crimes presented to the grand jury.

In light of the numerous deprivations of defendants rights to due process of law and equal protections under the law, and the egregious and fatally arbitrary actions on the part of the Assistant Attorney Generals, defendant asks that sentences be vacated, and indictments be dismissed with prejudice.

Questions Presented To The Court

1.) Whether petitioners 14th Amend. to due process of law and equal protection under the law violated when trial court convicted defendant on unindicted offenses?

2.) Whether petitioners 14th Amend. to due process of law and equal protections under the law violated when trial judge denied the petitioner "impanelment documents", thereby denying Brady material to petitioner? (And does this denial to prepare a defense constitute prejudice?)

3.) Whether petitioners 14th Amend. to due process of law and equal protections under the law violated when trial judge "inserted" herself into plea negotiations, in violation of Rule 11?

4.) Whether petitioners 14th Amend. to due process of law and equal protections under the law violated when trial judge infringed on defendants right pursuant to section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, to obtain a copy of the transcript from state grand jury proceedings?

5.) Whether petitioners 14th Amend. to due process of law and equal protections under the law violated when Judge Jefferson "relieved prosecutors burden of proof" pursuant to Rule 5(d) SCCrim.P.?

This [letter] from "Christina Bass" of SLED dated June 9, 2016 is indisputable to the [fact] that defendant had not been indicted. Please also see Correspondence from Court Admin. dated 10-23-17 and 11-6-17. (Emphasis)

Section 14-7-1750. states in pertinent part: ...

"If the presiding judge considers the indictment to be within the authority of the state grand jury and otherwise in accordance with the provisions of this article, [he] shall return the indictment [by order] to the county where [venue] is appropriate under South Carolina law for prosecution by the Attorney General or his designee. (emphasis).

This [letter] is not an "order" from the presiding judge of the state grand jury, nor is it a warrant for any indicted offenses, it is, in fact, direct evidence of a "conspiracy" between the Attorney Generals Office, Christina Bass of SLED, Justin Wingo of SLED, Judge Newman, and Judge Jefferson, and Defense Counsel Timothy Griffith, the State Grand Jury Clerk and other agents, to infringe on defendants "liberty interest". Please See (Conspiracy Against Public Policy) SC Code Ann. § 16-17-410 (emphasis).

"Substantive due process prohibits the government from depriving a person of life, liberty, or property for arbitrary reasons." U.S.C.A. Const. Amend. 14.

Amendment XIV, § 1, of the Constitution of the United States provides in part as follows: ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

6.) Whether trial judge failed to exercise her discretion, or abused her discretion when petitioner, in a criminal case show a "particularized need" for access to grand jury transcript?

7.) Whether trial judge committed "fraud on the Court" and "fraud upon petitioners legal rights"?

8.) Whether trial judge "conspired" with prosecution to infringe on petitioners legal rights and "liberty interest"?

9.) Whether trial judge violated defendants due process of law when the judge refused to allow petitioner to present exculpatory evidence?

10.) Whether trial judge infringed petitioners right to due process of law to have an "impartial" arbiter consider his case?

11.) Whether trial judge infringed defendants right to present an alibi?

12.) Whether trial judge "initiated" criminal charges against petitioner?

Relevant Statement Of Facts

Judge Jefferson committed judicial misconduct when she initiated criminal charges against defendant.

Judge Jefferson violated petitioners due process of law and equal protections under the law, when she denied defendant impanelment documents to "deep secret" the fact that "no impanelment documents existed", in order to complete the "act of conspiracy" against defendants legal rights, thereby denying "disclosure". (P.15, lines 5-9). Judge Jefferson refused to allow defendant to present exculpatory evidence in order to "lend the prestige of her office to advance the private interest of the prosecution. (P.17, lines 20-23)(P.19, lines 8-18).

Showing partiality to the prosecution, Judge Jefferson "urged" as the Gate Keeper, for defense counsel to "waive" defendants right to confront witnesses in the "chain of custody" by "stipulating" that the "chain of custody" for [all] the evidence has been established, in order to "greatly truncate the list of witnesses". (Tr. Page 74, lines 4-25); (Tr. Page 75, lines 1-7).

Judge Jefferson relieved prosecutors "Burden Of Proof" pursuant to Rule 5(d). (Tr. Page's 15, 16, 17, 18, 19 = lines 1-25)(emphasis).

Judge Jefferson "conspired" with A.G. and other agents to unlawfully convict defendant in an "unfounded prosecution", on unindicted offenses, thereby committing the act of "Fraud Upon the Court" and "Fraud Upon defendants legal rights. Judge Jefferson was showing "partiality" and bias in her judicial duties, acting as a second prosecutor trying to "coerce" defendant to plead guilty.

Judge Jefferson violated Brady when she refused petitioner "Discovery", (Page 15, lines 5-9). The judge unlawfully convicted defendant when the trial court exceeded its jurisdiction and could not lawfully pass judgment on unindicted offenses. The judge also refused to allow defendant to present an alibi. (P. ~~136~~ 620, lines 15-19)

1w)

Discussion: Judge Jefferson violated provisions of the Code of Judicial Conduct, Rule 501, SCACR: ....

(1) Canon 1(A), by failing to establish, maintain and enforce high standards of conduct in defendants trial proceedings.

(2) Canon 2(A), by failing to respect and comply with the law, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;

(3) Canon 2(B), by allowing social or other relationships to influence his conduct or judgment, and by lending the prestige of his judicial office to advance the private interest of another;

(4) Canon (3)(B)(5), by failing to perform judicial duties without bias or prejudice.

A criminal defendant has the due process right to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. U.S.C.A. Const. Amend. 14

Judge Jefferson failed to respect and comply with the law, in violation of Canon 2(A). Judge Jefferson denied defendant due process of law and aided and abetted prosecutions unfounded prosecution when she denied defendant the state grand jury impanelment documents - a right to which defendant is entitled, thereby prejudicing defendants preparation of a defense. Please See.,

2.)

Trial transcript dated July 24-28, 2017 - Page 15, Lines 5-6; 7-9; U.S.C.A. Const. Amend. 14; Code 1976 §§ 14-7-1700, 14-7-1720, 14-7-1770, Rule 5 Crim. Proc. Rule 5.

Judge Jefferson denied "alleged" documents because the trial judge was aware that a State Grand Jury had not convened on dates of "alleged" indictments (4-12-16, 4-13-16), and, in fact, that "no court reporter had been assigned to [record] grand jury proceedings as evidenced by Court Administration. See Correspondence from Court Reporter Manager, Desiree Allen. This misconduct by the judge satisfies the requirement of Canon 2(A).

It should be noted: South Carolina Code Ann. § 14-7-1720 generally provides that State Grand Jury material is secret, but allows disclosure for the purpose of "complying with constitutional, statutory, or other legal requirements or to further justice". See S.C. Code Ann. § 14-7-1720(A)(5). Additionally, defendants are [entitled] to discovery in criminal cases, pursuant to the constitution, statue, and rule. See Brady V. Maryland, 373 U.S. 83 (1963); Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005); S.C. Code Ann. § 14-7-1700; Rule 5, SCRCrimP.

In violation of Canon 2(B), Judge Jefferson allowed social or other relationships to influence her conduct or judgment, and by lending the prestige of her judicial office to advance the private interest of the prosecution. For example, Judge Jefferson "urged" as the "Gate Keeper", defense counsel to "waive" defendants right to confront witnesses in the "chain of custody" by "stipulating" that the chain of custody for all the evidence has been established, in order to "greatly truncate list of witnesses." (emphasis) (Tr. Page 74, Lines 4-25) (Tr. Page 75, Lines 1-7).

3.)

Example 2: "The burden of proof is on the State to demonstrate why the documents should not be released because [only] the State possesses the necessary information to analyze the issue and [explain to the court] why releasing the documents should be prohibited or delayed, pursuant to Rule 5(d), S.C.Crim.P.

Despite the "burden of proof" being on the [State] to establish, Judge Jefferson, in violation of statue, relieved the prosecutors "burden of proof" showing complete "partiality" to prosecution, in order to collude with State in unlawful conviction. Please See, Trial transcript Page 15, lines 19-25; Page 16, lines 1-25; Page 17, lines 1-25; Page 18, lines 1-25; Page 19, lines 8-25; Page 20, lines 1-25; Page 21, lines 3-4. In regards to defendant trying to get an answer from the judge regarding from "whom" would he have to write to obtain the "transcript", defendant stated: "I understand, but who would you write for that? (Tr. Page 17, lines 14-15). Trial judge stated: "You would have to know the name of the court reporter. And if you ask court administration, they will give you that, [or you would have gotten that from "probably" the State Grand Jury clerk] (emphasis). (Tr. Page 17, lines 16-19).

Please See, section 14-7-1700 in part: "Subject to the limitations of Section 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, a copy of the transcript of the recorded testimony or proceedings [requested by the Attorney General] or his designee shall be provided to the defendant by the court reporter, [upon request], at the transcript rate established by the [Office of Court Administration]. (emphasis)

When defendant attempted to provide the "exculpatory" evidence from Court Administration, defendant stated: "All right.

4.)

Can I [provide] you with the letter to [show] that I've done that?(Tr. Page 17, lines 20-21). The judge stated: "I dont have any reason to doubt your word, but I dont Know that court administration -- who is the State Grand Jury court reporters? How does that work? They freelance, don't they?(emphasis added) (Tr. Page 17, lines 22-25). Judge Jefferson refused to allow the presentation of exculpatory evidence by defendant. (Tr. Page 17, lines 20-25). The judge committed the act of Fraud on the Court and Conspiracy. Hence, "no court reporter had been assigned to record State Grand Jury proceedings on 4-12-16, 4-13-16 in regards to indictment numbers 2016-GS-47-02 and 2016-GS-47-03 concerning defendants case. Judge Jefferson was/is aware of said facts, as evidenced by Correspondence from Court Admin. dated 10-23-17 and 11-6-17.

Trial judges "denial" of defendants right to impanelment documents not only "prejudiced" defendants preparation of a defense, "defendant has been prejudice, i.e., taken by surprise and hence unable to combat the charges against him." State V. Baker, Supreme Court of South Carolina, Feb. 11, 2015 411 S.C. 583, but also petitioners legal rights.

Trial judges conduct relieving prosecutors "burden of proof" satisfys the requirements of Canon 2(B), Canon (3)(B)(5), and Canon 2(A). Judge Jeffersons misconduct serves as a "blatant disregard for the law and the Supreme Court precedents.

When the trial judge stated: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?(Tr. Page 19, lines 8-10). The defendant stated: "Well, I'm actually going to [show] that no State Grand Jury even occurred." Tr. Page 19, lines 11-12)(emphasis).

5.)

Without question, defendant's desire to view the documents related to the grand jury proceedings was well-founded in the law. See Evans V. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, defendant explained he had questions about his indictment not being "certified." (Tr. dated July 24-28, 2017, Page 19, lines 21-23.)

Defendant explained that during a pre-trial hearing, the judge indicated the indictments [were not] certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. (Tr. dated July 19, 2017, Page 23, lines 10-20.)(Tr. dated July 24-28, 2017, Page 19, lines 17-23). The judge told defendant that "once something is in a court order, sir, it's already certified." Tr. dated July 24-28, 2017, Page 19, lines 24-25). She told defendant that only documents going out of state would need to be certified. Tr. dated July 24-28, 2017, Page 20, lines 1-2.

According to the judge, "never, under any circumstances", would an individual receive "certified indictments". Tr. dated July 24-28, 2017, Page 20, lines 2-4). Certainly, defendant's request for certified indictments was not unreasonable in light of the statutory requirement that an indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

"There is no denial of [equal protections] of the laws in constitutional or statutory provisions relating to jury and grand jury. U.S.C.A. Const. Amend. 14.

6)

Judge Jefferson has failed to maintain, enforce, or observe high standards of conduct to ensure that the [integrity] and independence of the judiciary are preserved, in violation of Rule 501; Canon 1, SCACR.

She has also failed to conduct herself in a manner which promotes public confidence in the integrity and [impartiality] of the judiciary, in violation of Rule 501, Canon 2(A), SCACR.

An Attorney for the government and the defendants attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. [The court must not participate in these discussions.] See Rule 11. Pleas... Judge Jefferson did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary...]

Example 3.: Judge Jefferson was showing "partiality" and bias in her judicial duties, acting as a second prosecutor in trying to convince defendant to plead guilty, in trial, despite defendant exercising [his] right to proceed with a trial. See Tr. dated July 24-28, 2017 (Tr. Page 81, lines 1-25)(Tr. Page 82, lines 1-25)(Tr. Page 83, lines 13-25) (Tr. Page 195, lines 1-25)(Tr. Page 196, lines 1-25)(Tr. Page 197, lines 1-25) (Tr. Page 198, lines 1-25)(Tr. Page 199, lines 1-25)(Tr. Page 200, lines 1-25) (Tr. Page 201, lines 1-25)(Tr. Page 202, lines 1-25 - emphasis)(Tr. Page 203, lines 1-25)(Tr. Page 204, lines 1-25)(Tr. Page 205, lines 1-25)(Tr. Page 206, lines 1-25)(Tr. Page 207, lines 1-25)(Tr. Page 208, lines 1-25)(Tr. Page 209, lines 1-25)(Tr. Page 210, lines 1-25)(Tr. Page 216, lines 12-25)(Tr. Page 217, lines 1-25)(Tr. Page 218, lines 1-25)(Tr. Page 219, lines 1-25)(Tr. Page 220, lines 1-25)(Tr. Page 221, lines 1-25)(Tr. Page 222, lines 1-25)(Tr. Page 224, lines 1-25)(Tr. Page 225, lines 1-25)(Tr. Page 226, lines 1-25)(Tr. Page 227, lines 1-24)(Tr. Page 228, lines 1-25)(Tr. Page 229, lines 1-25)(Tr. Page 230, lines 1-25)(Tr. Page 231, lines 1-25)(Tr. Page 234, lines 1-25)(Tr. Page 235,

7.)

lines 1-25)(Tr. Page 236, lines 1-25)(Tr. Page 237, lines 1-25), emphasis, Trial judges actions constitutes impermissable coersion.

The trial judge must not show "partiality" to the prosecution. The trial judge must act with [absolute impartiality] in the performance of judicial duties. State V. Pace (S.C. 1994) 316 S.C. 71, 447 S.E. 2d 186.

Example 4.: Judge Jefferson stated that defendants case was assigned to her by Judge Newman on May 20, 2016 (Tr. Page 28, lines 13-14); (Tr. Page 234, line 1; line 13). In the trial courts efforts to collaborate with the State in an unfounded prosecution, the judge says and declares that defendants case was assigned by judge Newman despite having "no record" of state grand jury proceedings because "no court reporter had been assigned to record grand jury proceedings, therefore no transcript being available, as evidenced by Court Administration, points to the fact that Judge Jefferson "initiated criminal charges".

Please See, In re Newberry County Magistrate English, Supreme Court of South Carolina, Jan. 23, 2006 - 367 S.C. 297

"Except in the case of contempt of court, it is judicial misconduct for a judge to initiate criminal charges." (emphasis)

These two examples satisfys the requirments of Rule 501, Canon 2(A), SCACR, Canon 1(A), and Canon (3)(B)(5).

Defendant suffers great and immediate injury and prejudice by actions of the trial judge, and as a result of these actions the defendant is imprisoned for conduct that does not amount to a violation of S.C. law.

Defendant presents "indisputable" proof of being imprisoned and convicted unlawfully as a result of "Conspiracy" and "Fraud" on the part of the Attorney General and trial court, by way of correspondence

8.)

from Court Administration, dated 10-23-17, and 11-6-17.

In re Harrelson, Supreme Court of South Carolina, Feb. 11, 2008, 376 S.C. 488." By violating the Code of Judicial Conduct, judge also violated Rules for Judicial Disciplinary Enforcement.

Appellate Court Rule 502, Judicial Disciplinary Enforcement Rule 7(A)(1). Also See, Matter of McKinney, Supreme Court of South Carolina, Nov. 4, 1996 324 S.C. 126." Underlying theme of Code of Judicial Conduct is that judges above all else must preserve integrity and independence of judiciary. Appellate Court Rule 501, Code of Jud. Conduct, Canons 1, 2(A).

(The Court's power to render the particular judgement requested).

In re Estate of Hoyer ... Supreme Court, specifically, jurisdiction is composed of three elements: (1) personal jurisdiction, (2) subject-matter jurisdiction; and (3) the court's power to render the particular judgment requested.

Trial Court had no right to act.

"The circuit court does not have subject-matter jurisdiction to [convict] A defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State V. Parker (S.C. 2002) 351 S.C. 567, 571 S.E. 2d 288; Joseph V. State (S.C. 2002) 351 S.C. 551, 571 S.E. 2d 280.

Trial court lacked subject-matter jurisdiction to [convict] defendant for Kidnapping where there was no indictment for Kidnapping at the time the jury was sworn, and an indictment, which was true-billed and published by the clerk during a temporary suspension of the trial, did not remedy the s.m. jurisdictional defect. (State V. Beachum (S.C. 1986)

288 S.C. 325, 342 S.E. 2d 597. By allowing social or other relationships to influence her conduct or judgment, and by lending the prestige of her judicial office to advance the private interest of the prosecution, judge Jefferson [unlawfully convicted] defendant, without due process of law and equal protection under the law, in violation of the Fourteenth Amendment of the United States Constitution and § 17-19-10 and the defendants due notice. See S.C. Const. Art. 1 § 22:

"No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on [due notice] and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be [deprived] of [liberty] or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review."

Judge Jefferson unlawfully convicted defendant, depriving defendant of liberty, to collaborate with prosecutor in an unfounded prosecution, "prejudicing" defendants right to "prepare a defense", in violation of his due process of law, as well as the "prejudice" defendant suffers as being imprisoned on conduct that does not violate S.C. Law.

This satisfies the requirements of Canon 2 (A), Canon 2 (B), and Canon (3) (B) (5). A criminal defendant has the due process right to have his case heard by a fair and impartial judge. U.S.C.A. Const. Amend. 14. A criminal defendant has the due process right to have a judge assigned to his case in a manner free from "bias" or the desire to influence the outcome of the proceedings. U.S.C.A. Const. Amend. 14.

10.)

Judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to defendant. For example, the judge stated: "I would [strongly] suggest that you take advantage of your lawyer's voice and really listen to what he's saying to you, and really listen, and take into consideration the strength or weakness of the State's case against you and whether you really want to roll the dice and have a trial"..... "And, normally, at this stage or juncture, the State would not be amenable to anything. But I think as a [courtesy] to] the [Court], they are [re-opening] the lines of negotiation." (Tr. Page 83, lines 16-20; 24-25)(Tr. Page 84, lines 1-2). (emphasis)

Trial judge also stated: "I don't know that I would leave my faith to 12 people." (Tr. Page 197, lines 19-20). Also see., (Tr. Page 202, lines 15-18)(Tr. Page 203, lines 3-9). See, Tr. Page 203, lines 17-18,... "There's really no good outcome because you [can't] go home." The judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to defendant when the judge stated: "25 to 40. Now, are you all willing to [negotiate] in the range of 7 to 25 on the first if he pleads, or some range of that, or some combination of the charges?" (Tr. dated July 24-28, Page 206, lines 12-14). The judge stated: "Well, the incentive is 25 to 40 years is a long time., in her attempts to coerce defendant to plead)(Tr. Page 216, lines 16-17). (Also see., Tr. Page 224, lines 10-14). (Emphasis!)

Judge Jefferson stated: "Well, Im going to tell you, 25 years is a lot longer than 18. And 40 is a lot longer than [18]. Thats a long time." (Tr. Page 226, lines 1-3). (Emphasis).

11.)

When defense was "making it clear" to the trial judge that defendant would not accept a "plea" for 18 years, defendant himself asserted, "No, we can go to trial."(Tr. Page 226, lines 11.) Further on, the judge continued to "coerce" defendant to plead when the judge stated: "And its up to you whether you want to go from being able to [argue] for "less" than "18" years to facing a [mandatory] 25."(Emphasis)(Tr. Page 232, lines 11-13.).

The judge made comments like: "the longer you wait, the more the [penalties] [enhance]".(Tr. Page 225, lines 21-22.); "Sometimes people get higher ranges after a trial". Tr. Page 224, lines 18.)(Tr. Page 217, lines 10-11). In an attempt to coerce the defendant into a "plea" and "co-operation", the trial judge stated: "Well, any deal is going to include cooperation unless they are going to ask for the high-end of whatever "they" are looking for."(Tr. Page 204, lines 4-6).

"The coercive effect of such comments, from a judge, is likely to be overwhelming, even well-intentioned judicial comments urging a plea or cooperation are inherently coercive and violates cannons, rules, and standards of judicial ethics

Judicial exhortations to plead guilty damage the integrity of the judiciary and criminal justice system in addition to fundamentally impairing the voluntariness of a plea and a defendant's right to a [fair process].

By encouraging defendant to plead guilty the court not only [inserted] itself into plea negotiations, violating Rule 11(c)(1), but also abandoned its judicial role as neutral arbiter

12.)

The judge took on the role of partisan or counselor by reinforcing the advice given to defendant by counsel to plead guilty. It is a gross departure from the judicial role for a judge to advocate that a defendant waive his constitutional rights. The judge's encouragement to enter a guilty plea was coercive. The judge put the credibility and authority of the bench behind defense counsels advice to plead guilty, in a "conspiracy" to commit fraud on the court, and parties knowledge of proceeding being an unfounded prosecution, and the judges refusal to allow defendant to present this "exculpatory evidence" that, in fact, there were/are no indicted offenses against defendant and Judge Jefferson is aware of this fact. Judge Jefferson conspired with the prosecution to obtain an unlawful conviction after [persistent attempts] to [coerce] defendant to plead guilty.

This conduct satisfies the requirements of Cannon 2(B), "by allowing social or other relationships to influence his conduct or judgment, and by lending the prestige of his judicial office to advance the private interest of another.

" A criminal defendant has the due process right to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. U.S.C.A. Const. Amend. 14."

13.) Prejudice

1.) Petitioner suffers great "prejudice" by being incarcerated for conduct that does not amount to a violation of S.C. Law.

2.) Trial judge infringed petitioners rights to "disclosure" and petitioners right pursuant to § 14-7-1720 (A) and (D) and Rule 5, and S.C.R.C.P. "prejudicing" petitioners "preparation of a defense".

3.) Petitioner suffers "prejudice" from "fraud upon petitioners legal rights" and violation of his rights to "due process of law and equal protections under the law".

4.) Petitioner suffers "prejudice" as a result of the damage, or detriment to his right pursuant to § 17-19-10, § 17-25-10, and Art. I. § 11, as well as Art. 5. § 22.

5.) Petitioner suffers "prejudice" from judicial misconduct violating "fundamental fairness" and "judicial partiality" "shocking to the universal sense of justice".

6.) Petitioner suffers prejudice by being "unlawfully convicted" when the trial court exceeded its jurisdiction.

14.) Conclusion

Judge Jefferson has failed to maintain, enforce, or observe high standards of conduct to ensure that the integrity and independence of the judiciary are preserved, in violation of Rule 501; Canon 1, SCACR.

She has also failed to conduct herself in a manner which promotes public confidence in the integrity and impartiality of the judiciary, in violation of Rule 501, Cannon 2(A), SCACR.

In the trial judge's effects to "conspire" with the prosecution to complete the act of "fraud on the Court" and "fraud against petitioners legal rights", trial judge, by lending the prestige of her judicial office to advance the private interest of the prosecution in violation of "Canon 2 (B)", the judge denied petitioner "disclosure", Knowing that "impanelment documents" did not exist, and thus, unlawfully "convicted" defendant on "unindicted offenses".

In violation of "canon (3)(B)(5), judge Jefferson failed to perform judicial duties without bias or prejudice when she had "initiated criminal charges", denied defendant his right to present an alibi allowed the Court, and parties to "waive" constitutional right to confrontation by "stipulating" to "chain of custody" without "Colloquy", and infringed upon petitioners "preparation of defense" and petitioners constitutional rights to challenge whether defendant had been indicted by a legally constituted grand jury, as well as, denying defendant Brady material.

Judge Jefferson "inserted" herself into plea negotiation violating Rule 11 (C)(1), an abandoned her role as neutral arbiter, violating petitioners due process of law and equal protections under the law.

15.)

Judge Jefferson denied petitioner an "alibi" at trial by "coercive" and "manipulating" tactics, acting as second prosecutor in violation of Judicial impartiality.

The trial judge "refused" to allow defendant to present "exculpatory evidence", that in fact, supports petitioner contentions that a "state grand jury did not convene", however, in her desire to influence the outcome of the proceedings in violation of Canon (3)(B)(5) Canon 2 (B); Canon 2 (A); Const. Amend. 14, Judge Jefferson refused to "allow" petitioner to present the evidence, "exculpatory" in nature, thereby "conspiring" with prosecution to "conceal" the fact that petitioner had not been indicted, and to complete the act of "fraud upon the Court", and petitioners legal rights. Judge Jefferson violated cannons, rules, and standards of judicial ethics. Judge Jefferson "conspired" with the prosecution to convict, unlawfully, the defendant on unfounded prosecution. Petitioner asks that this court vacate petitioners sentences, make "void" the judgment, and dismiss indictment with prejudice because of the judges "egregious behavior" and judicial misconduct?

Questions Presented To The Court

1.) Whether prosecutor's mis-conduct was a significant infringement on grand jury's ability to exercise independent judgment, as would support dismissal of indictment?

2.) Whether defendant suffered prejudice from prosecutorial misconduct?,

3.) Whether prosecutors misconduct constitutes a violation of defendants due process of law?

4.) Whether defendant suffered deprivation of the right to Indictment by Grand Jury pursuant to § 17-19-10, and whether this constitutes structural error?

5.) Whether the accumulation of misconduct by prosecutors infringed on defendants "substantive" Due process rights where defendant has a "liberty" interest, when in violation of Art. V. § 22?

6.) Whether this defect affects substantial rights secured by the 14th Amend. Due process and equal protections under the law?

7.) Whether prosecutor violated petitioners "procedural" and "substantive" due process of law when prosecutor had not disclosed favorable evidence (Impanelment Documents), governed by materiality standard? And whether this denial constitutes "prejudice" as well as a Brady violation?

8.) Whether prosecutor committed "fraud on the Court" and "fraud against petitioners legal rights?

9.) Whether prosecutor "conspired" to infringe upon petitioners "liberty interest"?

10.) Whether prosecutor infringed petitioners right pursuant to § 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure?

11.) Whether petitioners right to due process of law and equal protections under the law violated when petitioner was denied the equal protections of the laws in constitutional, and statutory provisions relating to grand jury? When no court reporter had been assigned to record state grand jury proceedings?

Relevant Statement of Facts

On April 12-13, 2016 the A.A.G.'s, A.G., and Clerk of the state grand jury willfully printed and published false and misleading information in its indictment. A.G., A.A.G.'s, and Clerk of state grand jury, SLED and trial judge committed "fraud on the Court" and fraud upon petitioners legal rights, which violated procedural and substantive due process. A.A.G.'s, and Clerk of state grand jury committed "Offenses Against Public Justice in violation of S.C. Code Ann. § 16-9-10.

A.A.G.'s [prejudiced] the following constitutional provisions and statues causing prejudice to defendant... § 17-19-10, § 17-25-10, Art. I. § 11, Art. V. § 22, Art. I § 3, § 16-9-10, U.S.C.A. Const. Amend 14., Const. Art. I. § 22, § 14-7-1700, § 14-7-1720(A)(5), § 14-7-1720(A) and(D) and Rule 5, S.C. Rules of Crim. Proc., U.S.C.A. Const. Amend. 6., § 14-7-175

A.G., A.A.G.'s, SLED, Clerk of S.G.J., and trial judge conspired to unlawfully infringe on petitioners "liberty" and legal rights. As evidenced by Court Admin. there was no court reporter assigned to record grand jury proceedings on dates of petitioners indictments (4-12-16 4-13-16). Petitioner was unlawfully convicted in Berkeley County Court of General Sessions on July 28, 2017 on "unfounded charges and offenses".

A.A.G.'s violated his "constitutional duty" to disclose favorable evidence governed by materiality standard (Tr. Page 15, lines 5-25), thereby constituting a "Brady" violation.

(Argument)

Discussion:

"The Grand Jury determines whether there is probable cause to believe that a [crime] has been committed and protects citizens against unfounded prosecutions, U.S. V. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983); See, e.g., In re Impounded, 241 F. 3d 308, 312 (3d Cir. 2001)(grand jury belongs to no branch of government but serves as referee or buffer between government and people); U.S. V. Suarez, 263 F. 3d 468, 481 (6th Cir. 2001)(institution of a grand jury protects defendant from prosecutorial vindictiveness).

Defendant was accused of crimes not investigated by a state grand jury, and A.A.G.'s allowed government agents to make false and misleading statements "prejudicing" defendant. See e.g. U.S. V. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983).

"Substantive due process" protection prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. Yarbrough V. East Wake First Charter School.

A.A.G.'s violated defendants substantive due process rights and infringed upon defendants "liberty interest".

"A prosecutor must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional rights or privileges". In re Richland County Magistrate's Court, Supreme Court of South Carolina, Sept. 7, 2010 389 S.C. 408.

However, evidence will establish that the A.A.G.'s for the State and State Grand Jury Clerk, willfully printed and published false and misleading information in its indictment in order to deep secret it's violations of statutory law, thus, committing the act of perjury, and

fraud on the Court, which renders all judicial proceedings invalid and its indictment null. In the case of (2016-GS-47-02), defendants bill of indictment prints that it was returned "at a court of General Sessions, convened on Apr. 12-13, 2016, the grand jurors of Richland County present upon their oath", the title page of the "alleged" indictment prints that it was published at a court of General Sessions term as "convened" on Apr. 12-13, 2016 in Richland County "State Grand Jury".

Additional pieces of evidence very clearly settles the matter of the false return of defendants "alleged" indictment. For example: See Correspondence from (Court Admin. dated 10-23-17 and 11-6-17)(stating that "no court reporter was assigned to record state grand jury proceedin , therefore [no] transcript is available)(emphasis); also see (Letter from Christina Bass of SLED, dated June 9, 2016)(requesting for prisoners to be accepted)(emphasis); also see § 14-7-1750; § 14-7-1700; § 14-7-172((A) and (D) and Rule 5, SCRCP.

(Offense Against Public Justice)

S.C. Code Ann. § 16-9-10, Perjury and subornation of perjury, states in pertinent part:

A(2) It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record, or report, or form required by the law of this state.

B(2) A person who violates the provisions of subsection A(2) is guilty of a misdemeanor, and upon conviction, must be imprisoned not more than Six (6) months, or fined not less than 100 dollars, or both.

(C) a person may be convicted under this section... if he commits perjury by his own act, consent, or agreement.

Also established in subsection (A), was the fact that Mr. Roberts indictments were signed as a "true-bill" by the Attorney General, and contained false information, incorrectly printed that it had been "processed", "At a session of the State Grand Jury of South Carolina, convened in Columbia, South Carolina, on April 12-13, 2016, the State Grand Jurors present upon their oath". This indictment containing false information, and incorrectly printed was also filed April 13, 2016 by the Clerk of the State Grand Jury, James R. Parks and stamped "A True Copy" "Attest" James R. Parks, Clerk by Deputy Clerk Margaret Self.

It should be noted that a criminal indictment is a document required by the law of this state. In Gentry, our Supreme Court determined that an indictment is a "notice document required by state constitution" and statues See SC constitution Art. I. § 11 and Art. 5. § 22; SC Code Ann. § 17-19-10 "no person shall be held to answer in any court for an alleged crime or offense unless upon indictment by a grand jury, except in specified instances". Thus, Mr. Roberts "true-billed" indictment satisfies the provision of § 16-9-10 A(2), perjury, that specify the false information must be included in a "document required by the laws of this state".

The Constitution requires that the law be applied in accordance with lawful procedures (Per Mr. Justice Marshall, as Circuit Justice).

28 U.S.C. § 2255

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court

United States V. Fields, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979) Viewing the above-mentioned instances of conduct cumulatively, see United States V. Samango, 607 F.2d 877, 884 (9th Cir. 1979); United States V. Roberts, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980), defendant believes both functions is implicated here.

A prosecutor as an officer of the court is[sworn] to ensure that justice is done, not simply to obtain an indictment.

A.A.G.'s introduced perjured testimony in defendant's trial prejudicing defendant in order to gain an unlawful conviction.

Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role.

The incidents related are flagrant and unconscionable. Taking advantage of his special position of trust, the A.A.G.'s impaired the grand jury's integrity as an independent body. (emphasis)., (See Court Admin. Correspondence dated 10-23-17 and 11-6-17.)

Defendants trial proceedings were marred by a fundamental defect that inherently resulted in a complete miscarriage of justice, or in omissions inconsistent with rudimentary demands of fair procedure

The A.G.'s office and State Grand Jury's unlawful indictment process and subsequent criminal acts, resulted in an illegal grand jury, void indictment, and a violation of every component of the Due Process notice requirement owed to Mr. Roberts by this state.

which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time.

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Having not been indicted by a legally constituted grand jury violates an individual's "substantive right to be tried only on charges presented in an indictment [returned] by a grand jury". See State V. KnucKles - Court of Appeals of South Carolina, Jan. 28, 2002 348 S.C. 593 "Reference to relevant statue in caption of an indictment does not validate an invalid indictment; caption of an indictment is not a part of the finding of the grand jury".,... In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State V. Watson, (S.C. 2002) 349 S.C. 372, 563 S.E. 2d 336.

Dismissal of an indictment is justified to achieve either of two objectives; to eliminate prejudice to a defendant or, pursuant to court's supervisory power, to "prevent prosecutorial impairment of grand jury's independent role.

Under the applicable guidelines prosecutors have an ethical obligation strictly to observe the status of the grand jury as an independent legal body. See American Bar Association, Standards For Criminal Justice Standard 3-3.5 at 3.48 (2d ed. 1980).

Brady Violation

A.A.G.'s violated petitioners right to Brady material when prosecutor, (1.) Refused to "disclose" exculpatory evidence that "no court reporter was assigned to record state grand jury proceedings", (2.) that no state grand jury convened to find probable cause to hold petitioner for trial, and (3.) prosecutor refused defendant "impanelment documents".

The prosecutors intent can be considered in some circumstances. U.S. V. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986)(government's bad faith to suppress evidence indicates that such evidence may be material). See U.S. V. Agurs, 427 U.S. 97, 107-11 (1976)(prosecutor's constitutional duty to disclose favorable evidence governed by materiality standard and not limited to situations where defendant has requested favorable evidence). The government's duty under Brady arises regardless of whether the defendant specifically request the favorable evidence. (U.S. V. Agurs).

"Exculpatory evidence is evidence the suppression of which would undermine confidence in the verdict. U.S. V. Ruiz, 536 U.S. 622, 628 (2002)(quoting Giglio V. U.S., 405 U.S. 150, 154 (1972).

(Brady applies only to evidence that A reasonable prosecutor would identify at the time as material and favorable to defense)

U.S. V. Bagley, 473 U.S. 667, 676-77 (1985)(impeachment evidence, as well as exculpatory evidence, is subject to Brady disclosure).

A.A.G.'s refused petitioner "impanelment documents" because no state grand jury was impaneled, there is no record of testimony or proceedings of a state grand jury as evidenced by Court Admin. Court Reporter Manager Desiree Allen of South Carolina Supreme Court. (Enclosed).

The prosecution encouraged perjured testimony from all witnesses and infringed defendants right to prepare a defense. A.G. falsely printed that defendants indictment was returned "at a session of the State Grand Jury occurring in Columbia, S.C. on the dates of April 12-13, 2016".

The indictment represented an attempt to prosecute the petitioner unlawfully by criminal means, perjury, and "Offenses Against Public Justice" in violation of S.C. Code Ann. § 16-9-10.

The prosecutor has a "constitutional duty" not to obtain an "indictment or conviction" in whole or in part on perjured testimony. Mooney V. Holohan, 294 U.S. 103, 112; Pyle V. Kansas, 317 U.S. 213, 216; Napue V. Illinois, 360 U.S. 264, 269.

"In this connection, it is highly relevant that the grand jury is not the instrument of the prosecutor, to use in any manner which he finds expedient, but an arm of the court." Cobbledick V. United States, 309 U.S. 323, 327. Failure to make a transcript deprives the court of power to supervise grand jury proceedings, and hence should not be countenanced when done solely for tactical advantage or when the prosecutio has reason to suspect that it may operate to shield "unfounded prosecutions" "perjury" or "prejudice" to the defense.

Having "no court reporter assigned to record grand jury proceedinc violates statue § 14-7-1700 of a State Grand Jury Act, and [prejudiced] petitioners "rights to obtain transcript", pursuant to § 14-7-1720 (A) and (D) and Rule 5, S.C. Rules of Crim. Proc., and defendants right to "prepare a defense".

In violation of § 14-7-1750, the "indictment" was not returned by "order", hence SLED's "letter" (requesting for Prisoners to be accepted) without a warrant or committment order - without indictment, in too, Berkeley County (Hill Finkle Detention Center on June 9, 2016 (enclosed) (emphasis).

A.A.G.'s for the State "conspired" with S.L.E.D. Agents to unlawfully imprison defendant by authorizing agents to accomplish the unlawful act without regard to lawful procedure, when a "typed letter", (emphasis), from "Christina Bass of S.L.E.D. was used as an "unlawful Object" to secure defendant "unlawfully" in Berkeley County Detention Center without "warrant" or an "indictment", or "order of commitment...

Hence, that is why the "Typed letter" was provided to Director Diemory of Hill FinKlea Detention Center, who is also a "co-conspirator in the "unlawful act or object", who allowed defendant to be unlawfully held for 17 months until defendants "mock" trial on the "unindicted offenses" and "unfounded prosecution".

Prejudice

1.) Defendant was [prejudiced] by the violation of his right to be tried only by indicted crimes or offenses in violation of statutory law, section 17-19-10. Also see, Article I §11, Article V. §22

2.) Defendant was [prejudiced] by the violations of his right to due process of law and equal protections under the law when he was denied the equal protections of the laws in constitutional, and statutory provisions relating to jury and grand jury, when "no court reporter had been assigned to record grand jury proceedings in violation of sections 14-7-1700.

3.) Defendants right pursuant to §§ 14-7-1720 (A)(5), and 14-7-172((A) and (D) and Rule 5, S.C. Rules of Crim. Proc. were [prejudiced] when defendant was not able to "obtain" and "review" impanelment documents to prepare a defense" because the fact of the matter is they "do not exist", and prosecutors misconduct constitutes "fraud on the Court" and "fraud against petitioners legal rights.

4.) Defendant/Petitioner was [prejudiced] his constitutional right pursuant to Article V §22 to have "the body" of the grand jury to consist of eighteen members, twelve of whom [must] agree in a matter before it can be submitted to the court (emphasis).

5.) Defendant/Petitioner's right pursuant to §17-25-10 was [prejudiced] when he was/is being "punished for an offense he was not duly and legally convicted" thereof in a court having competent jurisdiction of the cause and of the person.

6.) Defendant/Petitioner suffers [prejudice] when in violation of S.C. Code Ann. § 16-9-10 (A) (2) and (C) prosecutor and clerk of the state grand jury, unlawfully and willingly printed false, misleading, or incomplete information on a document (Indictment), record, or report, or form required by the law of this state.

7.) Defendant was accused of crimes not investigated by grand jury, and allowed government agents to make false and misleading statements [prejudicing] defendant. Prosecutor encouraged false testimony.

8.) Defendant was [prejudiced] his 14th amendment right to prepare a defense when in violation of Rule 5(d) and Brady he was denied "disclosure".

9.) Defendant suffered [prejudice] when A.A.G.'s violated defendants substantive due process rights and infringed upon defendants "liberty interest".

10.) Defendant suffered [prejudice] when A.A.G.'s impaired the grand jury's integrity as an independent body.

11.) Mr. Roberts incarceration for conduct that does not amount to a violation of S.C. Law establishes prejudice. (emphasis)

12.) In regard to "unfounded" charges or offenses, "defendant has been prejudiced], i.e., taken by surprise and hence unable to combat the charges against him." See State V. Baker, Supreme Court of South Carolina, Feb. 11, 2015 411 S.C. 588.

A.A.G.'s conduct undermined the defendants right to fundamental fairness and due process in the criminal proceedings.

Egregious government conduct may violate due process and prevent the reprosecution of a defendant. See United States V. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994)(citing United States V. Goodwin, 854 F.2d 33, 36-37 (4th Cir. 1988). To constitute a due process violation, the governments actions must be "so outrageous as to shock the conscience of the court". Jones, 18 F.3d at 1154.

Prosecutor's conduct was a significant infringement on grand jury's ability to exercise independent judgment, as would support dismissal of indictment. See (Correspondence from Court Admin.)(enclosed).

In the extreme or egregious case (Defendants Case), therefore, where prosecutorial misconduct or abuse is [cumulative] and repeated, dismissal is the only effective deterrent to preserve the integrity of the judicial process.

Prosecutorial Misconduct can dramatically impair public confidence in the judiciary. Even the "appearance of impropriety"... diminishes faith in the fairness of the criminal justice system in general."

Young V. United States, 107 S.Ct. at 2139.

Public confidence requires that prosecutors respect and abide by the constitutional, statutory and judicial limits imposed on their conduct during the grand jury process. When the purposes of the grand jury are undermined by severe, deliberate and repeated instances of prosecutorial misconduct, the credibility and integrity of the criminal justice system are themselves put at risk.

Prosecutor's misconduct was purposeful and pervasive, was motivated by a resolve to prejudice the defendant, and undermine the integrity of the grand jury system.

The Federal courts have an interest "in preserving and protecting the appearance and the reality of fair practice before the grand jury ...." United States V. Serubo, 604 F. 2d 807, 817 (3d Cir. 1979).

This important institutional interest is separate and "independent of [the judiciarys] concern for the rights of the particular defendant." Ibid.

Conclusion

The governments position ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury. In effect, this would result in nothing less than a constructive amendment of the indictment. The error would affect the "fairness, integrity or public reputation of judicial proceedings" where the grand jury's role had been usurped, Pet. App. 8a (internal quotation marks omitted).

A.A.G.'s prejudice, oppressive, and corrupt motive impaired the grand jurys integrity as an independent body. A.A.G.'s conduct undermined the defendants right to fundamental fairness and due process in the crimina proceedings. A.A.G.'s committed "fraud on the court" and "fraud upon the petioners legal rights.

Accordingly, petitioner asks that sentence's be vacated, and indictment dismissed with prejudice.

(1.) Argument

Defendant's right to "Effective Assistance Of Counsel" pursuant to the Sixth Amendment of the United States Constitution, and Due Process of Law and equal protections under the law pursuant to the Fourteenth Amendment was violated when trial counsel "stipulated" to "chain of custody" for [all the evidence]; failed to [object and to [cite] controlling precedent's; did not [object] to codefendant's out-of-court-statements and confession; refused to present [Alibi] on defendant's behalf; refused to present [exculpatory evidence]; and acted as a second prosecutor in [trial] trying to convince defendant to plead.

Relevant Facts

1.) Defense Counsel "stipulated" to the "chain of custody" for [all the evidence] to greatly [truncate] the list of witnesses. (Tr. July 24-28, 2017, Page 74, Lines 4-5)

2.) Defense Counsel failed to [object] and to [cite] controlling precedent regarding impanelment documents (Tr. Page 15, Lines 5-6) (Tr. Page 19, Lines 11-12)

3.) Defense Counsel failed to [object] to codefendant's out-of-court statements and confession (Tr. Page 721, Lines 20-25)(Tr. Page 722, Lines 1-25)

4.) Defense Counsel refused to present [Alibi] on defendant's behalf.

5.) Defense Counsel refused to present [exculpatory evidence] to trial court. (Tr. July 24-28, 2017, Page 17, Lines 14-25)

6.) Defense Counsel acted as a second prosecutor at trial trying to convince defendant to take a plea. (Tr. Page 235, Lines 5-18) (Tr. Page 237, Lines 17-23)

that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record. (Tr. dated July 24-28, 2017, Page 22, Lines 16-23.) When defendant protested that trial counsel was not working in his interest, the judge responded that he was working in defendant's interest and that he would not risk losing his law license to collaborate with the state. (Tr. dated July 24-28, 2017, Page 22, Lines 24-25 - Page 23, Lines 1-9).

Defendant expressed to attorney Mr. Griffith that he he not been indicted by a legally constituted grand jury, and that defendan had corresponded with South Carolina Supreme Court, Court Administratio and, in fact, there was no court reporter assigned to record grand jur proceedings, therefore no transcript of testimony and proceedings were available for the date's of "alleged" indictments occurring on April 12-13, 2016. See Court Admin. Correspondence dated 10-23-17, and 11-6-17 (Attached).

At one point during the trial, before a jury being sworn, defendant attempted to offer this "exculpatory evidence" from Court Administration to the trial judge, to no avail. (Tr. dated July 24-28, 2017, Page 17, Lines 14-25.) emphasis.

Defendant corresponded with Court Admin. numerous time regarding these "alleged" proceedings and the impanelment documents to which defendant is entitled by law, and each time defendant was advised that there was no court reporter, and no transcript. See Enclosure from Court Admin. dated 10-23-17, and 11-6-17.

(2.)

Relevant Facts

On July 19, 2017, defendant moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. (Tr. dated July 19, 2017, Page 4, Lines 9-18). Thereafter, trial counsel indicated he had some concerns about defendant's competency. (Tr. dated July 19, 2017, Page 5, Lines 17-21 Trial counsel explained that defendant refused to cooperate with him, resulting in trial counsel asking a doctor to evaluate defendant. (Tr. dated July 19, 2017, Page 5, Lines 23-2 Page 6, Lines 1-4). Trial counsel expressed "concerns about his capability to understand really what's going on." (Tr. dated July 19, 2017, Page 7, Lines 3-6).

The doctor indicated defendant could not work with his attorney and the doctor did not think that it was "all volitional on his part." (Tr. dated July 19, 2017, Page 8, Lines 22-24; Page 10, Lines 11-12.) The doctor noted defendant had "the cognitive capacity to pay attention and assist," but she explained there was "a paranoid flavor" to his relationship with counsel. (Tr. dated July 19, 2017, Page 14, Lines 16-19.) The doctor was unsure if it were "a pathological one" or "functior given some of his views." (Tr. dated July 19, 2017, Page 14, Lines 19- Defendant requested "a moment" and the judge agreed. (Tr. dated July ~~19,~~ 24-28, 2017, Page 22, Lines 12-15.) Then defendant asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" (Tr. dated July 24-28, 2017, Line 15.) The judge responded: Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way

(4.)

Defendant provided attorney Mr. Griffith with this exculpatory evidence from Court Reporter Manager, Desiree Allen, and trial counsel insisted that "defendant was crazy, and did not Know what he was talKing about."

Despite defendants attempts to impress upon trial counsel that defendant had not been indicted by a legally constituted grand jury, trial counsel continued to [collborate] with the state in violation of defendant's right to due process of law and Art. 1. §11, Art. 5. §22.

For example: On July 19, 2017, hearing on competency, trial counsel stated: "If it please the court, Your Honor. I have also provided him with all of the [discovery] sent to us from the [Attorney General's Office.] (emphasis) Page 16, Lines 4-6,

Contrary to trial counsel's assertion that 1.) Discovery comes from or was sent from the Attorney General's Office, pursuan to section 14-7-1700 of a State Grand Jury Act in part: "Subject to the limitations of Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, a copy of the transcript of the recorded testimony or proceedings requested by the Attorney General or his designee [shall] be [provided] to the defendant by the [court reporter upon request, at the transcript rate established by the Office of Court Administration." 2.) It is indisputably impossible for trial Counsel to have recieved [any] [Discovery] in regards to defendant's case in light of the fact that "no court reporter had been assigned to record grand jury proceedings. [Emphasis Added]

And again, on July 19, 2017, the trial judge stated to trial counsel: "OKay. Now you said you've given him all the [discovery], is that correct? (Tr. July 19, 2017, Page 17, Lines 9-11.) Emphasis.

Trial counsel answered: "Yes, Your Honor. (Tr. July 19, 2017, Page 17, Line 11.)

On July 24, 2017, before a jury being sworn, defendant asked the trial court: "What does [discovery] consist of?" (Tr. dated July 24-28, 2017, Page 14, Line 12).

