ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
(Heard in Laurens County)



The Honorable R. Lawton McIntosh, Circuit Court Judge

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Case No. 2009-CP-01-00105

**Appellate Case No. 2013-001076**

Marshall Ray Miller, #249557 . . . . . Petitioner,

v.

State of South Carolina . . . . . Respondent.

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# PETITION FOR WRIT OF CERTIORARI

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Marshall Ray Miller
#248557
Lieber Correctional Inst. SB-56
Post Office Box 205
Ridgeville, South Carolina 29472

Petitioner, Pro se

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## STATEMENT OF THE CASE

On January 21, 2004 petitioner was convicted in absentia, App. 23, lines 12 – 23, and a twenty-five (25) year sentence was sealed, App.111 and 1824. On August 24, 2004, that sentence was opened and pronounced, App. 1827 - 30. On direct appeal his conviction was affirmed by the South Carolina Court of Appeals, *State v. Marshal Miller*, Op. No. 4307 (filed October 19, 2007).[1] This Court denied the petitioner for writ of certiorari on November 7, 2008, App. 1833.

Petitioner then brought this action seeking post-conviction relief in Abbeville County (2009-CP-01-00105) on April 16, 2009, App. 1934 – 1985.

The circuit court, the Honorable R. Lawton McIntosh, denied the application on March 25, 2013. On April 8, 2013, Petitioner filed a timely Rule 59(e) motion to alter or amend the March 25, 2013 order of dismissal, App. 2131 - 2135. On May 5, 2013, the circuit court denied the Rule 59(e) motion, App. 2140 –2141. A notice of appeal was timely filed and properly served on all parties required by Appellate Court Rules.

Petitioner now seeks a writ of certiorari to review this denial.

[1] 372 S.C. 370, 652 S.E.2d 444 (2007) cert. denied

I. **Did the circuit court err in holding petitioner's trial counsel was not ineffective in conceding petitioner's guilt during opening and closing arguments?**

Trial counsel Kim Varner conceded Petitioner's guilt to the jury at the outset of the trial, which removed Petitioner's presumption of innocence and affected the outcome of the trial by making the following statements to the jury during opening arguments:

i. "I submit to you that you won't hear that what he was doing was appropriate or good or part of the, quote, close quotes, synergy, or that even some of his activities were legal. They were illegal and nobody is going to argue that." (Emphasis supplied) App. 253, line 21 p. 254, line 1.

ii. "But there are other things that could happen in which you have got to say, particularly in a drug case, 'Yes, I do drugs,' or 'yes, I might have sold drugs.'" (Emphasis supplied) App. 254, lines 4 – 7.

Counsel re-enforced Petitioner's guilt by conceding his guilt during closing arguments before the jury in the following manner:

i. "You can look at all this other stuff [App. 1687-88], these baggies that somehow did not become baggies, but they are evidence, clearly, the same as words, evidence of these things, that Marshall Miller was engaged in criminal activity, no ifs, ands or buts." (Emphasis supplied) App. 1693, lines 15 - 20.

ii. "Is Marshall guilty of manufacturing crystal meth, probably so. Is he guilty of distributing, probably so." (Emphasis supplied) App. 1695, lines 4 – 6.

iii. "He may be guilty of other crimes, but not the conspiracy." (Emphasis supplied) App. 1696, lines 9 – 10.

iv. "I'm not asking you to look at whether or not Marshall Miller is innocent. He is certainly by no means that." (Emphasis supplied) App. 1700, lines 13 – 15.

In the State's closing argument, Assistant Attorney General Robert Hood referenced [App. 1738, lines 13 – 20 "remember Mr. Varner's closing arguments? He

said Mr. Marshall Miller may have been in a conspiracy with Tracy Davis, Earnest Covan and Ray Powell. Stop. That's enough."] and relied upon counsel Varner's statements [App. 1695, lines 13 - 20] conceding Petitioner's guilt. Petitioner testified to this prejudice at PCR, App. 2032, and lines 8 - 22.

In any lay juror's mind, indeed, in the mind of any reasonable man, when a criminal defendant's advocate concedes his client's guilt, especially in such a clear and repetitive manner as here, not only is the State's case not subjected to true adversarial testing, but counsel himself acts as a prosecutor for the State.

The Sixth Circuit Court of Appeals has held that "repeated expressions of contempt for his client, for his alleged actions" had the effect of "provid[ing] [Petitioner] not with a defense counsel, but with a second prosecutor. *See, e.g., Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) cert denied, 523 U.S. 1133 (1998).

The United States Supreme Court has held that the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of advocate, *Anders v. California*, 386 U.S. 738 (1967). The Court has also held "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact and element to constitute the crime with which he is charged, *In re Winship*, 397 U.S. 358 (1970).

When, as here, counsel concedes that there is no reasonable doubt concerning a factual issue in dispute, the Government has not been held to its burden of persuading the jury that Petitioner was guilty. *See*: "Marshall Miller was engaged in criminal activity, no ifs, ands, or buts," App. 1693, *supra*, and "I'm not asking you to look at whether or not Marshall Miller is innocent. He is certainly by no means that," App. 1700, *supra*.

In *United States v. Cronic*, 466 U.S. 648 (1984) the Court recognized that there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified, 466 U.S. at 658. The Court identified the complete denial of counsel or the deprivation of the effective representation at a critical stage of an accused's trial as justifying the presumption of prejudice, *id* at 659 - 600.