Trial court responds: "Evidence against you". (July 24, 2017, Page 14, Line 13.) Defendant responded: "I didn't get that. All I got was an "indictment". The Court then states: "Mr. Griffith, you said you went over the [discovery] with him; is that right? (Page 14, Lines 14-17.) Trial counsel then states: "I did provide him with all of the [discovery] that was sent to us, Your Honor. (July 24, 2017, Page 14, Lines 18-19.) Again, trial counse asserts that [all discovery] was sent to [us] from the [Attorney Generals Office], which is [totally] [inconsistent] with South Carolina Rules of Criminal Procedure, Rule 5, and section 14-7-1720 (A) and (D), and §14-7-1700 of Art. 15 (State Grand Jury Act). Emphasis

Next, defendant exercised his right to be heard in his own defense pursuant to Art. 1. §14 of S.C. ~~State~~ constitution when before a jury being sworn, defendant requested the [impanelment documents] from "Alleged" State Grand Jury proceedings, and trial counsel did not [object] and [cite] controlling precedents when [trial court] denied defendant [disclosure]. (Tr. dated July 24, 2017, Page 15, Lines 7-9). Emphasis.

Thereafter, the trial judge [questioned] defendant regarding his [request] for [impanelment documents] when the trial judge asked: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?

(Tr. July 24, 2017, Page 19, Lines 8-10) Emphasis.

(6.)

When defendant responded to the trial judge and stated: "Well, I'm actually going to show that no State Grand Jury even occurred." Emphasis. (Tr. July 24, 2017, Page 19, Lines 11-12.)

Trial Court responded: "Oh, it happened because I have the indictments." Emphasis (Tr. July 24, 2017, Page 19, Lines 13-14 (Enclosed). And again, to this, at [critical] stage of proceeding trial counsel still did not [object] and [cite] controlling Supreme Court precedent which allows a defendant to [obtain] and [review] all evidence which was considered in handing down an indictment.

Next, at trial, the trial judge questioned the prosecution, asking, "How long is it going to take the State to present their case?" (Tr. July 24-28, 2017, Page 74, Lines 4-5). Mr. Underwood replied: "As to that Your Honor, I had a brief conversation with both "opposing" counsel prior to selecting the jury. It's my understanding that they were both willing to [stipulate] that the "chain of custody" for [all the evidenc has been established. Emphasis! And "they are [not] going to [challenge it," which [would greatly truncate the list of witnesses.] Emphasis. (Tr. July 24-28, 2017, Page 74, Line 6-12.) Mr. Underwood then stated: "I just would like to [confirm] that is, [in fact], the "case." (Tr. Page 74, Lines 14-15 - July 24-28, 2017.)

The Court then asked Ms. Johns (Codefendant's counsel): "Is that correct, Ms. Johns? Ms. Johns replied: "Your Honor, from what I reviewed -- The Court: "You really dont have a good faith challenge to the chain correct?" Ms. Johns replied: "Mr. Under-wood provided me with everything. Internally, it looks like to me like the chain of custody has been met. So I would not be

challenging that. And I think that [will ferret down that long witness list.] (Tr. dated July 24-28, 2017, Page 74, Lines 16-24.) The Court then inquired to Mr. Griffith's answer (Defendant's Counsel) The Court: "Mr. Griffith?" (Tr. Page 74, Line 25) In response, Mr. Griffith stated: "Your Honor, having had reviewed the same "document" provided by Mr. Underwood -- The Court: "There's no really good faith basis to challenge the chain." Mr. Griffith responded: "I would [not] be [challenging Emphasis added (Tr. Page 75, Lines 1-5).

Thereby, trial counsel abandoned any defense for defendant in order to accomadate Assistant Attorney General's "long witness list" rendering the [adversarial process lost.]

In summation, "stipulation to chain of custody" has prejudiced defendant.

Next, trial counsel [refused] to present an [Alibi] when defendant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witness'es claimed defendant was engaged in criminal activity in South Carolina. (Tr. Page 616, Lines 10-14.) Defendant indicated his counsel was "fighting against" him regarding presenting that evidence. (Tr. Page 616, Line 14). Emphasis!

Next, trial counsel completely abandoned any defense for defendant when counsel acting as a second prosecutor suggested or rather advised defendant to take a plea of guilty when defendant [clearly] plead [not guilty] and proceeded to trial, trial counse Advice clearly erroneous. (Tr. Page 235, Lines 5-18); (Tr. Page 237, Lines 17-23)

(8.)

Statement Of Issue

Whether defendant's right to "Effective Assistance Of Counsel" pursuant to the Sixth Amendment of the United States Constitution, and due process of law and equal protections under the law pursuant to the Fourteenth Amendment violated when trial counsel "stipulated" to "chain of custody" for [all the evidence]; failed to "cite" controlling precedent did not object to codefendants out-of-court-statements; and acted as Second prosecutor in [trial] trying to convince defendant to plead?; and refused to present [Alibi] on behalf of defendant?

Discussion

"The Sixth Amendment guarantee's the right to effective assistance of counsel in criminal prosecutions. In Strickland V. Washington, the Supreme Court established a two-prong test to evaluate ineffective assistance claims. To obtain reversal of a conviction under the Strickland standard, the defendant must prove that counsel's deficient performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding".

At trial, the trial judge questioned the prosecution, asking, "How long is it going to take the "State" to present their case?" (Tr. dated July 24-28, 2017, Page 74, Lines 4-5). Mr. Underwood replied: "As to that, Your Honor, I had a brief conversation with both "opposing" counsel prior to selecting the jury. It's my understanding that they were both willing to [stipulate] that the "chain of custody" for [all the evidence] has been established. [emphasis]. And "they are not going to challenge it," which [would greatly truncate the list of witnesses.] [emphasis added] (Tr. Page 74, Line 6-12). Mr. Underwood then stated: "I just would like to [confirm] that is, [in fact], the case." (Tr. Page 74, Lines 14-15).

(9.)

The Court then asked Ms. Johns (Codefendant's Counsel): "Is that correct, Ms. Johns? Ms. Johns replied: "Your Honor, from what I reviewed -- The Court: "You really dont have a "good faith" challenge to the chain correct?" Ms. Johns replied: "Mr. Underwood provided me with everything. Internally, it looks like to me like the chain of custody has been met. So I would not be challenging that. And I think that [will ferret down that long witness list]. (Tr. Page 74, Lines 16-24).

The Court then inquired to Mr. Griffith's answer (Defendant's Counsel) The Court: "Mr. Griffith?" (Tr. Page 74, Line 25).

In response, Mr. Griffith stated: "Your Honor, having reviewed the same "document" provided by Mr. Underwood -- The Court: "There's no really good faith basis to challenge the chain." Mr. Griffith responded: "I would not be challenging." (Tr. Page 75, Lines 1-5).

Contrary to trial counsel's actions to [collaborate] with the State, the [Defendant] required that any [chemist], [analyst], and [all] [persons] within the [chain of custody appear in Court] for the purpose of personally testifying. [Defendant] thus "objects" to the introduction of any [chemist's] or [analyst's] [report] pursuant to [Rule 6, S.C. Rules of Criminal Procedure.] This is requested on the grounds that it is essential to insure the [Defendant's right] to a [fair trial], [right to confrontation of witnesses], the [right to effective counsel] and [due process of law] guaranteed by the South Carolina Constitution and the United States Constitution. [emphasis added].

Please See -- Williams, 529 U.S. at 393. (2000)

Strickland, 466 U.S. at 687. Unlike the perfocmance prong of the Strickland test, which is analyzed at the time of trial, the prejudice prong of the Strickland test is examined under the law[at the time] ineffective assistance claim is evaluated. see Lockhart V. Fretwell, 506 U.S. 364, 367-68 (1993). see Williams V. Taylor, 529 U.S. 362, 391-93 (2000). In Williams, the Supreme Court clarified that earlier exceptions explained in Nix V. Whiteside, 475 U.S. 157 (1986), and Lockhart V. Fretwell, 506 U.S. 364 (1993), should be narrowly applied and "do not justify a departure from a straight forward application of Strickland when the ineffectiveness of counsel [does deprive the defendant] of a [substantive or procedural right] to which the [law entitles him (see Rule 6, S.C. Rules of Criminal Procedure). Williams, 529 U.S. at 393 Except in the narrow category defined by Nix and Lockhart, courts need not delve into a separate inquiry concerning [fundamental fairness] where both prongs of Strickland have been satisfied. See id.

In addition, the "right to confrontation" of witnesses pursuant to Rule 6, S.C. Rules of Criminal Procedure and the Sixth Amendment to the U.S. Constitution, and due process of law are all [Constitutional and Statutory rights] that cant be "stipulated" to or "waived" unless by "colloquy". Supreme Court of South Carolina, in State V. Orr, 304 S.C. 185, 403 S.E. 2d 623 (1991), held that waiver of a [constitutional] or [statutory] right must be Knowingly and voluntarily established on the record by [colloquy] between either the court and the defendant, or between the court and defendant's counsel, or both.

Counsel's performance fell below objective standard of reasonableness by "stipulating" to [all evidence] through-out course of whole trial. [emphasis]

(11.)

Counsel's "agreement" or "stipulation" violated [Defendant's] [right to effective Counsel], [right to a fair trial], [right to confront all witnesses in chain of custody], and defendant's right to [due process of law.] Defense Counsel's "stipulation" was made in order to [accomadate] the prosecutions [long line of witnesses], to [greatly truncate] the list of witnesses. (Tr. dated July 24-28, 2017, Page 74, Lines 11-12)(Page 75, Lines 1-5).

"If counsel "entirely fails to subject the prosecutio case to [meaningful adversarial testing]", the adversarial proces itself becomes presumptively unreliable." Cronic, 466 U.S. at 659; see, e.g., Haynes V. Cain, 272 F.3d 757, 764 (5th Cir. 2001)

Trial Counsel's "stipulation" prejudiced defendant's right to [confront] and [cross-examine] [All Chemists or Analyst's] in regards to their lab reports and how much actual heroin?, and to confront All evidence technicians, and drug technicians to ascertain [whether testing procedures were properly carried out,] and whether chain was actually established. Any evidence introdu d through (Primarily Lab reports) Agents or officers Justin Wingo, Daniel Lundberg, Brandon Allen, Misael Vasquez, Aaron Raw and Jason Wells [violated] defendants due process of law to confront All witnesses in the chain of custody, and testimon given by officers constitutes "hearsay", and [Lab reports testimoni pursuant to Crawford V. Washington, 124 S.Ct. 1374 (2004). Without testimony from Scientific Analyst to establish how much actual heroin, and denial of constitutional right to confront All persons in the chain of custody violated defendants right to have effective Counsel, due process of law, and defendants right to a fundamentally fair trial.

(12.) Depcivation of Substantial (Substantive or Procedural Right)
Ineffectiveness of counsel did deprive defendant of a [substantive] or [procedural] right to which the law entitles him. Williams, 529 U.S. at 393. Defendant was deprived his right to confront [All persons] in the chain of custody. Witnesses unavailability was based off solely "To Greatly Truncate lists of witnesses" [emphasis] Rule 6 S.C. Rules of Criminal Procedure, and due process of law and equal protections under the law was violated. In Crawford v. Washington the Supreme Court held that the admission of testimonial hearsay statements (All Lab Reports read by officers)(chain of custody) violates the [confrontation] clause if the [prosecution fails to establish] the [declarant's unavailability] for trial. see, U.S. V. Aguilar-Tamayo 300 F.3d 562, 566 (5th Cir. 2002)(good-faith effort not established when government stipulated that it took no steps to secure presence of witnesses) see Tr. dated July 24-28, 2017, Page 74, Lines 1-25. [emphasis]. In Crawford, the court held that, absent a prior opportunity for cross-examination, a testimonial statement by an unavailable witness [offered against a defendant] to prove the truth of the matter asserted, is [categorically barred] by the Confrontation clause. "Stipulating" to [chain of custody] at trial to ["greatly truncate lists of witnesses] was ineffective Assistance of counsel because reasonable counsel would have [objected] to such flagrant violation of the defendants [right to due process of law] and a [fair trial].

Ineffective Assistance did deprive defendant of procedural or substantive right to which the law entitles him. See Williams, 529 U.S. at 393. also see, State Grand Jury Act, Article 15- Section 14-7-1700 (subject to the limitations of Section 14-7-1720(A) and (D) and Rule 5 South Carolina Rules

of Criminal Procedure, a [defendant has the right to review and to reproduce the stenographically or electronically recorded materials]. emphasis.

Counsel's performance was deficient and prejudiced defendant when defendant requested [impanelment documents] pursuant to Section 14-7-1720(A) and (D) and Rule 5 S.C. Rules of Criminal Procedure and the trial judge stated: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those." (Tr. Page 15, Lines 7-9) [emphasis added]. Trial Counsel being ineffective assistance did not [object] or cite controlling case law precedent, nor did trial counsel cite statue that it was clearly permissable and within the law of Criminal Procedure to obtain documents from state grand jury proceedings as long as the request was made before a jury being sworn, in fact, trial counsel at critical stage of proceeding "said" absolutely nothing, thus depriving defendant of procedural or substantive right to which the law entitles him. Williams, 529 U.S. at 393.

The Supreme Court of South Carolina noted in State V. Gunn, supra, "the State Grand Jury operates under a very specialized procedure under which a defendant is permitted to [obtain] and [review] [all evidence] which was considered in handing down an indictment."; see also, Evans, 322 S.C. 78, 79, 470 S.E. 2d 97, 99 at n.1. Under footnote one in Evans, a defendant can attack the State Grand Jury's subject matter jurisdiction by challenging the sufficiency of the evidence presented at the "grand jury proceeding" before the jury is sworn. See id.; also see, Code 1976, §§ 14-7-1610, 14-7-1630(A)(1).

Procedural and Substantive due process violated and Counsel's ineffectiveness resulted in prejudice to procedural and substantive due process,

defendant's right to effective assistance, right to confrontation of all persons in chain of custody, right to due process, and a right to a fair trial.

Trial Counsel Completely Abandoned Any Defense For Defendant

Trial Counsel completely abandoned any defense for defendant when Counsel was acting as a [second prosecutor]. In the middle of trial, trial Counsel stated: "Your Honor, just to help him understand, if he [pleads] today, he can still appeal." In response, the judge stated: "But Indigent Defense might do an "Anders" brief and say it's a waste of the court's time and there aren't any violations." In turn, trial counsel stated: "But he still has the right to appeal." "And it would be up to the Appeal's Court, not to us. Whether we have an opinion or not." (Tr. dated July 24-28, 2017, Page 235, Lines 5-18). When the trial judge questioned Counsel: "Mr. Griffith, let me ask one additional question - Is Mr. Roberts rejecting this [deal] [with] or [against] [your] [advice.?] Trial Counsel stated: "Against my advice, Your Honor." (Tr. Page 237, Lines 17-23) [emphasis], please see., Maples V. Stegall, 340 F. 3d 433, 439-41 (6th Cir. 2003) (defense Counsel's [erroneous advice] that [guilty plea] would not preclud defendant from appealing his speedy trial claim satisfies ineffecti performance test).

At one point in the trial, defendant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesse's claimed defendant was engaged in criminal activity in South Carolina. (Tr. Page 616, Lin 10-14). Defendant indicated his counsel was "fighting against" him regarding presenting that evidence. (Tr. Page 616, Line 14).

(15.)

When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of defendant's incarceration in New York would "open the door". (Tr. Page 619, Lines 21-22). The judge indicated the evidence was "A double-edge" sword. (Tr. Page 619, Line 23). Defendant explained that the charges against him were "by far the worst" of any prior accusations or convictions. (Tr. 619, Lines 24-25). Trial Counsel indicated he had been discussing with defendant that the jury had "no idea who he" was at that point, but that if defendant "open[ed] the door" to allow the state to introduce "his entire record", then the jury would have a "preconceived mind." (Tr. Page 620, Lines 2-6).

In response, the judge told Defendant the evidence of his incarceration in another state when alleged drug purchases were being made from him would be "prejudicial" to him. (Tr. Page 620, Lines 7.) Trial Counsel's refusal to present an alibi in defense of defendant was "prejudicial" to defendant, and sufficiently egregious. [emphasis]. Trial Counsel's "inaction" constituted deficient performance because such conduct could not be justified as strategic decisions. See Strickland, 466 U.S. At 690 (court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of reasonable professional judgment) see also Murray V. Carrier 477 U.S. 478, 496 (1986) "[T]he right to effective assistance of counsel... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.")

(16.)

1.) Defendant must prove that Counsel's performance fell below an [objective] standard of reasonableness: Trial Counsel did not [object] to defendant being denied impanelment documents by citing controlling precedent (Evans V. State) to judge when the judge stated: "You don't get those, sir. In South Carolina, All Grand Jury proceedings are secret. Nobody gets those." (Tr. dated July 24-28, 2017 - Page 15, Lines 5-9) emphasis added, also see, U.S. V. Williamson, 183 F. 3d 458, 463-64 (5th Cir. 1999) (Counsels failure to cite directly controlling precedent WAS ineffective assistance because it was objectively unreasonable and resulted in prejudice to defendant). Counsels deficient performance [prejudiced] the defendant from preparing a defense, and prejudiced defendants constitutional right to disclosure pursuant to Brady V. Maryland; Section 17-7-1700; Rule 5 S.C. Rules Crim. Proc Counsels deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair out come in the proceeding.

2.) Defendant must prove that Counsel's performance fell below an [objective] standard of reasonableness: Counsel failed to act when defendant attempted to offer [exculpatory] evidence to the judge regarding Court Administrations correspondence to defendant (Tr. dated July 24-28, 2017 - Page 17, Lines 20-25); see, Hart V. Gomez, 174 F. 3d 1067, 1073 (9th Cir. 1999) (counsel's failure to introduce exculpatory records into evidence was ineffective assistance because [objectively] reasonable performance by counsel would have created reasonable probability of different verdict); see Kimmelman V. Morrison, 477 U.S. 365, 385 (1986) (counsel's failure to conduct any pretrial discovery prejudicial because unreasonable and below prevailing norms); also see, Groseclose V. Bell, 130 F. 3d 1161, 1170 (6th Cir. 1997) (Counsel's failure to conduct any legal research, or obtain and review any records was ineffective assistance.) Counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding.

(17)

3.) Defendant must prove that Counsel's performance fell below an objective standard of reasonableness: Counsel had not prepared for trial and did not obtain [any] [discovery] before a jury being sworn - and could not have, as there was [no court reporter assigned] to [record] grand jury proceedings, therefore [no transcript] available which would become "Discovery" had defendant been indicted - defendant had not been indicted, see, Court Admin. Correspondence dated Oct. 23, 2017 and Nov. 6, 2017; also see, Hunt V. Mitchell, 261 F. 3d 575, 583 (6th Cir. 2001) (prejudice presumed when counsel was not afforded [discovery] before voir dire). Counsel's deficient performance prejudiced defendants due process and equal protection of the laws to "disclosure" and preparation of a defense. Counsel's deficient performance prejudiced the defendant resulting in an [unreliable] or [Fundamentally] unfair outcome in the proceeding.

4.) Defendant must prove that Counsel's performance fell below an [objective] standard of reasonableness: Counsel "stipulated" to chain of custody in order to help accomadate A.A.G.'s long witness list, "to greatly truncate list of witnesses, see (Tr. Page 74, Lines 4-25) (Tr. Page 75, Lines 1-5); also see, Cronic, 466 U.S. at 659; see, e.g., Haynes V. Cain, 272 F. 3d 757, 764 (5th Cir. 2001) (If Counse "entirely fails to subject the prosecution's case to meaningful adversarial testing", the adversarial process itself becomes presumptively unreliable.) Defendant was prejudiced his right to "confrontation" of [all witnesses] in the chain of custody, in violation of Rule 6. S.C. Rules of Criminal Procedure and due process of law and equal protections under the laws. Defendant was denied and prejudiced "Procedural" and "Substantive Law". Ineffectiveness of counsel did deprive defendant of a substantive or procedural right to which the law entitles him. Williams, 529 U.S. at 393. Confrontation is a procedural right, and establishing all elements to crime (actual amount of heroin) (Purchase or brought to this state) (Chain of custody) is a substantive right.

(18.)

i) Mason V. Hanks, 97 F.3d 887, 894 (7th Cir. 1996)(counsel's failure to raise obvious and significant issues was ineffective assistance because it was without legitimate strategic purpose). = When defendant in his own defense requested [minutes] or [impanelment documents] from the judge the judge denied defendant [disclosure] and trial counsel failed to cite controlling precedent, presumption of prejudice arose because counsel's performance was equivalent of being physically or mentally absent. (Tr. dated July 24-28, 2017, Page 15, Lines 5-9). Next, after denying defendant impanelment documents, the trial judge [questioned] what defendant thought he would be able to use from the state grand jury record?" Defendant stated: "[Well, I'm actually going to show that no State Grand Jury even occurred" [emphasis added]. (Tr. dated July 24-28, 2017, Page 19, Lines 8-12). Defense Counsel [again] failed to cite controlling precedent, see., U.S. V. Williamson 183 F.3d 458, 463-64 (5th Cir. 1999)(counsel's failure to cite directly controlling precedent was ineffective assistance because it was [objectively unreasonable] and [resulted in prejudice] to defendant); see also Evans V. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings). (and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury proceedings). Counsel did not [object] to defendant being denied [impanelment] [documents] by citing controlling precedent that entitles defendant to obtain them by law, thereby prejudiced defendant "effective counsel", "due process of law", and a "fair trial". Trial Counsel's failure to raise obvious and significant issues was ineffective assistance because it was without a legitimate strategic purpose, see, Mason V. Hanks, 97 F.3d 887, 894 (7th Cir. 1996); see also U.S. V. Williamson, 183 F.3d 458, 463-64 (5th Cir. 1999).

(19.)

Trial Counsel's "stipulation" [denied defendant procedural law] or laws or rules that [govern] the [method] of how a criminal case is [administered] and [tried] in court. Procedural rules are contrasted with rules of [substantive] law that define the [rights and duties] of parties, and the elements of particular crimes and [defenses]. (emphasis)

Substantive due process protection prevents the government from engaging in conduct that [shocks the conscience] or interferes with [rights] [implicit] in the concept of ordered liberty. Yarbrough V. East Wake First Charter School.

6.) Trial Counsel refused to [object] to admission of codefendant's out-of-court-statements (Confession) violating defendants due process and equal protection under the laws. Due process is a constitutional requirement guaranteeing procedural fairness when the government seeks to deprive people of property, liberty, or life.

When trial counsel did not object to the admission of codefendants out-of-court-statements, confession implicated defendant on its face., see U.S. V. Doherty, 233 F.3d 1275, 1281-82 (11th Cir. 2000); also see., Whelchel V. Washington, 232 F.3d 1197, 1204-05 (9th Cir. 2000) (confrontation clause violated when court admitted confession of codefendant because confession incriminated defendant.

Counsel failed to object to admission of codefendant's out-of-court statements, and failed to cite directly controlling precedent (Crawford V. Washington); see U.S. V. Williamson, 183, F.3d 458, 463-64 (5th Cir. 1999) (counsels failure to cite directly controlling precedent was ineffective assistance because it was [objectively unreasonable] and resulted in [prejudice] to defendant). Defendant ~~suffered~~ suffered prejudice when counsel was ineffective and deficient in his performance. Defendant has not recieved a fair trial by numerous due process of law violations committed by trial court and trial counsel.

(20.)

Trial counsel failed to protect defendants rights when he did not object to the admission of Codefendant's out-of-court-statements (Confession) at trial when Codefendant was [absent] for trial and defendant had not had a chance to cross-examine codefendant. Codefendant's statements and confession was introduced through testimony of Agent Justin Wingo at trial. (Tr. Page 721, Lines 20-25)(Tr. Page 722, Lines 1-25). Trial counsel failed to cite controlling precedent pursuant to (Crawford V. Washington) 124, S. Ct. 1354, 1374 (2004) I.D. "Crawford applies when the out-of-court-statements are testimonial, which refers to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [police interrogations.] Codefendants statements were the product of a police interrogation. Trial Counsels [stipulation] to help accomodate A.A.G.'s long witness list prejudiced defendants right to "confront" [all persons] in chain of custody, in violation of Rule 6 S.C. Rules of Criminal Procedure and in violation to "effective assistance of Counsel"; "Confrontation" pursuant to the Sixth Amendment to the U.S. Constitution.

In stipulating to [all the evidence], and [chain of custody] defendant was deprived effective assistance of counsel - A substantive right... Procedural right...; If counsel "entirely fails" to subject the prosecution's case to meaningful adversarial testing", the adversarial process itself becomes presumptively unreliable. Cronic, 466 U.S. at 659; see, e.g., Haynes V. Cain, 272 F. 3d 757, 764 (5th Cir. 2001).

Counsels [stipulation] to greatly truncate list of witnesses was an egregious violation of defendants due process of law, and to a fair trial. Counsel ineffective because counsel's performance was not in accordance with prevailing professional norms. Defendant was prejudiced A fundamentally fair trial, confrontation clause was violated by introduction into evidence [without objection], codefendants confession because admission substantial and injurious effect or influence on jurys verdict.

Appointed Counsel's Collusion/Collaboration With State In An Unlawful Prosecution...

At trial, before a jury being sworn, defendant asked the trial court: "What does "discovery" consist of?", The Court replied: "Evidence against you." Defendant responded: "I didn't get that. All I got was an indictment." (Tr. dated July 24-28, 2017, Page 14, Lines 12-15).

Trial court then addresses trial counsel: The Court: "Mr. Griffith, you said you went over the [discovery] with him; is that right?, Trial Counsel responded: "I did provide him with [All of the discovery] that was sent to us, Your Honor. [emphasis added]. (Please See., Correspondence from Supreme Courts, Court Admin. Desiree Allen (Court Reporter Manager) dated 10-23-17 and 11-6-17). (stating: "You are requesting a transcript from State Grand Jury proceedings, this is to advise that [no court reporter has been assigned to record Grand Jury proceedings] and therefore [there is no transcript] available). emphasis...

(July 19, 2017, Page 16, Lines 4-6 ↓)

Even at defendant's Competency Hearing, dated July 19, 2017 - one week before trial, trial counsel stated: "If it please the court, Your Honor. I have also provided [him] with all of the [discovery] sent to us [from the Attorney General's Office."] Please see § 14-7-1700 in part (... A copy of the transcript of the recorded testimony or proceedings requested by the Attorney General or his designee shall be [provided] to the defendant by the [court reporter not the A. G.'s office - just to emphasize trial counsel's collaboration with the state. also see., (Tr. dated July 24-28, 2017, Page 15, Lines 14-18.)

(22.)

And yet again, trial court questions trial counsel in regard to discovery: The Court: "OKay. Now you said you've given him [All the discovery], is that correct? Trial Counsel responded: "Yes, Your Honor. [emphasis]. (Tr. July 19, 2017, Page 17, Lines 9-11.)

Despite the trial judge's inquiry as to whether defendant was provided discovery - that doesnt exist because defendant had not been indicted, at trial the judge denied defendant "alleged" minutes/impanelment documents when defendant stated: "I would also like the State Grand Jury minutes." (Tr. dated July 24-28, 2017, Lines 5-6). (Page 15).

In response, the trial judge stated: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those. [emphasis added] (Tr. dated July 24-28, 2017, Page 15, Lines 7-9). Please See § 14-7-1700 - emphasis!

Trial Counsel never [objected] to the denial of impanelment documents because trial counsel [was well aware] that these documents relating to the State Grand Jury, and pursuant to [discovery] did not exist. Yet trial counsel consistently stated that he had recieved "Discovery", or provided "Discovery" to defendant. In light of defendant's case that had not been in front of a S.G.J.; no court reporter having been assigned to record grand jury proceedings, therefore no transcript being available, there had not been any Discovery" to provide to defendant to mount a "defense", which is required by constitution, statue, and rule. Please See., § 14-7-1720, § 14-7-1700, § 14-7-1720(A)(5), Brady V. Maryland, 373 U.S. 83 (1963); Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005); Rule 5, SCRCrimp.

(23)

Prejudice from counsel's deficient performance may be presumed where, and only where, (1) there is complete denial of counse at critical stage of trial: Defendant suffered complete denial of counsel at critical stage of trial when trial counsel did not object and cite controlling precedents in regard to impanelment documents and when trial counsel did not object to codefendant's out-of-court statements and confession and did not cite controlling precedent. (2) Counsel entirely fails to subject prosecution's case to meaningful adversarial testing..: Trial counsel entirely failed to subject prosecutions case to meaningful adversarial testing when trial counsel "stipulating" to "chain of custody" for "all the evidence" prejudicing defendant's right to confront [all persons] in the chain of custody. (3) Under the circumstances likelihood that counsel could have performed as effective adversary was so remote as to have made trial inherently unfair: Prejudice may be presumed for an ineffective assistance of counsel claim 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. U.S.C.A. Const. Amend. 6. - To this, prejudice is presumed without inquiry into the actual conduct of the trial as defendant had not even been indicted, and that no "probable cause" to hold defendant for trial existed, as well as "no discovery" existing to defense to prepare a defense - add the fact that "contrary to" clearly established Supreme Court precedent, trial judge denied defendant impanelment documents (which dont exist) without "objection" from trial counsel. (Tr. Page 15, Lines 5-25); (Tr. Page 19, Lines 8-25.) Enclosed.

In Conclusion...

Defendant was denied "Effective Assistance of Counsel pursuant to the Sixth Amendment to the United States Constitution and due process of law pursuant to the Fourteenth Amendment to the United State's Constitution. Trial Counsel failed to "object" and to "cite" the controlling precedent's to trial judge when defendant was denied impanelment documents by trial judge. And again, after being denied impanelment documents by the judge, when the judge questioned "What defendant thought he would be able to use from the State Grand Jury record?," the defendant stated "Well, Im actually going to prove that no State Grand Jury even occurred", trial counsel still failed to "object" and "cite" controlling precedent. Trial Counsel's failure to "object" to the "denial" of impanelment documents was deficient performance and prejudiced defendant from preparing a defense and a fair trial.

Trial Counsel failed to "object" to codefendant's out-of-court statements and confession introduced through officers "clearly" in violation of defendant's right's to confrontation.

Trial Counsel "stipulated" to chain of custody to accomadate prosecution's "long witness list", abridging defendant's right to confront [all persons] in the chain of custody which prejudiced defendant fundamental fairness. Defendant's 6th Amend. right to "confrontation" was violated due to Counsel "stipulation" and "lack" of a defense.

(25.) Trial Counsel's conduct so undermined the proper functioning of the [adversarial process] that the trial cannot be relied upon as having produced a just result.

Counsel performance was unreasonable under professional norms when counsel failed to "object" to defendant being denied impanelment documents by the [trial judge]. Counsel's deficient performance "prejudiced" defendant from preparing a defense and right to "discovery" to which the [law] entitles him.

Counsel's deficient performance was unreasonable under professional norms when trial counsel did not "object" to the introduction of codefendants out-of-court statements and confession, and did not "cite" Supreme Court precedent's regarding "impanelment documents" and "testimonial hearsay statements."

Trial Counsel's "stipulation" to chain of custody to accomadate A.A.G.'s long "witness list" was an [egregious] violation of defendant right to a fair trial and violation of defendants Sixth Amendment right to "Effective Assistance of Counsel" and to "Confront" all persons in the chain of custody. This "stipulation" to chain of custody allowed A.A.G. to admit [All] alleged evidence "uncontested", including the out-of-court statements of codefendent's confession, thereby rendering the proper functioning of the "adversarial process" [lost].

Counsel's deficient performance was equivalent of being physically or mentally absent, and prejudiced defendant his constitutional right to "Effective Assistance of counsel", right to confront all witness'es, right to a fair trial, and defendants right to present an [alibi] and [prepare a defense]. For all forementioned reasons and surrounding circumstances defendant ask this court to [vacate] or reverse judgment and convictions in the interest of justice.

STATE GRAND JURY OF SOUTH CAROLINA

COUNTY OF BERKELEY

Court of General Sessions
Case No. 2016-GS-47-02

STATE OF SOUTH CAROLINA

vs.

JUSTIN GORDON HUNTER (a/k/a Mo)
EMORY WARREN ROBERTS (a/k/a Q),

Defendants.

Transcript of Record

DATE:
July 24 - July 28, 2017

B E F O R E:

THE HONORABLE DEADRA JEFFERSON

A P P E A R A N C E:

JOSHUA UNDERWOOD and DAVID FERNANDEZ
Attorney General for the State

TIMOTHY L. GRIFFITH
Attorney for the Defendant, Emory Warren Roberts

THERESA JOHNS
Attorney for the Defendant, Justin Gordon Hunter

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

CI and the way state law works, your lawyer goes and looks at those. But at trial, you will have the opportunity to look at them. And if you would like to look at them, I will give Mr. Griffith the opportunity to do that as well.

THE DEFENDANT: I would also like the State Grand Jury minutes. Impeachment Document

THE COURT: You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those.

THE DEFENDANT: Well, I have a document from Judge Newman that's to be made public record.

THE COURT: Is that correct?

THE DEFENDANT: Yes. Oh, you are talking --

MR. UNDERWOOD: Your Honor, the transcript from the State Grand Jury do not become a public record. The defendant is able to read them. However, we do not give them a copy. They would have to get them from the court reporter who takes those transcripts.

THE COURT: Sir, you would have to order it from the court reporter and pay for it.

THE DEFENDANT: I tried that.

THE COURT: You have to pay her in advance. She's not going to provide it to you without paying.

THE DEFENDANT: I understand, but they say they do not have that. They have none of that.

Department.

THE DEFENDANT: All right. I have that too, but they access South Carolina Code and Annex 30/4 --

THE COURT: Let's just say for argument's sake that all that happened. I sent you copies of your indictments. They exist.

THE DEFENDANT: All right.

THE COURT: I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?

THE DEFENDANT: Well, I'm actually going to show that no State Grand Jury even occurred.

THE COURT: Oh, it happened because I have the indictments.

THE DEFENDANT: I have the papers, but that doesn't say it happened.

THE COURT: It happened. I have the indictments that are certified. That's why I sent them to you. And you said you didn't have them. I wanted to make sure you had them.

THE DEFENDANT: Also said that it wasn't certified. On July 19th, you said they didn't have to be. All they had to be was filed. So are they certified now?

THE COURT: They were filed -- once something is in a court order, sir, it's already certified. You only

Shows Date Written while In County Jail Regarding State Indictment

Hill Finklea Detention Center
I.D. Number
2016003071

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1220 SENATE STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

October 23, 2017

Emory W. Roberts #2016003071
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

I am writing in response to your letter dated October 16, 2017, requesting a copy of a transcript from a State Grand Jury proceeding that "may have occurred on the dates of April 12-13, in Richland County." In order for me to assist you in obtaining the transcript of record from your proceedings, please provide the following information:

1) **presiding judge;**
2) **exact date (with year) of hearing.**

This information is required in order for us to assist you. When this information is received we will forward the request to the court reporter, who will then contact you to make arrangements for payment and delivery of the transcript. Please be advised that court reporters have 60 days to prepare a transcript after satisfactory payment arrangements have been made. Please contact this office at your earliest convenience with this required information.

Sincerely,

Désiree Allen
Court Reporter Manager

South Carolina Court Administration

South Carolina Supreme Court

Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

November 6, 2017

Emory W. Roberts, Jr. #373393
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

Your inquiry has been received by this office. The convening of the State Grand Jury is not dependent upon a term of General Sessions court and often does not meet at the same time as General Sessions terms. You are requesting a transcript from State Grand Jury proceedings. This is to advise that there is no court reporter assigned to record Grand Jury proceedings, and therefore, there is no transcript available.

I am sorry that we are unable to assist you further.

Sincerely,

Desiree Allen
Court Reporter Manager

Roberts vs. Lewis
1:16# 2:17/cv/00453/RMG/1186

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor

MARK A. KEEL
Chief

TO: Berkeley County (Hill-Finklea) Detention Center
Corporal Frederick Samuel
300 California Avenue
Moncks Corner, SC 29461
(via email)

FROM: Christina Bass

RE: Request for Prisoners to be accepted

DATE: June 9, 2016

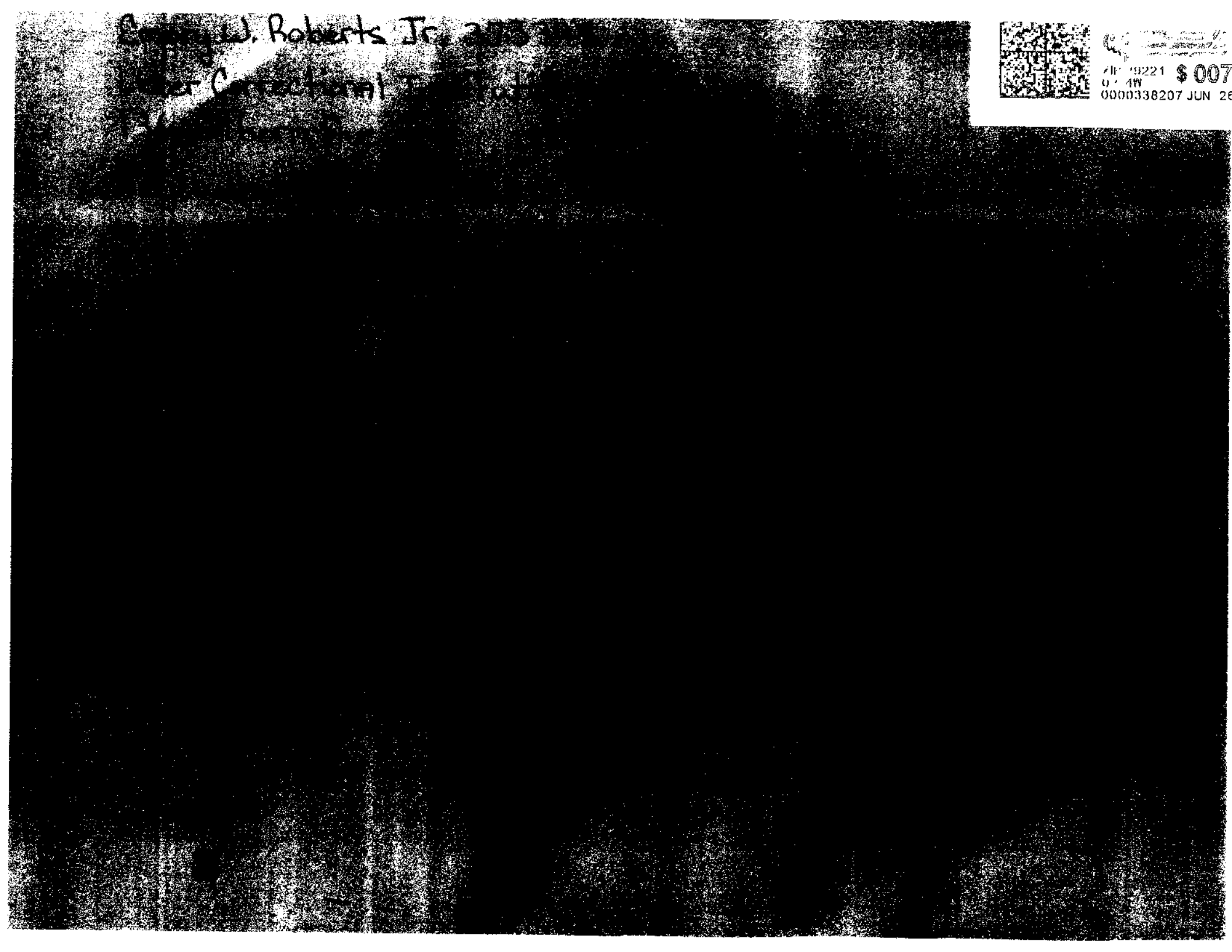
Please accept this memorandum as a request for you to accept the following prisoners this afternoon, **June 9, 2016** by **SLED Agent Justin Wingo**. These prisoners **will be housed at your facility until further notice.** These prisoners were previously housed in Columbia at Alvin S. Glenn Detention Center.

1) **Justin Hunter**
2) **Emory Roberts**
3) **Rosemary Quezada**
4) **Lassian Dixon-Johnson**

These subjects are being prosecuted by the SC Attorney General's Office.

Thank you for your attention and assistance with this matter. If you have any questions, please do not hesitate to contact me at 803-734-0056 or SLED Agent Justin Wingo at 803-609-7000.

P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588



STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Emory W. Roberts, Jr., #373393, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Case No.: 2020-CP-08-01349 **AMENDED RETURN AND PARTIAL MOTION TO DISMISS THE APPLICATION FOR POST-CONVICTION RELIEF** (Counsel Already Appointed)

FILED
2021 FEB -4 PM 12:01
BERKELEY COUNTY'S CLERK OF COURT

Respondent the State of South Carolina, making its amended return to the application for post-conviction relief filed by Applicant Emory W. Roberts, Jr. on July 21, 2020, would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined within the South Carolina Department of Corrections. In April 2016, the South Carolina State Grand Jury indicted Applicant and five co-conspirators under a multi-count indictment stemming from an investigation into a drug trafficking ring throughout Dorchester and Berkeley Counties (2016-GS-47-02). Under this indictment, Applicant was indicted for one count of trafficking in heroin of twenty eight grams or more, three counts of distribution of heroin, one count of trafficking in heroin between four and fourteen grams, one count of possession with intent to distribute methamphetamine, and one count of possession of a firearm during the commission of a violent crime.

On July 19, 2017, Applicant appeared before the Honorable Deadra L. Jefferson, circuit court judge, for pre-trial motions hearings alongside appointed counsel Timothy L, Griffith, Esquire. Thereafter, on July 24-28, 2017, Applicant and co-conspirator Justin Hunter (Hunter) proceeded to a jury trial with Judge Jefferson presiding. Applicant was again represented by Counsel Griffith. The State was represented by Assistant Attorneys General Joshua Underwood

cc: Email M. Jones 2/4/2021

and David Fernandez of the South Carolina Attorney General's Office. Hunter was not present for trial and was tried in his absence with Theresa Johns, Esquire, representing him.

At the conclusion of trial, the jury convicted Applicant of all counts. Following the verdict, Judge Jefferson sentenced Applicant to twenty-five years' imprisonment for trafficking in heroin of twenty eight grams or more, fifteen years' imprisonment for each count of distribution of heroin, fifteen years' imprisonment for trafficking in heroin four grams to fourteen grams, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifteen years' imprisonment for possession with intent to distribute methamphetamine. All of Applicant's sentences ran concurrently with each other, resulting in an aggregate total of twenty-five years' imprisonment.

Applicant timely appealed his convictions and was represented on appeal by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. On appeal, Applicant asserted the trial court violated his constitutional rights by denying his right to self-representation. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences on January 29, 2020. *State v. Roberts*, Op. No. 2020-UP-017 (S.C. Ct. App. filed January 29, 2020). On February 13, 2020, Applicant filed a Petition for Rehearing with the Court of Appeals. The Court of Appeals denied the Petition for Rehearing on March 27, 2020. Applicant then filed a petition for a writ of certiorari with the South Carolina Supreme Court on April 24, 2020. The State filed its return to the petition for writ of certiorari on May 6, 2020. On October 16, 2020, the Supreme Court denied certiorari. The Remittitur was returned to the circuit court on October 19, 2020.

While Applicant's direct appeal was pending, he filed this instant post-conviction relief action on July 21, 2020. Respondent moved to dismiss the application without prejudice because

his direct appeal was still pending before the South Carolina Supreme Court. *See* Rule 71.1, SCRCP ("An application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected."). Respondent submitted a proposed order of dismissal without prejudice at the same time to the chief administrative judge for common pleas. This order was neither signed nor acknowledged by the court.

Now that Applicant's direct appeal has concluded, Respondent makes the following amended return to the application and requests an evidentiary hearing to resolve the issues as set forth in the application, as will be addressed below.

II. ALLEGATIONS RAISED IN THE APPLICATION FOR POST-CONVICTION RELIEF

On July 21, 2020, while his direct appeal was still pending on a petition for writ of certiorari to the South Carolina Supreme Court, Applicant filed this instant post-conviction relief action, alleging:

- Ineffective assistance of counsel, specifically, that counsel "conspired with the prosecution on unfounded offenses"
- Prosecutorial misconduct, specifically, that prosecutors "impaired grand jury's independent role"
- Judicial misconduct, specifically, "trial judge committed 'fraud upon the court' and "exceeded its jurisdiction to impose sentence"

As requested relief, Applicant states he is seeking his sentences to be vacated and the indictment dismissed with prejudice.

Respondent previously filed a return, with various attachments including the State Grand Jury Clerk of Court Records regarding the Applicant's case, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's direct appeal, and the current application for relief. Respondent reserves the right to amend this

return based upon receipt of additional relevant information.

III. RESPONSE TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Applicant asserts trial counsel was ineffective in his representation of Applicant. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). *Id.* at 690–95; *Butler,* 286 S.C. at 442, 334 S.E.2d at 814. The defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the

range of reasonable professional legal assistance. *Strickland*, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (*quoting Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth

Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland,* 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington,* 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington,* 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside

the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695.

Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial*." *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose

result is being challenged." *Strickland,* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

In conclusion, Respondent submits Applicant cannot satisfy either requirement of the *Strickland* test for any of this various claims of ineffective assistance of counsel. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV. RESPONSE TO ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

Applicant further raises claims of prosecutorial misconduct, specifically, that the prosecutors impaired the grand jury's role. However, Applicant asserts he raised these concerns to the trial court prior to trial and the issues were denied, and accordingly, these issues should have been raised on direct appeal.

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Here, as Applicant raised these issues prior to trial, he could have raised these issues on

direct appeal. The failure to do so has waived this allegation as grounds for relief. *See Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel). Regardless, it is applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 U.S. 794 (1989). Notwithstanding the procedural bar to this claim, Applicant provides no evidence to suggest prosecutorial impropriety. Therefore, this allegation should be summarily dismissed

V. RESPONSE TO ALLEGATIONS OF TRIAL COURT MISCONDUCT

Applicant further raises claims of trial court misconduct. Again, these are issues that could have and should have been pursued on direct appeal. Post-conviction relief is not a substitute for an appeal. *Simmons*, 264 S.C. at 423, 215 S.E.2d at 885. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton*, 312 S.C. at 8, 430 S.E.2d at 520. Therefore, this allegation should be summarily dismissed

VII. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.*, 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue

the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP; *see also* Rules 15(a)-(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

VII. GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. CONCLUSION

WHEREFORE, Respondent respectfully requests this Court summarily dismiss the allegations of prosecutorial misconduct and trial court error and convene an evidentiary hearing on the allegation of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: Megan H. Jameson
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Feb. 1st, 2021

STATE OF SOUTH CAROLINA)
)
County of Berkeley.)
)
Emory W. Roberts Jr.)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

(Subsequent Application)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
21 MAY 13 PM 3:41
LEAH QUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution

2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) Justin Hunter, Rosemary Quezada, Lessian Johnson, William Brown..

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: (2016-GS-47-02)

(a) S.C. Code Ann. §§ 44-53-370(e)(3)(c); 44-53-370(b)(1);

(b) 44-53-370(e)(3)(A); 16-23-490; 44-53-375(B)

Copies sent E.W. Roberts Jr. 5/13 per l

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) July 28, 2017

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. No Action Taken Because "Represented" By Counsel

iii. _____

(c) the date of each such result:

i. January 29, 2020

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: (Conspiracy against public justice) Brady vio mis- (Corruption) 6th Amend. right nature cause

(a) See Briefs 1-9 (Attached); Prosecutorial Conduct; Fraud upon Court;

(b) Judicial Misconduct; Ineffective Assistance of Counsel; Perjury;

(c) Lack of subject-matter jurisdiction to convict; due process violations; Ineffective Appellate Counsel; trial court error; want of indictment - etc.

(Right to self-representation) (Insufficient evidence)

See Reverse Page 2 For answers to # 10.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

↑ Brady Violation; Self Represen-tation; 6th Amend. Juris.

(a) The facts which support each ground set out in (10) is marked Exhibit C

(b) in attachments; Exhibit B; Exhibit D; Exhibit F; Exhibit G;

(c) Exhibit H; Exhibit I; Exhibit J. (Emphasis).

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? (Mandamus)

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Fraud upon the Court; Violations of Art. 1. Section 11; Violations

ii. of Art. 5. Section 22; Violations of 1st Amend. Right to Redress Grievances;

iii. lack of subject-matter jurisdiction; violation of Art. 15 State Grand Jury Act;

iv. Violation of 6th Amend. right to be informed of nature and cause; Conspiracy; etc.

(b) the name and location of the Court in which each was filed:

i. S.C. Supreme Court

ii. SC Court of Appeals, 1220 Sentle Street, Columbia, South Carolina 29201

iii. Berkeley County Court of General Sessions (2020-CP-08-01349)

iv. Richland County Clerk of Court (See exhibit H)

(c) the disposition thereof:

i. Defendant was represented by counsel and no action was taken on (pro se) filing

ii. (2020-CP-08-01349) Dismissed based on pending appeal

iii. (Newly Discovered Evidence Motion) Refused to Clock or File (See Exhibit I)

iv. _____

(d) the date of each such disposition:

i. August 16, 2017, March 7, 2018; Jan. 31, 2018

ii. S.C. Supreme Court (July 23, 2018)(April 2, 2019)

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N.A.

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

E.R. [redacted] "Yes"

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented: Subject Matter Jurisdiction

i. (All Grounds) Violations of Const., Art. 1-§11; Art. 5§22;

ii. Right to self-rep.; Prosecutorial misconduct; Fraud upon the Court; unlawful conviction;

iii. Violation of §14-7-1700 and right to prepare a defense; Judicial Misconduct; ineffective assist. of counsel etc.

(b) the proceedings in which each ground was raised:

i. Appeal

ii. Mandamus

iii. Initial P.C.R. Filing (2020-CP-08-01349)

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

_____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Timothy Griffith, 360 West Westmark Blvd. 2nd Floor Sumter, SC 29150.

ii. Susan B. Hackett (S.C. Court of Appeals)

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Timothy Griffith (Trial)

ii. Susan B. Hackett (Appeal)

iii. _____

19. State clearly the relief you seek in filing this application:

Applicant seeks to have his sentences vacated and the indictment dismissed with prejudice and to be released immediately, As defendant suffers continuing collateral consequences.

20. Are you now under sentence from any other court that you have not challenged?

No

FILED
21 MAY 13 PM 3:42
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA)
)
County of Berkeley)

VERIFICATION

I, Emory W. Roberts Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Emory W. Roberts Jr.

SWORN to and subscribed before me this 1st day of April, 2021.

Lisa K. Be (L.S.)
Notary Public

My Commission Expires: 6-20-26

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Emory W. Roberts Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Emory W. Roberts Jr.
Applicant

SWORN or affirmed to and subscribed before me this 1st day of April, 2021.

Lida K. Bu
Notary Public

My Commission Expires: 6-20-26

FILED
21 MAY 13 PM 3:42
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

Revised 3/2003

Subsequent P.C.R. Application
Court Of Common Pleas... Courts Copy.

"Court should grant an evidentiary hearing on a motion to vacate, set aside, or correct sentence when the defendant alleges facts that, if proven, would entitle him to relief."
Sandoval V. U.S. 574 F.3d 847

Accordingly, Applicant request evidentiary hearing based on Exculpatory Evidence. See Court Admin. Corr. dated 10-23-17, and 11-6-17... (See Brief 1-2x)

Also, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, defendant request an evidentiary hearing to fully resolve this issue. See Sharper V. State, 279, S.C. 264, 305 S.E.2d 247 (1983). Accordingly, Applicant request an evidentiary hearing...

Clerk of Court, Please Clock, Stamp, File, and return copy to Emory W. Roberts Jr. (Applicant).

C.C. South Carolina State Ethics Commission

(Original Copy For Court/Clerk)

Clerk of Court, Leah Gueary Dupree
Berkeley County Court of General Sessions

(1 of 4 pages to Clerk including Verification) (1)

(3-25-21)

As I have been prejudiced my first Amendment rights to a "Redress of Grievances" by this Court and Clerk of Court, and now have become "strained" in my legal attempts to have filed "Subsequent" P.C.R. Application (herein), it should be [strongly] noted: Pursuant to 42 U.S.C.A. § 1983 "Every person who, under color of any State statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the U.S. to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity".

In addition," any Clerk of the court of common pleas and general sessions, sheriff, judge of probate or register of deeds in this State who shall willfully [fail] or [neglect] to discharge all the duties and perform all the services which are required of him by law shall, in addition to his liability to the person aggrieved, be liable to be indicted as for a misdemeanor and upon conviction thereof shall be fined, at the discretion of the court, not exceeding $500, § 8-1-60. Neglect of Duty. Accordingly, I ask that "subsequent Application" be stamped, clocked, dated, copied and return copy and exhibits to defendant and to make "null" or "void" Application # 2020-CP-08-01349, as that application was dismissed because of pending appeal, without prejudice. Mr. Roberts seeks now to eliminate [prejudice] to his filing of subsequent" applications; by acts of corruption, and offenses against public justice, fraud and conspiracy, the Attorney Generals Office oppressive power over defendants legal proceedings, and [influence] over Clerks of Court have just for hindered defendants attempts to file subsequent P.C.R. and Exhibits.

Leah Guerry Dupree ②
Clerk of Court 3-25-21
Berkeley County

Re: 2020-CP-08-1349
Emory W. Roberts Jr. #373393 vs. State of SC
Post-Conviction Relief Applicant; Believing
Counsel of Duty; Fraud upon the Court; Offense
Against public justice...etc!

Christopher L. Murphy, Attorney at Law is hereby relieved of his duty; fired; advised that "Post-Conviction Relief Application #2020-CP-08-1349 was "Dismissed" by "ORDER" Without Prejudice (See Exhibit A), and that defendant wishes to appear "pro se" concerning all legal matters, including my wishes to file "Subsequent" Post-Conviction Relief Application accompanied with this letter, as the Post-Conviction Relief Application #2020-CP-08-1349 was dismissed without prejudice based on Applicant's pending direct appeal pursuant to Rule 71.1, SCRCP. (See Exhibit A). Therefore, any filing of Initial Application #2020-CP-08-1349 and its exhibits (in light of the fact that it was dismissed without prejudice), constitute a fraud, and the non-filing of "subsequent" application will constitute a violation of § 8-1-60. Neglect of Duty. (Emphasis).

Leah Guerry Dupree, Clerk of Court, please make record of my right to "relieve Counsel", and please make record of my right to file "Subsequent" P.C.R. accompanied with this Correspondence.

Emory W. Roberts Jr. 373393 ③

Court of Common Pleas

V. P.C.R. Application §17-27-20 –

State of South Carolina – Paragraph A. (Subsequent Filing)

(P.C.R. Paragraph A.) (3-25-21)

Clerk of Court, Please file "Subsequent" P.C.R. Application pursuant to Uniform Post-Conviction Act, Paragraph A. §17-27-20. Please Clock, Stamp, Date, File and return copy of motions and exhibits to Defendant, thanking you in advance.

Enclosures/Attachments/Exhibits.....: Exhibit A - Protective Order; Order of Dismissal Without Prejudice; Exhibit B - Oct. 23, 2017 Correspondence from Desiree Allen; Exhibit C - Nov. 6, 2017 Correspondence from Desiree Allen; Exhibit D - Tr.; Exhibit E - Tr.; Exhibit F - letter from Christina Bates; Exhibit G - Clerk of Berkeley Correspondence; Exhibit H; Exhibit I; Exhibit J - Letter to Susan B. Hackett, Appellate Defender; Order or Motion relieving Attorney Christopher Murphy as P.C.R. Attorney; and 9 prose briefs/Motions.

C.C. Jennifer B. McCoy Chief Administrative Judge Ninth Judicial Circuit

South Carolina Attorney Generals Office

Christopher Murphy, Attorney (P.C.R.)

3-25-21

(4)

Leah Guerry Dupree, I am in possession of your correspondence to Attorney Christopher Murphy dated January 20, 2021, and correspondence to you from Attorney Generals Office dated December 30, 2020. Also Exhibit A. Exhibit A establishes that P.C.R. Application # 2020-CP-08-1349 was dismissed without prejudice and in its place subsequent application filed. Anything less than this will constitute a continuing conspiracy and fraud, as well as cruel and unusual punishment and [inadequate remedy] and blatant denial of defendants due process of law pursuant to the Fourteenth Amendment of the U.S. Const.

I have made numerous copies (notarized) of my correspondence to you and exhibits to "eliminate prejudice" and to evidence all actions to conspire with Attorney Generals Office against me, to be filed in a 1983 Civil action and for Complaint to be filed against conspiring persons to the Department of Justice (Civil Division For Rights).

Verification

I, Emory W. Roberts Jr., being duly sworn upon my oath, depose and say that all herein is true and authentic under penalty of perjury, and all exhibits and motions, facts and circumstances.

Emory W. Roberts Jr.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 1st DAY OF April
20 21

NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 6-20-26

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Emory W. Roberts, Jr., #373393, Applicant,	Case No.: 2020-CP-08-01349
v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL WITHOUT PREJUDICE**

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Emory W. Roberts, Jr. on July 21, 2020. Respondent made its return, requesting the application be summarily dismissed without prejudice based on Applicant's pending direct appeal pursuant to Rule 71.1, SCRCP. This Court finds this application must be summarily dismissed without prejudice.

I. Procedural History

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. In April 2016, the South Carolina State Grand Jury indicted Applicant and five co-conspirators under a multi-count indictment stemming from an investigation into a drug trafficking ring throughout Dorchester and Berkeley Counties (2016-GS-47-02). Under this indictment, Applicant was indicted for one count of trafficking in heroin of twenty eight grams or more, three counts of distribution of heroin, one count of trafficking in heroin between four and fourteen grams, one count of possession with intent to distribute methamphetamine, and one count of possession of a firearm during the commission of a violent crime.

On July 19, 2017, Applicant appeared before the Honorable Deadra L. Jefferson, circuit court judge, for pre-trial motions hearings alongside appointed counsel Timothy L, Griffith, Esquire. Thereafter, on July 24-28, 2017, Applicant and co-conspirator Justin Hunter (Hunter)

proceeded to trial before a jury on all counts in the Berkeley County Court of General Sessions with Judge Jefferson, presiding. Applicant was again represented by Counsel Griffith. The State was represented by Assistant Attorneys General Joshua Underwood and David Fernandez of the South Carolina Attorney General's Office. Hunter was not present for trial and was tried in his absence with Theresa Johns, Esquire, representing him.

At the conclusion of trial, the jury convicted Applicant of all counts. Following the verdict, Judge Jefferson sentenced Applicant to twenty-five years' imprisonment for trafficking in heroin of twenty eight grams or more, fifteen years' imprisonment for each count of distribution of heroin, fifteen years' imprisonment for trafficking in heroin four grams to fourteen grams, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifteen years' imprisonment for possession with intent to distribute methamphetamine. All of Applicant's sentences ran concurrently with each other, resulting in an aggregate total of twenty-five years' imprisonment.

Applicant timely appealed his convictions and sentences and this direct appeal is still pending. He is represented on appeal by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences on January 29, 2020. State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed January 29, 2020). On February 13, 2020, Applicant filed a Petition for Rehearing with the Court of Appeals. The Court of Appeals denied the Petition for Rehearing on March 27, 2020. Applicant then filed a petition for a writ of certiorari with the South Carolina Supreme Court on April 24, 2020. The State filed its return to the petition for writ of certiorari on May 6, 2020. This certiorari petition is still pending before the Supreme Court.

II. Current Action before this Court

On July 21, 2020, while his direct appeal was still pending on a petition for writ of certiorari to the South Carolina Supreme Court, Applicant filed this instant post-conviction relief action, alleging numerous grounds of trial court error, ineffective assistance of counsel, due process violations, and prosecutorial misconduct. As requested relief, Applicant states he is seeking his sentences to be vacated and the indictment dismissed with prejudice.

Attached to Respondent's return and motion to dismiss without prejudice are the State Grand Jury Clerk of Court Records regarding the Applicant's case, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's direct appeal, and the current application for relief. This Court has reviewed these materials before issuing this order.

Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court dismiss the application without prejudice based upon the following findings:

Summary Dismissal Based on Pending Direct Appeal

This Court finds this application must be summarily dismissed without prejudice based on Applicant's pending direct appeal.

Respondent moved to summarily dismiss the application because his direct appeal is still pending before the South Carolina Supreme Court. Pursuant to Rule 71.1, SCRCP, "[a]n application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected." Accordingly, this Court dismisses the present application **without prejudice**, with leave for Applicant file a new

application for post-conviction relief should be not prevail on direct appeal.

IV. Conclusion

Pursuant to S.C. Code Ann. § 17-27-70 and Rule 71.1, SCRCP, this Court dismisses this application **without prejudice** based on Applicant's pending direct appeal, with leave for Applicant to seek post-conviction relief through the filing of a subsequent application once his direct appeal concludes should he so desire.

AND IT IS SO ORDERED this _____ day of _____, 2020.

_____
JENNIFER B. MCCOY
Chief Administrative Judge
Ninth Judicial Circuit

_____, South Carolina

Where's Receipt From Purchase of Minutes?

Exhibit A

Exhibits A - J For Subsequent P.C.R. Application" (Carl's Copy)

STATE GRAND JURY OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA VS. JUSTIN GORDON HUNTER, (A.K.A. "MO"), EMORY WARREN ROBERTS, (A.K.A. "Q"), FNU LNU (A.K.A. "KEITH"), ROSEMARY QUEZADA, (A.K.A. "CI CI"), (A.K.A. "CHICKA") LASSIAN DIXON JOHNSON, (A.K.A. "G"), (A.K.A "BG"), WILLIAM ORLANDO BROWN, (A.K.A. "WILL"), DEFENDANTS.	INDICTMENT NOS.: 2016-GS-47-02 2016-GS-47-03 **PROTECTIVE ORDER** FILED SEP 15 2016 JAMES R. PARKS CLERK, STATE GRAND JURY

Stamp Bigger Than other One

Diff. Dates

This matter comes before the Court on motion of the Attorney General of South Carolina (the "Attorney General") requesting authorization to disclose State Grand Jury material to the attorneys for the defendants in the above-captioned case for purposes of providing the pre-trial discovery required in criminal cases. South Carolina Code Ann. § 14-7-1720 generally provides that State Grand Jury material is secret, but allows disclosure for the purpose of "complying with constitutional, statutory, or other legal requirements or to further justice". See S.C. Code Ann. § 14-7-1720(A)(5). Additionally, defendants are entitled to discovery in criminal cases, pursuant to the constitution, statute, and rule. See Brady v. Maryland, 373 U.S. 83 (1963); Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); S.C. Code Ann. § 14-7-1700; Rule 5, SCRCrimP.

However, the State Grand Jury statute also provides that disclosure of State Grand Jury evidence and testimony "must be made in that manner, at that time, and under those conditions

 1 of 5

Exhibit B

South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1220 SENATE STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

October 23, 2017

Emory W. Roberts #2016003071
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

I am writing in response to your letter dated October 16, 2017, requesting a copy of a transcript from a State Grand Jury proceeding that "may have occurred on the dates of April 12-13, in Richland County." In order for me to assist you in obtaining the transcript of record from your proceedings, please provide the following information:

1) **presiding judge;**
2) **exact date (with year) of hearing.**

This information is required in order for us to assist you. When this information is received we will forward the request to the court reporter, who will then contact you to make arrangements for payment and delivery of the transcript. Please be advised that court reporters have 60 days to prepare a transcript after satisfactory payment arrangements have been made. Please contact this office at your earliest convenience with this required information.

Sincerely,

Désiree Allen
Court Reporter Manager

Exhibit C

South Carolina Court Administration

South Carolina Supreme Court

Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

November 6, 2017

Emory W. Roberts, Jr. #373393
Kirkland Reception and Evaluation Center
4344 Broad River Rd.
Columbia, SC 29210-4098

Dear Mr. Roberts:

Your inquiry has been received by this office. The convening of the State Grand Jury is not dependent upon a term of General Sessions court and often does not meet at the same time as General Sessions terms. You are requesting a transcript from State Grand Jury proceedings. This is to advise that there is no court reporter assigned to record Grand Jury proceedings, and therefore, there is no transcript available.

I am sorry that we are unable to assist you further.

Sincerely,

Desiree Allen
Court Reporter Manager

Department.

THE DEFENDANT: All right. I have that too, but they access South Carolina Code and Annex 30/4 --

THE COURT: Let's just say for argument's sake that all that happened. I sent you copies of your indictments. They exist.

THE DEFENDANT: All right.

THE COURT: I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?

THE DEFENDANT: Well, I'm actually going to show that no State Grand Jury even occurred.

THE COURT: Oh, it happened because I have the indictments.

THE DEFENDANT: I have the papers, but that doesn't say it happened.

THE COURT: It happened. I have the indictments that are certified. That's why I sent them to you. And you said you didn't have them. I wanted to make sure you had them.

THE DEFENDANT: Also said that it wasn't certified. On July 19th, you said they didn't have to be. All they had to be was filed. So are they certified now?

THE COURT: They were filed -- once something is in a court order, sir, it's already certified. You only

Exhibit E

CI and the way state law works, your lawyer goes and looks at those. But at trial, you will have the opportunity to look at them. And if you would like to look at them, I will give Mr. Griffith the opportunity to do that as well.

THE DEFENDANT: I would also like the State Grand Jury minutes. Impeachment Document

THE COURT: You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those.

THE DEFENDANT: Well, I have a document from Judge Newman that's to be made public record.

THE COURT: Is that correct?

THE DEFENDANT: Yes. Oh, you are talking --

MR. UNDERWOOD: Your Honor, the transcript from the State Grand Jury do not become a public record. The defendant is able to read them. However, we do not give them a copy. They would have to get them from the court reporter who takes those transcripts.

THE COURT: Sir, you would have to order it from the court reporter and pay for it.

THE DEFENDANT: I tried that.

THE COURT: You have to pay her in advance. She's not going to provide it to you without paying.

THE DEFENDANT: I understand, but they say they do not have that. They have none of that.

Exhibit F

Supp. App'x 1306

Roberts vs Lewis
1:17-cv-00453-RMG-MGB

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor

MARK A. KEEL
Chief

TO: Berkeley County (Hill-Finklea) Detention Center
Corporal Frederick Samuel
300 California Avenue
Moncks Corner, SC 29461
(via email)

FROM: Christina Bass

RE: Request for Prisoners to be accepted

DATE: June 9, 2016

Please accept this memorandum as a request for you to accept the following prisoners this afternoon, **June 9, 2016** by **SLED Agent Justin Wingo**. These prisoners **will be housed at your facility until further notice.** These prisoners were previously housed in Columbia at Alvin S. Glenn Detention Center.

1) **Justin Hunter**
2) **Emory Roberts**
3) **Rosemary Quezada**
4) **Lassian Dixon-Johnson**

These subjects are being prosecuted by the SC Attorney General's Office.

Thank you for your attention and assistance with this matter. If you have any questions, please do not hesitate to contact me at 803-734-0056 or SLED Agent Justin Wingo at 803-609-7000.

P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

Exhibit G

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY
GENERAL SESSIONS COURT
POST OFFICE BOX 219
MONCKS CORNER, SOUTH CAROLINA 29461-0219
(843) 719-4400 (843) 567-3311 (843) 723-3800

TO: Emory Roberts

RE: Jurisdiction

The enclosed document is being returned for the following reason(s):

1 This Order needs to be sent to Berkeley County General Sessions Administrative Judge for Signature.

___ Requires original signature.

___ This document is a copy. We must file original.

___ We do not do criminal records check.

___ This is not a Berkeley County Case.

___ Please provide case number.

___ Attached is the requested information.

___ Contact Court Administration for transcript at the following address: 1220 Senate Street, Suite 200, Columbia, SC 29201-3739

___ Information may be obtained from our web-site at www.berkeleycountysc.gov.

X Other SLED has jurisdiction over you. We here @ the Clerk office have no info. You need to Contact BCSO

Please make the necessary corrections and return this document for filing.
Thank you for your assistance.

Staff Initials DOL

Date 7-6-16

FILED
2016 JUL -6 AM 11:25
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Exhibit H

Inmate ID: 20160023971

Case Status: NP

Supp. App'x 1308

12015A4700101 00017

Jeanette W. McBride
Clerk of Court

Virginia F. Belcher
Chief Deputy Clerk of Court

Mailing Address
Post Office Box 2766
Columbia, S.C. 29202
Phone: (803) 576-1939
Fax: (803) 576-1925

RICHLAND COUNTY JUDICIAL CENTER
Clerk of Court
Criminal Records Division
1701 Main Street
Columbia, S.C. 29201

Name: Emory Warren Roberts Jr.

Date: 7/1/16

We have received your inquiry and respond as follows:

___ Please find enclosed the following document(s):
____ Disposition ____ Sentence ____ Warrant ____ Indictment ____ Motion

____ Other: _____

___ A copy of your request has been forwarded for handling to:
____Solicitors Office ____Public Defender's Office

___ SCDC is responsible for clearing up detainers. Your charge(s) have been faxed to SCDC.

___ SCDC calculates credit for time served. Necessary records have been faxed to SCDC.

___ To obtain a transcript, please write to SC Court Administration at 1220 Senate Street, Suite 200, Columbia, SC 29201 and provide the case number, Judge's name, and date of trial.

___ We need more information to process your request:
___ Case Number ___ Charge ___ SSN ___ Court Location ___ Date of Arrest

✓ There is no record of said charge.

✓ Please contact: State Grand Jury
PO Box 11508 Columbia, SC 29211

DISCLAIMER: The role of the Clerk of Court's office is to maintain court documents. The Clerk's office provides copies of case documents (with proper identifying information) upon request, but does not provide other information regarding a case. The Clerk's office is not permitted to give legal advice and/or determine length of sentence or other case specific questions.

Exhibit I

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY
GENERAL SESSIONS COURT
POST OFFICE BOX 219
MONCKS CORNER, SOUTH CAROLINA 29461-0219
(843) 719-4400 (843) 567-3311 (843) 723-3800

TO: Emory Roberts

RE: _____

The enclosed document is being returned for the following reason(s):

___ This Order needs to be sent to Berkeley County General Sessions Administrative Judge for Signature.

___ Requires original signature.

___ This document is a copy. We must file original.

___ We do not do criminal records check.

X This is not a Berkeley County Case.

___ Please provide case number.

___ Attached is the requested information.

___ Contact Court Administration for transcript at the following address:
1220 Senate Street, Suite 200, Columbia, SC 29201-3739

___ Information may be obtained from our web-site at **www.berkeleycountysc.gov**.

✓ Other We can't clock this due to the fact that this is a Richland County Case. You will need to send it to them

FILED
2018 JAN 31 AM 11:22
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Please make the necessary corrections and return this document for filing.
Thank you for your assistance.

Staff Initials 1/31/18 **Date** PKL

(Newly Discovered Evidence)
Attempted To File,
Desiree Allen (Correspondence)
Court Admin.

Exhibit J

373393

LEGAL MAIL ONLY

Division of Appellate Defense (SCCID)
Susan B. HacKett, Appellate Defender

12/10/17

Hello Ms. HacKett, how are you? In regards to your correspondence dated December 4, 2017 I thank you for the information you have provided. One question or two concerning the enclosure, (South Carolina Judicial Department - Circuit Court Search Results) Would those Circuit Courts and dates be suggestive of the actual convening of a "State Grand Jury" for the entire State for the month of April, 2016?

Ms. HacKett, I'm being Unlawfully imprisoned pursuant to State V. Williams 348 S.C. 424, "Except for certain minor offenses, the circuit court does not have subject matter jurisdiction to convict a defendant unless there has been an indictment of the offense, a waiver of indictment, or unless the charge is a lesser included offense of the crime charged." Also, "One who demands and is refused the right to be tried for crime charged against him only upon indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the State Constitution, Const. Art. 1 § 3." In violation of South Carolina Constitution as well as the United States Constitution, Amend. IV, V, XIV, my rights and due process been violated

Sincerely
Emory W. Roberts Jr. 373393

Please See Enclosure: Desiree Allen, (Court Reporter Manager) of the South Carolina Supreme Court, 2 Letters dated 10-23-17/11-6-17

RECEIVED
DEC 13 2017
APPELLATE DEFENSE

373393

LEGAL MAIL ONLY

Susan B. HacKett, Appellate Defender

Ms. HacKett, I have reached out to the S.C. Bar Association, Client Assistance Program C.A.P., and the Office of Disciplinary Counsel just recently in regards to to concerns in this correspondence, as I'm contemplating the actions of the above mentioned, I was also thinking of a "State Motion To Vacate". Being as I'm still "trapped" in B&E, I was wondering would you be able to either submit a Motion to Vacate on my behalf or would you at least be able to provide me with the Motion/Legal form to complete and submit Pro se on my own behalf?

In addition, in regards to these circumstance's, I guess I'm curious to Know what your position would be concerning this matter, and what exactly are you able or obligated to do in these circumstances? Pursuant to "State v. Evans, 319 S.C. 320 (1995)", as well as "Knight Publishing Company v. U.S.C., 295 S.C. 31, 367 S.E. 2d 20 (1988)", "Subject Matter Jurisdiction may be raised for the first time on appeal", ... is this applicable to circumstances such as mines dealing with an unlawful imprisonment pursuant to 35 C.J.S. False Imprisonment § 3? In relation to the concerns of the above mentioned matters, is there specifically anything I can do or any action I can initiate to regain my freedom, and liberties???

My Mom is trying the avenues of the Innocent Project and A.C.L.U., is there anything else?

Again, Ms. HacKett I Know it is the Holiday season, and I appreciate your time, effort, and help, please enjoy your day as well as your Holidays.

Please File, Clock Stamped
Correspondence And Enclosure
And Return Copy To Myself,
thanKing you in advance...

Happy Holidays, Merry X-MAS
Emory W. Roberts Jr. 373393

Table of Authorities Subsequent P.C.R. Appl. (Brief 1 - IX)

Brady V. Maryland, 373 U.S. 83 (1963)
Kyles V. Whitley, 514 U.S. 419 (1995)
U.S. V. Agurs, 427 U.S. 97, 107-11 (1976)
Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005)
State V. Simpson, 425 S.C. 522
State V. Proctor, 348 S.C. 322, 559 S.E. 2d 318 (Ct. App. 2001)
U.S. V. Ruiz, 536 U.S. 622, 628 (2002)
Giglio V. U.S., 405 U.S. 150, 154 (1972)
U.S. V. BartKo - U.S.C.A. Fourth Circuit 8-23-2013
State V. Durant, Supreme Court of South Carolina, 430 S.C. 98
U.S. V. Bagley, 473 U.S. 667, 676-77 (1985)
U.S. V. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986)
State V. Quattlebaum, 338 S.C. 441, 527, S.E. 2d 105 (S.C. 2000)
State V. Durden, 264 S.C. 86, 212 S.E. 2d 587 (1975)
State V. King, 222 S.C. 108, 71 S.E. 2d 793 (1952)
Gill V. State, 346 S.C. 209 552 S.E. 2d 26
Patterson V. State, 359 S.C. 115 597 S.E. 2d 150
United States V. Socony Vacuum Oil Co., 310 U.S. 150, 234
Pittsburgh Plate Glass Company V. United States, supra.
United States V. Proctor & Gamble, supra.
McKeever V. United States, supra.
Zborowski V. United States, supra.
Travis V. United States, 269 F.2d 928 (10th Cir. 1959)
U.S. V. Sneed, 54 Fed. Appx. 375
Cobbledick V. United States, 309 U.S. 323, 327
United States V. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)

(2x)

Statutory Provisions
Section 14-7-1720
Section 14-7-1700
Section 14-7-1610
Section 14-7-1630 (A)(1)
Section 14-7-1770
Rule 5 (d)
Rule 5, SCRCrim.P
Section 17-25-10

Constitutional Provisions
Art. 1. § 11
Art. 5. § 22

"Court should grant an evidentiary hearing on a motion to vacate, set aside, or correct sentence when the defendant alleges facts that, if proven, would entitle him to relief." Sandoval V. U.S. 574 F.3d 847

Questions Presented To The Court (3x)

1.) Whether defendant's right to "disclosure" pursuant to Brady V. Maryland, and § 14-7-1720(A) and (D) and Rule 5, S.C.R Crim. P and defendant's due process of law and equal protections under the law violated when, before the jury being sworn, defendant was denied impanelment documents?

2.) Whether defendant's due process of law and equal protections under the law violated when he was not able to mount or prepare a defense due to prosecutors misconduct and trial judges prejudicial ruling?

3.) Whether trial court violated defendants due process of law and equal protections under the law when trial judge relieved prosecutions "burden of proof" to explain why the "impanelment documents" should not be released pursuant to Rule 5(d)?

4.) Whether evidence from Court Administration that factually and explicitly proves that "there is no record of State Grand Jury proceedings" constitute "exculpatory evidence favorable to the defense?

5.) Whether defendant suffers "prejudice" to his "legal rights" due to prosecutions attempts to shield "unfounded prosecution", failure to make a transcript, and deprived defendant "screening function", thereby "prejudicing" defendants rights pursuant to §14-7-1720, Brady, Art. I. §11, and his right to prepare a defense?

(4X)

6.) Whether defendant's right pursuant to §§ 14-7-1610, 14-7-1630(A)(1), and defendant's due process of law, violated when he was "infringed" his right to "challenge the subject matter jurisdiction of the State Grand Jury?

7.) Whether the denial of "impanelment documents" constitute a structural error?

Relevant Facts (5x)

Defendant was "alleged" to have been "indicted" on April 12-13, 2016 by the State Grand Jury. See Indictment NOS.: 2016-GS-47-02, 2016-GS-47-03. A "Protective Order" was signed by trial judge "authorizing" [disclosure] of State Grand Jury material to the attorneys for the defendants in the above-captioned case for purposes of providing the pre-trial discovery [required] in criminal cases. (Protective Order - Filed Sept. 15, 2016 by Clerk of S.G.J.)

On the date of defendants trial (July 24-28, 2017), before the jury being sworn, defendant asks the trial court: "What does discovery consist of?" (Tr. July 24-28, 2017, page 14, line 12). Trial court responded: "Evidence against you." (Tr. July 24-28, 2017, page 14, line 13) Defendant then stated: "I didnt get that. All I got was an indictment. (Tr. July 24-28, 2017, page 14, lines 14-15). Defendant states: "As well, pursuant to [Rule 5], "continuing disclosure", I haven't seen any audios, any tapes or... (Tr. July 24-28, 2017, page 14, lines 22-24).

Trial judge responded: "Because of the confidentiality of the CI and the way state law works, your lawyer goes and looks at those. [But at trial], you will have the opportunity to look at them. (Emphasis). Defendant then "attempts" to challenge the subject matter jurisdiction of the State Grand Jury based on the indictment, as well, to secure his [right] under Brady, when defendant moved for the production of state grand jury "impanelment documents", when defendant stated: "I would also like the State Grand Jury minutes". (Tr. July 24-28, 2017, page 14, line 25; page 15, lines 1-6). Trial court responded, and ultimately "ruled" stating: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those. (emphasis) (Tr. July 24-28, 2017, page 15, lines 7-9). Thus, defendant was denied "impanelment documents"; his [right] to "obtain" and "review" transcript pursuant to §

14-7-1720(A) and (D) and Rule 5, SC RCrim.P; S.C. Code Ann. § 14-7-1720(A)(5); Brady V. Maryland; Evans V. State; and defendants right to challenge the state grand jury's subject matter jurisdiction pursuant to §§ 14-7-1610, 14-7-1630(A)(1), as well as, defendant's right to be "indicted" by a legally constituted grand jury, pursuant to Art. 1. § 11.

After the trial judges "prejudicial ruling" denying "impanelment documents', in an attempt to "Keep the record clean", prosecution [concede's] that: "the transcript from the State Grand Jury do not become a public record. The defendant [is] able to read them. However, we do not give them a copy. They would have to get them from the [court reporter] who takes those "transcripts". (Emphasis!) (Tr. July 24-28, 2017, page 15, lines 14-18).

It must be pointed-out, here, as a "relevant fact" that pursuant to §14-7-1700, "Transcripts of the recorded testimony or proceedings [must] be made [when] [requested] by the Attorney General or his designee". (Emphasis). When a "legal grand jury" convenes, prosecutor [must] request transcript in order that defendant be provided a copy from the [court reporter.]

The second "relevant fact" is that it is an "indisputable fact" that "no court reporter had been assigned to record state grand jury proceedings, therefore [no] transcript is available for these "alleged" proceedings, as evidenced by South Carolina Supreme Court (Court Admin), Court Reporter Manager, Desiree Allen. (See Enclosure date 10-23-17, 11-6-17).

Thus, impanelment documents never existed, and therefore defendant could not "prepare a defense" against "unfounded prosecution".

Hence, when trial judge questioned defendant, asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record? (Tr. July 24-28, 2017, page 19, lines 8-10) The defendant answered: "Well, I'm actually going to show that [no] State Grand Jury even occurred".

(Tr. July 24-28, 2017, page 19, lines 11-12). (Emphasis). Trial court responded: "Oh, it happened because I have the indictments. (Tr. July 24-28, 2017, page 19, lines 13-14). Defendant then stated: "I have the papers (indictment), but that doesn't say it happened". (Tr. July 24-28, 2017, page 19, lines 15-16).

Defendant, in regards to the transcript, attempted to advise the trial judge that he had contacted or corresponded with Court Admin. several times concerning his "attempts" to obtain transcript, and that defendant had been advised that, "no court reporter had been assigned to record grand jury proceedings, and therefore, no transcript is available..." defendant stated: "I understand, but they (Court Admin.) say they do not have that. They have none of that". (Tr. July 24-28, 2017, page 15, lines 24-25).

Defendant attempted to present [exculpatory evidence] in support of defendants due dilligence and contentions that "no court reporter was assigned to record state grand jury proceedings in defendants case, therefor no transcript [is] available - when defendant stated: "All right. Can I provide you with the letter to show that I've done that?" (Tr. July 24-28, 2017, page 17, lines 20-21). Needless to say, defendant was "prejudice" his rights to §§ 14-7-1700, 14-7-1720(A)(D), §§ 14-7-1610, 14-7-1630(A)(1), Brady V. Maryland, Art. 1. § 11, Art. 5 § 22, and as a result of these various violations and prejudice, defendant was deprived "basic protections" without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. The ultimate denial of Brady, and defendant's right to prepare a defense necessarily has consequences "unquantifiable" and "indeterminate" and always results in "fundamental unfairness".

Discussion: In Brady V. Maryland, the Supreme Court held that due process, pursuant to 14th Amend. requires the prosecution to disclose evidence favorable to an accused upon request when such evidence is material to guilt or punishment.

"The Brady disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecutions possession that may be favorable to the accused and material to guilt or punishment." State V. Simpson, Court of Appeals of South Carolina, Jan. 23, 2019 425 S.C. 522.

Compliance with Brady evidence disclosure requirements is a constitutional requirement; the Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5. 14. State V. Proctor, 348 S.C. 322, 559 S.E. 2d 318 (Ct. App. 2001).

"Exculpatory evidence is evidence the suppression of which would 'undermine confidence in the verdict'" U.S. V. Ruiz, 536 U.S. 622, 628 (2002) (quoting Giglio V. U.S., 405 U.S. 150, 154 (1972). Evidence is "exculpatory" and "favorable", for purpose of determining whether its suppression by prosecution violates Brady, if it may make the difference between conviction and acquittal had it been disclosed and used effectively. (Emphasis). U.S. V. BartKo - U.S.C.A. Fourth Circuit 8-23-2013.

"Brady applies to both impeachment and [exculpatory] evidence." State V. Durant, Supreme Court of South Carolina, May 6, 2020 430 S.C. 98.

U.S. V. Bagley, 473 U.S. 667, 676-77 (1985)(impeachment evidence, as well as exculpatory evidence, is subject to Brady disclosure.

In United States V. Bagley, the Court held that evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding.

See Bagley, 473 U.S. at 678, 682; see also Kyles V. Whitley, 514 U.S. 419, 434 (1995)(defendant must show "that the favorable evidence could "reasonably" be taken to put the whole case in such a different light as to undermine confidence in the verdict).

Accordingly, defendant requested "impanelment documents", to which he is entitled (Tr. dated July 24-28, 2017, page 15, lines 5-6), in order to show that "no State Grand Jury even occurred" to consider criminal allegations against defendant (Tr. dated July 24-28, 2017, page 19, lines 8-12), as evidenced by Court Admin. (stating: "no court reporter had been assigned to "record" state grand jury proceedings, therefore there is no transcript available. (Emphasis). See Enclosure. (Exhibit C).

Defendant contends that "impanelment documents" (or the lack of impanelment documents) is favorable evidence, and the lack of impanelment documents, because "no court reporter was assigned to record grand jury proceedings, therefore no transcript being available", could "reasonably" be taken to put the whole case in such a different light as to undermine confidence in the verdict, as defendant was [unlawfully convicted] on "unfounded offenses" as the grand jury never convened to find "probable cause", this fact is logically indisputable.

The prosecutor's intent can be considered in some circumstances. See, U.S. V. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986)(government's bad faith to suppress evidence indicates that such evidence may be material).

See U.S.V. Agurs, 427 U.S. 97, 107-11 (1976)(prosecutions constitutional duty to disclose favorable evidence (impanelment) governed by materiality standard and not limited to situations where defendant has requested favorable evidence).

The government's duty under Brady arises regardless of whether the defendant specifically request the favorable evidence. (U.S. V. Agurs).

In the instant case, defendant "specifically" requested the "impanelment documents" to prove that "no state grand jury even occurred", (Tr. July 24-28, 2017, page 15, lines 5-6; Page 19, lines 11-12) and he was denied "disclosure" in violation of Brady and "infringed" defendants legal rights pursuant to § 14-7-1720...(See Exhibit E).

Section 14-7-1720

South Carolina Code Ann. § 14-7-1720 generally provides that State Grand Jury material is secret, but allows disclosure for the purpose of complying with "constitutional", "statutory", or other legal requirements or to further justice. See S.C. Code Ann. § 14-7-1720 (A)(5). Additionally, defendants are entitled to discovery in criminal cases, pursuant to the constitution, statue, and rule. See Brady V. Maryland, 373 U.S. 83 (1963); Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005); S.C. Code Ann. § 14-7-1700; Rule 5 SCRCrim. P. Including Kyles V. Whitley, 514 U.S. 419 (1995). [Exculpatory Disclosure]

The governments obligation to make disclosures of exculpatory material under Brady V. Maryland is pertinent not only to an accused's "preparation for trial" but also to his determination of whether to plead guilty; the defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. United States V. Avellino, 136 F. 3d 249, 255 (2d Cir. 1998).

Article 15. State Grand Jury Act (Brief 1 - Page 4)

"The state grand jury operates under a very specialized procedure under which a defendant is permitted to [obtain] and [review] all evidence which was considered in handing down an indictment." Code 1976, §§ 14-7-1610, 14-7-1630(A)(1).

"A defendant can attack the state grand jury's subject matter jurisdiction by challenging the sufficiency of the evidence" presented" at the grand jury proceeding before the jury is sworn." Code 1976, §§ 14-7-1610, 14-7-1630(A)(1).

Accordingly, pursuant to statue, defendant requested the "minutes" from the state grand jury proceedings before the jury being sworn. (Tr. July 24-28, 2017, page 15, lines 5-6)(emphasis). (See Exhibit E).

In response to defendant's request for the impanelment documents the trial judge denied defendant "disclosure" when the judge stated: "You [dont] get those, sir. In South Carolina, [all] Grand Jury proceedings are secret. [Nobody gets those]". Therefore, defendant was "prejudiced" his right to "disclosure", and [could not mount or prepare a defense]. (Tr. July 24-28, 2017, page 15, lines 7-9). (See Exhibit E).

Next, the trial judge [questioned] the defendant asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10.) In response, the defendant stated: "Well, I'm actually going to [show] that [no] State Grand Jury even [occurred] or [convened]. (Tr. July 24-28, 2017, Page 19, lines 11-12).

Without question, defendant's desire to view the document's related to the grand jury proceedings was well-founded in the law. See Evans V. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520(2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings

and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

"A Defendants [right] to [obtain] recorded proceedings and testimony before state grand jury in preparing his defense, which[right] is subject to limitations imposed by statue and rule., necessarily arises post-indictment; although maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill of indictment, and thus, a defendant is allowed to obtain and use the [impanelment documents] in [preparing a defense] and ensuring the [protection] of his [due process rights]. U.S.C.A. Const. Amend. 14; Code 1976 §§ 14-7-1700, 14-7-1720, 14-7-1770, Rule 5 Crim. Proc. Rule 5. (Emphasis).

Pursuant to Section 14-7-1700: "Subject to the limitations of sections 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, a defendant has a [right] to [review] and to [reproduce] the stenographically or electronically recorded materials. (emphasis).

There is no denial of equal protections of the laws in constitutional or statutory provisions relating to jury and grand jury. U.S.C.A. Const. Amend. 14.

In violation of the defendant's due process of law and equal protections there was no court reporter assigned to record grand jury proceedings in violation of statue § 14-7-1700. See Correspondence from South Carolina Court Admin. (enclosed).

Trial judge's "prejudicial ruling" (Tr. July 24-28, 2017, page 15, Lines 5-9; Page 19, Lines 8-25) denying defendant impanelment document's constituted a Brady violation.

"In the case of Brady V. Maryland, 373 U.S. 83 (1963)... ...(A defendant asserting a Brady violation must demonstrate that the evidence the state failed to disclose exculpatory material in its possession requires a demonstration that (1) the evidence was favorable to the accused, (2) it was in the possession of or "Known" to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. See..., Gibson V. State (S.C. 1999) 334 S.C. 515, 514 S.E. 2d 320.

Demonstration of Brady Violation

1.) Evidence was Favorable to the accused..." A defendant is allowed to obtain and use the impanelment documents in [preparing a defense] and [ensuring protection] of [his due process rights]. U.S.C.A. Const. Amend. 14.; Code 1976 §§ 14-7-1700, 14-7-1720, 14-7-1770, Rule 5 Crim. P.. Evidence of the "Known fact" that these "did not" exist a "Rule 5" or "impanelment documents" to provide defendant because "no court reporter had been assigned to record State Grand Jury proceedings on date's of defendant's "alleged" indictments - pointing to the "logically indisputable" fact that these "unfounded offenses" or prosecution and "lack of impanelment" on date's of defendants "alleged" indictments constitutes [exculpatory] evidence favorable to the accused.

"Exculpatory evidence is evidence the suppression of which would undermine confidence in the verdict." U.S. V. Ruiz, 536 U.S. 622, 628 (2002) (quoting Giglio V. U.S., 405 U.S. 150, 154 (1972); also see..., Correspondence from Court Administration dated 10-23-17, and 11-6-17 (enclosed). Surely, evidence of "unfounded prosecution" would undermine confidence in the verdict - emphasis.

2.) it was in the possession of or [Known] to the prosecution ... A.A.G.'s for the state, "themselves" committed the action of "undermining the integrity of the grand jury as an independent body", it is the prosecutions "rubber stamp" that led to the [non-existence] of the grand jury as a "body", and hence "no impanelment documents", "no court reporter assigned to record grand jury proceedings in violation of §14-7-1700 (emphasis). Surely, it was [Known] by the prosecution - A.A.G.'s for the State are well aware of the provisions of Article 15. State Grand Jury Act, as well as Knowing what "substantive" and "procedural" due process encompasses. (emphasis).

Assistant Attorney Generals holds full Knowledge an understanding of the [laws] of this State. It is a requirement of the high office of a prosecutor. The prosecutor occupies a quasi-judicial position, and must see that "justice is done", that [no conviction] takes place except in strict conformity with the law. See e.g. State V. Quattlebaum, 338 S.C. 441, 527, S.E. 2d 105 (S.C. 2000); State V. Durden, 264 S.C. 86, 212 S.E. 2d 587 (1975); State V. King, 222 SC 108, 71 S.E. 2d 793 (1952).

The prosecution's intent can be considered in some circumstances. U.S. V. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986) (governments bad faith to suppress evidence indicates that such evidence may be material), see (Tr. July 24-28, 2017, page 15, Lines 5-6; Page 19, Lines 8-25)(emphasis); it was Known to prosecution that impanelment documents "did not exist" because defendant had not been indicted by a legally constituted grand jury in violation of Art. I. §11, Art. V. §22, §14-7-1700 and Const. Amend. 14.

3.) it was suppressed by the prosecution.... A.A.G.'s for the State and the "trial judge" are well aware that in a State Grand Jury case - "a defendant is able to [obtain] and [review] all evidence which was considered in handing down an indictment". Code 1976, §§ 14-7-1610, 14-7-1630(A)(1); "subject to the limitations of sections 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, a defendant has a [right] to review and to reproduce the stenographically or electronically recorded materials". See also.., Brady V. Maryland, 373 U.S. 83 (1963).

Despite statue and controlling case, the defendant was denied "impanelment documents" and/or information "exculpatory in nature" that "impanelment documents" dont exist. (See (Exhibit C) Correspondence Court Admin.; Tr. July 24-28, 2017, page 15, lines 5-9). The trial judge and the prosecution suppressed "exculpatory evidence", and the trial judge [relieved] prosecution of his "burden of proof" in direct violation of Rules Crim. Proc., Rule 5(d), (See Tr. July 24-28, 2017, Page 19, Lines 8-25)(emphasis) - "Any shifting of the "burden of proof", "production" and "persuasion" must withstand constitutional scrutiny."

4.) it was material to guilt or punishment.... "In United States V. Bagley, the Court held that evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding". Accordingly, there was no court reporter assigned to record State Grand Jury proceedings, therefore no transcript available for "alleged" dates of indictments because "indisputably", "probable cause" was [not] found by grand jury to hold defendant for trial and certainly this Fact/information [is] material to "guilt or punishment". (emphasis)(See Correspondence Court Administration).

Exculpatory Evidence (Exhibit C) (Brief 1-Page 9)

Undermine's Confidence in the Verdict

Article V, § 22 provides, in pertinent part: "The grand jury of each county, and the "state grand jury," as the General Assembly may establish by general law, [shall] consist of "eighteen members", "twelve" of whom [must] agree in a matter [before] it can be "submitted" to the court - (emphasis)

The violation of state constitution, Art. V. § 22 in addition to the Attorney Generals and state grand jury's unlawful indictment process and subsequent criminal acts, resulted in an illegal grand jury, void indictment, and a violation of every component of the Due Process notice requirement owed to defendant by this state. In summation, there was no [probable cause] to hold defendant for trial, and the withholding of this information that was known by prosecution constitutes [exculpatory evidence], that would surely [undermine confidence in the verdict]. The Court cannot be confident in an invalid conviction.

The proposition that a conviction and sentence gained through judicial acts of [perjury] and [criminal conspiracy] can be declared lawful - Judicial [integrity] will have been [lost] if the State is not constrained by its own constitutional and statutory criminal laws.

Basic United States Due Process law dictates, with authority, that under NO circumstance can a state commit criminal acts against citizens in the name of judicial economy.

S.C. Code Ann. § 17-25-10, states..."no person shall be punished for an offense unless [duly] and [legally] convicted there of, in a court having "competent jurisdiction of the cause" and of the person."

The "Discovery" or disclosure of the fact, that defendant could "absolutely not" prepare a defense against unfounded charges or offenses would surely undermine confidence in the Verdict - to which was gained through knowingly sponsored acts of [fraud] and [perjury].

"Reasonable probability" that the result of a trial would have been different but for counsel's errors is a probability sufficient to undermine confidence in the outcome of the trial. Gill V. State, Supreme Court of South Carolina, August 20, 2001 346 S.C. 209 552 S.E. 2d 26; Patterson V. State, Supreme Court of South Carolina, May 24, 2004 359 S.C. 115 597 S.E. 2d 150.

Accordingly, defendant moved for the production of the State grand jury impanelment documents (Tr. July 24-28, 2017, page 15, lines 5-6), when the trial judge "denied" defendants motion (Tr. July 24-28, 2017, page 15, lines 7-9), trial counsel "did not" object - emphasis.

When the trial judge questioned defendant, asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10), trial counsel still does not [object]. (emphasis) See also Tr. July 24-28, 2017, page 19, lines 11-20 - emphasis. (See also Exhibit C).

Had trial counsel [objected] to the trial judge's erroneous ruling, it would of been "discovered" that defendant could not have been found guilty on unindicted offenses; defendant could not prepare a defense as there isn't any impanelment documents, thus counsel's errors is a probability sufficient to undermine confidence in the outcome of the trial. (Please See.., Correspondence from Court Administration dated 10-23-2017, and 11-6-2017 stating: "no court reporter was assigned to record state grand jury proceedings, therefore no transcript is available - emphasis. Hence, when trial judge questioned defendant in regards to the "impanelment documents" (Tr. July 24-28, 2017, page 19, lines 8-10), defendant responded, in fact, that he would prove that a state grand jury had not convened to consider any criminal allegations against defendant (Tr. July 24-28, 2017, page 19, lines 11-12) (enclosed). (Exhibit C) Counsel [did not] object.

Particularized Need

Defendant met Court's requirement for showing "particularized need" for the grand jury testimony (That it doesn't exist).
The trial court's ruling represented either a complete failure to exercise discretion or an abuse of discretion in refusing access despite the showing of particularized need. In this circuit the procedure whereby grand jury testimony may be made available to the defense is well established. See Article 15 (State Grand Jury Act, § 14-7-1700).

When defendants in a criminal case show a "particularized need" for access to grand jury transcripts, this Court has held that it becomes the trial judge's [duty] to grant such a motion in the exercise of his discretion. This absolute refusal is in square conflict with this Court's (Federal) position, long held, that "disclosure is wholly proper when the ends of justice require it". United States V. Socony Vacuum Oil Co. 310 U.S. 150, 234, and with this Courts opinions in Pittsburgh Plate Glass Company V. United States, supra, and United States V. Proctor & Gamble, supra.

Defendants "particularized need" in part was to establish that defendant could not "prepare a defense" against unfounded charges not considered by a grand jury. In short the trial court, without considering the issue of "need", held that it had no power to grant the motion for access because according to the judge "all grand jury proceedings are secret, nobody gets those"; that the proceedings and testimony were "privileged" despite statues and provisions of a S.G.J.A. and established law granting access to Grand Jury testimony and proceedings. (See Article 15 - State Grand Jury Act - Section 14-7-1700). (Emphasis).

(Brief 1- Page 12)

Nor could denial of access in this situation have been sustained even if it had resulted from an exercise of discretion. The overwhelming showing of need for transcript (or lack of) to "particularly" show untrustworthiness and perjury with respect to the instant case, gave defendant a right to access here, and denial would have been an abuse of discretion. In McKeever V. United States, supra, where the trial court denied defense motions for access to grand jury testimony, the Court of Appeals reversed, holding that whenever there is "some basis" to believe that discrepancies may exist, the trial judge must inspect the transcripts, and cannot simply deny the motion for production without determining if there are inconsistencies. Zborowski V. United States, supra, holds the same thing. (Emphasis.)

Whether the action of the trial court in denying defendant's motion for access be deemed a failure to exercise discretion or an exercise of discretion, it is clear that the action was erroneous in the face of the overwhelming showing of need.

In Travis V. United States, 269 F.2d 928 (10th Cir. 1959), the Court, discussing the meaning of "particularized need" as the Court (Federal) used the phrase in Pittsburgh Plate Glass Company V. United States, supra, speaks of "suggestion of material inconsistency" and likelihood that the grand jury testimony "would produce impeaching material". 269 F.2d 928, 945.

In U.S. V. Sneed, U.S. Court of Appeals, Fourth Circuit, December 23, 2002 54 Fed. Appx. 375... "To the extent that defendant alleged a Jenks Act violation because the government did not produce grand jury testimony of government witness's who testified at trial, his claim failed because he did not [move for the production] of such statements. 18 U.S.C.A. § 3500(b)(2000).

(Brief 1- Page 13)

Here, in the instant case, defendant, before a jury being sworn [had] moved for the production of the "impanelment documents" from alleged state grand jury proceedings, to which the defendant is entitled by law.

The trial judge denied defendants motion for production, relieving [State] of its [burden] to demonstrate why the documents should not be released. See., Rules Crim. Proc., Rule 5(d); (Tr. July 24-28, 2017, page 15, lines 5-9; Page 19, lines 8-25)(emphasis).

The defendant's claim for access to the state grand jury transcript was pressed and contested in the trial court. Defendant made an overwhelming showing of likelihood that the grand jury [never convened] on date's of alleged indictment. (See Correspondence from Court Admin. dated Oct. 23, 2017, Nov. 6, 2017).

Thus, defendant met Court's requirement for showing a "particularized need" in addition to defendants [right] to obtain the state grand jury transcript pursuant to Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure. The trial court's ruling represented either a complete failure to exercise discretion or an abuse of discretion in refusing access despite the showing of particularized need, and defendants [right] to obtain such transcript.

This case presents a record of abuse by the State of its prosecutorial function. Trial court's denial of defendant's right to "disclosure" is an act of "collusion" with the prosecution, in that trial judge was "very much aware" that "transcript" "did not exist." (See Correspondence Court Admin. stating, "no court reporter was assigned to record grand jury proceedings, therefore, no transcript [is] available). (Exhibit C).

Failure to record the grand jury's testimony of witness'es and proceedings was an abuse of power of the prosecutor. This case demonstrates anew that overzealous efforts to bring about a conviction lead to "distorted use of statues", "irregular and unfair procedures" and, ultimately, to "a denial of justice".

(Brief 1- Page 14)

"In this connection, it is highly relevant that the grand jury is not the instrument of the prosecutor, to use in any manner which he finds expedient, but an arm of the court." Cobbledick V. United States, 309 U.S. 323, 327.

Failure to make a transcript deprives the court of power to supervise grand jury proceedings, and hence should not be countenanced when done solely for tactical advantage or when the prosecution has reason to suspect that it may operate to shield "unfounded prosecutions", "perjury" or "prejudice" to the defense.

When the trial court "asked" defendant what he thought he'd be able to use from the state grand jury record, defendant responded: "Well, I'm actually going to [show] that no state grand jury even occurred." (Tr. July 24-28, 2017, page 19, lines 11-12)(Emphasis).

Prejudice

Prejudice is "damage" or "detriment" to one's legal rights.

Defendant was "prejudiced" his [disclosure right] pursuant to Brady V. Maryland, 373 U.S. 83 (1963); defendant was "prejudiced" his right to obtain and review all evidence which was considered in handing down an "indictment" pursuant to Code 1976, §§ 14-7-1610, 14-7-1630(A)(1); defendant was "prejudiced" his [right] to [review] and to [reproduce] the stenographically or electronically recorded materials, pursuant to sections 14-7-1700, 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure - in totality, defendant was "prejudiced" his [right] to mount or prepare a defense" in violation of his due process of law and equal protections of the laws pursuant to the Fourteenth Amendment of the United States Constitution. Defendant was "prejudiced" fundamental fairness", his trial not producing "a just result".

(Brief 1-Page 15)

In Conclusion...

Defendant was denied his right to "Discovery" pursuant to Brady V. Maryland, and "prejudiced" his due process of law and equal protection under the law pursuant to the Fourteenth Amendment to the United States Constitution. In violation of defendants due process of law he was denied "preparation of a defense". Defendant was "prejudiced" his right pursuant to §14-7-1720(A) and (D) and Rule 5, S.C.R.Crim.P., and his right to due process of law when he was denied his right to "review" and to reproduce the stenographically or electronically recorded materials (impanelment documents). Defendant could not "prepare a defense" and ensure the protection of his due process rights. Due to the trial judge's erroneous ruling denying defendant "disclosure", defendant could not exercise his right to challenge the state grand jurys subject matter jurisdiction by challenging the sufficiency of the evidence "presented at the grand jury" before the jury being sworn, creating "prejudice" to defendants legal rights, pursuant to §§14-7-1610, 14-7-1630(A)(1). Defendant was "prejudiced" his right to "fundamental fairness" in the proceeding and his trial cannot be relied upon as producing a "just result".

Defendants are entitled to discovery in criminal cases, pursuant to the constitution, statue, and rule, yet defendant was "prejudiced" constitutional and statutory provisions relating to the grand jury, violating his due process of law and equal protections under the law.

In light of the fact that "impanelment documents" dont exist, as evidenced by Court Administration - given to the rise of Brady violation, defendant respectfully ask that convictions and sentence be vacated in the interest of justice? And, in addition, that indictment be dismissed with prejudice?

Table of Authorities (Brief 2 - Page 1)

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Cole V. Arkansas, 333 U.S. 196, 201 (1948)
United States V. Stuckey, 220 F.3d 976, 981 & n.5 (8th Cir. 2000)
United States V. McDill, 871 F.3d 628
Costello V. United States, 350 U.S. 359, 362 (1956)
United States V. Calandra, 414 U.S. 338, 343 (1974)
Branzburg V. Hayes, 408 U.S. 665, 686-87 (1972)
United States V. Hogan, 712 F.2d 757, 759 (2d Cir. 1983)
Wood V. Georgia, 370 U.S. 375, 390 (1962)
In re Grand Jury Subpoena John Doe, No. 05 G.J. 1318 - 584 F.3d 175
In re Grand Jury, John Doe, No. G.J. 2005-2 478 F.3d 581
Young V. United States, 107 S.Ct. at 2139
Kinsella V. United States, 361 U.S. 234, 246 (1960)
American Land Co. V. Zeiss, 219 U.S. 47 (1911)
U.S. V. Russell, 411 U.S. 423, 432, (1973)
U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002)
Hobby V. United States, 468 U.S. 339, 345 (1984)
U.S. V. Morrison, 449 U.S. 361, 364-66 (1981)
County of Sacramento V. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998)
Zinermon V. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990)

Carey V. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978)
State V. Tumbleston, 376 S.C. 90, 97, 654 S.E. 2d 849, 853 (Ct. App. 2007)
State V. Wade, 306 S.C. 79, 86, 409 S.E. 2d 780, 784 (1991)

Constitutional Provisions	Statutory Provisions
S.C. Const. Art. 1 § 11	S.C. Code Ann. § 17-19-10
S.C. Const. Art. 5. § 22	S.C. Code Ann. § 14-7-1720
S.C. Const. Art. 1. § 3	
Const. Amend. 14	
Const. Amend. 6	

Olano, 507 U.S. at 735, 113 S.Ct. 1770.
United States V. David, 83 F.3d 638, 647 (4th Cir. 1996)
United States V. Marcus, 560 U.S. 258, 263, 130 S.Ct. 2159, 176 L.Ed. 2d 1012 (2010).
United States V. White, 405 F.3d 208, 221 (4th Cir. 2005).
Vasquez V. Hillery, 474 U.S. at 263-64, 106 S.Ct. 617
Arizona V. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 302 (1991).
Rose V. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed. 2d 460 (1986)
Weaver, 137 S.Ct. at 1908
McCoy, 138 S.Ct. at 1511
United States V. Gonzalez-Lopez, 548 U.S. 140, 149 n.4, 126 S.Ct. 2557, 165 L.Ed. 2d 409.
McKaskle, 465 U.S. at 177 n.8, 104 S.Ct. 944
United States V. Knight, 606 F.3d 171, 177 (4th Cir. 2010)
Henderson, 133 S.Ct. at 1130
Ramirez-Castillo, 748 F.3d at 215

(Brief 2 - Page 3)

Neder V. United States, 527 U.S. 1, 8-9 (1999)
Sullivan V. Louisiana, 508 U.S. 275, 282 (1993)

Fraud upon the court, as a ground for relief from judgment, is a narrow and invidious species of fraud that subverts the of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Sanders V. Smith, Court of Appeals of S.C. 431 S.C. 605 (See Exhibit C).

Relevant Facts (Brief 2 - Page 4)

On April 12-13, 2016 prosecutors "undermined the State Grand Jury as an independent body". A.A.G.'s for the State as well as State Grand Jury Clerk - willfully printed and published false and misleading information in its indictment in order to deep secret its violations of statutory law.

On July 19, 2017 a "Competency Hearing" was had, and a Doctor Maddox was ordered to evaluate defendant. At hearing regarding competency, Doctor Maddox stated to the trial court: "Again, he doesn't believe that these charges are genuine. And any cooperation on his part will constitute consent and he will not do that." (Tr. dated July 19, 2017, page 12, lines 14-17).

Doctor Maddox further stated: " he does not believe he has been properly indicted -- these warrants are not genuine". (Tr. July 19, 2017, page 15, lines 5-6).

Defendant then stated to the trial judge: "This court doesn't have jurisdiction over me, Your Honor." (Tr. July 19, 2017, page 17, lines 21-22). Again, defendant states: "The court is lacking jurisdiction, Your Honor" (Tr. July 19, 2017, page 22, lines 11). Next, trial court states: "My secretary sent you all of the State Grand Jury indictments and warrants with a letter and copied the State. (Tr. July 19, 2017, page 22, lines 7-9). Defendant responded, stating: "Your Honor, those indictments are not even certified. According to the State Grand Jury Act they are suppose to be certified." (Tr. July 19, 2017, page 23, lines 10-12). Further, defendant stated: "I still don't [understand] what is going on and I don't consent. (Tr. July 19, 2017, page 23, lines 21-22). Defendant had previously stated: "I dont consent to any of this". (Tr. July 19, 2017, page 21, lines 24.) On the day of defendants trial, before a jury being sworn, defendant stated to the trial judge: "All right, Judge. But the "Sixth Amendment" says I have a right to be informed about the nature and cause of accusation against me". (Tr. July 24-28, 2017, lines 5-6). Again, trial court stated: "Sir, "my office" sent you your indictment". (Tr. July 24-28, 2017, page 14, lines 7-8).

Next, defendant stated: "I would also like the State Grand Jury minutes.

(Tr. July 24-28, 2017, page 15, lines 5-6)(emphasis). Defendant attempted to obtain the state grand jury impanelment documents in order to challenge the state grand jury's subject-matter jurisdiction, when he was denied impanelment by trial judge, when she stated: "You dont get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those." (emphasis)(Tr. July 24-28, 2017, page 15, lines 7-9).

Thereby, defendant was denied "disclosure" and "preparing a defense" despite a signed "Protective Order" by the judge filed on Sept. 15, 2016. (emphasis) (see Exhibit A)

On several - even multiple occasions defendant had written to South Carolina Supreme Court (Court Administration) to attempt to obtain the state grand jury's impanelment documents to which defendant is entitled by law. (Exhibit C) Defendant was advised that "no court reporter had been assigned to record grand jury proceedings, therefore "no transcript" is available - clearly establishing the fact that "A state grand jury had not convened to consider any criminal allegations against defendant. See Correspondence from Court Reporter Desiree Allen dated 10/23/17 and 11/6/17 (enclosed). Defendant tried to explain to trial court that Court Admin. correspondence advised defendant that "impanelment documents" do not exist, and trial judge stated: "They are not going to do that for you. That's not their responsibility." (emphasis). (Tr. July 24-28, 2017, page 16, lines 18-19); (Tr. July 24-28, 2017, page 17, lines 1-25; page 18, lines 1-25). (Emphasis).

Next, the trial judge "questioned" defendant asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record? (Tr. July 24-28, 2017, lines 8-10)(Emphasis).

Defendant answered the trial judge, when he stated: "Well, I'm actually going to show that [no] State Grand Jury even occurred." (Emphasis).

The Court: "Oh, it happened because I have the indictments.

Defendant: "I have the papers, but that doesn't say it happened."

(Tr. July 24-28, 2017, page 19, lines 11-16). Therefor defendant was deprived his right to "prepare a defense" as "disclosure" was denied, defendant forced to stand trial without proper notice on "unfounded prosecution". (See Exhibits C, F, G, H.)(I

Questions Presented To The Court (Brief 2 - Page 6)

1.) Whether defendant's right to due process of law and equal protections under the law pursuant to the Fourteenth of the United States Constitution, and Art. I. § 11 of South Carolina Constitution, was violated when defendant did not recieve "proper" "required notice" of charges against him and defendant had not been indicted by a legal grand jury?

2.) Whether defendant suffered "prejudice", substantial and injurious, when he was unable to "mount", "combat", or "prepare a defense" against unfounded charges?

3.) Whether defendant's rights pursuant to the Sixth Amendment of the United States Constitution, and defendant's due process of law pursuant to the Fourteenth Amendment, violated when he was not "informed of the nature and cause of the accusation"?

4.) Whether defendant's case constitutes structural error, in regards to nullity indictment?

5.) Whether prosecutions arbitrary and egregious misconduct prejudiced defendant a fair trial, and warrants dismissal of indictment with prejudice?

6.) Whether failure to make a "transcript" is an error that necessarily has consequences that are "unquantifiable" and "indeterminate"?

Discussion: An indictment is a critical document in criminal defense preparation that is grounded in "constitutional" and "statutory" principles. See S.C. Const. Art. 1 §11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed"....); S.C. Code Ann. §17-19-10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury"...) As was explained in State V. Gentry, 363 S.C. 93, 610 S.E. 2d 494 (2005).

The indictment is the charge of the State against the defendant, the pleading by which he is "informed" of the fact, and the nature and scope of the accusation. When the indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation (Tr. July 19, 2017, page 12, lines 14-17; July 19, 2017, page 17, lines 21-22; July 19, 2017, page 22, lines 11-12; July 19, 2017, page 23, lines 10-12; July 24-28, 2017, page 15, lines 5-6; July 24-28, 2017, page 19, lines 8-10); (July 24-28, 2017, page 19, lines 11-12), the manner in which it has been presented, the source from which it proceeds, and have these matters "promptly and properly determined"; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge.

(See., Tr. July 24-28, 2017, page 15, lines 5-9; page 19, lines 11-12)

Accordingly, defendant challenged the subject-matter jurisdiction based on the indictment, when before a jury being sworn, defendant requested the "minutes" or impanelment documents from state grand jury proceedings to which he was denied by the trial judge., "prejudicing" defendants right pursuant §14-7-1720(A) & (D) and Rule 5; Art. I §11; Art. V. §22; Art. I. §3; prejudicing defendant's right to "prepare a defense". (Const. Amend. 14)

Defendant Raise's Timely Challenge

If a defendant raises a timely challenge to the sufficiency of an indictment (Tr. July 19, 2017, page 12, lines 14-17; July 19, 2017, page 17, lines 21-22; July 19, 2017, page 22, lines 11-12; July 19, 2017, page 23, lines 10-12; July 24-28, 2017, page 15, lines 5-6; July 24--28, 2017, page 19, lines 8-10; July 24-28, 2017, page 19, lines 11-12), the reviewing court is charged with: "determining whether (1) the offense is stated with sufficient certainty and particulary to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and "whether he may plead an acquittal" or "conviction" thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Notice

"An indictment is needed to give notice to the defendant of the charges against him". Gentry, 363 S.C. at 102 n. 6, 610 S.E.

The bare "minimum" requirement of the Due Process Clause is that "deprivation of life, liberty or property by adjudication be preceded by "notice" and opportunity for hearing appropriate to the nature of the case." (Mullane V. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)(emphasis added).

Without "due notice", defendants trial was riddled with procedural irregularities and plagued by a lack of order creating an intolerable risk of erroneous deprivation.

Procedural due process requires "fair notice of impending state action" and an opportunity to be heard. Mathews V. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Fairness and due process require that a criminal defendant recieve sufficient notice of the charge against him to enable him to prepare a defense. (Per Beatty, J., with one justice concurring and one justice concurring in the result.) U.S.C.A. Const. Amend. 14.; In re Corey B., 291 S.C. 108, 109, 352 S.E.2d 470 (1987) (same).

A criminal conviction violates due process if, at the time of the conduct which forms the basis of the conviction, the defendant did not have fair notice that the conduct was criminal. State V. Edwards, 302 S.C. 492, 494, 397 S.E.2d 88 (1990).

(Brief 2 - Page 10)

"Fairness and due process require that a criminal defendant recieve sufficient notice of the charges against him to enable him to prepare a defense". State V. Baker, 411 S.C. 583; U.S.C.A. Const. Amend. 14.

In Stroud V. Polk, U.S.C.A., 466 F. 3d 291, the court held..."Reasonable notice of charge, under the due process clause, sufficiently apprises criminal defendant of what he must be prepared to meet. U.S.C.A. Const. Amend. 14.

In the instant case, defendant "did not" recieve reasonable notice of charge, and could not have been sufficiently apprised of what he must be prepared to meet, as the state grand jury [did not] exist as "A Body" on dates of defendants indictments (April 12-13, 2016), as there was "no court reporter assigned to record grand jury proceedings, and "no record of transcript" for these "alleged" proceedings. See Court Admin. Supreme Court Correspondence dated 10-23-17 and 11-6-17, (enclosed)(emphasis). (See also Exhibit C).

The governments (State) ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury.

In effect, this would result in nothing less than a constructive Amendment of the indictment which itself is reversible plain error.

The error would affect the "fairness, integrity or public reputation of judicial proceedings where the grand jury's role had been usurped. Pet. App. 8a (internal quotation marks omitted).

The constitution requires that, in a Federal or State prosecution, defendant be given "notice" of the nature of the charge against him.

Notice is expressly guaranteed in the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation."

But it also rooted in fundamental principles of due process, see, e.g., Cole V. ArKansas, 333 U.S. 196, 201 (1948)("noting that "[n]o principle of procedural due process is more clearly established than that 'notice' of the specific charge [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal").

"IF it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value it almost destroyed.

United States V. StucKey, 220 F.3d 976, 981 & n.5 (8th Cir. 2000).

United States V. McDill, U.S.C.A., Eighth Circuit. Sept. 15, 2017, 871 F.3d 628 "A defendant may not be tried on charges that were not made in the indictment."

Role of the Grand Jury (Brief 2 - Page 12)

The historic role of the grand jury is "to provide a fair method for instituting criminal proceedings," Costello V. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against arbitrary and oppressive governmental action," United States V. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecting [of] citizens against unfounded criminal prosecutions." Branzburg V. Hayes, 408 U.S. 665, 686-87 (1972).

Convening "as a body of lay persons acting in secret," United States V. Hogan, 712 F.2d 757, 759 (2d Cir. 1983), the grand jury must not only be "independent and informed," but must also "stand between the Accuser and the accused"... to determine whether a charge is founded upon reason or "dictated by an intimidating power or by malice and personal ill will". Wood V. Georgia, 370 U.S. 375, 390 (1962). In re Grand Jury Subpoena John Doe, No. 05 GJ 1318 U.S.C.A., Fourth Circuit Oct. 14, 2009 584 F.3d 175 "The grand jury is responsible for both authorizing criminal prosecutions when probable cause exists and ensuring the protections of citizens against unfounded criminal prosecutions when probable cause is lacking". U.S.C.A. Const. Amend. 4; also see... ..., In re Grand Jury, John Doe No. G.J. 2005-2, U.S.C.A. Fourth Circuit, Feb. 22, 2007 478 F.3d 581.

Public Confidence

Public confidence requires that prosecutors respect and abide by the constitutional, statutory and judicial limits imposed on their conduct during the grand jury process. When the purposes of the grand jury are undermined by severe, deliberate and repeated instances of prosecutorial misconduct, the [credibility] and integrity of the criminal justice system are themselves put at risk.

Public Confidence

Prosecutorial misconduct can dramatically impair public confidence even if a particular defendant does not or cannot prove actual prejudice. In the instant case, defendant [can] prove actual prejudice, but, in limiting the arsenal of weapons available to the district court or reviewing court in an egregious or extreme instance of prosecutorial misconduct can be expected to undermine public confidence in the criminal justice system. As the court has stated, even the "appearance of impropriety ... diminishes faith in the fairness of the criminal justice system in general."

Young V. United States, 107 S.Ct. at 2139.

Due Process

Due process "has to do ... with the denial of that "fundamental fairness, shocking to the universal sense of justice." It deals with neither power nor jurisdiction but with their exercise. Kinsella V. United States, 361 U.S. 234, 246 (1960). The Due Process Clause restrains those [arbitrary] and [unreasonable] exertions of power by the States which are not really within the lawful State power, since they are so unreasonable and [unjust] as to [impair] and [destroy] [fundamental] rights. American Land Co. V. Zeiss, 219 U.S. 47 (1911).

Courts will dismiss indictments for government misconduct outside the indictment process on due process grounds if such conduct is so outrageous that it violates "fundamental fairness" or is "shocking to the universal sense of justice." U.S. V. Russell, 411 U.S. 423, 432, (1973); See, e.g. U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002).

(Brief 2 - Page 14)

The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property, and those who seek to invoke its procedural protection must establish that one of those interest is at stake.... Defendant has a liberty interest at stake, and presently suffers "prejudice" as he is incarcerated unlawfully due to the deprivation of his "legal rights" and "federal rights". (See Exhibits C, E, F, G, H, I).

A claim of denial of due process must be analyzed with a two-part inquiry: (1) Whether the interest (liberty) involved can be defined as "liberty" or "property" within the meaning of the Due Process Clause and, if so, (2) what process is due in the circumstances. U.S.C.A. Const. Amend. 14. The process due is: "Courts will [dismiss] indictments for government misconduct outside the indictment process on due process grounds if such conduct is so outrageous that it violates "Fundamental fairness" or is "shocking to the universal sense of justice". U.S. V. Russell, 411 U.S. 423, 432, (1973); see. e.g. U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002)

Having not been indicted by a legally constituted grand jury deprives a defendant "notice" and violates an individuals "substantive right to be tried only on charges presented in an indictment [returned] by a grand jury".

The State [did not] provide the constitutionally required assurance of "proper notice" under due process. Prosecutor's undermined the integrity of the grand jury as an independent body creating "prejudice" to defendants "liberty interest" protected by the Due Process Clause.

A Liberty interest protected by the Fourteenth Amendments Due Process Clause may arise from the Constitution itself, by reason of guarantee's implicit in the word "liberty", or it may arise from an expectation or interest created by state laws or policies.

Sixth Amendment Apprisal Requirement (Brief 2-Page 15)

Defendant's case implements the Sixth Amendments "apprisal" requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to..."be informed of the nature and cause of the accusation"; 1D. Amend VI. In fact, at trial, before a jury being sworn - defendant stated: "But the Sixth Amendment says I have a "right" to be informed of the nature and cause of accusation." (Tr. July 24-28, 2017, page 14, lines 5-6)(emphasis).

Defendant's case implicates defects in the indictments apprisal function, the error in the present case reflects fault in (or the complete absence of) the grand jury's screening function. (See Exhibit C). Where this "screening" function "later", is directly implicated (At Present?!), no logical means of [discerning] what happened in the grand jury exist, (as evidenced by (Court Admin.), "no court reporter was assigned to record grand jury proceedings", "therefore there is no transcript available" for date's of defendants "alleged" indictment...,). The grand jury's failure to find probable cause suggest that (1) the grand jury never viewed evidence of probable cause or (2) the grand jury refused to find probable cause. In either case, defendant was deprived of the screening process to which he is guaranteed by the Constitution. Accordingly, the "lack" of a legally constituted grand jury "impugned" the "fundamental fairness" of the process itself so as to undermine the integrity of the indictment."

Please See., Hobby V. United States, 468 U.S. 339, 345 (1984). Elementary principles of due process require that an accused be informed of the specific charge against him, and such a requirement is also imposed by Sixth Amendment; in this regard, due process clause and sixth amendment provide essentially the same protection to defendants. U.S.C.A. Const. Amend., 6, 14.

(Brief 2-Page 16)

Actual Prejudice

Supreme Court has held that a defendant must show actual prejudice to warrant dismissal of an indictment with prejudice. See U.S. V. Morrison, 449 U.S. 361, 364-66 (1981).

Accordingly, in this instant case, defendant suffered [prejudice] when he was not able to "mount" or "prepare a defense" against "unfounded charges" that lead directly to the defendants "unlawful conviction". Defendant was "prejudiced" his "legal right" pursuant to §17-19-10 (Offense shall be prosecuted upon grand jury indictment); as well, defendant was "prejudiced" his "legal right" pursuant to §17-25-10 (no person shall be punished for an offense unless duly and legally convicted thereof, in a court having competent jurisdiction of the [cause] and of the person); defendant suffered "prejudice." by being taken by "surprise" and hence unable to combat the charges against him (see State V. Baker, Supreme Court of South Carolina, Feb. 11, 2015, 411 S.C. 583). Defendant was "prejudiced" his [constitutional] right to "challenge" whether the "grand jury" which indicted him was legally constituted and established as prescribed by law pursuant to Art. I. §11, and Art. V. § 22 (Please see., Tr. July 24-28, 2017, page 15, lines 5-9; page 19, lines 8-25); defendant suffered and was "prejudiced" by the "infringment" of his "legal rights" pursuant to §14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, when defendant was denied disclosure, and thus, constituting a Brady violation as well, defendants "right" to "review and to reproduce the stenographically or electronically recorded materials - defendants right to "disclosure" [lost] on the trial judges ruling (Tr. July 24-25, 2017, page 15, lines 5-9; page 19, lines 8-25), and this "ruling" by trial judge [found] on the indisputable fact that defendant "could not" "review" stenographically recorded materials, because they "do not" "exist", as evidenced by South Carolina Supreme Court (Court Admin.) See Correspondence from Court Reporter Manager - Enclosed. (Emphasis)

Prejudice

A.A.G.'s for the State performed with "passion" and "prejudice" when prosecutor's conduct was a "significant infringement" on "grand jury's ability to exercise independent judgment", as would support dismissal of indictment. Defendant's incarceration for conduct that does not amount to a violation of S.C. Law establishes [prejudice]. Defendant has proved a "fundamental miscarriage of justice", because he is incarcerated for conduct that does not violate S.C. law, and he is, in fact, innocent of the charge upon which he is now imprisoned.

Substantive Due Process

"The touchstone of [substantive] due process is protection of the individual against [arbitrary] action of government. County of Sacramento V. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The Fourteenth Amendment prohibits the States from "depriving any person of life, liberty, or property without [due process of law]. U.S. Const. Amend. XIV. Due process contains both substantive and procedural components. Procedural due process prevents mistaken or unjust deprivation, while substantive due process prohibits certain actions regardless of procedural fairness. Zinermon V. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990); Carey V. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).

[Freedom] from bodily restraint has always been at the Core of the [liberty] protected by the Due Process Clause from [arbitrary] governmental action. U.S.C.A. Const. Amend. 14. (Emphasis).

Nature And Scope of Accusation

If a defendant raise's a timely challenge to the sufficiency of an indictment, the reviewing court is charged with: ...

...determining whether (1) the offense is stated with sufficient certainty and particularity to "enable the court to know what judgment to pronounce," and the "defendant to know what he is called upon to answer" and "whether he may plead an acquittal or conviction thereon"; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (emphasis added). In determining whether an indictment meets the sufficiency standard, the trial court [must] look at the indictment with a practical eye in view of all the surrounding circumstances". State V. Tumbleston, 376 S.C. 90, 97, 654 S.E. 2d 849, 853 (Ct. App. 2007). In doing so, "one is to look at the 'surrounding circumstance's' that existed pre-trial, in order to determine whether a given defendant has been "prejudiced', i.e., taken by surprise and hence unable to combat the charges against him". State V. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

Courts focus their attention on Gentry as it is the seminal case in analyzing the sufficiency of an indictment. Specifically, Gentry sets forth two requirements that are relevant and dispositive in the instant case. The First being a defendant's right to question the manner in which the accusation has been presented, which defendant has done. The second, and most important here, is the Court's determination as to whether the offense is stated with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer and whether he may plead an acquittal.

(Brief 2 - Page 19)

Examining the indictments in the instant case in view of all the surrounding circumstances, the Court should find that Mr. Roberts was prejudiced a "legally constituted grand jury" pursuant to Art. 1 § 11 and Art. 5. § 22 - as grand jury in defendants case" did not exist as a body" as evidenced by Court Admin. and defendant was [undoubtedly] taken by surprise and significantly limited in his ability to combat the charges against him. Simply stated, there was no way for Mr. Roberts to Know "whether he could plead an acquittal". Gentry, 363 S.C. at 103, 610 S.E. 2d at 500. Also see, Correspondence from Court Admin. dated 10-23-17, 11-6-17 (emphasis added). (Exhibit C).

Aside from this concrete example of "prejudice" in regards to there [absolutely] [not] being a record of "alleged" proceedings, the [reviewing court] is [unable] to discern how any defendant could effectively defend himself against an "unfounded prosecution", as the reviewing court itself, is [deprived] of "supervising" grand jury proceed-ings [absent a record] (emphasis). (Also See Exhibit C).

Count 1 of Indictment - Unconstitutionally Overbroad

Count 1 was unconstitutionally [overbroad] because it lacked [specificity] as to [when] the alleged [acts] occurred. (emphasis). It is axiomatic that an indictment must include more than the elements of the charged offense." The indictment is a notice document: State V. Gentry, 363 S.C. 93, 102-03, 610 S.E. 2d 494, 500 (2005). As such, The circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to Know what judgment to pronounce, and the defendant to Know what he is called upon to answer and whether he may plead an acquittal or conviction thereon;

and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Id. (citations omitted); see also S.C. Code Ann. §17-19-20 (2003)("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to [time] and [place], as [required by law] charges the crime substantially in the language of the common law or of the statue prohibiting the crime or so [plainly] that the nature of the offense charged may be easily understood).

Thus, "an indictment passes legal muster when it charges the crime substantially in the language of the statue prohibiting the crime or so plainly that the nature of the offense charged, may be easily understood." State V. Tumbleston, 376 S.C. 90, 98, 654 S.E. 2d 849, 853 (Ct. App. 2007).

Conviction is Constitutionally Invalid

Defendant argues that his conviction is "constitutionally invalid", [relying] on [Supreme Court] [precedent], defendant contends that a constitutionally invalid conviction affects [substantial] rights "as a per se matter."

Defendants argument is supported by the Supreme Court's long-held view that there is "a special category of Forfeited errors that can be corrected regardless of their effect on the outcome," and that "not in every case" does a defendant have to "make a specific showing of prejudice" (Though defendant has in the instant case), to satisfy the 'affecting substantial rights' prong..." Olano, 507 U.S. at 735, 113 S.Ct. 1770. The Court has recognized that this language refers to "structual errors". United States V. David, 83 F.3d 638, 647 (4th Cir. 1996); see also, United States V. Marcus,

560 U.S. 258, 263, 130 S.Ct. 2159, 176 L.Ed. 2d 1012 (2010) (certain "structual errors" might affect substantial rights regardless of their actual impact on an appellants trial); United States V. White, 405 F.3d 208, 221 (4th Cir. 2005) (Olano recognizes a "special category of unpreserved errors... that may be noticed regardless of their effect on the outcome.") Such errors are referred to as "structual" because they are "Fundamental Flaws" that "undermine the structural integrity of a criminal tribunal". See Vasquez V. Hillery, 474 U.S. at 263-64, 106 S.Ct. 617.

"The purpose of the structual error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affects the Framework within which the trial proceeds, rather than being 'simply an error in the trial process itself.' Weaver, 137 S.Ct. at 1907-08 (citing Arizona V. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 302 (1991).

Structural errors are "defects in the constitution of the trial mechanism which defy analysis by "harmless-error standards", Fulminante, 499 U.S. at 309, 111 S.Ct. 1246, and "deprive defendants of "basic protections" without which 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."

Neder V. United States, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999) (quoting Rose V. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed. 2d 460 (1986).

The Supreme Court has adopted at least three broad rationales for identifying errors as structural.

First, an error has been deemed structural in instances where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest; such as 'the fundamental legal principal that a defendant must be allowed to make his own choices about the proper way to protect his own liberty'." McCoy, 138 S.Ct. at 1511 (quoting Weaver, 137 S.Ct. at 1908).

Deprivations of the Sixth Amend. right to self-representation are structural errors not subject to harmless error review because "the right is either respected or denied; its deprivation cannot be harmless." McCoy, 138 S.Ct. at 1511 (quoting McKaskle, 465 U.S. at 177 n.8, 104 S.Ct. 944).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure; i.e. where "the precise effect of the violation cannot be ascertained. United States V. Gonzalez-Lopez, 548 U.S. 140, 149 n.4, 126 S.Ct. 2557, 165 L.Ed. 2d 409 (quoting Vasquez, 474 U.S. at 263, 106 S.Ct. 617). (Emphasis)

Such is the case where the consequences of a constitutional deprivation "are necessarily unquantifiable and indeterminate." Gonzalez-Lopez, 548 U.S. at 150, 126 S.Ct. 2557.

Third, an error has been deemed structural if the error always results in "fundamental unfairness".

In these circumstances, it would therefore be futile for the government to try to show harmlessness. Weaver, 137 S.Ct. at 1908.

The prosecution, after "undermining the integrity of the state grand jury as an independent body" deprived defendant of "notice" and "nature of offense", and the court deprived defendant of his right to determine the best way to protect his liberty. Defendant need not demonstrate prejudice resulting from the error (although defendant has) because harm to a defendant is irrelevant to the principles underlying his autonomy right and liberty interest. McKaskle, 465 U.S. at 177 n.8, 104 S.Ct. 944. Thus, the error is structural regardless of the strength of the prosecution's evidence or whether the error would have affected the ultimate outcome of the proceedings. Id.

The error is structural because the deprivation of defendants autonomy interest under the 5th & 14th Amend. due process clause has consequences that "are necessarily unquantifiable and indeterminate" see Gonzalez-Lopez, 548 U.S. at 150, 126 S.Ct. 2557, rendering the impact of the district courts error simply too difficult to measure. See Id. at 149 n.4, 126 S.Ct. 2557 (quoting Vasquez, 474, U.S. at 263, 106 S.Ct. 617) (Finding structural error where "the precise effect of the violation cannot be ascertained.)

Because defendant had "no notice of charges", nor "notice of their elements of the offenses", returned by a legally constituted grand jury, the error is structural.

Structural errors affect the entire conduct of the criminal proceeding from beginning to end, and therefore cannot be harmless.

(Brief 2 - Page 24)

To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights. Olano, 507 U.S. at 732, 113 S. Ct. 1770; United States V. Knight, 606 F. 3d 171, 177 (4th Cir. 2010).

To be "plain", an error must be "clear or obvious". Ramirez-Castillo, 748 F. 3d at 215 (citations and internal quotation marks omitted) see also Olano, 507 U.S. 734, 113 S. Ct. 1770; Henderson, 133 S. Ct. at 1130.

(1) an error occurred

Structural protections of the State Grand Jury were compromised when prosecution "undermined the integrity of the grand jury as an independent body", this error led directly to defendants "unlawfull conviction";

(2) the error was plain

It being "clear" and "obvious" that the state grand jury never convened to consider criminal allegations against defendant, as no court reporter was assigned to record grand jury proceedings (In violation of §14-7-1700), therefore no [transcript] being available, as evidenced by South Carolina Supreme Court, Court Admin. Court Reporter Manager, Desiree Allen.

Its plain, that there is [no record] of any State Grand Jury proceedings. (Emphasis), (see Enclosure)(Exhibit C).

(3) the error affected defendant's substantial rights

Defendant has a "liberty interest" at stake, he is suffering [continuing] [consequences] from [unlawful] conviction, and [irreparable] injury. Prosecutors misconduct has "prejudiced" defendants due process of law and equal protections.

(Brief 2-Page 25)

The result of defendant's constitutionally invalid conviction, the error is structural on the ground that (1) the effects of the error are simply too hard to measure; that is, where the precise effect of the violation cannot be ascertained; and (2) Fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid conviction, and is structural and affects defendant's substantial rights, satisfying the third prong of the Olano inquiry.

Public reputation

This error seriously affects the fairness, integrity or public reputation of judicial proceedings.

An undisputed constitutional violation where defendant was not "informed" about the nature of the charges against him - is the type that is fundamental to the judicial process.

A case or case's where the grand jury's role is usurped by the petit jury; and the prosecution has "undermined the integrity of the grand jury as an "independent body", the credibility and integrity of the criminal justice system are themselves put at risk. Even the "appearance of impropriety ... diminishes faith in the fairness of the criminal justice system in general". Young V. United States, 107 S.Ct. at 2139.; see also Olano, 507 U.S. at 732, 113 S.Ct. 1770 (internal quotation marks omitted). (See Exhibit C). (Exhibit H, I).

Deprivation Of The Right To Indictment By Grand (Page 26)
Jury Is Structural Error.

The Court's recent opinion in United States V. Gonzalez-Lopez outlines three circumstances in which an error is termed "structural": (1) if its consequences are necessarily difficult to assess, (2) if it necessarily renders the criminal proceeding fundamentally unfair; or (3) if the harmless-error inquiry is irrelevant to remedying the constitutional error. 126 S.Ct. at 2564 n.4. The Court's use of the disjunctive demonstrates that each can provide an independent basis for finding a structural defect. First, a defect is structural if it has "consequences that are necessarily unquantifiable and indeterminate". Id. at 2564. Second, a defect is structural if it "necessarily renders a trial fundamentally unfair and deprives defendants of "basic protections" which without 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. Neder V. United States, 527 U.S. 1, 8-9 (1999). Finally, an error is structural if it is not amenable to harmless-error analysis.

The error in the present case meets all three criteria, especially the first (unquantifiable and indeterminate) and third (not logically amenable to harmless-error analysis), thus, it "unquestionally qualifies as "structural error". Sullivan V. Louisiana, 508 U.S. 275, 282 (1993). (Emphasis).

(See Exhibit C)

An Indictments Failure To State An Offense Has Consequences That Are Necessarily Unquantifiable, Indeterminate And Not Logically Amenable To Harmless-ERROR Analysis.

The prejudice caused by the error in this case is "unquantifiable and indeterminate," Sullivan, 508 U.S. at 281-82, and not properly reviewed under harmless error analysis.

The error here occurred in the grand jury context, where a State Grand Jury "transcript" was not made. As a result, a reviewing court is incapable of assessing what a grand jury did or did not do.

Indeed, a reviewing court can have no confidence that it was error at all because the grand jury might deliberately have declined to find probable cause for an overt act and therefore removed that element from the indictment. While remote, this possibility demonstrates the absolute inability of a reviewing court to assess what a grand jury did or did not do. There is no object, so to speak upon which harmless-error scrutiny can operate." Id. at 280. Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction", we cannot be sure that the error leading to the indictments insufficiency did not affect the "very existence of the proceedings to come". Vasquez, 474 U.S. at 263 (emphasis).

In sum, in light of deprivation of a specific constitutional guarantee, the Constitutions articulation of a remedy for such a deprivation and the [pernicious] effects of such a deprivation, the Court should hold that the error that occurred here is "structural."

To hold otherwise, would effect a "fundamental change" in the criminal process.

Constitutional Grand Jury Error Requires A Court To Dismiss An Indictment When The Defendant Properly Preserves A Timely Objection To Such Error.

The indictment in this case was insufficient constitutionally to bring defendant to trial. Because [defendant] diligently pursued his [objection] to this constitutional error, this Court's [precedent] [mandates] [dismissal] of the indictment.

Constitutional grand jury errors violate one or more of the three requirements of the Indictment Clause, as laid out in Costello, 350 U.S. at 363. There, Justice Black held that an indictment returned by a (1) legally constituted and (2) unbiased grand jury . . . (3) if valid on its face, is enough to call for trial of the charge on the merits." Id.

Properly Preserved Constitutional Grand Jury Error Results In Reversal.

In every case in which a defendant preserved his or her timely objection to constitutional grand jury error, this Court has adhered to a strict rule of mandatory reversal. See Vasquez, 474 U.S. at 256. (Emphasis).

If it be once held that changes can be made by the consent or the order of the court in the "body" of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exist.

It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime;

for though it has possession of the person, and "would have" jurisdiction of the crime., if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has [no right] to proceed any further in the progress of the case for want of an indictment.

Conclusion

Defendant's right to due process of law and equal protections under the law pursuant to the Fourteenth Amendment of the United States Constitution, and Article I. § 11 and Article 5. § 22 of South Carolina State Constitution was violated when defendant did not recieve "proper, required notice" of charges against him when defendant had not been indicted by a legally constituted grand jury, resulting in "prejudice" to defendants legal rights. Defendant suffered "prejudice" when he was unable to "mount" or "prepare a defense" against unfounded charges due to prosecutor's arbitrary and egregious misconduct regarding the grand jury process. Defendant suffered "prejudice" from structural error that affected the entire conduct of the criminal proceeding.

Structural errors in defendants case are "unquantifiable" and "indeterminate", always resulting in fundamental unfairness, affecting defendants substantial rights. Defendant was "prejudiced" his Sixth Amendment right to "be informed about the nature of the charges against him.

Defendant respectfully asks that this Court to dismiss defendants indictments with prejudice, as defendant suffers prejudice from continuing consequences of unlawful conviction?

Subsequent Application

Questions Presented to the Court (Brief 3- Page 1)

1.) Whether trial court lacked subject-matter jurisdiction to "convict" and "sentence" defendant on "unindicted" offenses in violation of §17-19-10, §17-25-10, and defendants right to due process of law and equal protections under the law pursuant to the Fourteenth Amendment of the U.S. Const.?

2.) Whether trial court violated State Const. Art. I §11; Art. V §22; Art. I §3 and defendant's due process of law and equal protections under the law, when defendant was "denied" his "infringed" right to challenge whether a legally constituted grand jury consider his case?

* Court should grant an evidentiary hearing on a motion to vacate, set aside, or correct sentence when the defendant alleges facts that, if proven, would entitle him to relief. *

Sandoval V. U.S. 574 F.3d 847

Accordingly, defendant request an evidentiary hearing pursuant to the above.

Relevant Facts (Brief 3 - Page 2)

On April 12-13, 2016, A.A.G.'s for the State, and the Clerk of the State Grand Jury willfully printed and published false and misleading information in its indictment in violation of "constitutional" and "statutory" law. (See Ind.# 2016-GS-47-02/03), (See also, Court Admin. Correspondence dated 10-23-17, 11-6-17). On several attemps to obtain the state grand jury transcript (impanelment documents) from "alleged" proceedings, defendant was advised by Court Reporter Manager, Desiree Allen, of the Supreme Court that, in fact, there was "no court reporter assigned to record grand jury proceedings" on dates of defendants indictments (April 12-13, 2016), and therefore, there is no transcript available - in square conflict with state constitution and statues (14-7-1700). It is an "indisputable fact" that no court reporter had been assigned to state grand jury proceedings on April 12-13, 2016 in regards to defendants case (Case #2016-GS-47-02/03), as evidenced by the South Carolina Supreme Court, Court Admin., South Carolina Supreme Court being the very entity responsible for "rules" and "operation" of the State Grand Jury system (Article 15. State Grand Jury Act).

On July 19, 2017, a Competency Hearing was held after an evaluation was ordered by the court, and a Doctor Maddox was ordered to evaluate defendant. Doctor Maddox stated to the trial judge: "Again, he doesn't believe that the court has any jurisdiction." He does not believe that these charges are genuine. (Emphasis). And any cooperation on his part will constitute consent and he will not do that." (Tr. dated July 19, 2017, page 12, lines 14-17).

Fucthes on in the hearing the defendant stated: "This court doesn't have "jurisdiction" over me, Your Honor". (Tr. dated July 19, 2017, page 17, lines 21-22). And again defendant states: "The Court is lacking jurisdiction, Your Honor. (Tr. dated July 19, 2017, page 22, lines 11-12).

Defendant continued to make "contemporaneous objections" to the court based on the indictment, and that the court has no power to adjudicate for a "want of jurisdiction" when defendant stated: "Your Honor, those indictments are not even certified. According to the State Grand Jury act they are suppose to be certified." (Tr. dated July 19, 2017, page 23, lines 10-12).

On the day of defendants trial (July 24, 2017), before the jury being sworn, defendant attempted to challenge the jurisdiction of the state grand jury when defendant requested the "minutes" (impanelment documents), in order to prove that a state grand jury had not convened in defendants case, defendant stated: "I would also like the State Grand Jury minutes". (Tr. dated July 24-28, 2017, page 15, lines 5-6). Despite defendants "right" under the state constitution to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him, the trial court denied defendants request in her (Judge's) ruling when she stated: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those." (Emphasis) (Tr. dated July 24-28, 2017, page 15, lines 7-9).

Next, the trial judge stated: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. dated July 24-28, 2017, page 19, lines 8-10). (Emphasis).

In response to the trial judge's "question", defendant in his many "contemporaneous objections" to the courts jurisdiction and that of the State Grand Jury's lack of subject-matter jurisdiction, answered: "Well, I'm actually going to show and prove that no State Grand Jury even occurred." (Tr. dated July 24-28, 2017, page 19, lines 11-12) (Emphasis).

Discussion:

The circuit court does not have subject-matter jurisdiction to convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State V. Parker (S.C. 2002) 351 S.C. 567, 571 S.E. 2d 288; Joseph V. State (S.C. 2002) 351 S.C. 551, 571 S.E. 2d 280.

Also see... State V. Beachum (S.C. 1986) 288 S.C. 325, 342 S.E. 2d 597..."(Trial court lacked subject-matter jurisdiction to convict defendant for Kidnapping where there was no indictment for Kidnapping at the time the jury was sworn, and an indictment, which was true-billed and published by the clerk during a temp-orary suspension of the trial, did not remedy the subject-matter jurisdictional defect)."

In a criminal case the trial court's subject-matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State V. Watson (S.C. 2002) 349 S.C. 372, 563 S.E. 2d 336.

A formal accusation is essential for every criminal trial, and without it, the court has no jurisdiction to proceed. Post V. United States, 161 U.S. 583, 587 (1896); Albrecht V. United States, 273 U.S. 1, 7 (1927).

In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject-matter jurisdiction of the offense. State V. Smalls, 354 S.C. 498.

(Brief 3 - Page 5)

Generally, in a criminal case, the trial court acquires subject-matter jurisdiction by way of a valid indictment, and a court lacks subject-matter jurisdiction to convict and sentence a defendant for an offense for which he was not indicted. State V. Johnston (S.C. 1999) 333 S.C. 459, 510 S.E. 2d 423.; State V. Beachum, 288 S.C. 325, 342 S.E. 2d 597 (1986). In other words, a court lacks subject matter jurisdiction to convict and sentence a defendant for an offense for which he was not indicted. I.D.

Supreme Court of the United States in the case of United States V. Gale, 109 U.S. 65, 3 S.Ct. 1, 27 L.Ed. 857 "There are cases undoubtedly which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found; or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with." (Emphasis).

In the case of State V. Edwards, 68 S.C. 318, 47 S.E. 395, 396, in which the opinion was delivered by Mr. Justice Jones, the court held that the trial judge did commit error in not sustaining a motion in arrest of judgment, because it appeared in that case that the grand jury which found the bill of indictment had been drawn under an act which was unconstitutional. Obviously this went to the very vitals of the grand jury, and since it had no valid existence the indictment so found by it was void, and the point could first be raised

on motion in arrest of judgment. The Court says: "But the objection here goes deeper. It does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in which the law requires, which assumes power to act; but it goes to existence of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity".

A criminal defendant has a constitutional and statutory right to have the indictment issued by a legally constituted grand jury. See Evans V. State, 363 S.C. 495, 611 SE 2d 510(2005); State V. Williams, 263 S.C. 290, 210 SE 2d 298(1974). Also see SC Const. Art. I. § 11 and Art. V. § 22. The Evans court overruling several cases, further determined that an indictment which is deemed to be a nullity because it was issued by an illegal grand jury no longer implicate subject-matter jurisdiction.

"State constitution requires a person be indicted by the grand jury before standing trial for a crime". State V. Owens (S.C. 2001) 346 SC 637, 552 S.E. 2d 745... Where defendant was tried and convicted upon an indictment which was a nullity, it follows that he was convicted in violation of this section. State V. Funderburk (S.C. 1972) 259 S.C. 256, 191 S.E. 2d 520.

"In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject-matter jurisdiction of the offense". State V. Smalls Court of Appeals of S.C. May 5, 2003, 354 S.C. 498.

(Brief 3 - Page 7)

A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. Bailey V. State, 392 S.C. 422, 433, 709 S.E. 2d 671 (2011).

"Lack of subject-matter jurisdiction is fundamental and may not be waived even by consent of the parties." Brown V. State, 343 S.C. 342, 540 S.E. 2d 846 (2001). A judgment by a court cannot be affirmed where the court had no right to act. The actions and judgment of the court in absence of subject-matter jurisdiction are void Id.

Defendant contends that because no indictment charging him with offenses was prepared by "a grand jury" and submitted to trial court, that there was no way to confer subject-matter jurisdiction to trial court. A court lacks S.M.J. to convict and sentence a defendant for an offense for which he was not indicted. See § 17-25-10 (no person shall be held/punished until legally convicted), Also see § 17-19-10 (no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...) As was explained in State V. Gentry, 363 S.C. 93, 610 S.E. 2d 494 (2005).

The grand jury in defendants case were not selected, drawn, summoned, impaneled, or sworn as prescribed by law, and in fact, did not exist "as a body" at all - as there is no record of "alleged" proceedings as evidenced by Court Administration's Court Reporter Manager, Desiree Allen, in violation of § 14-7-1700 Art. 15 (State Grand Jury Act).

On July 28, 2017, Judge Jefferson unlawfully convicted defendant of offenses when there is no indictment charging him with that offense[s] when the jury was sworn. See Sentencing Sheets (Enclosed). Also see S.C. Code Ann. § 17-19-90; see also Trial transcrip dated July 24-28, 2017 - Page 15, Lines 5-9; Page 19, Lines 8-12 (Emphasis). (See Exhibits C, G).

The U.S. Supreme Court has made it clear that the actions of a court without jurisdiction are void, and or nugatory and a defendant's 14th Amendment rights are violated when a court entertains a case without jurisdiction. Burnham V. Superior Court of California, 495 U.S. 604, 110 S.Ct, 2105 (1990) see pages 2109--2110. The Federal courts who have addressed this matter found that it was a jurisdictional defect when the indictments are filed contrary to the rules of criminal procedure, and in this state not filing the indictment is contrary to Rule 3(c) SCRCRIM.P.

"The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the State, and is fundamental". State V. Heyward, 564 SE.2d 379 (SC App 2002)(citing Anderson V. Anderson, 299 SC. 110, 115, 382 SE. 2d 897, 900 (1989)(emphasis added).

"It is axiomatic that a defendant may not be tried on charges that were not made in the indictment." United States V. Novak, 217 F.3d 566, 574 (8th Cir. 2000); United States V. McDill, 871 F.3d 628

(Brief 3 - Page 9)

Trial proceedings were marred by a [fundamental defect] that inherently resulted in a complete miscarriage of justice, or in omissions inconsistent with rudimentary demands of fair procedure. (See Exhibit C).

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested charges, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer", may be frittered away until its value it almost destroyed. United States V. StucKey, 220 F.3d 976, 981 ¶ n.5 (8th Cir. 2000).

"Subject matter jurisdiction" is a court's statutory or constitutional power to adjudicate case. In the case of 2016-GS-47-02, trial court was without jurisdiction to impose sentence. Article V, § 22 provides, in pertinent part: "The grand jury of each county, and the "state grand jury", as the General Assembly may establish by general law, [shall] consist of eighteen members, twelve of whom [must] agree in a matter before it can be submitted to the court." In violation of Art. V, § 22 - there did not exist the required 12-18 members to consist of "a body", and that because of the "non-existence" of the grand jury, as evidenced by Court Admin., the "indictment" could not, and was not submitted to trial court - and therefore trial court lacked subject matter jurisdiction over offenses to be able to convict defendant. Also see Art. I § 11; § 17-25-10.

Structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. Bank of Nova Scotia V. United States, 487 U.S. 250, 257 (1988). (See Exhibit C).

While it may be presumed that a grand jury proceeding transpires with all due regularity (see United States V. Johnson, 319 U.S. 503, 512-13 (1943); see also United States V. Mechanik, 475 U.S. 66, 75 (1986)(O'Connor, J., concurring in judgment) where there is "particularized proof of irregularities in the grand jury process", this presumption of regularity... may be dispelled." Id. A violation of the Indictment Clause's requirement that an indictment must be "returned by a legally constituted and unbiased grand jury [and] valid on its face", Costello V. United States, 350 U.S. 359, 363 (1956)(internal footnote omitted)(emphasis added), is precisely the brand of "particularized proof" that overcomes any presumption of regularity.

Here, the claim of fundamental unfairness relies upon not only the Fourteenth's Amendment's guarantee of Due Process, but also upon its specific and emphatic guarantee that "No State shall... deprive any person of life, liberty, or property, without due process of law"...

There exist errors in the indictment and sentencing, moreover, the integrity, fairness, and public reputation of the proceeding were seriously affected by the 6 and 14th Amendment violations in this case.

The discreation to correct such systemic errors does not depend on a defendant's innocence or guilt. In accordance with the carefully crafted structure of our criminal process, the State's failure to present such evidence to the grand jury and obtain a seperate, greater charge in an indictment warrants vacatur of petitioners sentences.

A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4) [SCRCP] Gainey V. Gainey, 382 S.C. 414, 424, 675 S.E. 2d 792 (Ct. App. 2009) "A void judgment is one that, from its inception, is a complete nullity and is without legal effect"... Id.

Constitutional Law

Statutory and, especially, constitutional elements of jurisdiction are essential ingredient of seperation and equili- - bration of powers, restraining courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. U.S.C.A. Const. Art. 3. § 2, cl. 1.

"Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Dreher V. Experian Information Solutions, Inc. 856 F. 3d 337; U.S. Const. Art. 3, § 2, cl. 1.

(Brief 3- Page 12)

"Without jurisdiction, court cannot proceed at all in any cause except to announce the fact and dismiss the cause. U.S. V. Beasley, 495 F. 3d 142.

On July 19, 2017 at defendants "Competency Hearing", Doctor Maddox stated: "Again, he doesn't believe that the court has any jurisdiction. He does not believe that these charges are genuine." (Tr. 7-19-2017, Page 12, Lines 14-16).

Further, at the same Competency Hearing, the defendant stated: "This court doesn't have jurisdiction over me, Your Honor". (Tr. 7-19-2017, Page 17, Lines 21-22). Again, defendant states to the trial judge: "The court is lacking jurisdiction, Your Honor". (Tr. 7-19-2017, Page 22, Lines 11-12).

At trial, before a jury being sworn, defendant motioned the trial court for the production of the state grand jury's impanelment documents when he stated: "I would also like the State Grand Jury minutes." (Tr. July 24-28, 2017, Page 15, Lines 5-6). The Court respond: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those". (Tr. July 24-28, 2017, Page 15, Lines 7-9).

Contrary to the judges ruling, South Carolina Code Ann. § 14-7-1720 generally provides that State Grand Jury material is secret, but allows disclosure for the purpose of "complying with constitutional, statutory, or other legal requirements or to further justice". See S.C. Code Ann. § 14-7-1720 (A)(5). Additionally, defendants are entitled to discovery in criminal cases, pursuant to the constitution, statue, and rule. See Brady V. Maryland, 373 U.S. 83 (1963);

Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005); S.C. Code Ann. § 14-7-1700; Rule 5, SCRCrimP. Including Kyles V. Whitley, 514 U.S. 419 (1995).

"A Defendants right to obtain recorded proceedings and testimony before state grand jury in preparing his defense, which right is subject to limitations imposed by statue and rule, necessarily arises "post-indictment"; although maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill of indictment, and thus," a defendant is allowed to obtain and use the impanelment documents in preparing a defense and ensuring protection of his due process rights". U.S.C.A. Const. Amend. 14; Code 1976 §§ 14-7-1700, 14-7-1720, 14-7-1770, Rule 5 Crim. Proc. Rule 5.

After the trial courts ruling, and "infringement of defendants right to prepare a defense", the trial court questioned: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. 7-24-2017 - 7-28-2017, Page 19, Lines 8-10).

In responding to the courts inquiry, the defendant stated: "Well, I'm actually going to show that no State Grand Jury even occurred," or convened to return an indictment. (Tr. dated July 24-28, 2017, Page 19, Lines 11-12.)(emphasis).

Defendant consistently "objected" to the trial courts lack of subject-matter jurisdiction based on the indictment, as evidenced from Court Administration that no state grand jury convened as there was" no court reporter assigned to

record grand jury proceedings on dates of defendants alleged indictments. See Court Admin. correspondence dated 10/23/17, 11/6/17. (Enclosed)

The grand jury in defendants case were not selected, drawn, summoned, impaneled, or sworn as prescribed by law.

There had not been a court reporter assigned to record state grand jury proceedings on dates of defendants indictments, April 12-13, 2016, in violation of § 14-7-1700, there is no possible "legal" way to "operate a state grand jury system in violation of its own statue's", these exist "direct evidence" that proves that these exist absolutely "no record" of alleged "proceedings" because these proceedings did not occur, defendant has not been indicted on any offenses, and the trial court lacked jurisdiction to convict defendant on unindicted offenses.

The whole proceeding of forming the panel is void; the jury is not a jury of the court or term in which the indictment is found; they (jury) have not been sworn, and did not exist as "a body".

"No person shall be held to answer for any crime unless on a presentment or indictment of a grand jury." (South Carolina Constitution, Article I, section 11; S.C. Code Ann. Section 17-19-10 1976); United States V. Gale, 109 U.S. 65, 3 S. Ct. 1, 27 L. Ed. 857.

The trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury is sworn. Accordingly, trial court in defendants case lacked subject matter jurisdiction to convict defendant on unindicted offenses.

(Brief 3- Page 15)

Prosecutors malicious and egregious act(s) of undermining the integrity of the grand jury as an independent body infringed defendants right to be prosecuted only upon indictment pursuant to §17-19-10; Art. 1§11, Art. 5§22.

"There's no denial of equal protections of the laws in "constitutional" or "statutory provisions" relating to jury and grand jury". U.S.C.A. Const. Amend. 14.

There was no court reporter assigned to record "alleged" State grand jury proceedings on the dates of defendants "alleged" indictments as evidenced by Court Administration (Enclosed), therefore no transcript being available "indisputably" proves that there is "no record of these proceedings in violation of §14-7-1700 and defendants due process of law and equal protections of the laws.

There was no court reporter assigned, and no transcript available in violation of Constitutions, statues, and rule because "the body of a State Grand Jury did not exist on "alleged" dates of defendants indictments.

Defendant contends that because no indictment charging him with offenses was ever prepared by "a grand jury" or submitted to the court by a "legally constituted grand jury", that trial court lacked subject-matter jurisdiction to convict defendant on unindicted offenses. See §17-25-10; State V. Gentry, 363 S.C. 93, 610 S.E. 2d 494 (2005).

(Brief 3 - Page 16)

A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him. See trial transcript dated July 24-28, 2017, Page's 15, lines 5-6; Page 19, lines 8-12; See also... S.C. Const. Art. 1. § 11 and Art. 5. § 22 "[O]ne who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the state constitution. Rector, 158 S.C. at 230, 155 S.E. at 392 (internal quotes omitted).

An indictment or "notice document" issued by a grand jury which is established or constituted illegally is deemed a nullity.

An indictment which is a nullity would be insufficient, as a matter of law, to give the required notice to a defendant. In such cases, a defendants challenge "does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing [that] which the law requires, which assumes a power to act; but it goes to the existence of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity. See State V. Edwards, 68 S.C. 318, 322, 47 S.E. 395, 396 (1904); State V. Sanders, 251 S.C. 431, 438, 163 S.E. 2d 220, 224 (1968); State V. Rafe, 56 S.C. 379, 34 S.E. 660 (1900); Campbell V. Louisiana, 523 U.S. 392, 398, 118 S.Ct. 1419, 1423, 140 L.Ed. 2d 551, 559 (1998); Vasquez V. Hilleny, 474 U.S. 254, 263-264, 106 S.Ct. 617, 623, 88 L.Ed 2d 598, 609 (1986) (Same), (internal quotes omitted).

(Brief 3 - Page 17)

The circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity or proves the disqualification of an individual juror. (See trial transcript, page 15, lines 5-6; Page 19, lines 8-12). Otherwise, the defendants constitutional right to demand that his case be considered by a grand jury which is properly established and constituted under the law would have no force or effect. (Emphasis).

Defendant was denied his right to challenge whether his case was considered by a grand jury which is properly established and constituted under the law when defendant asked for the impanelment documents and was denied by trial judge. (Tr. page 15, lines 5-9). (Before jury sworn).

When the judge questioned the defendant stating: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record? (Tr. page 19, lines 8-10). Defendant responded: "Well, I'm actually going to show that no State Grand Jury even occurred." (Emphasis) (Tr. page 19, lines 11-12). Defendant's right to challenge whether his case was considered by a grand jury which is properly established and constituted under the law was "infringed" by the trial court and prosecution because the impanelment documents do not exist, and there is absolutely no record of grand jury proceedings, as evidenced by Court Reporter Manager, Desiree Allen of Court Administration.

Challenge to Indictment Before Jury Being Sworn

If challenge to indictment is raised before the jury is sworn (Tr. dated July 24-28, 2017, page 15., lines 5-6; page 19., lines 8-12), circuit court should judge suffiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable court to Know what judgment to pronounce and defendant to Know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises defendant of elements of offense that is intended to be charged. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (citing State V. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003)).

Contrary to the above legal principle and controlling case law, trial judge violated defendants due process of law when defendant "attempted" to challenge indictment by moving for the production of "impanelment documents" and trial judge refused "disclosure" (Tr. July 24-28, 2017, page 15, lines 5-9; page 19, lines 8-14) to defendant, stating: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those." (Tr. July 24-28, 2017, page 15, lines 7-9). Next, trial judge "questioned" defendant, asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10) (emphasis). In response, defendant stated: "Well, I'm actually going to show that no State Grand Jury even occurred." (Tr. July 24-28, 2017, page 19, lines 11-12). (emphasis). Trial court responded: "Oh, it happened because." I have the indictments" (emphasis) (Tr. July 24-28, 2017, page 19, lines 13-14).

Thus, defendants right to challenge indictment, whether legally constituted grand jury was "infringed" by trial judge.

Prejudice

1.) Defendant suffers prejudice by the "infringement" of defendants right to indictment by grand jury pursuant to § 17-19-10, S.C. Const. Art. 1 § 11, Art. V. § 22.

2.) Defendant suffers prejudice in that prosecutor's conduct was a significant infringement on grand jury's ability to exercise independent judgment, as would support dismissal of indictment.

A.A.G.'s conduct undermined the defendants right to fundamental fairness and due process of law and equal protections under the law in the criminal proceedings.

3.) Defendant has been prejudice, i.e., taken by surprise and hence unable to combat the charges against him.

4.) Defendants right "not to be punished until legally convicted," pursuant to § 17-25-10 was "infringed" by trial court, and defendant suffers prejudice by the continuing effects or consequences of his incarceration.

5.) Defendants incarceration for conduct that does not amount to a violation of S.C. Law establishes prejudice. Defendant has proved a fundamental miscarriage of justice, because he is incarcerated for conduct that does not violate S.C. law, and he is, in fact, innocent of the charge upon which he is now imprisoned.

6. Judgment was rendered without subject matter jurisdiction, lacking due process and produced through fraud or collusion, thus, defendant suffers prejudice, in that, his right pursuant to § 14-7-1720(A) & (D) and defendant could not mount a defense.

Conclusion : The trial court lacked subject matter jurisdiction to convict defendant for an offense when there is no indictment charging him with that offense when the jury is sworn.

The whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found. In violation of section 14-7-1700 - there was no court reporter assigned to record grand jury proceedings, and this fact is "indisputable" as evidenced by Court Administration. There is absolutely no record of state grand jury proceedings as evidenced by Court Admin.

Defendants right to be indicted by a legally constituted grand jury was "infringed" by the prosecutions "rubber stamp".

The defendant can be punished only by a court of competent jurisdiction. Trial court exceeded its jurisdiction to convict defendant on unindicted offenses. In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject matter jurisdiction of the offense.

An indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged.

A judgment by a court cannot be affirmed where the court had no right to act. Actions and judgment of the court in the absence of subject matter jurisdiction are void.

Accordingly, defendant asks this court to vacate and dismiss defendants sentences and indictment for a lack of subject matter jurisdiction?

Table of Authorities (Brief 4 - Page 1)

Strickland V. Washington, 466 U.S. at 687
Williams, 529 U.S. at 393 (2000)
Williams V. Taylor, 529 U.S. 362, 391-93 (2000)
Lockhart V. Fretwell, 506 U.S. 364, 367-68 (1993)
Nix V. Whiteside, 475 U.S. 157 (1986)
State V. Orr, 304 S.C. 185, 403 S.E. 2d 623 (1991)
Cronic, 466 U.S. at 659
Haynes V. Cain, 272 F.3d 757, 764 (5th Cir. 2001)
Crawford V. Washington, 124 S.Ct. 1374 (2004)
U.S. V. Aguilar-Tamayo, 300 F.3d 562, 566 (5th Cir. 2002)
Maples V. Stegall, 340 F.3d 433, 439-41 (6th Cir. 2003)
Murray V. Carrier, 477 U.S. 478, 496 (1986)
U.S. V. Doherty, 233 F.3d 1275, 1281-82 (11th Cir. 2000)
Whelchel V. Washington, 232 F.3d 1197, 1204-05 (9th Cir. 2000)
U.S. V. Williamson, 183, F.3d 458, 463-64 (5th Cir. 1999)
Kimmelman V. Morrison, 477 U.S. 365, 385 (1986)
Groseclose V. Bell, 130 F.3d 1161, 1170 (6th Cir. 1997)
Hunt V. Mitchell, 261 F.3d 575, 583 (6th Cir. 2001)
Hart V. Gomez, 174 F.3d 1067, 1073 (9th Cir. 1999)
Ard V. Catoe, 373 S.C. 318, 331, 642 S.E. 2d 590, 596 (2007)
McKnight V. State, 378 S.C. 33, 46, 661 S.E. 2d 354, 360 (2008)
Evans V. State
Brady V. Maryland

Questions Presented To The Court (Brief 4 - Page 2)

1.) Whether defendants right to "Effective Assistance of Counsel" as guaranteed by the Six Amendment and Fourteenth Amendment of the United States Constitution violated when trial counsel did not [object] to codefendants out-of-court statements and confession?

2.) Whether defendants right to "Effective Assistance of Counsel" as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution violated when trial counsel "stipulated" to [All] the evidence in the chain of custody, thereby abridging defendants right to "Confrontation", in order to accomadate Assistant Attorney Generals long witness list?

3.) Whether trial Counsel was "ineffective" and "prejudiced" defendant Brady material and right to prepare a defense when trial counsel did not [object] to the trial Courts erroneous ruling denying defendant impanelment documents?

4.) Whether trial Counsel was "ineffective" and "prejudiced" defendants right to "effective assistance of counsel" when trial counsel advised defendant to plead and give up his rights despite defendants proceeding to press for trial?

5.) Whether trial counsel was "ineffective" and "prejudiced" defendants right to "effective assistance of counsel when trial counsel did not object to lab reports introduced by police or read by Sled Agents despite the declarants unavailability for trial to be cross-examined?

(Brief 4 - Page 3)

6.) Whether trial counsel "ineffective" and "prejudiced" defendant from preparing a defense when trial counsel refuse to present an alibi in defendants defense?

7.) Whether under the circumstances concerning the evidence of the grand jury "not consisting as a body", and defendants persistent attempts to challenge jurisdiction regarding that fact, could trial counsel be presumed ineffective because of that fact?

* The allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, defendant requests an evidentiary hearing to fully resolve this issue. *

See Sharper V. State, 279, S.C. 264, 305 S.E. 2d 247 (1983); U.S.C.A. Const. Amend. 6.

8. Whether defendants right to "effective assistance of counsel" pursuant to the Sixth Amendment of the United States Constitution and due process of law pursuant to the United States Constitution, violated when trial counsel "consistently" refused to object to [reports] and out-of-court statements by unavailable lab technicians?

Relevant Facts (Brief 4 - Page 4)

On July 19, 2017, a Competency Hearing was held on motion of trial counsel having "concerns" about being able to mount a defense for defendant as trial counsel was unable to gain defendant's cooperation in his own defense. (Tr. July 19, 2017, page 6, lines 8-11). At the start of this hearing, trial counsel stated: "Mr. Roberts does not wish for me to represent him." (Tr. July 19, 2017, page 4, lines 9-10). Trial court appointed a Doctor Maddox to evaluate defendant. Doctor Maddox stated: "I witnessed directly today he cannot work with his attorney. And I don't think that is all volitional on his part. He clearly does not trust his attorney." (Tr. July 19, 2017, page 8, lines 22-25). Doctor Maddox stated: "Its my understanding he does not like his attorney, he does not trust him and he feels threatened by him." (Tr. July 19, 2017, page 15, lines 1-3). Mr. Griffith (Trial Counsel) stated: "If it please the court, Your Honor. I have also provided him with all of the "discovery" sent to us from the Attorney General's Office." (Emphasis) (Tr. July 19, 2017, page 16, lines 4-6). When questioned by trial judge: "OKay. Now you said you've given him [all] the "discovery", is that [correct]?" (Tr. July 19, 2017, page 17, lines 9-10). Trial Counsel answered: "Yes, Your Honor." (Tr. July 19, 2017, page 17, line 11) At trial, the trial court questioned: "Mr. Griffith, you said you went over the "discovery" with him; is that right?" (Tr. July 24-28 2017, page 14, lines 16-17). Mr. Griffith replied: "[I] did provide him with [all] of the "discovery" that was sent to us, Your Honor." (Tr. July 24-28, 2017, page 14, lines 18-19.) (Emphasis). Two Facts to be noted here, (1) the defendant was unlawfully convicted on unfounded prosecution, (2) A State Grand Jury never convened in defendants case, as there is no record of grand jury proceedings, a court reporter was [not] assigned to record state grand jury proceedings, therefore there is no transcript available, as evidenced by South Carolina Supreme Court (Court Administration), Court Reporter Manager, Desiree Allen. Yet, trial counsel, consistently states he was "sent" discovery; that he actually provided defendant

"discovery". (See Correspondence from Court Admin. dated 10/23/17 and 11/6/17.)

At trial, trial counsel [waived] or [stipulated] too the chain of custody for all the evidence, prejudicing defendants right to confrontation.

1.) Defense Counsel "stipulated" to the chain of custody" for [all the evidence] to greatly [truncate] the list of witness'es.

(Tr. July 24-28, 2017, Page 74, Lines 4-5; lines 4-25; page 75, line 1)

2.) Defense counsel failed to [object] and to [cite] controlling precedent regarding judge's erroneous ruling denying defendant impanelment documents (Tr. July 24-28, 2017, page 15, lines 5-6; page 19, lines 11-12)

(Tr. July 24-28, 2017, page 85, lines 5-6; page 88, lines 12-13)

3.) Defense Counsel failed to [object] to codefendant's out-of-court statements and confession (Tr. Page 721, lines 20-25; Page 722, lines 1-2

4.) Defense Counsel refused to present [alibi] on defendant's behalf. (Tr. Page 616, lines 7-8)(Tr. Page 617, lines 1-25)(Tr. Page 618, lines 1-25)(Tr. Page 619, lines 1-25)(Tr. Page 620, lines 1-25)(Tr. Page 621, lines 1-13)(Emphasis).

5.) Defense Counsel refused to present [exculpatory evidence] to trial court. (Tr. July 24-28, 2017, Page 17, lines 14-25)

6. Defense Counsel acted as a second prosecutor at trial in his attempts at trying to coerce defendant to plead after defendant exercised [his] right to have a trial. (Tr. Page 235, lines 5-18)

(Tr. Page 237, lines 17-23)

7) Counsel's deficient performance was equivalent of being physically or mentally absent (Tr. July 24-28, 2017, page 15, lines 5-25; page 16, line 1-25 page 17, lines 1-25; page 18, lines 1-25; page 19, lines 1-25; page 20, lines 1-25; page. 21, lines 1-25)(Tr. July 24-28, 2017, page's 83-89, lines 1-25)

Precedent

In Keeping with [precedent] and the judiciary's central role in regulating the legal profession, this Court should presume [prejudice] when ineffective assistance of counsel results in [structural] [error]. The Court traditionally presumes prejudice for three reasons. First, counsel's error [contaminates] the trial and manifests a "breakdown in the adversarial process". (Emphasis) Cronic, 466 U.S. at 662. Second, the probability that the error resulted in harm to the defendant is high, but the "precise effects of the harm are difficult to measure". See, e.g., Id. at 658; Strickland, 466 U.S. at 692; Holloway V. Arkansas, 435 U.S. 475, 488-91 (1978). Third, the trial judge can easily observe, prevent, and remedy the error. See Strickland, 466 at 692. Taken together, these reasons reflect an understanding that public trust is essential to the proper functioning of our legal system and that judges have a substantial role to play in promoting that trust. Counsel did not conduct an adequate investigation, the hallmark of cause-and-prejudice is "a showing that the prisoner was denied "fundamental fairness at trial" thus "infecting [the] entire trial with error of constitutional dimensions" Id. at 494. "The duty of seeing that the trial is conducted with solicitude for the essential rights of the accused rest foremost upon the trial judge". Glasser, 315 U.S. at 71. (Emphasis).

Discussion: "The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. In Strickland V. Washington, the Supreme Court established a two-prong test to evaluate ineffective assistance claims. To obtain reversal of a conviction under the Strickland standard, the defendant must prove that counsel's deficient performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding". Deficient Performance

At trial, the trial judge questioned the prosecution, asking, "How long is it going to take the State to present their case?" (Tr. July 24-28, 2017, Page 74, lines 4-5). Mr. Underwood replied: "As to that, Your Honor, I had a brief conversation with both opposing counsel prior to selecting the jury. It's my understanding that they were both willing to [stipulate] that the "chain of custody" for [all the evidence] has been established. (Emphasis) And "they are not going to challenge it," which [would greatly truncate the list of witnesses.] (emphasis). (Tr. July 24-28, 2017, page 74, line 6-12). Mr. Underwood then stated: "I just would like to [confirm] that is, [in fact], the case. (Tr. July 24-28, 2017, page 74, lines 14-15).

The Court then asked Ms. Johns (Codefendant's Counsel): "Is that correct, Ms. Johns? Ms. Johns replied: "Your Honor, from what I reviewed -- The Court: "You really dont have a "good faith" challenge to the chain correct?" Ms. Johns replied: "Mr. Underwood provided me with everything. Internally, it looks like to me like the chain of custody has been met. So I would not be challenging that. And I think that [will ferret down that long witness list]. (Tr. July 24-28, 2017, page 74, lines 16-24).

The Court then inquired to Mr. Griffiths answer (Defendants Counsel) The Court: "Mr. Griffith?" (Tr. page 74, line 25). In response, Mr. Griffith stated: "Your Honor, having reviewed the same "document" provided by Mr. Underwood -- The Court: "There's no really good faith basis to challenge the chain." Mr. Griffith responded: "I would not be challenging (Tr. Page 75, lines 1-5). (Emphasis). Thus, defendant's "chain of custody" and "right to confrontation" abridged in order to accomodate prosecutions "long witness list". Prejudice 2.

Contrary to trial counsel's actions to [collaborate] with the State, the defendant [required] that any [chemist], [analyst], and [all] [persons] within the [chain of custody appear in Court] for the purpose of personally testifying. [Defendant] thus "objects" to the [introduction] of any [chemist's] or [analyst's] [report] pursuant to Rule 6, S.C. Rules of Criminal Procedure. This is requested on the grounds that it is [essential] to [insure] the Defendant's [right] to a [Fair trial], [right to confrontation of witnesses], the [right to effective counsel] and [due process of law] guaranteed by the South Carolina Const. and the United States Constitution. (Emphasis). Please See... Williams, 529 U.S. at 393. (2000).

Prejudice 2

Strickland, 466 U.S. at 687. Unlike the performance prong of the Strickland test, which is analyzed at the time of trial, the prejudice prong of the Strickland test is examined under the law [at the time] ineffective assistance claim is evaluated. see Williams V. Taylor, 529 U.S. 362, 391-93 (2000); Lockhart V. Fretwell, 506 U.S. 364, 367-68 (1993).

In Williams, the Supreme Court clarified that earlier exceptions explained in Nix V. Whiteside, 475 U.S. 157 (1986), and Lockhart V. Fretwell, 506 U.S. 364 (1993), should be narrowly

applied and "do not justify a departure from a straight forward application of Strickland when the ineffectiveness of counsel [does deprive the defendant of a [substantive or procedural right] to which the [law entitles him], i.e. Rule 6, S.C. Rules of Criminal Procedure; §14-7-1720(A) and (D) and Rule 5, S.C. Rules of Criminal Procedure; Williams, 529 U.S. at 393. Except in the narrow category defined by Nix and Lockhart, courts need not delve into a separate inquiry concerning fundamental fairness where both prongs of Strickland have been satisfied. See id. Because of Counsels "deficient performance.", defendant was "prejudiced" his [right] to the state grand jury impanelment documents; his [right] to obtain transcript pursuant to § 14-7-1720(A)(D) and Rule 5 S.C. Rules of Criminal Procedure; his [right] to a fair trial; his [right] to "Confrontation of witnesses" pursuant to the Sixth Amendment of The United States Constitution, and to Effective Assistance of Counsel.

Confrontation/Colloquy

When trial counsel "stipulated" to the chain of custody, his deficient performance "prejudiced" defendants constitutional [right] to "Confrontation" of witnesses. See Williams, 529 U.S. at 393.

In addition, the "right to confrontation of witnesses" is a right that is "constitutional". Supreme Court of South Carolina, in State V. Orr, 304 S.C. 185, 403 S.E. 2d 623 (1991), held that waiver of a [constitutional] or [statutory] right must be Knowingly and voluntary established on the record by [colloquy] between either the court and the defendant, or between the court and defendants counsel, or both.

Trial Counsels performance fell below "objective" standard of reasonableness by "stipulating" to [all evidence] through-out course of the "whole" trial — there did not exist any "adversarial testing".

(Brief 4- Page 10)

Counsel's "stipulation" violated defendant's right to effective counsel, right to a fair trial, right to confront all witnesses in chain of custody, and defendant's right to [due process of law.] Counsel's "stipulation" was made in order to [accomodate] the prosecutions [long witness list] (Tr. July 24-28, 2017, page 74, lines 11-12)(Page 75, lines 1-5)(Emphasis).

If counsel "entirely fails to subject the prosecutions case to meaningful adversarial testing", the adversarial process itself becomes presumptively unreliable Cronic, 466 U.S. at 659; see, e.g., Haynes V. Cain, 272 F.3d 757, 764 (5th Cir. 2001). Trial counsel's "stipulation" prejudiced defendant's [right] to "confront" and "cross-examine" [all] Chemist's or Analyst's in regards to their lab reports and [how much actual heroin?]; and to "confront" all evidence technicians, and drug technicians to ascertain [whether testing procedures were properly carried out] and whether chain was actually established? Any evidence introduced through (Primarily lab reports) Agents or officers Justin Winga, Daniel Lundberg, Brandon Allen, Misael Vasquez, Aaron Rawl and Tasan Wells [violated] defendant's due process of law to confront all witnesses in the chain of custody, and testimony given by officers constitutes "hearsay", and Lab reports are testimonial pursuant to Crawford V. Washington, 124 S.Ct. 1374 (2004).

Deprivation of Substantive or Procedural right

Ineffectiveness of counsel did deprive defendant of a substantive or procedural [right] to which the law entitles him. Williams, 529 U.S. at 393. Defendant was deprived his [right] to confront [all] persons in the chain of custody.

In Crawford V. Washington, the Supreme Court held that the admission of testimonial hearsay statements (All Lab reports read by officers) violates the confrontation clause if the prosecution fails to establish the declarant's unavailability for trial. See, U.S. V. Aguilar-Tamayo, 300 F.3d 562, 566 (5th Cir. 2002)(good-faith effort not established when government

stipulated that it took no steps to secure presence of witnesses). See Tr. dated July 24-28, 2017, page 74, lines 1-25. (Emphasis).

In Crawford, the court held that, absent a prior opportunity for cross-examination, a testimonial statement by an unavailable witness, offered against a defendant to prove the truth of the matter asserted, is categorically barred by the Confrontation Clause. (emphasis)

"Stipulating" to [chain of custody] at trial to "greatly truncate lists of witnesse's was ineffective assistance of counsel because reasonable counsel would have [objected] to such flagrant violation of the defendant's [right] to due process of law and a fair trial.

Impanelment Documents

Ineffective assistance did [deprive] defendant of procedural or substantive right to which the law entitles him. See Williams, 529 U.S. at 393. also see, State Grand Jury Act, Article 15. - Section 14-7-1700 (subject to the limitations of Section 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, "a defendant has a [right] to review and to reproduce the stenographically or electronically recorded materials. (emphasis).

Counsel's performance was deficient and [prejudiced] defendant when defendant requested [impanelment documents] and the trial judge stated: "You don't get those, sir. In South Carolina, all Grand Jury proceedings are secret. Nobody gets those". (Tr. July 24-28, 2017, page 15, lines 7-9) (Emphasis).

Trial Counsel being ineffective assistance did not "[object] or [cite] controlling case law precedent, nor did trial counsel [cite] statue that it was "clearly" permissable and within the law of Criminal Procedure to [obtain] impanelment documents from state grand jury proceedings as long as the request was made before a jury being sworn. In fact, trial counsel at critical

stage of proceeding" said" absolutely nothing - equivalent to being physically or mentally absent, thus depriving defendant of procedural or substantive [right] to which the law entitles him. Williams, 529 U.S. at 393.

Trial counsel, by "not objecting" to trial judge's erroneous ruling deprived defendant of "effective counsel" and abridged [his] right to "mount or prepare a defense".

Trial Counsel Completely Abandoned Any Defense For Defendant

Trial counsel completely abandoned any defense for defendant when Counsel was acting as a [second prosecutor]. In the middle of trial, trial counsel stated: "Your Honor, just to help him understand, if he [pleads] today, he can still appeal." In response, the judge stated: "But Indigent Defense might do an "Anders Brief and say its a waste of the court's time and there aren't any violations." And it would be up to the Appeal's Court, not to us. Whether we have an opinion or not." (Tr. July 24-28, 2017, page 235, Lines 5-18).

When the trial court questioned trial Counsel: "Mr. Griffith, let me ASK one additional question - Is Mr. Roberts rejecting this [deal] [with] or against [your] [advice]? (Emphasis) Trial Counsel stated: "Against my advice, Your Honor." (Tr. Page 237, Lines 17-23), please see., Maples V. Stegall, 340 F.3d 433, 439 - 41 (6th Cir. 2003) (defense counsel's erroneous advice that guilty plea would not preclude defendant from appealing his speedy trial claim satisfies ineffective performance test).

Trial Counsel Denys Defendant Right To Present An Alibi

At one point in the trial, defendant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the states witnesses claimed defendant was engaged in criminal activity in South Carolina. (Tr. Page 616, Lines 10-14). Defendant indicated his counsel was "fighting against" him regarding presenting that evidence. (Tr. Page 616, Line 14).

When the trial judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of defendant's incarceration in New York would "open the door" (Tr. Page 619, lines 21-22). The judge indicated the evidence was a "double-edge sword. (Tr. Page 619, line 23). Defendant explained that the charges against him were "by far the worst" of any prior accusations or convictions. (Tr. Page 619, lines 24-25). Trial counsel indicated he had been discussing with defendant that the jury had "no idea who he" was at that point, but that if defendant "opened the door" to allow the state to introduce "his entire record", then the jury would have a "preconceived mind." (Tr. Page 620, lines 2-6)

In response, the judge told defendant the evidence of his incarceration in another state when alleged drug purchases were being made from him would be "prejudicial" to him. (Tr. Page 620, Line 7). Trial Counsels refusal to present an "alibi" in defense of defendant was "prejudicial" to defendant, and sufficiently egregious. (Emphasis). Trial Counsels "inaction" constituted deficient performance because such conduct could not be justified as strategic decisions. See., Strickland, 466 U.S. at 690 (court must "determine whether, in light of all the circumstances the identified acts or omissions were outside the wide range of reasonable professional judgement) see also Murray V. Carrier, 477 U.S. 478, 496 (1986) (The right to effective assistance of counsel ... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial")

Trial Counsel Refuses To Object To Co-defendants Out-of-Court Statements. Trial counsel refused to [object] to admission of codefendants out-of-court statements (Confession) violating defendants due process of law.

Due process is a constitutional requirement guaranteeing procedural fairness when the government seeks to deprive people of life, liberty, or property.

When trial counsel did not object to the admission of codefendants out-of-court statements, confession implicated defendant on its face., see U.S. V. Doherty,

233 F.3d 1275, 1281-82 (11th Cir. 2000); also see., Whelchel V. Washington, 232 F.3d 1197, 1204-05 (9th Cir. 2000)(confrontation clause violated when court admitted confession of codefendant because confession incriminated defendant.)

Trial Counsel failed to [object] to admission of codefendants out-of-court statements, and failed to cite directly, controlling precedent (Crawford V. Washington); see also., U.S. V. Williamson, 183, F.3d 458, 463-64 (5th Cir. 1999)(counsels failure to cite directly, controlling precedent was ineffective assistance because it was [objectively unreasonable] and resulted in [prejudice] to defendant).

Trial counsel failed to protect defendants rights when he did not object to the admission of co-defendant's out-of-court statements at trial when co-defendant was [absent] for trial and defendant had not had a chance to cross-examine co-defendant. Co-defendant's statements and confession was introduced through testimony of Agent Justin Wingo at trial. (Tr. Page 721, lines 20-25)(Tr. Page 722, lines 1-25). Trial counsel failed to [object] and to cite controlling case law pursuant to Crawford V. Washington 124, S. Ct. 1354, 1374 (2004) Id." Crawford applies when the out-of-court statements are testimonial, which refers to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to "police interrogation

Co-defendants out-of-court statements were the product of a [police interrogation]. Trial counsels "stipulation" to help accomadate A.A.G.'s "long witness list" [prejudiced] defendant's right to "confront" [all persons] in chain of custody, in violation of Rule 6 S.C. Rules of Criminal Procedure, and [prejudiced] defendants right to his 6th amend. right to confrontation of all witnesses against him. In stipulating to [all the evidence], and the [chain of custody] defendant was deprived "effective assistance of counsel"... ..a substantive right, a procedural right. "If counsel entirely fails to subject the prosecution's case to [meaningful] [adversarial] testing," the adversarial process itself becomes presumptively unreliable. Cronic, 466 U.S. at 659; See

e.g., Haynes V. Cain, 272 F.3d 757, 764 (5th Cir. 2001).

Counsel's [stipulation] to "greatly truncate list of witnesses was an egregious violation of defendant's due process of law and right to a fair trial. Counsel ineffective because counsel's performance was not in accordance with "prevailing professional norms". Defendant was [prejudiced] a fundamentally fair trial where confrontation clause was violated by introduction into evidence/or testimony, "without objection", co-defendant's confession because admission substantial and injurious effect or influence on jury's verdict.

Appointed Counsel's Collusion/Collaboration With State To An Unlawful Prosecution

On the day of defendants trial, before a jury being sworn, defendant asked the trial judge: "What does "discovery" consist of?" The Court replied: "Evidence against you". Defendant responded: "I didn't get that. All I got was an indictment". (Tr. July 24-28, 2017, page 14, lines 12-15). Trial court then addresses trial counsel: The Court: "Mr. Griffith, you said you went over the [discovery] with him; is that right? Trial counsel replied: "I did provide him with [all of the discovery] that was sent to us, Your Honor. (Emphasis) (please see., Correspondence from Supreme Court of South Carolina, Court Administration, Court Reporter Manager, Desiree Allen, dated 10-23-17 and 11-6-17, stating: "You are requesting a transcript from State Grand Jury proceedings, this is to advise that [no court reporter has been assigned to record Grand Jury proceedings, and therefore [there is no transcript available]. (emphasis). (See Exhibits C).

Even at defendant's Competency Hearing, dated July 19, 2017 - one week before trial, trial counsel stated: "If it please the court, Your Honor. I have also "provided" him with [all] of the [discovery] sent to us from the Attorney Generals Office." (Tr. July 19, 2017, page 16, lines 4-6).

(Brief 4 - Page 16)

Please see., § 14-7-1700 in part: "A copy of the transcript of the recorded testimony or proceedings "requested" by the Attorney General or his designee [shall] be [provided] to the defendant by the [court reporter]," - not the Attorney General's Office - just to emphasize trial counsel's [collaboration] with the State. Also see., (Tr. July 24-28, 2017, page 15, lines 14-18).

And yet again, trial court questions trial counsel in regards to discovery: "Okay. Now you said you've given him [all the discovery], is that correct? Trial counsel responded: "Yes, Your Honor." (Emphasis) (Tr. July 19, 2017, page 17, lines 9-11).

Trial counsel never [objected] to the denial of impanelment documents because trial counsel "was well aware" that these documents relating to the State Grand Jury, and pursuant to [discovery] - dont exist! (Emphasis)(See., Correspondence - Court Admin., dated 10-23-17, 11-6-17.)

Yet, trial counsel [consistently] stated that he had received "discovery", or [provided] "discovery" to defendant. (Emphasis). Please See., Kimmelman V. Morrison, 477 U.S. 365, 385 (1986)(counsel's failure to conduct any pretrial discovery prejudicial because unreasonable and below prevailing norms); also see, Groseclose V. Bell, 130 F.3d 1161, 1170 (6th Cir. 1997)(counsel's failure to conduct any legal research, or obtain and review any records was ineffective assistance). Counsel's deficient performance [prejudiced] the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding.

Defendant must prove that Counsel's performance fell below an objective standard of reasonableness: Counsel had not prepared for trial and did not obtain [any] [discovery] before a jury being sworn - - and could not have, as there was [no court reporter assigned] to [record] [grand jury proceedings], therefore [no transcript] available on dates of alleged indictments. See., Court Admin. Correspondence., 11-6-17.

Please See, Hunt V. Mitchell, 261 F. 3d 575, 583 (6th Cir. 2001) (prejudice presumed when counsel was not afforded [discovery] before voir dire). (Emphasis). Trial Counsels deficient performance [prejudiced] defendants due process of law, right to disclosure, and preparation of a defense. Counsel's deficient performance [prejudiced] the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding. (See Exhibit C).

Defendant must prove that Counsel's performance fell below an [objective] standard of reasonableness. Counsel "stipulated" to chain of custody in order to help accomodate A.A.G.'s long witness list, "to greatly truncate list of witnesses". see (Tr. July 24-28, 2017, page 74, lines 4-25)(Tr. Page 75, lines 1-5); also see., Cronic, 466 U.S. at 659; see., e.g., Haynes V. Cain, 272 F. 3d 757, 764 (5th Cir. 2001) (If Counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing", the adversarial process itself becomes presumptively unreliable.) Defendant was [prejudiced] his 6th Amend. right to "confrontation" of [all witnesses] in the chain of custody, in violation of Rule 6 S.C. Rules of Criminal Procedure and due process of law. Defendant was denied and [prejudiced] procedural and substantive due process. Ineffectiveness of counsel did deprive defendant of a substantive or procedural right to which the law entitles him. See., Williams, 529 U.S. at 393. "Confrontation" is a procedural right, and defendant was ultimately denied this 6th Amend. and 14th Amend. to accomadate A.A.G.'s long witness list - Emphasis.

Trial Counsel refuses to object to lab reports and declarants unavailability

Trial Counsel did not object to reports read into the record regarding unavailable declarants prejudicing defendants right to cross-examine rendering trial unfair.

Defendant "had not" been indicted by a grand jury, and the very "transcript" or [impanelment documents] do not exist as evidenced by South Carolina Supreme Court, Court Admin., impanel-ment documents are subject to "disclosure" under Brady, and entitled to [defendant] pursuant to § 14-7-1720 (A) and (D) and Rule 5, S.C. Rules of Criminal Procedure. Defendant's right to [prepare a defense] pursuant to the Fourteenth Amendment of the United States Constitution - requires due process of law, and "effective assistance of counsel" - the idea that the [structural error] that has occurred regarding the "undermining of the state grand jury as an "independent body" and whether under such circumstances "Counsel" could be "effective" is remote. See., Weaver, 137 S.Ct. at 1907-08. ("the defining feature of a structural error is that it affects the [framework] within which the trial proceeds"...) Defendant's right to "prepare a defense" affects the [framework] - Yet defendant could not "prepare a defense" because of 1.) an unfounded prosecution; 2.) impanelment documents dont exist. Surely, trial counsel could not be afforded [discovery] before ~~void~~ voir dire because no "discovery" exist - thereby [prejudice] to defendant is [presumed]. See., Hunt V. Mitchell, 261 F.3d 575, 583 (6th Cir. 2001) (prejudice presumed when counsel was not afforded [discovery] before voir dire). (Emphasis)

Counsel's deficient performance [prejudiced] the defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding. (See Exhibit C).

Defendant's 2nd Attempt To Challenge The State Grand Jury's Jurisdiction. Trial Counsel Refuse's To Object.

When defendant, again, attempted to challenge the jurisdiction of the state grand jury, when defendant stated to trial judge: "I asKed to challenge the jurisdiction of the State Grand Jury. Nothing." (Tr. July 24-28, 2017, page 85, lines 5-6)(Emphasis Trial court respond: "You have no basis to challenge it." (emphasis (Tr. July 24-28, 2017, page 85, line 7). Trial Counsel still does not [object] and [prejudiced] defendant "effective assistance of Counsel Please See (Tr. July 24-28, 2017, page 85, lines 5-25; also see., page 85, lines 21-22, where trial court states: "The remedy is just to re-present your indictments. It's not going to make your case go away." (Tr. July 24-28, 2017, page 86, line 7-8, defendant instructed to the judge that defendant had not even had a preliminary hearing, nor grand jury indictment to have determined "probable cause" regarding defendant's case - trial counsel" said nothing! No objections, no defense - see Tr. July 24-28, 2017, page 87, lines 1-25; page 88, lines 12-14).

Prejudice Presumed

Prejudice from counsel's deficient performance may be presumed where, and only where, (1) there is complete denial of counsel at critical stage of trial: Defendant suffered complete denial of counsel at critical stage of trial when trial counsel did not object to the erroneous ruling by trial judge denying defendant impanelment documents (Tr. July 24-28, 2017, page 15, lines 7-9; page 85, lines 5-7), and did not cite controlling case law and Supreme Court precedents. There was a complete denial of counsel at critical stage of trial when trial counsel did not [object] to codefendant's out-of-court statements and confession and cite controlling case law and Supreme Court precedents.

(See., Tr. July 24-28, 2017, page 721, lines 19-25; page 722, lines 1-25). (2) Counsel entirely fails to subject prosecution's case to meaningful adversarial testing ... : Trial counsel entirely failed to subject prosecution's case to meaningful adversarial testing when, trial counsel, "stipulated" to "chain of custody" for [All the evidence], prejudicing defendant's right to confront [all persons] in the chain of custody in regards to essential element of "TraffickKing" - "How much actual heroin?". Also, counsel entirely failed to subject prosecution's case to meaningful adversarial testing when, trial counsel attempts to "coerce" defendant into pleading after defendant has exercised his right to have a trial. (See., Tr. page 235, lines 5-18; page 237, lines 17-23). (Emphesis). (3) Under the circumstances likelihood that counsel could have performed as effective adversary was so remote as to have made trial inherently unfair: Prejudice may be presumed for an ineffective assistance of counsel claim 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. U.S.C.A. Const. Amend. 6. - To this, prejudice is presumed without inquiry into the actual conduct of the trial as defendant had not been indicted, and no "probable cause" to hold defendant for trial existed, as well as "no discovery" existing to defense to "prepare a defense". (Emphesis)

Adding the fact - or "hence" the fact that "contrary to clearly established Supreme Court precedent - trial judge denied defendant the State Grand Jury impanelment documents (which dont exist) without any [objection] from trial counsel. (Tr. July 24-28, 2017, page 15, lines 5-25; page 19, lines 8-25; page 85, lines 5-25). Defendant's trial was inherently unfair, as he was denied "Effective Assistance of Counsel" and due process of law pursuant to the 14th Amend. of U.S. Const.

Exculpatory Evidence (Brief 4 - Page 21)

Defendant must prove that Counsel's performance fell below an objective standard of reasonableness: Counsel failed to act when defendant attempted to offer [exculpatory] evidence to the judge regarding Court Administrations correspondence to defendant. (Tr. July 24-28, 2017, page 17, lines 20-25); see., Hart V. Gomez, 174 F.3d 1067, 1073 (9th Cir. 1999) (counsel's failure to introduce exculpatory records into evidence was ineffective assistance because objectively reasonable performance by counsel would have created reasonable probability of different verdict). Please see., Ard V. Catoe, 373 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) ("criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case."; see also McKnight V. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("a criminal defense attorney has the duty to conduct a reasonable investigation to "discover" all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the state.

Trial counsel failed to interview any witnesses, and refused to present [exculpatory] material to trial court. Counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Strickland V. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Trial counsel's deficiency prejudiced him (defendant) to the point that defendant was deprived of a fair trial whose result is reliable. Id.

Trial counsel's deficiency prejudiced defendants Sixth Amendment right to "effective assistance of counsel", "due process of law", "confrontation to all witnesses", "impeachment documents", and his right to "prepare a defense".

Ineffective Assistance/Prejudice (Brief 4- Page 23)

1.) Counsel's performance fell below an[objective] standard of reasonableness when trial counsel did not[object]to defendant being denied impanelment documents by citing controlling precedent. See, U.S. V. Williamson, 183 F.3d 458, 463-64(5th Cir. 1999)(Counsel's failure to cite directly controlling precedent was ineffective assistance because it was[objectively] unreasonable and resulted in prejudice to defendant). (Evans V. State)

2.) Counsel's performance fell below an[objective] standard of reasonable-ness when trial counsel did not[object] to codefendant's out-of-court statements. (Tr. page 721, lines 19-25; page 722, lines 1-25); also see, U.S. V. Williamson, 183 F.3d 458, 463-64(5th Cir. 1999)(Counsel's failure to cite directly controlling precedent was ineffective assistance because it was[objectively] unreasonable and resulted in[prejudice] to defendant). (Crawford V. Washington)

3.) Counsel's performance fell below an objective standard of reasonableness when trial counsel [stipulated] to the chain of custody for[all the evidence] without[objection], thereby "waiving" defendant's right to confrontation - in order to accomodate A.A.G's long witness list(emphasis)(Tr. July 24-28, 2017, Page 74, lines 1-25); U.S. V. Williamson, 183 F.3d 458, 463-64(5th Cir. 1999); also see. Cronic, 466 U.S. at 659; see, e.g., Haynes V. Cain, 272 F.3d 757, 764(5th Cir. 2001)("If counsel", "entirely fails to subject the prosecutions case to meaningful adversarial testing", the adversarial process itself becomes presumptively unreliable...; also see Crawford V. Washington - in regards to[confrontation of witnesses]; see also, U.S. V. Aguilar - Tamayo, 300 F.3d 562, 566(5th Cir 2002)(good-faith effort not established when government stipulated that it took no steps to secure presence of witnesses)(Emphasis). Thereby, prejudicing defendants "right to effective Counsel"

(Brief 4 - Page 23)

as guaranteed by the Sixth Amend. And Fourteenth Amend. to U.S. Const.

4.) Defendant suffers [prejudice] to [his] right to "effective assistance of counsel" when trial counsel, at "critical stage" of the proceeding, "abandoned any defense" for defendant, for example...

.. Defendant, for the "third" or "fourth" time, attempts to exercise his his "right" to [challenge] the stat grand jury's subject matter jurisdiction, when defendant stated: "I asked to challenge the jurisdiction of the Stat Grand Jury. Nothing. (Emphasis) (Tr. July 24-28, 2017, page 85, lines 5-6)"; also See Tr. July 24-28, 2017, page 15, lines 5-25; Tr. July 24-28, 2017, page 73, lines 3-17 (Emphasis),... Trial Counsel, not once, "objected" to the [deprivation] of defendants right[s] pursuant to § 14-7-1720(A) and (D) and Rule 5 SCRCrim.P.; Brady; § 17-19-10; Art. 1 § 3; Art. 1 § 11; Art. 5 § 22, and thus, Counsel's unprofessional errors so upset adversarial balance between defense and prosecution that trial was rendered unfair and verdict rendered suspect. U.S.C.A. Const. Amend. 6.

Counsel's representation was unreasonable under prevailing professional norms and actions taken by counsel was not sound strategy. U.S.C.A. Const. 6.

Right to counsel is a [fundamental] right of criminal defendant; it assures fairness, and thus legitimacy, of adversary process. U.S.C.A. Const. Amend. 6.

The hallmark of cause-and-prejudice is "a showing that the prisoner was denied "fundamental fairness" at trial, thus "infecting [the] entire trial with error of constitutional dimensions". Id. at 494.

Defendant was denied "effective assistance of counsel" and "Fundamental Fairness" when trial counsel abandoned any defense for defendant at trial when counsel did not "object" to the judge and cite Supreme Court precedent regarding impanelment documents and defendants challenge to subject matter jurisdiction.

5.) Trial Counsel [prejudiced] defendant a defense, and was ineffective assistance of counsel when Counsel failed in his [duty] to under-take a "reasonable investigation" into defendants repeated claims of having not been indicted by a legally constituted grand jury. (See Exhibit C); See also, Ard V. Catoe, 373 S.C. 318; 331, 642 S.E. 2d 590, 596 (2007)("criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes ... making an independent investigation of the facts and circumstances of the case)."; see also McKnight V. State, 378 S.C. 33, 46, 661 S.E. 2d 354, 360 (2008).

Trial Counsels deficiency [prejudiced] defendant to the point that defendant was deprived of a fair trial whose result is reliable. Id.

6.) Counsel [prejudiced] defendant "effective assistance of counsel" as guaranteed by the Sixth Amendment of the United States Constitution when trial counsel "persistently" tried to "coerce" defendant to give-up his [right] to proceed to trial and take "a plea" instead, abandoning any defense for defendant (Tr. page 235, lines 5-6), see Maples V. Stegall, 340 F. 3d 433, 439-41 (6th Cir. 2003)(defense counsels erroneous advice that guilty plea would not preclude defendant from appealing his speedy trial claim satisfies ineffective performance test). In addition, when a client expressly asserts that the objective of his defense is to maintain innocence of the "charged" criminal acts, his defense Counsel must abide by that objective and may not override it by conceding guilt. U.S.C.A. Const. Amend. 6.

(Brief 4- Page 25)

Preserving for the defendant the ability to decide whether to maintain his innocence should[not] displace counsel's, or the court's, respective trial management roles; counsel, in any case, must still develop a trial strategy and discuss it with her client explaining why, in her view, conceding guilt would be the best option. U.S.C.A. Const. Amend. 6. (Emphasis).

Structural Error

Structural error is a defect in a trial mechanism or framework that, by deprivation of basic constitutional protections, taints the trial process, making it unreliable and rendering any punishment fundamentally unfair. This error is per se prejudicial and requires automatic reversal. An example of structural error is the denial of right to [effective] assistance of counsel.

In keeping with [precedent] and the judiciary's central role in regulating the legal profession, this Court should presume [prejudice] when ineffective assistance of counsel results in structural error.

Here, in the instant case, Mr. Roberts (defendant) was denied "effective assistance of counsel" and "proper notice".

Proper notice is an elementary and fundamental requirement of due process, and must be reasonably calculated to convey information concerning deprivation. U.S.C.A. Const. Amend. 14.

Conclusion (Brief 4 - Page 26)

Defendant was denied his Sixth Amendment right to "Effective Assistance Of Counsel" and due process of law pursuant to the Fourteenth Amendment of the United States Constitution. Trial counsel's conduct so undermined the proper functioning of the "adversarial process" that the trial cannot be relied upon as having produced a just result. Trial counsel's "stipulation" to [chain of custody] to "accomodate" A.A.G.'s long witness list was an [act] of [collusion] and was an [egregious] violation of defendant's [right] to a fair trial and defendant's Sixth Amendment [right] to confront [all] persons in the chain of custody, thereby causing prejudice to defendants legal rights. This "stipulation" to the chain of custody allowed A.A.G. to admit [All] evidence alleged, "uncontested", including the out-of-court statements of co-defendants, thereby prejudicing defendant and rendering the proper functioning of the "adversarial process" [lost]. Counsel's deficient performance was "unreasonable" under professional norms when trial counsel did not "object" to the introduction of codefendants out-of-court statements and confession, ... and did not "cite" Supreme Court precedent's regarding "testimonial hearsay statements". Trial counsel failed in his [duty] to undertake a reasonable investigation, which at a minimum includes ... making an independent investigation of the facts and circumstances of the case regarding "impanelment documents or lack of impanelment documents" because defendant had not been legally indicted by a state grand jury.

Counsels performance fell below an [objective] standard of reasonableness when trial counsel did not [object] to the trial judge's erroneous ruling denying defendant "impanelment documents", and failed to [cite] controlling Supreme Court precedent. Counsel's deficient performance regarding "impanelment documents" prejudiced defendants right to "disclosure" pursuant to Brady, and due process right to "prepare a defense".

(Brief 4 - Page 27)

Counsel's deficient performance was equivalent of being physically or mentally absent and [prejudiced] defendant his constitutional right to "effective assistance of counsel", his right to "confront witnesses" [right] to a fair trial", and defendants right to "present exculpatory evidence", an alibi and to "prepare a defense". For all foremention reasons and surrounding circumstances defendant ask's this Court to [vacate] or reverse judgment and convictions in regards to error being structural, where there, prejudice may be presumed, and to hold counsel as "ineffective assistance of counsel" in violation of defendants Six Amendment right to "Effective Assistance" causing prejudice to defendants legal rights regarding "preparing a defense"?

(Subsequent Application)

1. (Brief 5)

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(2.) Argument/Questions Presented to the Court

1.) Whether State lacked subject matter jurisdiction in regards to the elements of offense (Trafficking), and defendants right to due process of law and equal protection under the laws pursuant to the Fourteenth Amendment to the United States Constitution was violated when the State in violation of Rule 6 S.C. Rules Crim. Proc. had not offered testimony by [all witnesses] in the chain of custody, and had not offered reliable testimony from Forensic Chemist to establish [actual amount of heroin]?

2.) Whether defendants due process of law violated when prosecution did not meet its burden of production on every element of the offense? (Purchase, or bring into this state) and (Actual Amount of Heroin?)(Emphasis).

③ Statement Of Issue

Whether State lacked subject matter jurisdiction in regards to the elements of offense (Trafficking), and whether defendants right to due process of law and equal protection under the law pursuant to the Fourteenth Amendment to the United States Constitution was violated when State, in violation of Rule 6 S.C. Rules Crim. Proc. had not offered testimony by [All witnesses] in chain of custody, and had not offered reliable testimony from forensic chemist to establish [actual amount of heroin] ?

Relevant Facts

At trial, the judge asked Assistant Attorney General, "Mr. Underwood": "How long is it going to take the State to present their case?" (Tr. dated July 24-28, 2017, Page 74, Lines 4-5). Mr. Underwood replied: "As to that, Your Honor, I had a brief conversation with both opposing counsel prior to selecting the jury. It's my understanding that they were both willing to [stipulate] that the chain of custody for [All the evidence] has beenestablished. [And they are not going to challenge it], which [would greatly truncate the list of witnesses]. [emphasis added] (Tr. Page 74, Lines 6-12). Mr. Underwood then stated: "I just would like to confirm [that is], [in fact], [the case]. (Tr. Page 74, Lines 14-15). The Court then asked Ms. Johns (Co-defendants counsel): "Is that correct, Ms. Johns? Ms. Johns replied: "Your Honor, from what I reviewed-- The Court: "You really dont have a good faith "challenge to the cha correct? Ms. Johns replied: "Mr. Underwood provided me with everything. Internally, it looks like to me like the chain of custody has been met. So I would not be challenging that. And I think that [will ferret down that long witness list]. (Tr. Page 74, Lines 16-24).

The Court then inquired to Mr. Griffiths answer (Defendants Counse "Mr. Griffith?" (Tr. Page 74, Line 25)

(4.)

In response, Mr. Griffith stated: "Your Honor, having reviewed the same document provided by Mr. Underwood --

The Court: "There's no really good faith basis to challenge the chain. Mr. Griffith responded: "I would not be challenging". (Tr. Page 75, Lines 1-5). State then introduced state's exhibit 1 and 2 (Tr. Page 127, Lines 15-16); State's exhibit 21, 24, 5, 16, 10, 11, 12, 13, 14, 15, Pre-admitted without objection, and without testimony from Evidence Technicians, Drug Technicians, and all other witnesses in the chain of custody. (Tr. Page 131, Lines 16-21. State then, and in same manner introduced state's exhibits 43, 44, 45, 46, 47, 48. (Tr. Page 148, Lines 14-15.) State's exhibit 1, Page 285, Line 10-11; State's exhibit 3, Page 288, Line 25; State's exhibit 4, Page 290, Line 20; State's exhibit 7, Page 298, Lines 9-10; State's exhibit 9, Page 305, Line 23-24 - all pre-admitted without testimony or cross-examination of Evidence Technicians and Drug Technicians. This continued in violation of "procedural" and "substantive law throughout duration of trial. For example: Mr. Underwood stated: "Your Honor, at this time, I believe without objection from the "opposing" counsel, I would seek to enter into evidence State's Exhibits 126 through 133 and Exhibits 141 through 165, Pre-admitted without objection, and without defendant being able to cross-examine evidence technicians, drug technicians, and all other witnesses apart of the chain of custody. (Tr. Page 420, Lines 22-25)(Tr. Page 421, Lines 1-3). State's exhibit's 126 through 133 consist of Sled Analysis and Lab Reports. State's exhibit's 141 through 165 consist of Lab Reports and "Chain of Custody". At one point in the trial, the State offered Mr. ZivKovich as an expert in forensic chemistry. (Tr. Page 335, Lines 3-4). Mr. ZivKovich's testimony was specifically applicable to the following State's Exhibits: S-44, S-46, S-47, S-98, S-99, S-100, S-101, S-102, S-103, S-104, S-105, S-106, S-107, S-108, S-109, S-110, S-111, S-112, S-113, S-114, S-115, S-116, S-117, S-118.

(5.)

Though State offered Mr. ZivKovich's testimony as a forensic Chemist, Mr. ZivKovich did not give testimony in regards to "actual amount of heroin", but only the "mixture" or "sample" containing heroin, and the "total weight" of that mixture or sample. For example: In reference to State's Exhibit, the A.A.G. asks Mr. ZivKovich: "And what were you able to do with that particular exhibit? Mr. ZivKovich replied: "I found this to contain "heroin" [and] "methamphetamine" with a weight of 1.28 grams. emphasis added. Mr. ZivKovich did not give testimony as to what "preliminary" tests were performed, and no testimony in regards to whether a "final analysis" was performed on it (Sample/Mixture) to determine exactly what the "contents" do or dont contain. emphasis. Please See (Tr. Page 342, Lines 9-12). (Tr. Page 340, Lines 4-9). (How much heroin?

A chain of custody is the more complex foundation needed for the admissability of certain types of exhibits as evidence. Exhibits are tangible objects that are relevant to the facts of a case - proving that an exhibit being offered into evidence is exactly what it is represented to be; requires proof of "who" had "possession" of the "exhibit" at [all times] between the time the evidence was "seized" and the trial. Proving this chain of custody is especially necessary when exhibits are subject to alteration or are tested prior to trial.

To prove defendant guilty: the prosecutor must offer the "substance" that a police officer/agent removed from defendant (A drug) into evidence, and prove that the substance is an illegal drug. To establish the chain of custody for the "substance" the prosecutor will have to do the following: • Call a qualified expert to testify to the chemical composition of the "substance"; establish that the substance given to and tested by the expert is the one that the officer seized from defendant; prove that the testing procedures were properly carried out; and prove that the "substance" tested by the expert is the same "substance" as the prosecutor/police bring to trial.

(6.)

When trial counsel "stipulated" to the [chain of custody], ~~and~~ it thereby prejudiced defendant's right to a fair trial, the right to effective Counsel, defendants right to [confront] any chemist, analyst, evidence technician, drug technician, and [all persons] [within the chain of custody], no colloquy was established on record between the court and the defendant, the court and defendants counsel, or both violated due process of law and equal protections under the law pursuant to the 14th Amendment to the U.S. Const.

The right to "Confrontation" is a "constitutional" and "Statutory" right.

Procedural law: Laws or rules that govern the method of how a criminal case is administered and tried in Court.

Procedural rules are contrasted with rules of "Substantive" law that [define] the [rights] and [duties] of parties, and the [elements] of particular [crimes] and [defenses.] (Relevant Facts).

At the end of closing arguments, before the jury charge, the judge asked if the State were ready to proceed. (Tr. 861, Line 13). To response, the A.A.G. stated: "Your Honor, [one matter concerning the charge], I wanted to inquire for the court. Does your charge include language that any mixture of a substance that contains a substance, that the [entire mixture] [counts] towards the weigh pursuant to State V. Johnson? (Tr. Page 861, Lines 14-18). emphasis. Judge responded "I dont make any charge that would constitute a charge on the facts. (Tr. Page 861, Lines 19-20). The judge stated: "My charge reflects exactly what the statute says, which is the State must also prove beyond a reasonable doubt that the amount of heroin or any mixture containing was -- and it states the amounts. emphasis. (Tr. 861, Lines 24-25) (Tr. 862, Lines 1-2).

(7)

Discussion

Proving Elements Beyond A Reasonable Doubt - The reasonable doubt standard applies in both state and federal proceedings. See Sullivan V. La., 508 U.S. 275, 278 (1993). The Winship reasonable doubt standard protects three interest. First, it protects the defendant's liberty interest. See 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. See id. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. Id. at 363-64. A state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns, because the interest in due process is implicated. See Apprendi v. N.J., 530 U.S. 466, 488-92 (2000) (state must prove every element that distinguishes lesser from greater crime).

The burden of proof consist of two parts: the burden of production and the burden of persuasion. The party bearing the burden of production must produce enough evidence to put a fact in issue. (Purchase, or bring into this state) and (actual amount of heroin). If a party fails to sustain its burden of production, that party is subject to an adverse ruling by the court. For instance the prosecution has the burden of production on every element of the offense charged. If the government fails to produce sufficient evidence for any element thereby not bringing the fact into issue, the judge may direct a verdict in the defendants favor. The Due Process Clause places on the prosecution the burden of persuasion on every element of the crime charged; only rarely does the burden shift to the defendant. Any shifting of the burden of persuasion must withstand constitutional scrutiny.

A.A.G. had the burden of proving essential element of trafficking in regards to how much heroin?

⑧ Rule 6, S.C. Rules of Criminal Procedure

The Defendant required that any [chemist], [analyst], and [all persons] [within the chain of custody] [appear] in Court for the purpose of personally testifying. Defendant thus objects to the introduction of any [chemist's] or [analyst's] [report] pursuant to Rule 6, S.C. Rules of Criminal Procedure. Defendant requested on the grounds that it is [essential] to [insure] the Defendant's [right to a fair trial,] [right to confrontation of witnesses], the [right to effective Counsel] and [due process of law guaranteed by the South Carolina Constitution and the United States Constitution.

In violation of "Rule 6, S.C. Rules of Criminal Procedure defendant was denied his rights to "Confrontation" pursuant to the Sixth Amendment to the United States Constitution, and due process of law pursuant to the Fourteenth Amendment of the United States Constitution, (See Crawford v. Washington, U.S. Sup Ct. 2004), when Trial counsel "stipulated" to the chain of custody. Defense Counsel at critical stage of trial proceedings "stipulated" to chain of custody to [accomadate prosecution to "greatly truncate" the list of witnesses, [thereby relieving from prosecutor the burden of proving his case]. (Tr. dated July 24-28, 2017, Page 74, Lines 4-25; Page 75, Lines 1-7).

Defendants right to [confront] chemist's, analyst, evidence technician drug technicians, and [all persons] within the chain of custody is a constitutional and statutory right. No Colloquy was established on record to waive a "constitutional" or "statutory" right; In State v. Orr, 304 S.C. 185, 403 S.E. 2d 623 (1991), the Supreme Court of South Carolina held that waiver of a [constitutional] or [Statutory] right must be Knowingly and voluntarily established on the record by colloquy between either the court and the defendant, or between the court and defendant's counsel, or both. There was no colloquy established on record, Please See (Tr. Page 74, Lines 4-25; Page 75, Lines 1-7).

(9.)

Here, "Confrontation" is a constitutional right, and defendant had a right to cross-examine any "chemist", "analyst", "evidence technician, drug technician and [all persons] within the chain of custody in regards to the evidence to prove whether the testing procedures were properly carried out; [establish that the evidence given to and tested by the expert is the one that the officer seized from the defendant]; and to prove [actual amount of heroin.] There was no testimony given at defendants trial regarding "actual amounts of heroin", thereby state lacking sufficient proof to charge and convict.

The State must prove that the amount of heroin or any mixture containing heroin was 4 grams or more but less than 14 grams; 14 grams or more but less than 28 grams; and 28 grams or more.

State lacked sufficient proof to convict defendant of trafficking, which must be proven element by element. U.S. V. Jordan, United States Court of Appeals, Fourth Circuit, December 4, 2007 509 F.3d 191 held "No one element of a crime is more essential than another."

The State must prove that defendant [purchased] or [brought into this State], trafficking amounts of heroin. In a pre-trial hearing dated July 19, 2017 (Motion to Suppress) on cross-examination by Defense Counsel, the [Case Agent] Justin Wingo was asked: "Was there any prior knowledge before the issuance of these warrants that Mr. Roberts (defendant) was involved with any [out-of-state-purchases] of "heroin" either from New York or some other state? (Tr. dated July 19, 2017, Page 92, Lines 11-25.) When Defense Counsel re-iterated: "And they informed you that Mr. Roberts was involved with [out-of-state-purchases]? The [Case Agent] Justin Wingo answered: "No sir", they [didnt inform] me that he (defendant) was involved in [out-of-state-purchases] (Tr. Page 93, Lines 1-10, dated July 19, 2017.

The State offered "Lawrence ZivKovich" as an expert in forensic chemistry. (Tr. dated July 24-28, 2017, Page 335, Lines 3-4). When questioned by the A.A.G. concerning once the evidence arrives at SLED, who handles" that evidence and where it goes? (Tr. Page 336, Lines 19-21), Mr. ZivKovich stated, : "Yes, sir. It's all tracked electronically by "what we say" is an electronic chain of custody. Everytime it [transfers from one person to another], its entered into the "electronic chain". (Tr. Page 336, Lines 22-2 When asked by A.A.G. to identify the exhibit number and the lab number associated with each, Mr. ZivKovich preceded to do so. (Tr. Page 337, Lines 5-13). When A.A.G. sought to admit Exhibits 98 through 105 without objection from trial counsel, this violated defendants right to "confront" [all witnesses] to the chain of custody and was ineffective assistance of counsel. (Tr. Page 337, Lines 17-23). Next, the A.A.G asked Mr. ZivKovich, : [what did you do to analyze it?] (Tr. Page 340, Line 1), In response, Mr. ZivKovich "answered", : "Once I've determined that the seal has been intact, then I open the evidence and compare it to the inventory on the submission form And if everything matches up, then I proceed with a [preliminary test ???] on the evidence, which [I would have to look at my case note's to see which preliminary test I performed ???]. And then [we] perform a final analysis on it to determin [exactly what the contents do or don't contain ???] emphasis added. (Tr. Page 340, Lines 1-9). When A.A.G. specifically asked Mr. ZivKovich, : "Were you able to successfully [test] that [substance] or [substances] in that package? (Tr. 340, Lines 12-13) Mr. ZivKovich replied that "he did". A.A.G. then asked : "And what were the [results] or [conclusions] that you were able to draw? (Tr. Page 340, Lines 12-16). Mr. ZivKovich stated, "For SLED No. L15-12524, I found it [contained] heroin with a [weight] of 3.41 grams (Tr. Page 340, Lines 17-18).

Mr. ZivKovich's testimony never established [how much actual heroin] but only that a substance [contained] heroin and how much the [entire] substanc [weighed], and never gave testimony to [preliminary test's performed] and whether these procedures were properly carried out (testing procedures).

At one point, for instance, as an example to Mr. ZivKovich's "unreliable testimony ... A.A.G. questioned Mr. ZivKovich, in regards to State's exhibit 47 asking, "And what were you able to do with that particular exhibit? (Tr. Page 342, Lines 6-10). Mr. ZivKovich stated to the A.A.G.: "I found this to [contain] [heroin] and [methamphetamine] with a [weight] of 1.28 grams. emphasis added (Tr. Page 342, Lines 11-12). Mr. ZivKovich testimony throughout only elicited what the sample [weighed] and only that it [contained] heroin, he never testified to [actual amount of heroin].

"The State must prove beyond a reasonable doubt that [the amount of heroin] or any [mixture] [containing] heroin was 4 grams or more but less than 14 grams; 14 grams or more but less than 28 grams; and 28 grams or more.

Mr. ZivKovich's testimony was unreliable to establish (how much) (actual heroin) as the statue contemplates. It is a well known fact that "Cutting Agents" are used for various reasons with certain controlled substances. The State failed in their burden of proof, and evidence insufficient to convict of trafficking. Mr. ZivKovich testified to testing a substance or substances [containing] [heroin] and [methamphetamine] with a [total] [weight] of [1.28 grams] (Tr. Page 342, Lines 11-12) emphasis. The remainder of his testimony, and applicable to States exhibits that he gave testimony elicited that a substance or mixture [contained heroin and how much the [entire] [mixture] [weighed]. The statue contemplates [how much actual heroin], not simply how much the sample or mixture weighed.

Insufficiency of Prosecutors Chain Of Custody Has Prejudiced Defendant from having a Fundamentally Fair Trial

Defendant is on trial for "allegedly" possessing illegal drugs. To prove defendant guilty, the prosecutor must offer the packet of powder that a police officer removed from defendant into evidence, and prove that the powder is an

illegal drug. To establish the chain of custody for the packet of powder, the prosecutor will have to do the following:

1.) show that the officer who seized the packet marked it in a way that enables the officer to distinguish it from other similar items that may have been taken from other suspects;

2.)[prove] that the police [stored] the packet in a way that provides reasonable assurance that nobody tampered with its contents;

3.) call a qualified expert to testify to the [chemical composition] of the [contents] of the packet; [emphasis]

4.) establish that the packet given to and tested by the expert is the one that the officer seized from defendant - emphasis added. (See Tr. Page 347, Lines 12-16)

5.) prove that the testing procedures were properly carried out - emphasis (Tr. Page 340, lines 1-9)

6.) prove that the packet tested by the expert is the same packet as the one the police bring to trial...

The State failed to establish that the packet/or illegal drug, given to and tested by the expert is the one that the officer seized from defendant. On cross-examination trial counsel asked the witness, Mr. ZivKovich: "Mr. ZivKovich, you would be unaware as to which particular buy's these were connected to and which -- whether these were collected from, et cetera? You would not know that, correct? (Tr. Page 347, Lines 12-15)

Mr. ZivKovich answered, "Thats correct", emphasis (Tr. Page 347, Line 16)

The State failed to prove that the [testing procedures were properly carried out]. Mr. ZivKovich, in his testimony, when questioned by A.A.G. regarding what he did to analyze the sample or mixture, Mr. ZivKovich stated, ..." then I proceed with a [preliminary test] ??? on the evidence, which I would have to look at my case notes to see which [preliminary test] I performed ??? And then [we] perform a [final analysis] on it to determine exactly what the contents do or dont contain (Tr. 340, Line 1-9). Mr. ZivKovich never testified to what these [preliminary test] and [final analysis] were exactly and were they carried out properly, thus defendant was prejudiced a fair trial in that A.A.G. had not proved these procedures were properly carried out, nor had defendant been afforded the [right] to [confront] all persons in the chain of custody pursuant to Rule 6 S.C. Rules Crim. Proc. and due process of law pursuant to the 14th Amend. to the U.S. Constitution. Defendants rights were violated and defendant prejudiced a fundamentally fair trial simply because the prosecutor wanted to "greatly truncate" a long line of witnesses. (Tr. Page 74, Lines 6-12). State failed to call [all persons] within the chain of custody, and failed to call reliable and qualified expert to testify to the chemical composition of the contents of the evidence. There was only testimony offered by Mr. ZivKovich regarding that [the sample] contained heroin, and the weight of the mixture from which [sample] was taken "allegedly". He never testified to actual amount of the heroin, which is an essential element that must be proved beyond a reasonable doubt. U.S. V. Jorden, United States Court of Appeals, Fourth Circuit, December 4, 2007 509 F. 3d 191 (No one element of a crime is more essential than another)." The State is confident in the weight of the sample, but they did not say the sample contained half-heroin, one-quarter heroin, one-eighth heroin, even 10 percent heroin, so they never established how much actual heroin it was. (Tr. Page 837, Lines 1-25). On cross-examination of Agent Justin Wingo, trial counsel asked: "When you talk about the confidence level of 99.7 percent, you say the confidence level of the weight, isn't that what we are talking about? (Tr. Page 736, Lines 9-11)

(14.)

Agent Wingo answered: "That's what the [lab report said]. (Tr. Page 736, Line 12). Defense Counsel then stated: " But the confidence level of the [weight], that means that they took something, [weighed it], and they are very confident that what they weighed [weighs] that much?" (Tr. Page 736, Lines 13-15). When Agent Wingo stated: " Sir, I'm a narcotics agent, not a chemist." Defense Counsel questioned: " That's not the percentage of heroin in that sample, is it?] (Tr. Page 736, Lines 16-18). Agent Wingo stated: " Again, sir, I'm a narcotics agent. [I am not a chemi I am not in the lab. [And I couldn't tell you how they test that stuff] - Despi Agent Wingo testifying to all these [lab reports] emphasis added. - "You would have to reference a chemist." (Tr. Page 736, Lines 19-22). Defense counsel stated: "What you are saying is, [when you repeat that], and when [you've read that], you've said the confidence level of the [weight] was 99.7 percent; isn't that correct"? (Tr. Page 736, Lines 23-25). Agent Wingo then asks: "You got a specific [lab report] you are referencing?", Defense Counsel then answers: "You said that on [every lab report]. (Tr. Page 737, Lines 1-3). Agent Wingo states: "That's what the [lab reports Say." (Tr. Page 737, Line 3). Defense counsel then asks: "Okay. [So if I mix a gram of heroin with 27 grams of baby powder, it's going to come up, yep, that sure does weigh 28 grams]. But that doesn't mean it's 28 grams of [heroin], does it Agent Wingo answers: "That means there's heroin in there, sir. But, again, I am not a chemist." emphasis (Tr. Page 737, Lines 4-9). There was no testimony as to actual amount of heroin, thereby State not meeting their burden of sufficient proof to elements of offense.

At the end of closing arguments, before the jury charge, the judge asked if the State were ready to proceed. (Tr. Page 861, Line 13). In response, the A.A.G. stated: "Your Honor, [one matter concerning the charge], I wanted to inquire for the court. [Does your charge include language that any mixture of a substance that "contains" a substance, that the "entire mixture counts towards the weight pursuant to State v. Johnson?] emphasis added!

(Tr. Page 861, Lines 14-18). The Court responded: "I dont make any charge that would constitute a charge on the facts. And the case that you state deals with a motion for directed verdict, not a jury charge. It deals with the [sufficiency of the evidence], which is a matter of law for the Court, not a jury. My charge reflects exactly what the statue says, which is the State must also [prove beyond a reasonable doubt] that the [amount of heroin] or [any mixture containing heroin] was -- and it states the amounts. (Tr. Page 861, Lines 19-25)(Tr. Page 862, Lines 1-2) emphasis added. The State is clearly aware that it hadn't proved its case and evidence was insufficient to convict. The State had not proved any "purchase's" of heroin from defendant out of state, or that defendant "brought heroin into this state. Please see. Transcript of record dated July 19, 2017 Motion to Suppress - Justin Wingo - Cross-examination by Mr. Griffith, Page 92 Lines 11-25 and Page 93, Lines 7-10).

Again, the State's "stipulation" to chain of custody deprived the defendant of a substantive or procedural right to which the law entitles him. This "stipulati occurred to [greatly truncate list of witnesses]. The judge stated to Defense Counsel "You really dont have "a good faith" challenge to the chain, correct", ... See U.S. V. Aguilar Tamayo, 300 F. 3d 562, 566 (5th Cir. 2002)(good-faith effort not established when government stipulated that it took no steps to secure presence of witnesses).

In Crawford V. Washington, the Supreme Court held that the admission of testimonial hearsay statements violates the confrontation clause if the prosecution fails to establish the declarant's unavailability for trial.

In Crawford, the court held that, absent a prior opportunity for cross-ex mination, a testimonial statement by an unavailable witness, offered against a defendant [to prove the truth of the matter] [asserted], is categorically barred by the Confrontation clause.

(16.)

Defendant was prejudiced a fundamentally fair trial when chain of custody was "stipulated" too and State had not called a reliable qualified expert to testify to the chemical composition of the substance, and [had not] gave testimony in regards to [actual amount of heroin]. The State [had not] established that the substance given to and tested by the expert is the one that the officer seized from defendant. (Tr. Page 347, Lines 12-15)(Tr. Page 347, Line 16). By "stipulating" to chain of custody, the State [had not] proved that the testing procedures were properly carried out, emphasis. The State did not prove that the "substance" tested by the expert is the same "substance" as the prosecutor/police brought to trial. Please See. Mr. ZivKovich testimony on cross-examination. (Tr. Page 347, Lines 12-15)(Tr. Page 347, Line 16). See U.S. V. Agurs, 427 U.S. 97, 107-11 (1976)(prosecution's constitutional duty to disclose favorable evidence (Testing procedures)(actual amount of heroin governed by [materiality] standard and not limited to situations where defendant has requested favorable evidence (Chain of Custody) for which defendant is being tried is [material] to [guilt] or [punishment], and prosecutor has a [constitutional duty] to disclose favorable evidence or exculpatory evidence governed by materiality standard. See Also; [Procedural and Substantive] Law.

Defendant suffered numerous due process of law violations by stipulating to chain of custody, in violation to Rule 6 S.C. Rules of Crim. Proc., Supreme Court of the United States held "Due process is primary and indispensable foundation of individual freedom. May 15, 1967 387 U.S. 1. Also See, Supreme Court of the United States June, 2015 135 S. Ct. 2419 (the government has broad powers, but the means it use's to achieve its end must be consistent with the letter and spirit of the constitution). State lacked subject matter jurisdiction to convict defendant of Trafficking. Subject matter jurisdiction may be raised in regards to the necessary elements of the offense. State did not prove "Purchase" or "Brought into this state, and did not prove [Actual amount of heroin]. (Tr. dated July 19, 2017, Page 93, Line 1-10)(Tr. dated July 24-28, Page 861, Lines 14-18)(Tr. 861, Lines 24-25)(Tr. 862, Lines 1-2).

In Conclusion

Stipulation to chain of custody deprived defendant of a substantive and procedural right to which the law entitles him. Defendants right to confrontation, due process of law, and a fair trial was prejudiced by the denial of substantive and procedural right.

There was no colloquy established on record by the court and defendant, or court and trial counsel to waive a "constitutional" or a "statutory" right.

Absent "all persons" within the chain of custody violated Rule 6 S.C. Rules of Criminal Procedure and due process of law and equal protections under the laws.

State lacked subject matter jurisdiction in regards to elements of offense when state had not proved defendant "purchased" or "brought into this state" "actual trafficking amounts" of heroin. State had not offered reliable testimony in regards to "how much actual heroin".

In violation of Rule 6 S.C. Rules of Criminal Procedure, defendant was denied a right to a fundamentally fair trial, denied right to confront all witnesses in chain of custody, denied right to effective counsel and due process of law guaranteed by the South Carolina Constitution and the United States Constitution.

These rights of defendant were denied him to "accomadate" a shorter witness list or to "greatly truncate list of witnesses".

Defendant ask that this court vacate convictions and sentence in the interest of justice.

Subsequent Application

Table of Authorities (Brief 6 - Page 1)

Brady V. Maryland, 373 U.S. 83(1963)
Evans V. State, 363 S.C. 495, 611 S.E. 2d 510(2005)
Evans V. State, 363 S.C. 495, 509-514, 611 S.E. 2d 510, 518-520(2005)
In re Newberry County Magistrate English, 367 S.C. 297
Mangold Vs. Bacon, 229 Mo., p. 487
Clyce Vs. Anderson, 49 Mo. 37
Johnson Vs. Waters, 111 U.S., p. 667
Arrowsmith Vs. Gleason, 129 U.S., p. 100
H.K. Porter Co. V. Goodyear Tire & Rubber Co. 536 F.2d 1115, 1119 (6th Cir. 1976)
Glasser, 315 U.S. at 71.
Waite, Schneider, Bayless & Chesley Co., L.P.A. V. Davis, 191 F. Supp. 3d 743.
Sanders V. Smith, 431 S.C. 605
Young V. United States, 107 S. Ct. at 2139.
State V. BUCKMAN, 347 S.C. 316, 555 S.E. 2d 402 (SC 2001)
State V. Hammit, (SC App. 2000) 341 SC 638, 535 SE 2d 459
State V. Dasher, 298 SE 2d 215, 217 (SC 1986)
State V. Oliver, 275 SC 79, 267 SE 2d 529 (1980)
State V. Ferguson, 221 SC 300, 70 SE 2d cert. denied 344 U.S. 830, 73 S.Ct. 35, 97 L.Ed. 646 (1952).
State V. Parker (S.C. 2002) 351 S.C. 567, 571 S.E. 2d 288
Joseph V. State (S.C. 2002) 351 S.C. 551, 571 S.E. 2d 280.
State V. Beachum (S.C. 1986) 288 S.C. 325, 342 S.E. 2d 597
Costello, 350 U.S. at 363.
Hamling V. United States, 418 U.S. 87, 117 (1974)
Russell
Stirone
State V. Watson (S.C. 2002) 349 S.C. 372, 563 S.E. 2d 336
State V. Owens (S.C. 2001) 346 S.C. 637, 552 S.E. 2d 745

State V. Funderburk (S.C. 1972) 259 S.C. 256, 191 S.E. 2d 520.

U.S. V. Tanner, U.S.C.A. Jan. 9, 2007 1 Fed. Appx. 162

Hayle V. United States, 815 F.2d 879, 881-82 (2d Cir. 1987)

United States V. Broce, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L.Ed. 2d 927 (1989)

Kurschner V. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E. 2d 346, 350 (2008)

Albrecht V. United States, 273 U.S. 1, 7 (1927)

Ex parte Bain, 121 U.S. 1, 12-13 (1887)

Stirone V. United States, 361 U.S. 212, 217 (1960)

United States V. Miller, 471 U.S. 130, 144 (1985)

Arizona V. Fulminante, 499 U.S. 279, 310 (1991)

Silber V. United States, 370 U.S. 717 (962)

McKaskle, 465 U.S. at 177 n.8, 104 S.Ct. 944

State V. Orr, 304 S.C. 185, 403 S.E. 2d 623 (1991)

Questions Presented To The Court (Brief 6 - Page 3)

1.) Whether trial judge violated defendant's right to due process of law when trial judge erroneously denied defendant impeachment documents [prejudicing] his right to "prepare a defense"?

2.) Whether trial judge denied defendant his right to have a Fair and impartial judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings, when ... Judge Jefferson denied defendant his right to present an alibi at trial by "coercive" and "manipulating tactics" acting as a second prosecutor in violation of Judicial Impartiality; and attempting to negotiate plea for defendant to complete the [object] of "conspiracy" and "fraud upon the Court"?

3.) Whether defendant's right to due process of law violated when trial judge, trial Counsel, Assistant Attorney generals, and State grand jury clerk committed Conspiracy Against Public Policy?

4.) Whether trial judge violated defendant's due process of law when she [convicted] defendant on "unindicted offense"?

5.) Whether trial judge violates defendant's right to due process of law when judge "relieved" prosecutor of his "burden of proof" (Rule 5(d)) regarding impeachment documents and whether defendant suffered prejudice because of this?

6.) Whether defendant was denied due process of law when he infringed his right to "challenge the sufficiency of the evidence presented at the grand jury proceeding?

7.) Whether trial judges erroneous ruling denying defendant the state grand jury impanelment documents before a jury being sworn on "Abuse of discreation" or a failure to "exercise discreation? And whether defendant suffers prejudice?

8.) Whether trial judge committed the act of "actual" or "constructive" fraud upon the Court? And whether defendant suffers prejudice?

9) Whether trial judge infringed defendant's due process of law and defendant's 6th Amend. right to "confrontation" when as the gate keeper she "urged" a stipulation of defendant's chain of custody without colloquy?

Relevant Facts (Brief 6 - Page 5)

On July 24, 2017, the day of defendant's trial, before a jury being sworn, trial judge erroneously denied defendant the state grand jury impanelment documents (Tr. July 24-28, 2017, page 15, lines 7-9). Defendant was prejudiced his due process right to prepare a defense. Trial judge conspired with the prosecution committing conspiracy against public policy when trial judge knowingly suppressed exculpatory evidence that a state grand jury had not convened on dates of defendant's indictment (as evidenced by exhibit C).

Judge Jefferson committed "fraud upon the Court" when she held defendant for trial on unindicted offenses. Judge Jefferson, in blatant disregard of the law denied defendant impanelment documents because she was very much aware that the documents dont exist (See exhibit C). Judge Jefferson abused discretion or failed to exercise discretion when she denied defendant the s.g.j. impanelment documents. (Tr. July 24-28, 2017, page 15, lines 7-9).

Trial judge violated defendant's due process of law when she "relieved" prosecutions "burden of proof" to explain why releasing the impanelment documents to be released should be prohibited or delayed. (Tr. July 24-28, 2017, page 15, lines 5-25; p.16, lines 1-25; p.17, lines 1-25; p.18, lines 1-25; p.19, lines 1-25). (Emphasis).

To denying defendant impanelment documents the judge also denied defendant his right to "discovery", and to challenge whether a legally constituted grand jury had indicted defendant. The trial judges acts of "collusion" deprived defendant a fair and impartial judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. Judge Jefferson violated canons regarding Judicial Impartiality. Judge Jefferson "urged" as the gate keeper for trial counsel to "stipulate" to the "chain of custody" to greatly "truncate" list of witnesses for the prosecution, thereby abridging defendants right to confront all witnesses in the chain of custody, in violation of the 6th Amend. and no colloquy was established to do so and was not knowingly and intelligent.

(Tr. July 24-28, 2017, page 74, lines 4-25; p. 75, lines 1-5). In effect, this "judicial partiality" from the judge rendered the adversarial process lost - depriving defendant of a fair trial. Defendant was denied his right pursuant to § 14-7-1720 (A) and (D) and Rule 5 S.C.R.Crim.P. Judge Jefferson denied defendant his due process right to "challenge the sufficiency of the evidence" presented" at the grand jury proceeding. Judge Jefferson denied defendant his due process right pursuant to Brady (Tr. July 24-28, 2017, p. 15, lines 7-9). Judge Jefferson initiated criminal charges against defendant when she conspired with prosecution to obtain an unlawful conviction. Judge Jefferson abandoned the proper role as neutral arbiter and violated Rule 11(C)(1) and instead adopted the role of advocate or legal counselor to defendant when she "inserted" the court into plea negotiations depriving defendant of a fair proceeding (Tr. July 24-28, 2017, page 83, lines 16-25; p. 84, lines 1-2; p. 197, lines 19-20; p. 203, lines 17-18 etc.) Judge Jefferson denied defendant his right to present an alibi at trial by "coercive" and "manipulating" tactics" prejudicing" defendants right to mount a defense. (Tr. page 616, lines 10-14; Page 619, lines 21-22; Page 619, lines 24-25)(Emphasis). Judge Jefferson abridged defendants right to challenge the subject matter jurisdiction of the State Grand Jury. Judge Jefferson lacked subject matter jurisdiction to [convict] defendant on unindicted offenses (See exhibit C).

In violation of § 17-25-10, judge convicted defendant unlawfully.

Judge Jefferson abridged defendants right to a fair proceeding and was bias and performed with passion & prejudice in an conspiracy to committ fraud upon the Court and upon defendants legal rights. The conduct of the trial judge deprived defendant of the presumption of innocence and a fair trial. Trial judge erroneously admitted highly prejudicial hearsay from codefendant's out-of-court statements. Judge Jeffersons "partiality" towards prosecution deprived defendant a fair trial and violated defendants due process of law.

Subsequent Application P.C.R. (Brief 6 - Page 7)

Discussion: Judge Jefferson violated provisions of the Code of Judicial Conduct, Rule 501, SCACR:

Canon 1(A), by failing to establish, maintain and enforce high standards of conduct in defendant's trial proceedings.

Canon 2(A), by failing to respect and comply with the law, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2(B), by allowing social or other relationships to influence his conduct or judgment, and by lending the prestige of his judicial office to advance the private interest of another.

Canon (3)(B)(5), by failing to perform without judicial bias or prejudice.

Judge Denies Defendant Discovery In Criminal Case Causing Prejudice To Defendants Right To Prepare A Defense.

At trial, before a jury being sworn, defendant moved the court for the production of the state grand jury impanelment documents, when defendant stated: "I would also like the State Grand Jury minutes". (Tr. July 24-28, 2017, page 15, lines 5-6). (Also See Exhibit C).

Trial Judge responded: "You don't get those, sir. In South Carolina, [all] Grand Jury proceedings are [secret.] Nobody gets those. (emphasis) (Tr. July 24-28, 2017, page 15, lines 7-9).

The judge's erroneous ruling denying disclosure to defendant [prejudiced] defendants constitutional right to prepare a defense in violation of the 14th Amendment of the United States Due Process Clause.

(Brief 6- Page 8)

South Carolina Code Ann. § 14-7-1720 generally provides that State Grand Jury material is secret, but allows disclosure for the purpose of "complying with constitutional, statutory, or other legal requirements or to further justice". See S.C. Code Ann. § 14-7-1720 (A)(5). Additionally, defendants are entitled to discovery in criminal cases, pursuant to the constitution, statue, and rule. See Brady V. Maryland, 373 U.S. 83 (1963); Evans V. State, 363 S.C. 495, 611 S.E. 2d 510 (2005); S.C. Code Ann. § 14-7-1700; Rule 5, SCRCrimP.

Despite the laws, trial judge violated defendant's right to discovery, and his constitutional right to "prepare a defense" pursuant to the 14th Amendment of the United States Constitution.

Trial judge failed to respect and comply with the laws when before a jury being sworn, defendant moved for the production of the state grand jury's impanelment documents and was "erroneously denied" Brady material, satisfying the violation of Canon 2(A), "by failing to respect and comply with the laws...", and the [prejudice] defendant suffered from not being able to "prepare a defense" the judge violated Canon (3)(B)(5), "by failing to perform judicial duties without [bias] or [prejudice]..(See Exhibits D, E, C).

"A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration"...

Next, the trial judge, after denying defendant "discovery" and "prejudicing" defendant's [right] to "prepare a defense", thenquestions the defendant asking: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10)(See Exhibit D)(Enclosed).

Defendant answered: "Well, I'm actually going to show that [no] State Grand Jury even occurred or convened". (Tr. July 24-28, 2017, page 19, lines 11-12)(Emphasis). Trial Court responded: "Oh, it happened because I have the indictments" (Tr. page 19, lines 13-14). The defendant then stated to the judge: "I have the (indictment) papers, but that doesn't say it happened." (Tr. page 19, lines 15-16)(See Exhibit D). To this, the judge explained the grand jury met as evidence by the indictments. (Tr. page 19, lines 13-14). Without question, defendant's desire to view the documents related to the grand jury proceedings was well-founded in the law and even [conceded] by the prosecution. (Tr. July 24-28, 2017, page 15, lines 14-18). See Evans V. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury proceedings and the documents to which a defendant is entitled during the [discovery] phase regarding the state grand jury's proceedings).

Defendant's Desire To View Impanelment Documents Conceded By The Prosecution.

When Judge Jefferson erroneously denied defendant "discovery" regarding impanelment documents, the prosecution [conceded] that obtaining impanelment was well-founded in the law when the Assistant Attorney General stated: "Your Honor, the transcript from the State Grand Jury do not become a public record. The [defendant] [is] able to read them. However, we do not give them a copy. They would have to [get] them from the [Court reporter] who takes those transcripts. (Tr. July 24-28, 2017, page 15, lines 14-18)(Emphasis). See ~~Exhibit~~ (Exhibit E)(Enclosed).

See also Canon 2(A) and Canon (3)(B)(5). (Emphasis).

(Brief 6 - Page 10)

Judge Jefferson Initiates Criminal Charges Against Defendant

Fact #1 - On date's of defendant's "alleged" indictments there were "no court reporters assigned to record state grand jury proceeding's, therefore there is [no] transcript available. (See Exhibit C)(Enclosed).

Therefore there is absolutely [no record] of a state grand jury convening on dates of defendant's alleged indictments (see Exhibit C).

Fact #2 Defendant moves for production of the State Grand Jury's impanelment documents to which he is entitled and in "blatant disregard" for the constitution, controlling case laws, and Supreme Court precedents, the [trial judge] denies defendant discovery. (Tr. July 24-28, 2017, page 15, lines 7-9)(emphasis)(See exhibit E)(Enclosed).

There's no court reporter assigned to record state grand jury proceedings and no transcript available because a state grand jury never convened as a [body] to find probable cause to charge defendant. (See Exhibit C).

Judge Jefferson, "by allowing social or other relationships to influence his conduct or judgment, and by lending the prestige on his judicial office to advance the private interest of the prosecution when trial judge initiated charges against defendant, and to [conceal] the States "unfounded prosecution" denied [impanelment documents] to the defendant because she was "well-aware" that "impanelment" doesn't exist in violation of § 14-7-1700; Art. 1 § 11; Art. 5 § 22; § 17-19-10.

Judge Jefferson initiated criminal charges against defendant when she "conspired" with prosecution for the purpose of obtaining an unlawful conviction in violation of Canon 2(B); Canon (3)(B)(5). See., In re Newberry County Magistrate English, 367 S.C. 297 "Except in the case of contempt of court, it is judicial misconduct for a judge to initiate criminal charges.

Defendant suffers continuing consequences from judicial misconduct, an "fraud upon the court" and defendant's legal rights.

(Brief 6 - Page 11)

By initiating criminal charges against defendant the trial judge denied defendant [due process of law] pursuant to the 14th Amend. U.S. Const., and violated provisions of the Code of Judicial Conduct, Rule 501, SCACR, Canon 1(A); Canon 2(A); Canon 2(B); and Canon (3)(B)(5).

"A criminal defendant has the due process right to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings." U.S.C.A. Const. Amend. 14

Judge abandoned The Proper Judicial Role As Neutral Arbiter And Violates Rule 11(C)(1).

Judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to defendant. For example, the judge stated: "I would [strongly] suggest that you [take advantage] of your lawyer's voice and [really listen] to what he's saying to you, and really take into consideration the strength or weakness of the State's case against you and whether you [really] want to roll the dice and have a trial." ... "And, normally, at this stage or juncture, the State would not be amenable to anything. But I think as a [courtesy] [to the Court], they are [re-opening] the lines of [negotiation]." (Emphasis)(Tr. July 24-28, 2017, page 83, lines 16-25)(Tr. Page 84, lines 1-2). Trial judge stated: "I don't know that I would leave my faith to 12 people (Tr. Page 197, lines 19-20); (Tr. Page 202, lines 15-18) (Tr. Page 203, lines 3-9). (See Tr. Page 203, lines 17-18), "There's really [no good] [outcome] because you [can't] go home." The judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to defendant when the judge stated: "25 to 40". Now, [are] you all [willing] to [negotiate] in the range of 7 to 25 on the first's [if he pleads], or some range of that, or some combination of the charges?"

(Tr. page 206, lines 12-14). The judge stated: "Well, the incentive is 25 to 40 years is a [long time]," in her attempts to coerce defendant to give up his [rights] and plead. (Tr. Page 216, lines 16-17); (Tr. page 224, lines 10-14) (Emphasis). Judge Jefferson stated: "Well, I'm going to tell you, 25 years is a lot longer than 18. And 40 is a lot longer than 18. That's a long time." (Tr. Page 226, lines 1-3). (Emphasis). (See Canon 2(A) and Canon (3)(B)(5).)

When defendant was "making it clear" to the trial judge that defendant would not be accepting "a plea" for 18 years, defendant himself asserted "No, we can go to trial." (Tr. Page 226, lines 11). Further on, the judge continued to "coerce" defendant to plead when the judge stated: "And it's up to you whether you want to go from [being] [able] to argue for "less than 18 years" to "facing" a [mandatory] 25." (Tr. 232, lines 11-13) (emphasis). Canon (3)(B)(5).

The judge made comments like: "the longer you wait, the more the [penalties enhance]". (Tr. Page 225, lines 21-22); "sometimes people get higher ranges after a trial." (Tr. Page 224, lines 18); (Tr. Page 217, lines 10-11).

In an attempt to coerce the defendant into "a plea" and "co-operation", the trial judge stated: "Well, any [deal] is going to include cooperation unless they are going to ask for the high-end of whatever they are looking for." (Tr. Page 204, lines 4-6). Canon 1(A); Canon (3)(B)(5).

The ~~coercive~~ (coercive) effect of such comments, from a judge, is likely to be overwhelming, even well-intentioned judicial comments [urging] a "plea or cooperation" are inherently coercive and violates canons, rules, and standards of judicial ethics. Judicial exhortations to plead guilty damage the integrity of the judiciary and criminal justice system in addition to fundamentally impairing the voluntariness of a plea and a defendant's right to a [fair process]. By encouraging defendant to plead guilty the court not only [inserted] itself into plea negotiations, violating Rule 11(C)(1), but also abandoned its judicial role as neutral arbiter.

The judge took on the role of partisan or counselor by reinforcing the advice given to defendant by counsel to plead guilty. It is a gross departure from the judicial role for a judge to advocate that a defendant waive his constitutional rights. (Tr. Page 231, line 25; Page 232, lines 1-14).

The judge's encouragement to enter a guilty plea was coercive. (Tr. Page 228, lines 2-14)(emphasis). In violation of Canon 2(B) "by lending the prestige of his judicial office to advance the private interest of another" - The judge put the credibility and authority of the bench behind defense counsel's advice to plead guilty, in a "conspiracy" to commit fraud on the court, and fraud upon defendant's legal rights. In violation of Canon (3)(B)(5).

A criminal defendant has the due process [right] to have a judge assigned to his case in a manner free from "bias" or the desire to "influence the outcome" of the proceedings. U.S.C.A. Const. Amend. 14.

Judge Jefferson Denied Defendant His Right To Present An Alibi At Trial By "Coercive" and "Manipulating" Tactics, Acting as Second Prosecutor In Violation Of Judicial Impartiality.

At one point in the trial, defendant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed defendant was engaged in criminal activity in South Carolina. (Tr. Page 616, lines 10-14). Defendant indicated his counsel was "fighting against" him regarding presenting that evidence. (Tr. Page 616, line 14). When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open the door". (Tr. Page 619, lines 21-22). The judge indicated the evidence was a "double-edge" sword. (Tr. Page 619, lines 23). Defendant explained that the current charges against him were "by far the worst" of any prior accusations or convictions. (Tr. Page 619, lines 24-25).

(Brief 6 - Page 14)

Trial counsel indicated he had been discussing with defendant that the jury had "no idea who he" was at that point, but that if defendant "opened the door" to allow the state to introduce "his entire record", then the jury would have a "preconceived mind". (Tr. Page 620, lines 2-6).

In response, the judge told defendant the evidence of his incarceration in another state when alleged drug purchase's were being made from him would be "prejudicial" to him. (Tr. Page 620, line 7). The judge told defendant that as long as he were silent, there was nothing the state could say. (Tr. Page 620, lines 12-13). She informed defendant that he could not "just get on the stand and say, I was in Nassau County". (Tr. Page 620, lines 15-16). If defendant took the stand, the state would "get to ask[him] about everything else. (Tr. Page 620, lines 16-17). She opined that was "a dangerous road to go down. It's a rabbit hole. (Tr. Page 620, lines 17-18). She agreed with trial counsel that it was "not in [his] interest." (Tr. Page 620, lines 18-19). See Canon (3)(B)(5). (Emphasis).

Defendant's desire to present the evidence of an alibi was abridged by trial counsel's and the judge's acts of [collusion] with the state, and by the trial judge's "coercive" and "manipulating" tactics. This in effect, prejudiced defendant's right to an alibi, and his [right] to have his case heard by a fair and impartial judge., in violation of U.S.C.A. Const. Amend. 14.

This conduct from the judge violated substantive due process of law and violated provisions of the Code of Judicial Conduct, Rule 501, SCACR, Canon 1(A), Canon 2(B), and Canon (3)(B)(5).

Defendant was "prejudiced" a fair trial and a fair and impartial judge, in violation of U.S.C.A. Const. Amend. 14.

(Brief 6 - Page 15)

Judge shows Partiality To Prosecution When Judge Relieved Prosecutions Burden Of Proof

"The burden of proof is on the State to demonstrate why the impanelment documents should not be released because only the State possess'es the necessary information to [analyze] the issue and [explain to the court] [why] releasing the documents should be prohibited or delayed, pursuant to Rule 5(d), S.C.R.Crim.P.

Despite the "burden of proof" being on the [State] to establish, Judge Jefferson, in violation of statue, relieved or shifted the prosecutions [burden of proof] showing [complete] "partiality" to prosecution, in order to collude with State in an unlawful prosecution to gain an unlawful conviction.

Any shifting of the "burden of proof" [must] withstand constitutional scrutiny. (emphasis). Please See, Trial transcript Page 15, Lines 5-25; Page 16, lines 1-25; Page 17, lines 1-25; Page 18, lines 1-25; Page 19, lines 8-25; Page 20, lines 1-25; Page 21, lines 3-4. This conduct satisfy's the requirements of Canon 1(A); Canon 2(A); Canon 2(B). A criminal defendant has the due process [right] to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. U.S.C.A. Const. Amend. 14.

Defendant's [2nd] Attempt To Challenge The State Grand Jury's Jurisdiction

When defendant, "again", attempted to challenge the jurisdiction of the state grand jury by stating to the trial judge: "I asked to challenge the jurisdiction of the State Grand Jury." (Tr. July 24-28, 2017, page 85, lines 5-6).

Trial judge responded: "You have no basis to challenge it". (Tr. page 85, line 7. (Emphasis). Once again denying defendant's right to due process of law and preparing a defense. Please See, Tr. July 24-28, 2017, page 15, lines 5-6, Defendant, before a jury being sworn, stated to the trial judge: . . .

..."I would also like the State Grand Jury minutes (impanelment documents)". The trial judge responded to defendant stating: "You dont get those, sir. In South Carolina, [All] State Grand Jury proceedings [are] secret. [Nobody] [gets] [those]. (Emphasis)(Tr. July 24-28, 2017, page 15, lines 7-9).

This erroneous ruling from the trial judge violated defendant's [right] to "Discovery", his [right] to "prepare a defense", defendant's [right] to due process of law, and defendants [right] pursuant to §§ 14-7-1610, 14-7-1630 (A)(1). (Emphasis). Trial judge also violated defendant's [right] under the state constitution pursuant to Const. Art. 1 § 11; Art. 5 § 22, which states: ..."A defendant has a [right] under the state constitution to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him". (Also see., Exhibit C., Correspondence Court Administration, dated November 6, 2017)(stating: "You are requesting a transcript from State Grand Jury proceedings. This is to [advise] that there is no court reporter assigned to record Grand Jury proceedings, and therefore, there is no transcript available.")(Emphasis). When the trial judge questioned defendant asking: "I guess I'm trying to figure out what is it that [you] [think] you would be able to use from the State Grand Jury record"?) (Tr. July 24-28, 2017, page 19, lines 8-10). Defendant responded: "Well, I'm actually going to show that [no] State Grand Jury even occurred." (Emphasis) (Please See Exhibit D; Exhibit C)(Enclosed). Defendant's trial was fundamentally unfair as structural protections have been compromised.

Defendant was [prejudiced] his right to have his case heard by a "fair" and "impartial" judge in strict violation of the Fourteenth Amendment of the United States Constitution.

(Brief 6 - Page 17)

Trial Judge Infringed Defendant's Right Pursuant To Code 1976, §§ 14-7-1610, 14-7-1630(A)(1)

"The state grand jury operates under a very specialized procedure under which a defendant is permitted to [obtain] and [review] [all] evidence which was considered in handing down an indictment."

Code 1976, §§ 14-7-1610, 14-7-1630(A)(1)

"A defendant can attack the state grand jury's subject matter jurisdiction by challenging the sufficiency of the evidence presented at the grand jury proceeding before the jury is sworn." Code 1976, §§ 14-7-1610, 14-7-1630(A)(1). Accordingly, before the jury was sworn, defendant requested the minutes from the [alleged] state grand jury proceedings. (Tr. July 24-28, 2017, page 15, lines 5-6). In response to defendant's request for the impanelment documents the trial judge denied defendant [disclosure] creating [prejudice] to defendant's legal rights pursuant to §§ 14-7-1610, 14-7-1630(A)(1) and [prejudice] to defendants [right] to mount or prepare a defense. (Tr. July 24-28, 2017, page 15, lines 7-9).

A criminal defendant has the due process right to have a judge assigned to his case in a manner free from "bias" or the desire to influence the outcome of the proceedings.

U.S.C.A. Const. Amend. 14.

(Brief 6 - Page 18)

Judge Commits Fraud Upon The Court

Where fraud has caused a judgment, it is [immaterial] whether it be actual or constructive fraud. Either vitiates the judgment and deprives it of any effect as an estoppel. Mangold Vs. Bacon, 229 Mo., p. 487; Clyce Vs. Anderson, 49 Mo. 37. See also Johnson vs. Waters, 111 U.S., p. 667; Arrowsmith vs. Gleason, 129 U.S., p. 100.

Fraud upon the Court itself constitutes fraud upon the [rights] of the defendant. H.K. Porter Co. V. Goodyear Tire & Rubber Co. 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since Attorneys are officers of the court, their conduct, if dishonest, would constitute Fraud on the court.") Accordingly, trial counsel collaborated with trial judge and prosecution to commit the act of Fraud upon the Court. (See Exhibit C).

The Fraud on the court doctrine encompasses conduct: (1) on the part of an officer of the court; (2) directed to the "judicial machinery" itself; (3) involving either willful blindness to, or reckless disregard of, the truth; (4) amounting to a positive averment or a failure to disclose where there was a duty to do so; and (5) that deceives the court.

Accordingly, A.A.G.'s willfully printed and published false and misleading information in its indictment in order to deep secret its violations of statutory law, thus, committing the act of perjury, fraud on the court which renders all judicial proceedings invalid and its indictment null.

In the case of (2016-GS-47-02/3) Mr. Roberts bill of indictment prints that it was returned "At a session of the State Grand Jury, convened in Columbia, South Carolina, on April 12-13, 2016", the State Grand Jurors present upon their oath". The title page of "alleged" indictment prints that it was published "At a session of the State Grand Jury of South Carolina", however, Exhibit C - very clearly settles the matter of the false return of defendants' alleged" indictment.

(Brief 6 - Page 19)

A.A.G.'s are "officers of the court" as well as Judge Jefferson, and the false return of defendants indictment, constituting fraud upon the court, was directed to the "judicial machinery" itself, involving either willful blindness to, or reckless disregard of, the truth. Judge Jefferson was well aware of the false return of defendant's indictment, and her conduct proves this. For example: Before a jury being sworn, defendant requested impanelment documents and was denied this request by the trial judge. (See Exhibit E). When trial judge "questioned" what defendant thought he would be able to use from the State Grand Jury record?" Defendant answered: "Well, I'm actually going to show that [no] State Grand Jury even occurred." (See Exhibit D). Trial judge, "persistently" and "adamantly" continued to deny defendant the "record" of state grand jury proceedings despite a "protective order" "[she signed] giving authorization to "disclose" to the attorneys of the defendants dated September 15, 2016 (See Exhibit A). Exhibit A shows the "manufacturing" of the fraud very clearly, being a [fraudulent] document to give the "appearance" that these proceedings actually took place, when "Exhibit C" establishes the fact that they didn't. (Emphasis). (See S.C. Code Ann. §16-9-10.(A)(2)(Offense Against Public Justice). Defendants fraudulent "indictment" and "protective order", along with A.A.G.'s and trial courts conduct deceived the court. "The duty of seeing that the trial is conducted with solicitude for the essential rights of the accused rest foremost upon the trial judge". Glasser, 315 U.S. at 71.

Under the fraud on the court doctrine, the individual accused of perpetrating the fraud must have directly interacted with the court to prevent an adversary from presenting his case fully and fairly. Waite, Schneider, Bayless & Chesley Co., L.P.A. V. Davis, 191 F. Supp. 3d 743.

A.A.G.'s, trial counsel, and trial court have directly interacted with the court to prevent defendant from presenting his case fully and fairly.

(1) A.A.G.'s and Clerk of the State Grand Jury willfully printed and filed false and misleading information in the indictment, incorrectly stating that it had been returned "At a session of the State Grand Jury of South Carolina, convened in Columbia, South Carolina, on April 12-13, 2016; (2) to further the conspiracy against defendant's legal rights, a "fraudulent" Protective Order was signed by trial court on "motion" of the Attorney General of South Carolina; (3) before a jury being sworn, defendant requested and was denied the "record" of testimony and proceedings consistently; (4) trial counsel did not [object] to the erroneous and egregious ruling of the trial judge; (5) trial counsel [consistently] stated that he had [provided] discovery to defendant - when, in fact, no discovery existed (See Exhibit C); (6) trial judge, as the gate keeper, "urged" trial counsel to [stipulate] to the chain of custody, thereby abridging defendant's right to confrontation of witnesses in order to "greatly truncate list of witnesses (See Tr. July 24-28, 2017, page 74, lines 6-25; page 75, lines 1-5)(Emphasis).

Where fraud has caused a judgment, it is immaterial whether it be actual or constructive fraud. Either vitiates the judgment and deprives it of any effect as an estoppel. Mangold Vs. Bacon, 229 Mo., p. 487; Clyce vs. Anderson, 49 Mo. 37. See also Johnson vs. Waters, 111 U.S., p. 667; Arrowsmith vs. Gleason, 129 U.S., p. 100. Fraud upon the court, as a ground for relief from judgment, is a narrow and invidious species of fraud that subverts the integrity of the court, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the [usual] manner its impartial task of adjudging cases that are presented for adjudication. Sanders V. Smith, Court of Appeals of South Carolina 431 S.C. 605. Even the "appearance of impropriety"... diminishes faith in the fairness of the criminal justice system in general". Young V. United States, 107 S.Ct. at 2139.

A.A.G.'s, State Grand Jury Clerk, Trial Counsel And Trial Judge Commits Conspiracy Against Public Policy.

S.C. Code Ann. § 16-17-410 : provides in pertinent part: "The Common law crime Known as "conspiracy" is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object, or lawful object by unlawful means. A person who commits the crime of conspiracy is guilty of a felony and upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.

Here, the facts and evidence will establish that the A.A.G.'s and State Grand Jury Clerk also [conspired] with trial counsel and several other Judicial personnel to complete the return of an illegal "true bill" and to print and publish false information in an indictment in order to unlawfully convict defendant. Mr. Roberts submits sufficient evidence is presented here to establish the existence of a criminal conspiracy. See State V. Buckman, 347 SC 316, 555 SE 2d 402 (SC 2001). The gravement of conspiracy is the agreement or mutual understanding. See State V. Hammit (SC App. 2000) 341 SC 638, 535 SE 2d 459, rehearing denied, cert. granted." ... If there is one overall agreement among the various parties to perform different functions in order to carry out the objective of the conspiracy, the agreement among all the parties constitutes a single conspiracy". State V. Dashes, 298 SE 2d 215, 217 (SC 1986) citing, Am Jur. 2d conspiracy § 11 (1979).

Conspiracy may be shown by circumstantial evidence including the parties consent, State V. Oliver, 275 SC 79, 267 SE 2d 529 (1980), and South Carolina does not require an overt act. See State V. Ferguson, 221 SC 300, 70 SE 2d cert. denied 344 U.S. 830, 73 S. Ct. 35, 97 L. Ed 646 (1952).

(Brief 6-Page 22)

Facts Establishing Conspiracy Against Public Policy.

1.) A.A.G.'s and State Grand Jury Clerk "undermine the integrity of the state grand jury as an independent body" on April 12-13, 2016, by willfully printing and filing false and misleading information in the indictment. (See Supporting evidence - Exhibit C)

2.) On June 9, 2016, Defendant was unlawfully held in custody and denied his liberty - not by a "courts order" or a "warrant of arrest" - but by a "letter" (Emphasis)(See Exhibit F)(as supporting evidence) Clearly in violation of the [warrant] clause, and in violation of § 14-7-1750 ("If the presiding judge considers the "indictment" to be within the [authority] of the state grand jury and otherwise in accordance with the provisions of this article, he [shall] return the indictment by [order] to the county where venue is appropriate under South Carolina law"....)(emphasis).

3.) Prior to June 9, 2016, defendant was [unlawfully] held for 4 months in Richland County although defendant was arrested on February 8, 2016 in Berkeley County. As a result of this arrest - defendant was never charged in Berkeley County - but taken directly to Richland County. At trial, the defendant attempted to explain to the trial court that defendant was not arrested in Richland County, but was taken into custody in Berkeley County. The trial judge stated: "I don't know why that was done, but [I] then gave [strict] instructions it wasn't to be done anymore." (Tr. July 24-28, 2017, page 87, lines 5-9)(Emphasis).

(Brief 6 - Page 23)

4.) Defendant wrote to Mary P. Brown - Former Clerk of Court of Berkeley County in regards to [jurisdiction]. Mary P. Brown responded in a letter Filed 2016 Jul-6 AM 11:25, stating: "SLED has jurisdiction over you. We here at the Clerk Office have no info. You need to Contact B.C.S.O." (See Exhibit G); (also see Exhibit F)(emphasis); also in violation of warrant clause and Rule 3.

5.) Defendant wrote Richland County Judicial Center (Clerk of Court), in regards to [jurisdiction] and [charges]. The Clerk responded by letter dated 7-1-16, stating: "There is [no record] of said charge. (See Exhibit H)

6.) When defendant attemps to have filed a motion based off "Newly Discovered Evidence" by Mary P. Brown (Berkeley County), the Clerk (Former) states explicitly: "We can't Clock this due to the [fact] that this [is] a "Richland County Case". You will need to send it to [them]. (Please See Exhibit I - then refer back to Exhibit H)

7.) Exhibit C, without a shadow of doubt, shows and proves that a state grand jury did not convene and there is absolutely [no record] of proceedings. (See Exhibit C).

8.) At defendant's Competency Hearing on July 19, 2017, Judge Jefferson stated: "But out of an abundance of caution I had [my staff] [research] [his] [entire situation], send him copies of his "warrants" as well as his indictments so that he would be clear of what was, "in fact", pending against him". (Emphasis) Yet, for some reason, denys impanelment documents to which defendant is entitled. (Tr. July 24-28, 2017, page 15, lines 7-9.)

(Brief 6-Page 24)

On July 19, 2017 at defendants' "Competency Hearing", Doctor Maddox stated to the trial judge: "he does not believe he has been properly indicted - these warrants are not genuine" (Tr. July 19, 2017, page 15, lines 5-6).

The trial judge responded: "he wrote to the court and he should be disabused of that knowledge because we [totally], [I] had my law clerk [totally] [research] the [records] and send him copies of his indictments and give him a [chronological breakdown] of what "has" happened since he was arrested. So [I] don't think he should have any "vague" idea as to what happened or didn't happen." (Tr. July 19, 2017, page 15, lines 8-14).

At the defendants trial, when defendant was addressing the trial judge regarding the violation of § 14-7-1750 (Tr. July 24-28, 2017, page 13, lines 6-10), the trial judge responds: "the Supreme Court does that. And [they've given me jurisdiction over this case." (Tr. July 24-28, 2017, lines 11-12).

Repeatedly, Judge Jefferson admitts to either having her staff [totally] research defendants case, and that South Carolina Supreme Court had given the trial court [jurisdiction] over defendants case.

As presented in Exhibit C, there was no court reporter assigned to record state grand jury proceedings", as required by law", and therefore there is no transcript of grand jury proceedings, pointing to the most obvious fact that no state grand jury convened to consider criminal allegations against defendant - there is absolutely [no record] of state grand jury proceedings on dates of defendants indictments. (See Exhibit C).

The trial judge's conduct and blatant disregard for the law, and the defendants substantive due process showed her "partiality" to the prosecution, and her obvious acts of collusion. For example, Defendant attempted to explain to the judge that in his efforts to obtain impanelment documents from Court Administration, he was advised that no court reporter had been assigned, therefor there was no transcript & no record of alleged proceedings, the

judge stated: "Who did you write?" Defendant replied: South Carolina Court Administration." Trial judge stated: "They dont. [You] have to write the individual court reporter." (Tr. July 24-28, 2017, page 16, lines 1-5). (Emphasis)

Defendant advised the judge that he'd written Desiree Allen (Court reporter Manager), in his attempts to obtaining the "alleged" record from s.g.j. proceedings. (Tr. July 24-28, 2017, Page 16, line 6). Judge Jefferson stated: "Desiree Allen, she's in charge of the court reporters. [You] have the [responsibility] to [write] the [actual] court reporter that [did] it." (Tr. July 24-28, 2017, page 16, lines 7-9). (Emphasis). Contrary to the judge's statements, the [office of Court Admin.] [forwards] the [request] to the [court reporter], who will then "contact defendant" to make arrangements for payment and delivery of the transcript (See Exhibit B).

The Defendant cannot "per se" write the actual court reporter, it is not the defendants [responsibility] to write the actual court reporter, defendant has to seek this information on his own through Court Administration. Surely, the judge is aware of this. Yet, when defendant explained that he could only seek for information regarding transcript through Court Admin. - Judge Jefferson then states: "They are not going to do that for you. That's not their responsibility." (Tr. July 24-28, 2017, page 16, lines 18-19. (Emphasis). Again, Judge Jefferson states: "Yeah, and you have to write that [particular] court reporter." (Tr. July 24-26, 2017, page 17, lines 5-6). Finally, defendant asks: "but [who] would you write for that?"

Judge Jefferson responded: "You would have to [Know] the [name] of the [court reporter.] And if [you] [ask] "court administration", they will give you that.... (Emphasis) (Tr. July 24-28, 2017, page 17, lines 14-18). Judge Jefferson's conduct was "blatantly obvious" concerning [suppressing] the [fact] that no state grand jury convened and that there are no impanelment documents. Defendant tried to offer exculpatory material to trial judge when defendant stated: "All right. Can I [provide] you with the letter to show that I've done that." (Tr. July 24-26, 2017, page 17, lines 20-21) (Emphasis supplied).

(Brief 6 - Page 26)

The judge states: "I don't have any reason to doubt your word, but I don't know that court administration -- [who] is the State Grand Jury court reporters? [How] does that [work]? They freelance, don't they"? (Tr. July 24-28, 2017, page 17, lines 22-25). The judge after suggesting that defendant was seeking the transcript from wrong entity, then states: "You would have to have gotten [transcript] from the State Grand Jury Clerk. Because those reporters that do that are freelance reporters. They are not under court administration." (Emphasis) (Tr. July 24-28, 2017, page 18, lines 2-5).

When Judge Jefferson questioned: "I guess I'm trying to figure out what is it that you think you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10) Defendant stated to the trial judge: "Well, I'm actually going to [show] that no State Grand Jury even occurred." (Tr. July 24-28, 2017, page 19)(Also See Exhibit C);

To this, the judge explained the grand jury met as evidenced by indictments. (Tr. July 24-28, 2017, page 19, lines 13-14)(Emphasis).

Without question, defendant's desire to view the documents related to the grand jury proceedings was well-founded in the law and even [conceded] by the prosecution. See Evans V. State, 363 S.C. 495, 509-514, 611 S.E. 2d 510, 518-520 (2005).

Accordingly, "the agreement of a conspiracy may come into being through an implied mutual understanding. The willful, intentional and knowing adoption by two or more persons of a common plan is sufficient."

Overt acts need not be shown to establish a conspiracy. A conspiracy may be shown by circumstantial evidence and the [conduct] of the [parties].

Assistant Attorney Generals, the Clerk of the State Grand Jury, the trial judge; Christina Bass of SLED and trial counsel conspired to unlawfully deprive defendant of his liberty. See Exhibit C; Exhibit A; Exhibit F; Exhibit C ... (Emphasis) There exist a conspiracy.

(Brief 6 - Page 27)

Trial Court Lacked Subject Matter Jurisdiction To Convict And Pass Judgment On Defendant.

The circuit court does not have subject-matter jurisdiction to [convict] a defendant of an offense unless there [is] an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime [charged] in the indictment. State V. Parker (S.C. 2002) 351 S.C. 567, 571 S.E. 2d 288; Joseph V. State (S.C. 2002) 351 S.C. 551, 571 S.E. 2d 280.

Trial Court lacked subject-matter jurisdiction to [convict] defendant for Kidnapping where there was no indictment for Kidnapping at the time the jury was sworn, and an indictment, which was true-billed and published by the clerk during a temporary suspension of the trial, did not remedy the subject-matter jurisdictional defect. State V. Beachum (S.C. 1986) 288 S.C. 325, 342 S.E. 2d 597.

The indictment in this case was unconstitutional to bring defendant to trial. Because defendant diligently pursued his [objection] to this constitutional error, this Courts [precedent] mandates dismissal of the indictment. Constitutional grand jury errors violate one or more of the three requirements of the Indictment Clause, as laid out in Costello, 350 U.S. at 363. There, Justice Black held that " an indictment returned by a [1] legally constituted and [2] unbiased grand jury ... [3] if valid on its face, is enough to call for trial of the charge on the merits." Id. The prosecution in this case violated this requirement in two ways, each of which mandates reversal under this Courts precedents

① Whether it " fairly informs a defendant of the charge against which he must defend."

(Brief 6-Page 28)

②Whether it "enables him to plead an acquittal or conviction in bar of future prosecution for the same offense." Hamling V. United States, 418 U.S. 87, 117 (1974). ③Whether it "contains the elements of the offense charged. These criteria serve to uphold the constitutional function of the facial validity requirement. See, e.g., 24 James W. Moore et al., Moore's Federal Practice § 607.02[2][A] (3d ed. 2006).

First, the facially valid indictment enforces the Indictment Clause's command that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". U.S. Const., Amend. V. Second, it implements the Sixth Amendments "Apprisal" requirement that "in all criminal prosecutions, the accused shall enjoy the [right] to . . . " be informed of the nature and cause of the accusation." I.D., Amend. VI. Third, it protects the accused from reprosecution for the same offense in furtherance of the Fifth Amendment's double jeopardy provision. I.D. As the Court recognized in Russell and Stirone, a reviewing court [must] dismiss a facially invalid indictment - at least where the accused makes a timely objection to this error - because it necessarily deprives the defendant of at least one of these three constitutional guarantees. Having not been indicted by a legally constituted grand jury, Judge Jefferson lacked subject-matter jurisdiction to [convict] defendant on unindicted offenses. In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State V. Watson (S.C. 2002) 349 S.C. 372, 563 S.E. 2d 336. The judge violated defendants substantial due process to only be convicted, if convicted at all of charges made in the indictment. State Constitution requires a person be [indicted] by the [grand jury] before standing trial for a crime. State V. Owens (S.C. 2001) 346 S.C. 637, 552 S.E. 2d 745.

(Brief 6 - Page 29)

Subject-matter jurisdiction can never be waived or forfeited. United States ex rel. Oliver V. Philip Morris USA, Inc. United States District Court, District of Columbia. April 30, 2015 101 F. Supp. 3d 111.

Criminal charging documents serve to provide a jurisdictional grounding for the court to hear the case, to provide notice of the charge to the defendant against which he must defend himself, and to prevent a defendant from being subject to double jeopardy; to serve these functions, a charging document must be legally sufficient to impart jurisdiction and satisfy due process. U.S.C.A. Const. Amends. 5, 14.

Where defendant was tried and convicted upon an indictment which was a nullity, it follows that he was convicted in violation of this section. State V. Funderburk (S.C. 1972) 259 S.C. 256, 191 S.E. 2d 520. See U.S. V. Tanner, U.S.C.A. Jan. 9, 2007 1 Fed. Appx. 162 "In order to sustain challenge to trial court's jurisdiction, criminal defendant must establish that indictment [does not], by "any reasonable" construction, charge offense for which he was convicted. (Please See Exhibit C). Hayle V. United States, 815 F.2d 879, 881-82 (2d Cir. 1987); United States V. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed. 2d 927 (1989).

In the instant case, "on the face of the record", the court had no power to enter the conviction. (See Exhibit C).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interest within the meaning of the Due Process Clause of the 5th or 14th Amendments of the United States Constitution." Kurschner V. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E. 2d 346, 350 (2008).

(Brief 6- Page 30)

A formal accusation is essential for every criminal trial, and without it, the court has no jurisdiction to proceed. Post V. United State's, 161 U.S. 583, 587(1896); Albrecht V. United States, 273 U.S. 1, 7 (1927). An "indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged." Ex parte Bain, 121 U.S. 1, 12-13(1887).

For this proposition," the Bain case .... has never been disapproved." Stirone V. United States, 361 U.S. 212, 217(1960); See also United States V. Miller, 471 U.S. 130, 144(1985).

This Court has held that proceeding against a defendant for an offense not charged in the indictment can never be harmless error. Stirone V. United State's, 361 U.S. 212(1960).

The errors in this case fall into a class of fatal flaws known as "structural errors" that affect the framework within which the trial proceeds". Arizona V. Fulminante, 499 U.S. 279, 310 (1991). Specifically, this Court has held that reversal is necessary when a court proceeds against a defendant for a charge that was not in the indictment, even if the error has been forfeited. Silber V. United States, 370 U.S. 717(1962). (See Tr. July 24-28, 2017, page 19, lines 11-12) also see Exhibit C). (Emphasis).

Defendant need not demonstrate prejudice resulting from the error (Although defendant has) because harm to a defendant is irrelevant to the principals underlying his autonomy right and liberty interest. McKaskle, 465 U.S. at 177 n.8, 104 S.Ct. 944. Judge Jefferson [conspired] with the prosecution to deny defendant his liberty interest by [convicting] defendant, unlawfully, on "unfounded offenses" not charged in indictment. (See Exhibit C). Defendant suffers continuing [consequences] as a result of this unlawful conviction.

Trial Judge Violates Due Process And SC Code Ann. § 17-25-10

Trial Judge Violate's SC CODE ANN. § 17-25-10 "no person shall be punished for an offense unless duly and legally convicted thereof, in a court having competent jurisdiction of the cause and of the person."

A Plain reading of § 17-25-10 requires that a criminal defendant cannot be punished for an offense until after the State has duly and legally convicted the individual.

The A.G.'s office and State Grand Jury Clerk's unlawful indictment process and subsequent criminal acts, resulted in an "illegal grand Jury, void indictment, and a violation of every component of the Due Process notice requirement owed to Mr. Roberts by this State.

Judge Jefferson violates "impartiality" and defendant's due process of Law When She infringed defendants right to "confrontation" of all witnesses in chain of custody.

The prosecutor stated to the trial court: "It's my understanding that trial counsel were both willing to "stipulate" that the chain of custody for all the evidence has been established. And they are not going to challenge it, which would greatly [truncate] the list of witnesses." (Tr. July 24-28, 2017, page 74, lines 8-12). When trial judge questioned was this correct, and stated to trial counsel that: "There's no really good faith basis to challenge the chain." (Tr. July 24-28, 2017, page 75, lines 3-4). Trial counsel responded: "I would not be challenging". (Tr. July 24-28, 2017, page 75, line 5)(Emphasis).

Supreme Court of South Carolina, in State V. Orr, 304 SC. 185, 403 S.E. 2d 623(1991), held that waiver of a [constitutional] or [statutory] right [must] be Knowingly and voluntary established on the record by [colloquy] between either the court and the defendant, or between the court and defendant's counsel, or both". (Emphasis). Defendant's 6th Amend. right to confront witnesses in chain of custody was in effect, waived without colloquy prejudicing defendant's

6th Amend. right. The trial judge, as the "gate Keeper" did not establish a on the record colloquy and therefore unlawfully waived and infringed defendants legal rights.

Conclusion

Judge Jefferson performed with passion and prejudice when she denied defendant his due process right to have a fair and impartial judge assigned to his case free of bias or desire to influence the outcome of the trial proceedings.

Trial judge excoreously denied defendant the state grand jury impeachment documents to deep secret prosecutions violation of constitutional and statutory law in order to collaborate with the state in an unfounded prosecution.

Judge Jefferson unlawfully convicted defendant on unindicted offenses in order to complete the objective of fraud upon the court and defendants legal rights. Judge Jefferson committed Conspiracy against public policy.

Trial judge exceeded its jurisdiction when trial judge convicted defendant of unfounded offenses. Trial judge, in violation of Judicial Imparthiality denied defendant his right to present an alibi by "coercive" and "manipulating" tactics prejudicing defendants right to prepare a defense, and a fair trial. The judge violated cannons, rules, and standards of judicial ethics when she not only "inserted" the court into plea negotiations, violating Rule 11(C)(1), but also abandoned its judicial role as neutral arbiter. The judge put the credibility and authority of the bench behind defense counsels advice to plead guilty in a conspiracy to commit fraud upon the court. Judge Jefferson infringed defendants right to challenge the subject-matter jurisdiction of the state grand jury and defendants right to discovery.

Trial judge violated judicial imparthiality and defendants due process of law and right to a fair trial. For these reasons, defendant ask that indictment be dismissed with prejudice in light of the arbitrary, egregious, and prejudicial actions of the trial court?

Questions Presented To The Court (Brief 7, Page 1)

1.) Whether defendant was denied his constitutional right to the "effective assistance of appellate counsel" and "due process of law pursuant to the Fourteenth Amendment?

2.) Whether defendant suffered "prejudice" from Appellate Defenders deficiency?

Relevant Facts

Defendant was[prejudiced]his "right" to "effective assistance of Appellate Counsel and "due process of law when "Appellate Defender" failed to raise viable issues, and failed to present [significant]and[obvious]issues on Appeal. Defendant provided Appellate Defender "exculpatory evidence" in the form of letters from Court Administration establishing that "no court reporter was assigned to record state grand jury proceedings and therefore no transcript was available(See Exhibit C). The Correspondence To Ms. Hackett and the South Carolina Court Of Appeals is dated Dec. 13, 2017(See Exhibit J)(Emphasis). Susan B. Hackett "deliberately" ignored significant and obvious issues denying defendant his constitutional [right] to "Effective Assistance Of Appellate Counsel" and "due process of law when she did not raise issue's of (1) impanelment documents and defendants[right] to "mount or prepare A defense (2), the issue of subject-matter jurisdiction based on the indictment, in light the fact that "Defendant" provided exculpatory material regarding that matter to Appellate Defender [many] times in written corresponses. See (Exhibit T). Thus, defendant suffers prejudice From Appellate Defenders deficiency

(Brief 7, page 2)

Discussion: A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts V. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland V. State, 337 S.C. 610, 524 S.E. 2d 833 (1999).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray V. Greer, 800 F. 2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored are clearly stronger than those actually raised on appeal. Id.

The Applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker V. State, 407 S.C. 400, 404-05, 756 S.E. 2d 144, 146 (2014).

Susan B. HacKett, Appellate Defender was deficient in her performance when she failed to raise viable issues. Appellate Counsel failed to present [significant] and [obvious] issues on appeal, when, before a jury was sworn - defendant requested impanelment documents from the trial court (Tr. July 24-28, 2017, page 15, lines 5-9), and was unlawfully denied by the trial court. The erroneous ruling by the trial judge denied due process to defendant, clearly. See Evans V. State, 363 S.C. 495, 509-514, 611 S.E. 2d 510, 518-520 (2005); Art. 1 §11; Art 5. §22. (Emphasis). (See Exhibit E).

(Brief 7, page 3)

Fact 1: In[many]letters written to Appellate Defender, Susan B. HacKett, defendant "persistently" requested that Ms. HacKett challenge (1) the defendants[right] to obtain and review the state grand jury's impanelment documents, and (2), that "impanelment documents or any" documents related to the grand jury, to which defendant is[entitled] "do not exist" as evidenced by Court Administration (See Exhibit C)(Emphasis); (3) And, finally, to challenge subject-matter jurisdiction based on the indictments. Please See (Exhibit J)(Received By Appellate Defense Dec. 13, 2017).

Fact 2: At defendants trial after [erroneously] being denied impanelment document's; and "record of proceedings and testimony", the trial judge stated: "I guess I'm trying to figure out what is it that you would be able to use from the State Grand Jury record?" (Tr. July 24-28, 2017, page 19, lines 8-10) The defendant stated to the trial judge: "Well, I'm actually going to show that no State Grand Jury even occurred." (Tr. July 24-28, 2017, page 19, lines 11-12)(Emphasis), (see Exhibit C).

Appellate Defender was deficient - the issues regarding impanelment documents, the lack of, and Art. 1. § 11; Art. 5. § 22, and defendants[right]to "prepare a defense" was [significant] and [obvious] and Appellate Defender failed to raise [them]. When Appellate Defender failed to raise these issues defendant's due process of law was denied and he suffers [prejudice] as a result of Appellate Defenders deficient performance, and also, now suffers from "collateral consequences" also a result of Ms. HacKetts deficient performance.

(Brief 7, page 4)

Fact 3: Appellate Defender, Susan B. HacKett contained the knowledge that "no court reporter was assigned to record grand jury proceedings on dates of defendant's indictments, and there was no transcript available because of that [fact]. (See Exhibit C; see also Exhibit J). (Emphasis).

Fact 4: Defendant is a victum of a formed [conspiracy] against him and his [liberty] interest by the prosecution, trial judge and trial counsel. "Circumstances and Relationships must be considered"...

(1) A Judge before a jury sworn, unlawfully denys defendant impanelment documents (2) trial counsel does not object (3) Appellate Defender is provided [exculpatory evidence] to support defendants contentions that a State grand jury did not convene to consider criminal allegations against defendant; (4) Defendant "persistently" writes letters to Appellate Defender to request that she challenges "subject-matter jurisdiction" and yet, she doesn't - even with first hand knowledge that it was "clear" defendant had not been indicted. (See exhibit C; and exhibit J).

Fact 5: Defendant requested impanelment document and was "erroneously" denied - this being an "significant" and "obvious" issue was ignored because of the influence of the Attorney General's Office and Ms. Hacketts [collusion]. Appellate Defender was deficient in her performance and [prejudiced] defendant a defense, due process of laws, and effective assistance of Appellate Counsel when she "collaborated" with the State to affirm an unlawful conviction and sentence. (Please See Correspondence from The South Carolina Court of Appeals dated August 19, 2019; May 23, 2019; Defendants correspondence dated 5/20/19.) (August 1, 2019 to S.C. Court of Appeals).

(Brief 7, page 5)

Conclusion

Defendant was prejudiced his right to effective assistance of appellate counsel and due process of law when Appellates deficient performance in failing to raise significant and obvious issues relating to "subject-matter jurisdiction" and defendants "right to prepare a defense" concerning impanelment documents and other forms of "discovery" entitled to defendant. Susan B. MacNeil "deliberately" ignored these issues because of her acts of "collusion" with the State in order to infringe upon defendants liberty interest. Defendant suffers prejudice from Appellate Defenders deficient performance and collusion with prosecution.

Defendant provided Appellate Defender "exculpatory evidence" of the fact that trial court was lacking subject-matter jurisdiction and repeatedly requested that she raise this issue, and she refused, despite first hand knowledge that "no transcript exist" - which is a structural error, and she "consistently" refused to raise issues such as Art. 1. §11; Art. 5 §22; and defendants right to indictment by grand jury. Appellant Defender did not raise issue's relating to the State Grand Jury because she colluded with prosecution to affirm unlawful conviction.

Exhibit J, clearly puts the Court of Appeals on notice of the constitutionally invalid conviction which is clearly a stronger issue than the issue of self-representation when the trial court lacks subject-matter jurisdiction. Accordingly, I ask that judgment be set aside, vacated and indictment dismissed with prejudice?

Table Of Authorities (Brief 8 - Page 1)

In re Winship, 397 U.S. 358, 364 (1970)
Jackson V. VA., 443 U.S. 307, 319 (1979
C. McCormick, Evidence, S 321, pp. 681-682 (1954)
9 J. Wigmore, Evidence, S 2497 (3d ed. 1940)
U.S.C.A. Const. Amend. 14
Miles V. United States, 103 U.S. 304, 312, 26 L.Ed 481 (1881)
Davis V. United States, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 -
- L.Ed. 499 (1895)
Holt V. United States, 218 U.S. 245, 253, 31 S.Ct. 2, 6, 54 L.Ed -
- 1021 (1910)
Wilson V. United States, 232 U.S. 563, 569-570, 34 S.Ct. 347, 349, 350, 58 -
- L.Ed. 728 (1914)
Brinegar V. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310, 93 L.Ed. -
- 1879 (1949)
Leland V. Oregon, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 1006, 96 L.Ed. 1302 -
- (1952)
Holland V. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 136, 137, 99 L.Ed. 150 -
- (1954)
Speiser V. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460 -
- (1958)
Coffin V. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895)

Questions Presented To The Court (Brief 8-Page 2)

1.) Whether the State failed to prove beyond a reasonable doubt that the amount of heroin or any mixture containing heroin was 4 grams or more but less than 14 grams; 14 grams or more but less than 28 grams; and 28 grams or more? And whether this violated defendants due process of law?

2.) Whether defendants right to due process of law violated when all essential elements of guilt (Purchase, or brought in to this State) were not proven beyond a reasonable doubt? And whether the defendant suffered prejudice?

3.) Whether a rational trier of fact, viewing evidence in light most favorable to the prosecution, could have found the essential elements of the crime of Trafficking Heroin beyond a reasonable doubt?

(Brief 8 - Page 3)

Relevant Facts

On July 19, 2017 at Competency Hearing, on cross-examination [Case Agent] Justin Wingo was asked by defense counsel: "Was there any prior knowledge before the issuance of these warrants that Mr. Roberts was involved with any out-of-state purchases of heroin either from New York or some other state?" (Tr. July 19, 2017, Page 92, lines 11-14).

After clarification is needed by Case Agent Justin Wingo, and given by defense attorney, defense attorney asks again: "And they informed you that Mr. Roberts was involved with out-of-state purchases?" (Tr. July 19, 2017, page 93, lines 7-8). [Case Agent] Justin Wingo responds: "No sir, they [didnt] inform me that he was involved in out-of-state purchases of heroin." (Tr. July 19, 2017, page 93, lines 9-10)(Emphasis).

Next, on cross-examination, defense counsel questions Case Agent Justin Wingo, asking: "Did you ever see with your own eyes Mr. Roberts hand any drugs to anybody?" (Tr. July 28, 2017, page 736, lines 5-6). Case Agent Justin Wingo answers: "With my own eyes, no, sir"... Tr. July 28, 2017, page 736, lines 7).

The following exchange occurs between defense counsel and Case Agent Justin Wingo:

Q. When you talk about the confidence level of 99.7 percent, you say the confidence level of the weight, isnt that what we are talking about?

A. That's what the lab report said.

Q. But the confidence level of the weight, that means that they took something, weighed it, and they are very confident that what they weighed weighs that much?

A. Sir, I'm a narcotics agent, not a chemist.
Q. That's not the percentage of heroin in that sample, is it?
A. Again, sir, I'm a narcotics agent. I am not a chemist. I am not in the lab. And [I couldn't] tell you how [they] test that stuff. You would have to reference a chemist.
Q. What you are saying is, when you repeat that, and when [you've] [read] that, you've said the confidence level of the weight was 99.7 percent; isn't that correct?
A. You got a specific lab report you are referencing?
Q. You said that on [every lab report.] (Emphasis)
A. That's what the lab reports say.
Q. OKay. So if I mix a gram of heroin with 27 grams of baby powder, its going to come up, yep, that sure does weigh 28 grams. But that doesn't mean it's 28 grams of heroin, does it?
A. That means there's "heroin" in there, sir. But, again, I am not a chemist. Tr. July 24-28, 2017, page 736, lines 5-25; page 737, lines 1-9 (Emphasis).

Next, Assistant Attorney General, Joshua Underwood stated to the trial judge: "Your Honor, one matter concerning the charge, I wanted to inquire for the Court. Does your charge include language that any [mixture] of a [substance] that contains a substance, that the entire mixture counts towards the weight pursuant to State V. Johnson? (Tr. Page 861, lines 14-18)(Emphasis).

Trial judge responded: "I don't make any charge that would constitute a charge on the facts"... (Tr. Page 861, lines 19-20).

"My charge reflects exactly what the statue says, which is the State must also [prove] beyond a reasonable doubt that the

amount of heroin or any mixture containing heroin was -- and it states the amounts. (Tr. 862, lines 1-2). (Emphasis).

Discussion: The Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt" of every fact necessary to [constitute the crime] with which the defendant is charged. In re Winship, 397 U.S. 358, 364 (1970).

See Jackson V. VA., 443 U.S. 307, 319 (1979)(habeas relief granted for insufficient evidence because prisoner showed that no rational trier of fact, viewing evidence in light most favorable to prosecution, "could have found the essential elements of the crime beyond a reasonable doubt").

It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution [must] convince the trier of all the essential elements of guilt." C. McCormick, Evidence s 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence, s 2497 (3d ed. 1940).

Due process [commands] that no man lose his liberty unless government has borne burden of convincing fact finder of his guilt. U.S.C.A. Const. Amend. 14.

Due process clause protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute crime with which he is charged. U.S.C.A. Const. Amend. 14.

Rule requiring establishment of guilt of criminal charge by proof beyond reasonable doubt is accepted in common-law jurisdictions as measure of persuasion by which prosecution must convince trier of all essential elements of guilt.

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, Miles V. United States, 103 U.S. 304, 312, 26 L.Ed 481 (1881); Davis V. United States, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499 (1895); Holt V. United States, 218 U.S. 245, 253, 31 S.Ct. 2, 6, 54 L.Ed 1021 (1910); Wilson V. United States, 232 U.S. 563, 569-570, 34 S.Ct. 347, 349, 350, 58 L.Ed. 728 (1914); Brinegar V. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949); Leland V. Oregon, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 1006, 96 L.Ed. 1302 (1952); Holland V. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 136, 137, 99 L.Ed. 150 (1954); Speiser V. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460 (1958). C.f. Coffin V. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). Mr. Justice Frankfurter stated that "it the duty of the Government to establish guilt beyond a reasonable doubt. This notion - basic in our law and rightly one of the boast of a free society - [is] a requirement and a safeguard of due process of law in the historic, procedural content of "due process". Leland V. Oregon, supra, 343 U.S., at 802-803, 72 S.Ct., at 1009. In a similar vein, see Brinegar V. United States, supra, 338 U.S., at 174, 69 S.Ct., at 1310. (Emphasis).

Purchase, OR Brought In to This State (Brief 8-Page 7)

Special Agent, Justin Wingo - being the "Case Agent" regarding the investigation into "alleged" heroin trafficking offenses concerning Mr. Roberts stated: "No sir, [they] didn't inform me that Mr. Roberts was involved with out-of-state purchases of heroin". (Tr. July 19, 2017, page 93, lines 9-10)(Emphasis). Due process clause protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute crime with which he is charged. U.S.C.A. Const. Amend. 14.

It is indisputable that if the "lead investigator" or "Case Agent" had no knowledge or evidence, or witness to inform [him] of the necessary facts to constitute the crime. - then the prosecuting Attorney could not have them, and thereby could not substantiate the crime with which he is charged. (Emphasis). Again, when under cross-examination, Justin Wingo was questioned: "And they informed you that Mr. Roberts was involved with out-of-state purchase?" (Tr. July 19, 2017, page 93, lines 7-8), Case Agent, Justin Wingo stated: "No Sir, they didn't inform me that Mr. Roberts was involved with out-of-state purchases of heroin". (Tr. July 19, 2017, page 93, lines 9-10). (Emphasis). "No rational trier of fact, viewing evidence in light most favorable to prosecution, could have found the essential elements of the crime beyond a reasonable doubt". See Jackson V. VA., 443 U.S. 307, 319 (1979).

At trial, on cross-examination, the defense questioned Agent Wingo, asking: "Did you[ever] see with your own eyes Mr. Roberts hand any drugs to anybody?" (Tr. July 24-28, 2017, page 736, lines 5-6), Agent Wingo answered: "With my own eyes, no, sir"..... (Emphasis)(Tr. July 24-28, 2017, page 736, lines 7-8).

Proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, Miles V. United States, 103 U.S. 304, 312, 26 L.Ed 481 (1881).

Defendant was charged with trafficking in heroin". The State must prove beyond a reasonable doubt that the defendant ... purchased, brought in to this state ... purchase, or bring into this state", heroin."

There was no reliable detective testimony that they saw Mr. Roberts handle any drugs at all. There was not [a] detective that [ever] saw Mr. Roberts with drugs in his hand. (Tr. Page 736, lines 5-8); (Tr. Page 160, lines 22-24); (Tr. Page 436, lines 4-6)(Emphasis). When Case Agent Justin Wingo was questioned on cross-examination whether he had any [Knowledge] or was he [informed] about any out-of-state purchases of heroin by Mr. Roberts, he answered: "No sir, they didn't inform me that [he] was involved in any out-of-state purchases of heroin." (Tr. July 19, 2017, page 93, lines 9-10)(Emphasis).

The Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt" of every fact necessary to constitute the crime with which the defendant is charged. In re Winship, 397 U.S. 358, 364 (1970).

Element Regarding Actual Amount Of Heroin

Special Agent, Case Agent Justin Wingo

On cross-examination, defense counsel questioned Justin Wingo concerning [all] lab reports he testified to, asking the percentage of heroin in the samples? (Tr. Page 736, lines 17-18) The [Case Agent] answered: "I'm a narcotics agent. I am not a chemist. I am not in the lab. And I [couldn't] tell you how "they" test that stuff. You would have to reference a chemist." (Tr. Page 736, lines 19-22)(Emphasis). Defense counsel states: "Okay. So if I mix a gram of heroin with 27 grams of baby powder, it's going to come up, yep, that sure does weigh 28 grams. But that doesn't mean it's 28 grams of heroin, does it? Case Agent Justin Wingo answers: "That means there's heroin in there, sir. But, again, I am not a chemist. (Emphasis)(Tr. Page 737, lines 1-9).

Accordingly, State did not present sufficient evidence regarding essential element of how much actual amount of heroin to substantiate proof beyond a reasonable doubt.

Element Regarding Actual Amount Of Heroin (Brief 8-Page 9)

Forensic Scientist

Lawrence ZivKovich, who is employed as a forensic scientist by SLED, testified for the State as to what a controlled substance may [contain]. (Tr. July 24-28, 2017, page 334, lines 1-8), (Page 340, lines 7-9). Mr. ZivKovich testimony was based on the State's exhibits and whether it [contained] heroin and how much the "entire" substance weighed. (Tr. Page 340, lines 17-18); (Tr. Page 342, lines 4-5); (Tr. Page 342, lines 20-21); (Tr. Page 343, lines 4-5); (Tr. Page 343, lines 16-17); (Tr. Page 344, lines 2-4); (Tr. Page 344, lines 16-17). Mr. ZivKovich testified to what the controlled substance [contained] and the weight of that entire substance - but not [how much actual] heroine. For example, Mr. ZivKovich testified that States exhibit 47 contained heroin [and] methamphetamine with a weight of 1.28 grams (Emphasis) (Tr. Page 342, lines 11-12). A substance [containing] heroin "and" methamphetamine - with a weight of 1.28 grams - but how much actual heroin? What is the amount of heroin? Mr. ZivKovich said in his testimony that there was heroin found in the samples, but it doesn't say how much heroin. He says the weight of this or that whole sample was so much. Could have been sand with four sprinKles of heroin in it. We don't Know. They (the State) are confident in the weight of the sample, but they did not say the sample contained half heroin, one-quarter heroin, one-eighth heroin, or even 10 percent heroin. The State never established how much actual heroin it was. There has to be sufficient proof beyond a reasonable doubt.

The State failed to prove beyond a reasonable doubt that the amount of heroin or any mixture containing heroin was 4 grams or more but less than 14 grams; 14 grams or more but less than 28 grams; and 28 grams or more.

The Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt" of every fact necessary to "constitute the crime" with which the defendant is charged. In re Winship, 397 U.S. 358, 364 (1970); Jackson V. VA., 443 U.S. 307, 319 (1979)

(Brief 8-Page 10)

On cross-examination, Mr. ZivKovich was questioned in regards to his testimony regarding state's exhibits when defense counsel asked: "Mr. ZivKovich, you would be [unaware] as to which particular buys these were connected to and which -- whether these were collected -- who they were collected from, et cetera? You would not know that, correct?" Mr. ZivKovich answered: "That's correct." (Tr. Page 347, lines 12-16)(Emphasis). See Jackson V. VA., 443 U.S. 307, 319 (1979)(habeas relief granted for insufficient evidence because prisoner showed that no rational trier of fact, viewing evidence in light most favorable to prosecution," could have found the essential elements of the crime beyond a reasonable doubt"). (Emphasis).

State Understands Clearly That It Hasn't Proven Actual Amounts Of Heroin - Which Is Essential Element... Of Trafficking.

Assistant Attorney General Joshua Underwood inquire's to the trial judge: "Your Honor, one matter concerning the charge, I wanted to inquire for the Court. Does your [charge] include language that any mixture of a substance that contains a substance", that the [entire mixture] counts towards the weight pursuant to State V. Johnson?" (Tr. Page 861, lines 14-18)(Emphasis). Trial judge responds: "I don't make any charge that would constitute a charge on the facts ... (Tr. Page 861, lines 19-20) ... My charge reflects exactly what the statue says, which is the State must also prove beyond a reasonable doubt that the amount of heroin or any mixture containing heroin [was] -- and it states the amounts. (Tr. Page 861, lines 24-25; Page 862, lines 1-2). (Emphasis).

(Brief 8-Page 11)

Conclusion...

The State has not met its burden of proving the defendants guilty beyond a reasonable doubt. State failed to prove beyond reasonable doubt elements to establish guilt of criminal charge.

Reasonable doubt standard of criminal law has constitutional stature, and due process clause protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute crime with which he is charged.

The State has not established how much heroin, nor has the State proved any purchases of heroin, or that defendant brought any heroin in to the State of South Carolina. Case Agent Justin Wingo testified that he had not been informed that defendant had been involved with any out-of-state purchases of heroin. Forensic Scientist Lawrence ZivKovich testified to the weight of the samples, but never gave testimony as to actual amounts of heroin. Special Agent Wingo read all of these lab reports, and every time he said, well, the weight was so much and the confidence in the weight was 97.7 percent. When asked, well, does that mean that's how much heroin? What is the amount of heroin? He said, well, there was heroin found in the sample, but it doesn't say how much heroin. Due process commands that no man lose his liberty unless government has borne burden of convincing fact finder of his guilt. No rational trier of fact, viewing evidence in light most favorable to prosecution, "could have found the essential elements of the crime beyond a reasonable doubt.

Therefore, defendant ask that his convictions be reversed?

Subsequent Application

Table of Authorities (Brief 9, page 1)

In re Grand Jury Subpoena John Doe, No. 05GJ1318 584 F.3d 175
In re Grand Jury, John Doe No. G.J 2005-2 478 F.3d 581
Branzburg V. Hayes, 408 U.S. 665
United States V. Fields, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979)
United States V. Samango, 607 F.2d 877, 884 (9th Cir. 1979)
United States V. Roberts, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980)
United States V. Jones, 18 F.3d 1145, 1154 ([redacted]) (4th Cir. 1994)
United States V. Goodwin, 854 F.2d 33, 36-37 (4th Cir. 1998)
U.S. V. Russell, 411 U.S. 423, 432, (1973)
U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002)
U.S. V. Morrison, 449 U.S. 361, 364-66 (1981)
Bank of Nova Scotia V. United States, 487 U.S. 250, 257 (1988)
United States V. Johnson, 319 U.S. 503, 512-13 (1943)
United States V. Mechanik, 475 U.S. 66, 75 (1986)
Costello V. United States, 350 U.S. 359, 363 (1956)
Neder, 527 U.S. at 8-9
Medina V. California, 505 U.S. 437, 443 (1992)
Gentry
U.S. V. Alerre, 430 F.3d 681 (4th Circuit)
Brady
Evans V. State, 363 S.C. 495, 513, 611 S.E.2d 510 (2005)
State V. Baker, 411 S.C. 583
Riddle V. Ozmint, 369 S.C. 39
U.S. V. Mills, 555 Fed. Appx. 241

Subsequent Application

Questions Presented To The Court (Brief 9, page 2)

1.) Whether prosecutor's misconduct was a significant infringement on grand jury's ability to exercise independent judgment, as would support dismissal of indictment?

2.) Whether prosecutor is in violation of the provisions of a State Grand Jury Act (Art. 15) § 14-7-1700, when prosecutor [prejudiced] defendant's legal rights, and [no court reporter] was assigned to record state grand jury proceedings, as evidenced by Court Administration? (See exhibit C) (See Exhibit C)

3.) Whether prosecutor is in violation of the provisions of a State Grand Jury Act (Art. 15) § 14-7-1700, when prosecutor [prejudiced] defendant's legal right "to review and to reproduce the stenographically or electronically recorded materials" also in violation of § 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, as evidenced by Court Administration? (See Exhibits D, E)

4.) Whether prosecutor is in violation of the provisions of a State Grand Jury Act (Art. 15) § 14-7-1650, when the Attorney General or his designee [had not] examined witness'es, presented evidence, and drafted indictment and reports upon the direction of a state grand jury? (See Exhibit C)

5.) Whether prosecutor's misconduct was "arbitrary" and sufficiently "egregious", "flagrant" and "unconscionable"?
(See Exhibits A, B, C, D, E, F)

(Brief 9, page 3)

6.) Whether prosecutor's misconduct was "so outrageous that it violated fundamental fairness" or is "shocking to the universal sense of justice?

Relevant Facts

On April 12-13, 2016, evidence will establish that the Assistant Attorney Generals for the state and the Clerk of the state grand jury willfully printed and published false and misleading information in its indictment in order to keep secret its violations of statutory law, thus, committing the act of perjury, fraud upon the court and defendant's legal rights.

Prosecutor's misconduct prejudiced defendant's right to indictment pursuant to statues and controlling case law. Prosecutor withheld "exculpatory evidence" concerning the fact that there is no record of state grand Jury proceedings as evidenced by Court Admin. (See Exhibit C). Prosecutor withheld this information in violation of Brady. The prosecution prejudiced defendants right to obtain and review transcript in violation of § 14-7-1700 ; § 14-7-1720(A) and (D) and Rule 5, S.C. Rules Crim. P. Prosecutions "persistent" and "accumulated" violates of Art. 15 State Grand Jury Act, and violations of defendants right to prepare a defense, and prosecutors oppressive power and influence to affirm unlawful conviction, Fraud upon the Court and other violations was sufficiently egregious to warrant dismissal of indictment. Prosecutor prejudice defendants right to a fair trial when prosecutor "undermined the integrity of the grand jury as an independent body". Assistant Attorney Generals and State Grand Jury Clerk violated S.C. Code Ann. § 16-9-10(A)(2) and conspired with trial court, trial counsel to deprive defendant of his liberty interest unlawfully without due process of law, and therefore defendant suffers continuing collateral consequences as a result of this unfounded prosecution. Prosecutors misconduct was "so outrageous that it violated fundamental fairness and is shocking to the universal sense of justice",

(Brief 9, page 4)

Discussion: Prosecutor's conduct was a significant infringement on grand jury's ability to exercise independent judgment, as would support dismissal of indictment.

For example, A.A.G. had not presented defendant's case for indictment by a legally constituted grand jury. In fact, a grand jury [did not] exist as a [body] at all. A prosecutor as an officer of the court is [sworn] to ensure that justice is done, not simply to obtain an indictment. A.A.G.'s conduct undermined the [defendant's] right to fundamental fairness and due process in the criminal proceeding.

[Substantive] due process prohibits the government from depriving a person of life, liberty, or property for arbitrary reasons. U.S.C.A. Const. Amend. 14.

Section 17-19-10. States: "Offense shall be prosecuted upon grand jury indictment." However, defendant had not been indicted by a grand jury violating § 17-19-10, and defendants due process of law.

In re Grand Jury Subpoena John Doe, No. 05GJ1318 U.S.C.A., Fourth Circuit, Oct. 14, 2009 584 F.3d 175 "The Grand Jury is responsible for both [authorizing] criminal prosecutions when probable cause exists and ensuring the protections of citizens against [unfounded criminal prosecutions] when [probable cause is lacking]. U.S.C.A. Const. Amend. 4.

In re Grand Jury, John Doe No. G.J. 2005-2 U.S.C.A., Fourth Circuit, Feb. 22, 2007 478 F.3d 581. "The grand jury's mission is to inquire into all information that might possibly bear on its investigation until it has [identified] an [offense] or has satisfied itself that none has occurred.

(Brief 9, page 5)

Branzburg V. Hayes - Supreme Court of the United States 408 U.S. 665 "Grand Jury has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. [This case] presents an example of abuse of the power of prosecution which requires dismissal of the indictment.

Pursuant to Article 15. State Grand Jury Act. Section 14-7-1650. Duties and obligations of Attorney General; (A) "The Attorney General or his designee shall examine witnesses, present evidence, and [draft indictments] and reports upon the [direction of a state grand jury]. In this instant case, this wasnt done, and section 14-7-1650 was violated by A.G.'s office. Sections 14-7-1650, 14-7-1720, 14-7-1700 14-7-1720(E), and § 14-7-1720(A)(4)(5) require the presence of a court reporter pursuant to statue, yet there was no court reporter assigned to record grand jury proceedings on dates of defendants alleged indictments (4-12-16, 4-13-16). Defendant contends that the body of the grand jury, the [very existence] of that body [did not] exist on dates of alleged indictments as there is no record of any grand jury proceedings because no court reporter was assigned to record grand jury proceedings as evidenced by the correspondence from Court Reporter Manager, Desiree Allen of Court Administration. (Enclosed)(Exhibit C).

Pursuant to Section 14-7-1720.(D) "Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine not exceeding five thousand dollars or by a term of imprisonment not exceeding one year, or both. As evidenced by correspondence from Court Admin., A.A.G.s for the state are guilty of violating the provisions of Article 15. State Grand Jury Act.

(Brief 9, page 6)

Dismissal of an indictment is justified to achieve either of two objectives; to eliminate [prejudice] to a defendant or, pursuant to court's supervisory power, to prevent the prosecutorial impairment of grand jury's independent role. United States V. Fields, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979) viewing the above-mentioned instances of conduct cumulatively, see United States V. Samango, 607 F.2d 877, 884 (9th Cir. 1979); United States V. Roberts, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980). Under the applicable guidelines prosecutors have an [ethical obligation] strictly to observe the status of the grand jury as an [independent legal body]. See American Bar Association, Standards for Criminal Justice Standard 3-3.5 at 3.48 (2d ed. 1980)

The incidents related are flagrant and unconscionable. Taking advantage of his special position of trust, the A.A.G. impaired the grand jury's integrity as an independent body. (emphasis)

This court has previously acknowledged that egregious government conduct may violate due process and prevent the reprosecutic of a defendant. See United States V. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994) (citing United States V. Goodwin, 854 F.2d 33, 36-37 (4th Cir. 1998).

To constitute a due process violation, the governments actions must be "so outrageous as to shock the conscience of the court." Jones, 18 F.3d at 1154. A.A.G. committed fraud on the court in the case of indictment numbers 2016-GS-47-02, and 2016-GS-47-03, and in violation of Art. 1 § 11; Art. 5 § 22, and section 17-19-10., held defendant for trial on offenses not investigated by a State Grand Jury. These constitutional and statutory violations [prejudiced] defendants right to indictment on only indicted offenses and lead directly to defendants wrongful conviction and unlawful imprisonment.

(Brief 9, page 7)

Courts will dismiss indictments for government misconduct outside the indictment process on due process grounds if such conduct is so outrageous that it violates "fundamental fairness" or is "shocking to the universal sense of justice". U.S. V. Russell, 411 U.S. 423, 432, (1973); see, e.g. U.S. V. Guzman, 282 F.3d 56, 59 (1st Cir. 2002). Supreme Court has held that a defendant must show actual prejudice to warrant dismissal of an indictment with prejudice See U.S. V. Morrison, 449 U.S. 361, 364-66 (1981).

Structural protections of the grand jury have been so compro-mised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. Bank of Nova Scotia V. United States, 487 U.S 250, 257 (1988). While it may be presumed that a grand jury proceeding transpires with all due regularity (see United States V. Johnson, 319 U.S. 503, 512-13 (1943); see also United States V. Mechanik, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in judgment) Where there is "particularized proof of irregularities in the grand jury process", this presumption of regularity ..... may be dispelled." Id. A violation of the Indictment Clause's requirement that an indictment must be "returned by a legally constituted and unbiased grand jury [and] valid on its face", Costello V. United States, 350 U.S. 359, 363 (1956) (internal footnote omitted) (emphasis added), is precisely the brand of "particular-ized proof" that over comes any presumption of regularity.

The Error In This Case Is Structural Because It Renders The Trial Fundamentally Unfair.

An indictment that fails to state an offense is also structural error because it "necessarily render[s] a trial fundamentall unfair [and] deprive[s] defendant of basic protections without

(Brief 9, page 8)

which 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." Neder, 527 U.S. at 8-9.

Here, the claim of fundamentally unfairness relies upon not only the 14th Amendments general guarantee of Due Process, but also upon its specific and emphatic guarantee that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. Also see, §17-19-10: "No Person shall be held to answer for any crime unless on a presentment or indictment of a grand jury". U.S. Const. Amend. 14. While it is true that this Court has "defined the category of infractions that violate "Fundamental Fairnes very narrowly' based on the recognition that, beyond the specific guarante enumerated in the Bill of Rights, the Due Process Clause has limited operation," Medina V. California, 505 U.S. 437, 443 (1992)(alteration omitted), the question presented in this case concern one of the more specific guarantee's that the Framers articulated in that the language of the Indictment Clause contains its own remedy - "no person shall be held to answer" absent an indictment.

In sum, in light of deprivation of a specific constitution guarantee, the Constitutions articulation of a remedy for such a deprivation and the pernicious effects of such a deprivation, the Court should hold that the error that occurred is structur

To hold otherwise, as would effect a fundamental change in the criminal process.

(Brief 9, page 9)

This case presents an example of abuse of the power of prosecution which requires dismissal of the indictment.

Defendant, [before a jury being sworn], requested the impanelment documents to prove to the trial court that such documents [do not exist] because no state grand jury proceedings occurred on dates of indictments. (Tr. Page 15, Lines 5-6); (Tr. Page 19, Lines 8-25)(Enclosed.)

Defendant was denied his [right] to impanelment documents by the trial judge. (Tr. Page 15, Lines 7-9). This denial of the impanelment documents violated defendants right to due process of law. And the denial of the impanelment documents was based off not being able to provide the [minutes], or [Record of the proceedings] and [testimony of witnesses] to defendant because these proceedings never took place, thus a state grand jury [had not] convened to consider criminal allegations against defendant as evidenced by Court Administration - (Enclosed

Subject to the limitations of Section 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure, a defendant has the [right] to "review" and to "reproduce" the [stenographically] or electronically recorded materials.

Defendant suffered [prejudice] when [no court reporter] was assigned to record grand jury proceedings, and defendants right to review and to reproduce the stenographically or electronically recorded materials was violated, prejudicing defendants right to preparation of a defense.

Pursuant to Section 14-7-1700: "A court reporter shall record, either stenographically or by use of an electronic recording device, [All] proceedings except when a state grand jury is deliberating

(Brief 9, page 10)

or voting. In violation of statue and defendants due process right, there [had not] been a court reporter [assigned] to [record] state grand jury proceedings. Please see, Court Admin. Correspondence (Enclosed).

The bottom portion of section 14-7-1700. states: "An [unintentional] failure of any recording to [reproduce] all or any portion of the testimony or proceedings does not affect the validity of the prosecution." — Any argument to that effect would be meritless, as no [unintentional] failure occurred, the very fact of the matter is that "no court reporter was [assigned] to [record] State grand jury proceedings", therefore no transcript being available," because these proceedings never happened. Defendant suffered from not being able to prepare a defense. U.S.C.A. Const. Amend. 14. In violation of defendants due process of law and Art. 1. § 3 of the South Carolina State Constitution, defendant is unable to challenge by right "to have a legally constituted grand jury to consider criminal allegations against him", also see Art. 1. § 11; Art 5 § 22. as the grand jury [did not] exist as a independent body in defendants case resulting in defendants being wrongly convicted in an unfounded prosecution. Prosecutor encouraged perjured testimony resulting in a fundamentally unfair trial. Defendant suffers great prejudice as a result of been wrongly convicted and punished for offense's that does not violate S.C. Laws. Without a court reported being present - a state grand jury could "hardly" be effective and legal as prescribed by law and Article 15 if the very provisions and statues require the presence of the court reporter so that a defendant may be provided disclosure, and right to challenge the subject matter jurisdiction of the state grand jury pursuant to statue, but there had not been a "court reporter" assigned in violation of statue, and defendants due process of law was denied him because of the misconduct of the prosecutor.

(Brief 9, page 11)

Evidence will establish that the A.A.G.'s, State Grand Jury, and Richland County willfully printed and published false and misleading information in its indictment in order to deep secret its violations of statutory law, thus, committing the act of perjury, fraud on the court and fraud on Attorney Generals Office which renders all judicial proceedings invalid and its indictment null.

In the case of (2016-GS-47-02, 2016-GS-47-03), Mr. Roberts bill of indictment prints that "At a session of the State Grand Jury of South Carolina, convened in Columbia, South Carolina, on April 12, 2016, the State Grand Jurors present upon their oath:, However, additional pieces of evidence [very clearly] settles the matter of the [false] return of defendant alleged indictment. Please see, Correspondence from Court Reporter Manager, Desiree Allen (Court Admin.); Correspondence from Clerk of Court, Mary P. Brown of Berkeley General Sessions Court.

Also brought befae the court for judgment are violatio of SC Code Ann. § 16-9-10, offense against public justice and SC Code Ann. § 16-17-410.

(Offense Against Public Justice)

S.C. Code Ann. § 16-9-10 - Perjury and subornation of perjury, states in pertinent part: A(2) "It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record, or report, or form required by the law of this state. B(2) "A person who violates the provisions of subsection A(2) is guilty of a misdemeanor, and upon conviction, must be imprisoned not more than six (6) months, or fined not less than 100 dollars, or both.

(Brief 9, page 12)

(C) A person may be convicted under this section . . . if he commits perjury by his own act, consent, or agreement.

Also established in subsection (A), was the fact that "Defendants" indictments were sealed with a true-billed stamp, signed by the Attorney General, and contained false information, incorrectly printed that it had been processed "At a session of the State Grand Jury of South Carolina, convened in Columbia, South Carolina, on April 12, 2016 the State Grand Jurors present upon their oath" . . . However, the State Grand Jury [had not] convened to consider criminal allegations against defendant. See Court Admin. Correspondence.

This indictment containing false information, and incorrectly printed was also [filed] April 13, 2016 by the Clerk of the State Grand Jury, James R. Parks and stamped "A True Copy" "Attest" James R. Parks, Clerk, by Deputy Clerk, Margaret Self.

It should be noted that a criminal indictment is a document required by the law of this state. In Gentry, our Supreme Court determined that an indictment is a notice document [required] by state constitution and statues. See S.C. Constitution, Art. 1. § 11; Art. 5. § 22, and S.C. Code Ann. § 17-19-10, which states: "no person shall be held to answer in any court for an alleged crime or offense unless upon indictment by a grand jury, except in specified instances.

Thus, Mr. Roberts "true-billed" indictment [satisfies] the provision of § 16-9-10 (A) (2), perjury, that specify the false information must be included in a "document [required] by the law of this state.

Prosecutorial Misconduct Claim (Brief 9, page 13)

When asserting a prosecutorial misconduct claim, a defendant bears the burden of showing (1) that the prosecution engaged in improper conduct, and (2) that such conduct prejudiced the defendant's substantial rights so as to deny the defendant a fair trial. U.S. V. Alerre, United States Court of Appeals, Fourth Circuit 430 F.3d 681.

The A.A.G.'s for the State engaged in improper conduct when (1) material evidence was withheld in violation of Brady, becaus undisclosed information that defendant's case had not been in front of a grand jury raised reasonable probability of different result; (2) the prosecution's unlawful indictment process, and subsequent criminal acts, resulted in an illegal grand jury, void indictment, and a violation of every component of the Due Process notice requirement owed to defendant by this State; (3) defendant was accused of crimes not investigated by grand jury, and A.A.G.'s allowed government agents to make false and misleading statements prejudicing defendant; Prosecutor encourage false testimony; (4) A defendant is entitled to review empanelment documen in order to determine whether the state grand jury which indicted him was [legally] established or suffered from any lesser irregularity (Evans V. State, 363 S.C. 495, 513, 611 S.E. 2d 510 (2005)), yet despite this substantial [right], and in violation of Rule 5(d), SCCrimP. defendant was [denied] impanelment documents prejudicing defendant's preparation of a defense, (Tr. Page 15, Lines 5-25); (5) "defendant has been prejudiced, i.e., taken by surprise and hence unable to combat the charge against him." (State V. Baker, Supreme Court of South Carolina, Feb. 11, 201 411 S.C. 583.

Prejudice (Brief 9, page 14)

Defendant suffer's continuing consequence's as a result of an unlawful conviction when prosecutor's misconduct [prejudiced] defendant's right to §17-19-10. (Offense shall be prosecuted upon grand jury indictment.); and §14-7-1750. (Indictment by state grand jury), ("In order to return a "true bill" of indictment, twelve or more state grand jurors [must] find that probable cause [exists] for the indictment and vote in favor of it.). Defendant was [prejudice] his legal rights pursuant to Art. 5 §22 ("The grand jury of each county, and the state grand jury, as the General Assembly may establish by general law, shall consist of eighteen members, twelve of whom [must] agree in a matter before it can be submitted to the court), and the [fact] that the grand jury "did not exist as a body" violates substantial due process of law where defendant has a "liberty" interest. In violation of §14-7-1700, [no] court reporter was assigned to record state grand jury proceedings, thereby [prejudicing] defendant's [right] to review and to reproduce the stenographically or electronically recorded materials.

There is no record of state grand jury proceedings as evidenced by South Carolina Court Administration, on date's of defendant's alleged indictments. (See Correspondence from Court Administration dated 10/23/17, 11/6/17) also see, (Indictment number 2016-GS-47-02-03, dated 4/12/16, 4/13/16).

Defendant was [prejudiced] his [right] to challenge whether he was indicted by a legally constituted grand jury in violation of Art. 1 §11 of South Carolina Constitution. (See Tr. July 24-28, 2017, page 15, lines 5-9; page 19, lines 8-16). Defendant suffered [prejudice] and could not "mount or prepare a defense" as a result of the judges "erroneous ruling" denying defendant the state grand jury "impanelment documents" which "don't exist" as evidenced by South Carolina Court Administration dated 10/23/17, 11/6/17. (Emphasis)

Defendant's trial was fundamentally unfair, allowing the presumption of "prejudice" as a result of compromised structural protections of the grand jury.

(Brief 9, page 15)

As there was no evidence put before a grand jury in defeodants case, and no convening of the state grand jury as no court reporter had been assigned to record grand jury proceedings, as evidenced by Court Admin., prosecutor deceived the court and jurors by presenting false evidence to gain unlawful conviction., See, Riddle V. Ozmint, Supreme Court of South Carolina, 369 S.C. 39 "A prosecutor's deliberate deception of a court and jurors by the presentation of Known false evidence is incompatible with rudimentary demands of justice.

At issue are sections 14-7-1720(A) and (D)(defendants right to view and obtain documents); section 14-7-1700(a court reporter shall record stenographically or electronically all proceedings); section 17-19-10(offens shall be prosecuted upon grand jury indictment); section 17-25-10(no perso shall be punished for an offense unless duly and legally convicted...); as well as Art. I. § 11(no person shall be held to answer for any crime unless on a presentment or indictment of a grand jury), the violations of these sections as a result of prosecutors conduct prejudicially affected defendants substantial rights so as to depive him of a fair trial. See, U.S. V. Mills, U.S.C.A. 555 Fed. Appx. 241.

Dismissal of an indictment is justified to achieve either of two objectives; to eliminate prejudice to a defendant or, pursuant to court's supervisory power, to prevent[prosecutorial impairment] of [grand jury's] independent role. Accordingly, A.A.G.'s impaired the grand jury's integrity as an independent body. Since the presence of prosecutorial misconduct is a factual inquiry, a district courts findings on that issue are reviewed for clear error. A.A.G.'s conduct undermined the defendants right to fundamental fairness and due process in the criminal proceedings.

In Conclusion... (Brief 9, page 15)

Prosecutor's misconduct violated defendants Fourteenth Amendment right to due process of law. The incidents related are flagrant and unconscionable. A.A.G.'s for the State encouraged perjured testimony against defendant in order to obtain unlawful conviction. Prosecutor impaired the grand jury's independent role when defendant was held for trial on offense's not investigated by a grand jury in violation of statues and rule. Prosecutors have an ethical obligation strictly to observe the status of the grand jury as an independent body. A.A.G. impaired the grand jury's integrity as an independent body. In violation of the provisions of a State Grand Jury Act, there was [no] court reporter assigned to alleged grand jury proceedings, and thus defendants [right] to challenge whether a legally, constituted, and unbiased grand jury consider the criminal allegations against him was without force or effect, and defendant suffered prejudice from wrongful conviction and unlawful incarceration. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishmer

Prosecutor suppressed the evidence of a state grand jury's [non-existence] as a body on alleged date's of defendants indictments. Defendant requested the impanelment documents in order to demonstrate that "no State Grand Jury had occurred" on dates of alleged indictment. Defendant was denied these alleged impanelment documents because the alleged grand jury proceedings never occurred, and state grand jury [had not] met to consider any crime or offense against the defendant, and yet defendant was held for trial on offenses and wrongly convicted and thus prejudiced suffered from unlawful imprisonment based on prosecutorial misconduct. Defendant request indictment be dismissed with prejudice.

Courts Copy - Original (1 of 3 pages)

Clerk of Court for Berkeley County,
Leah Guerry Dupree

6-29-21

2020-CP-08-01349

Re: Deprivation of 14th Amendment Due Process of Law Right regarding "Subsequent P.C.R. Application". Case number 2020-CP-08-01349 in Berkeley County; South Carolina Supreme Court correspondence dated June 18, 2021; Public Corruption; Freedom from Cruel and Unusual Punishment; Filing of Subsequent P.C.R.; And the dismissal of Initial P.C.R. Case # 2020-CP-08--01349 because of "then" pending direct Appeal ... And the filing of Subsequent P.C.R. Received May 11, 2021 Lieber Mail Room, and filed May 13, 2021 PM 3:26 as a "Amendment" to Case # 2020-CP-08-01349 [in error] as this Subsequent P.C.R. Application # Motions 1-9 are [Subsequent] to intial application dismissed because of Rule 71.1 (Pending Appeal); Conspiracy ...

FILED
21 JUL -6 PM 3:47
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

cc: E.W.P. A.G. B. Limbaugh 7/06/2021

(2 of 3 pages)

Leah Guessy Dupree (Clerk of Court), I am in possession of and have made copies for my family regarding all matters that will be addressed "Criminally" and "Civil".

In a Correspondence from South Carolina Supreme Court dated June 18, 2021 - in which I will present as evidence in future proceedings, the correspondence states in pertinent part:

"This letter is in response to your letter dated April 19, 2021, received by this office regarding the filing of a PCR application. Upon review of the [public index], it appears that your PCR action under case number 2020-CP-08-01349 in Berkeley County has not been dismissed. It appears that your "amended" PCR application was filed on May 13, 2021."

I state that my subsequent application [cannot] be an "amendment" to my initial PCR App. that was dismissed pursuant to Rule 71.1, and is [not] an "amendment" but a [Subsequent] Filing deserving a "separate" case # than 2020-CP-08-01349 (which was dismissed as I have alerted you (Clerk) in previous correspondence's).

Therefore, conspiring with the Attorney Generals Office to deprive Defendant of an [Adequate Remedy] and his [14th amendment] right to [due process of law] you are in violation of § 1983. 42 U.S.C.A. as well as Neglect of Duty.

(3 of 3 pages) Courts Copy

I ask that my [subsequent] PCR & Motions 1-9 [not] be treated or filed as an "amendment" but as a subsequent filing "unrelated" to case # 2020-CP-08-01349 (as that case or app. was dismissed because of pending appeal), and that my procedural rights be respected - your silence equals agreement - your disagreement to my request and the law governing Rule 71.1 equal you as a co-conspirator.

I state that I am being [prejudiced] my right to the Due Process of law pursuant to the 14th Amendment to the United States Constitution.

Please assign seperate case # to My Subsequent Filing as a Subsequent filing along with Motions 1-9.

The Clerk of Court is [Required] to Know and OBEY the legal mandates regarding Rule 71.1 and PCR Applications & Filings.

If I am in error - your reply will constitute guidance and instruction, however I have made multiple copies of [all] my correspondence to you and therefore Adequate Remedy and my 14th Amend. Rights I shall be able to exercise without prejudice.

Please stamp, date, clock & Return
Copy to Mr. Roberts

Sincerely
Emory W. Roberts Jr.

FILED DW

21 AUG -9 AM 10:48

LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

(1.)

State Of South Carolina
County Of Berkeley

In The Court Of Common Pleas
For The Ninth Judicial Circuit

Emory W. Roberts, Jr.
#373393 Applicant

V.

State Of South Carolina,
Respondent

Case No.: 2020-CP-08-01349

Amendment/Attachment To Subsequent Application Pleading/Motion

(Meagan Jamesons July 12, 2021 correspondence and Motion To Partially Dismiss)

Re: Invoke formal discovery processes to issue subpoenas and obtain discovery materials (Impanelment documents, Record of Proceedings, Testimony Of Witnesses); Request leave from the Court upon a showing of good cause; Claims of Ineffective Assistance of appellate counsel - see Subsequent P.C.R. App. (Brief 7) and additional exhibits as well as existing exhibits filed with Subsequent App.; Specify claims he intends to raise at the PCR evidentiary hearing; Structural errors; Subpoena duces tecum; Right to present witnesses; compulsory process to obtain witnesses; "Meagan Jamesons July 12, 2021, Correspondence & "Motion To Partially Dismiss".

Clerk of Court - Leah Guerry Dupree

Please Check, Date, Stamp, File And Return (Exhibits)(Enclosure)

Copy To PCR Applicant, Mr. Roberts,

thank you.

DW

SCANNED

Email NINTH PCR mailER

Invoke formal discovery processes to issue subpoenas and obtain discovery materials (Impanelment Documents, State's petition, Supporting materials, Record of proceedings, testimony of witnesses)

Terms of statue governing the sealing of grand jury records did not impose complete prohibition on release of impanelment documents or other records, such that they had to remain secret forever, removing veil of secrecy after a defendant has been indicted was consistent with legislative intent expressed in statue. Code 1976, § 14-7-1770.

Petitioner asserts he has a [right] to obtain and review the state's petition, supporting materials, Record of proceedings and testimony of witnesses, and the judge's order impaneling the state grand jury which indicted him, as well as [all] subpoenas.

The Court in Evans concluded impanelment documents, including the State's petition, supporting materials, and the impaneling judge's order, may be released to a defendant prior to trial upon timely request or to an applicant in a PCR proceeding. The State may, of course, redact information concerning other persons or matters under consideration by the state grand jury. Release of the documents may be appropriate because (A) Section 14-7-1770 is not a complete prohibition on the release of the information; (B) release of the documents usually is [not] prohibited by secrecy provisions or other concerns following the issuance of a true bill of indictment; and (C) a defendant has the right to review the documents to determine whether to timely challenge the legality of the state grand jury which indicted him. Evans V. State, Supreme Court of South Carolina - April 4th, 2005, 363 S.C. 495, 611 S.E. 2d 510. Removing the veil of secrecy after a defendant has

been indicted is consistent with the [legislative] [intent] expressed in Section 14-7-1770 and the Act as a whole. E.g., Ray Bell Constr. Co. V. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998)("[A]ll rules of statutory construction are [subservient] to the one that the legislative intent [must] prevail if it can be reasonably discovered in the language used, and that language [must] be construed in light of the intended purpose of the statue."); also see, Section 14-7-1720 (A)(5). It must be pointed out here that the Applicant [reserve's] his [rights] pursuant to Section 14-7-1770 and Section 14-7-1720 (A)(5), however, the "possibility" of Petitioners [rights] to these Sections [not] to be infringed, rely's on Respondent action to [not] committ a continuing crime of "Fraud", "Conspiracy Against Public Policy", and "Conspiracy Against Applicant's Civil Rights" - in light of the indisputable fact that "no court reporter was assigned to record "state grand jury" proceedings on date's of defendant's indictments (4-12-16 and 4-13-16), therefore [no] transcript being available - in violation of Section 14-7-1700, as evidenced by Supreme Court of South Carolina (Court Administration) correspondence dated (10-23-17 and 11-6-17)(Emphasis).

Subpoena Duces Tecum

Just as an accused has the right to confront the prosecution's witnesse's for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense; this right [is] a fundamental element of due process of law. U.S. Const. Amends. 6, 14. See also, State V. Inman, Supreme Court of South Carolina; December 28, 2011 395 S.C. 539 "The right to offer the testimony of witnesse's, and to compel their attendance, if necessary, is in plain terms the

right to present a defense, the right to present the defendant's version of the facts... this right is a fundamental element of due process of law. U.S.C.A. Const. Amend. 14. The Sixth Amendment to the U.S. Constitution entitles the accused "to have compulsory process for obtaining witness'es in his favor".

Const. art. 1, § 18, giving to accused compulsory process for obtaining witness'es "in his favor" does not require the court to issue compulsory process for any one the accused may designate as a witness, but there must be a showing that the person wanted is a witness in favor of accused, and that his testimony will be material. State V. Pope, Supreme Court of South Carolina. April 1, 1907 78 S.C. 264.

Accordingly, defendant exercise's his Sixth Amendment right "to have compulsory process for obtaining witness'es in his favor", and request that Ms. Desiree Allen (Court Reporter Manager of Court Admin.) of the Supreme Court of South Carolina be subpoena in regards to her correspondence to defendant dated (10-23-17 and 11-6-17), and that her testimony will be material to defense regarding "indictment" and defendant's [right] to "conduct his own defense as necessary", pursuant to the 6th Amend. to U.S. Const. Ms. Allens testimony will be material also concerning Art. 1. §11, Art. V. §22 and § 14-7-1700 and additional constitutional and statutory violations of Brady and § 14-7-1720(A)(4) and (A)(5); And why her testimony material to "ineffective Assistance of Counsel Claim"

Accordingly, Subpoena duces tecum is hereby directed to witness (Ms. Desiree Allen) regarding above-mentioned matters and defendant's [right] to establish a defense - this right is a fundamental element of due process of law.

Subpoena Duces Tecum Is Hereby Directed To Witnesses Having Control of Records: Assistant Attorney Generals, Joshua Underwood, David Fernandez, and Clerk of State Grand Jury - James R. Parks.

Defendant, exercises his 6th, and 14th Amends. right to offer the testimony of above-mentioned witnesses, and to compel their attendance, if necessary, is in plain terms the [right] to present a defense, the [right] to present the defendant's version of the facts... this right is a fundamental element of due process of law. U.S.C.A. Const. Amend. 14.

These named witnesses testimony will be material to the violations of Section 14-7-1650; Section 14-7-1700; Section 14-7-1720 (A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure; Section 14-7-1750; S.C. Code Ann. §§ 16-9-10, (A)(2); Section 17-19-10; S.C. Code Ann. § 16-17-410; S.C. Code Ann. § 17-25-10; Art. 1. § 11; Art. V. § 22; Brady; Code 1976 § 16-3-910 - Kidnapping; § 16-3-920. Conspiracy to Kidnap; and § 16-5-10. Conspiracy against civil rights.

Accordingly, Subpoena duces tecum is hereby directed to witnesses, above-mentioned, and to secure defendant's [right] to establish a defense - this right is a fundamental element of due process of law.

Testimony will be material to establish a criminal conspiracy to deprive defendant of his liberty interest in violation of the 14th Amend. U.S. Const.

Subpoena Duces Tecum Is Hereby Directed To Witnesses, Christina Bass of South Carolina Law Enforcement Division, Corporal Frederick Samuel of Berkeley County (Hill Finklea) Detention Center, and SLED Agent Justin Wingo.

The above-mentioned witnesses testimony will be material to defendant's false imprisonment, unlawful restraint, and detention of defendant against [his] will, without authority of law, done in furtherance of the object of the conspiracy.

Testimony will be material to typed document (Exhibit F) by Christina Bass, dated June 9, 2016, and testimony will be material to evidence of participation in the conspiracy to Kidnap, Kidnapping, and defendant's depsivation of "liberty" in violation of due process of law pursuant to U.S. Const. Amend-14.

Issues Raised At Trial And Prejudiced By Ineffective Assistance of Appellate Counsel.

A post-conviction relief application cannot assert any issues that could have been raised at [trial] or on "appeal". Drayton V. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Respondent [concedes] that Applicant had raised these issues prior to trial and during trial. (See Respondents Amended Return And Partial Motion To Dismiss The Application For Post-Conviction Relief (Page 8 of 11-Bottom)) ("Here, as Applicant raised these issues prior to trial, he could have raised these issues on direct appeal). On page 9 of 11, Respondent states: "The failure to do so has waived this allegation as grounds for relief." Respondent then cite's - Stepney V. State, 278 S.C. 47, 292 S.E.2d 41 (1982) (issues that could have been raised on direct appeal cannot be considered on PCR application "absent claims of ineffective assistance of appellate counsel"). Applicant directs the Courts attention to PCR Application that was

Filed May 13, 2021 PM 3:41 (Page 3, Question 10)(Brief 7), where Applicant" raises claims" of "ineffective assistance of appellate counsel", also see., accompanied with Application-(Brief 7.) (Emphasis); Also see., Correspondence from... The South Carolina Court of Appeals dated June 14, 2019 (Enclosed); Correspondence by Applicant dated June 5, 2019 and stamped "Received June 11, 2019 by SC Court of Appeals, where Applicant "pleads" with SC Court of Appeals, Appellate Defender Susan B. Hackett, and the South Carolina Supreme Court to review: 1.) Constitutional Claims., 2.) Conduct Hearing on Sufficiency of Evidence, 3.) Freedom From Cruel and Unusual Punishment, 4.) Right to "Confrontation" pursuant to U.S. Const. Amend. 6 regarding "chain of custody",; 5.) Subject Matter Jurisdiction/Insufficient Evidence,; 6.) Right to Effective Assistance Of Counsel; 7.) Due Process Violations regarding Art. 1. § 11 and Art. 5. § 22; 8.) Violation of due process of law regarding §§ 14-7-1700, 14-7-1750, 14-7-1720 (A) and (D), 14-7-1770, 17-19-20; 9.) Violation of Brady V. Maryland, and Rule 5; 10.) Violation of "Confrontation" regarding co-defendants out-of-court statements; Also see.) correspondence by Applicant dated June 3, 2019., and stamp "Received June 6, 2019 by SC Court of Appeals; See also., "Petition for Redress of Grievances" dated May 20, 2019 addressed to South Carolina Supreme Court, but forwarded to SC Court of Appeals (Emphasis). Accordingly, Applicant's claims of "Trial Court Mis--conduct should be considered in PCR Application Filed May 13, 2021 in light of: 1.) Raised Claim of "Ineffective Assistance of Appellate Counsel, and 2.)" Pursuant to S.C. Code Ann. § 17-27-70 and Rule 71.1, SCRCP, the Court dismissed "Initial Application" without prejudice based on Applicants' pending direct appeal, with leave for Applicant to seek post-conviction relief through the filing of a subsequent application once his direct appeal