The Supreme Court has recognized the importance of the opening and closing argument to a criminal defendant, *see Herring v. New York*, 95 S.Ct. 2550 (1975). An attorney who informs the jury that in his view of evidence that there is "no reasonable doubt" regarding one of the factual issues in dispute has utterly failed to subject the prosecution's case to a meaningful adversarial testing, *Cronic, id* at 2047. The Ninth Circuit Court of Appeals has found that a closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one, *see Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2003).

The standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted in South Carolina in *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985), requires an Applicant to show counsel's performance was below professional norms; and that said performance prejudiced the Applicant in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Essentially, where counsel's conduct so undermined the proper functioning of the adversarial process, the trial cannot be relied upon as having produced a just result.

The circuit court's March 25, 2013 Order of Dismissal ("Order") [App. 2118 – 2130] erred in law and fact where it agreed with counsel when counsel testified he "was being rhetorical based on the Applicant's damning statement..." Order p. 2123. The

Court accepted counsel's position that counsel sought to challenge the conspiracy evidence.

Petitioner submits that neither trial counsel nor the circuit court's Order utilized specific nomenclature indicating "trial counsel's goal," Order *Id.* In an abundance of caution, Petitioner submits that trial counsel did not articulate a *valid* reason for employing a certain strategy,[2] *that encompassed conceding Petitioner's guilt*, rhetorical or not. A blanket statement counsel employs "strategy" does not automatically insulate a lawyer from being found ineffective, *see Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002).

The circuit court's reliance (Order, p. 2123) on counsel's talismanic incantation of the word "strategy," in regard to conceding guilt, App. 2086, line 23 – p. 2087, lines 5, 10; p. 2088, line 6; p. 2089, lines 21 – 22; p. 2090, lines 22 – 23; and p. 2091, line 14, was in error where the circuit court sought a reason to lend credence and deference to counsel's subjective justifications for [his] professional errors.

The noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy... must be reasonable, see *Cone v. Bell*, 243 F.2d 961 (6th Cir. 2001), cert granted 535 U.S. 685, 695 – 96 (2002).

The circuit court erred where it assumes that counsel's argument, as a whole, must be considered where counsel quite literally removed Petitioner's cloak of innocence with each statement, and once removed, that cloak cannot be replaced for that particular jury. There is more than enough probative evidence not to uphold the PCR Court's finding that counsel did not concede Petitioner's guilt.

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[2] *See, e.g., Weik v. State*, 2014 WL 3610954 (Sup. Ct. July 23, 2014)

This Court previously found trial counsel ineffective in failing to object to a solicitor's closing argument, *see Vaughn v. State*, 362 S.C. 163, 607 S.E.2d 72 (2004). Thus, logically, trial counsel here was cognizant of the sensitivity of the opening and closing argument to the jury and should have known removing Petitioner's cloak of innocence was an admonition of his client's guilt.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them, *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996). There is no evidence here to support the PCR Court's findings that trial counsel's remarks in opening and closing remarks, which were referenced by the Assistant Attorney General in his closing, App. 1736, did not conceded Petitioner's guilt. Furthermore, this Court should reverse the PCR judge's decision when it is controlled by an error of law, *see, Simpson v. State*, 317 S.C. 506, 455 S.E.2d 175 (1995).

Where the PCR Court's order was based on an objectively unreasonable application of the facts in the record as a whole to the Supreme Court precedent provided in support[3], and the PCR Court provided no legal precedent in support of the error of law, or to supportive probative finding, the PCR Court's order should be reversed.

[3] See Petitioner's April 16, 2009 Post-Conviction Relief Memorandum of Law, (pp. 4 – 8); App. 1945 - 1951

II. **Did the circuit court err in holding petitioner's trial counsel was not ineffective in failing to object to the trial court's constitutionally deficient hybrid reasonable doubt and circumstantial evidence charge and was the circuit court's finding based on an error of clearly established law?**

Following the United States Supreme Court ruling in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990); and based on the Court's ruling in *Holland v. United States*, 348 U.S. 121 (1954); this Court, in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991), cert denied, 503 U.S. 914 (1992), reversed, remanded, and limited the reasonable doubt instruction to be issued in South Carolina to criminal trials to the following:

> "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act."

*Manning*, 305 S.C. at 416, 409 S.E.2d at 375.

The trial court here issued the following hybrid instructions concerning reasonable doubt and circumstantial evidence in part:

> "A reasonable doubt is simply a doubt for which you find to be reasonable." App. p. 1769, lines 24 - 25.
>
> and;
>
> "...[n]ot only must the circumstantial evidence be proved beyond a reasonable doubt, but they must point conclusively, that is, to a moral certainty to the guilt of the accused. They must wholly and in every particular be perfectly consistent with each other and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused." App. 1776, line24 – p. 1777, line 7.

The "moral certainty" language employed herein was the basis of the United States Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. at 41, 111 S.Ct. at 329-330, which rises to a level of constitutional violation when it is combined with other terms in the judge's charge which "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." In *Victor v. Nebraska*, 511 U.S. 1, 114

S.Ct. 1239 (1994), the Court analyzed and corrected their holding in *Cage*, specifically focusing on the "moral certainty" language, 511 U.S. at 10 - 22, 114 S.Ct. at 1245-1250. The *Victor* Court specifically reiterated that the moral certainty language applied in Cage [as here] "was clearly related to the defendant's guilt," 511 U.S. at 21, 114 S.Ct. 1250. Finally, the *Victor* Court reaffirmed *Holland, supra*, insofar as defining reasonable doubt, 511 U.S. 22-23, 114 S.Ct.1251.

Here, the trial court set the bar at an impossible level that "[t]hey must *wholly and in every particular* be *perfectly consistent* with each other and they *must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused.*" (Emphasis supplied) App. 1777, lines 3 - 7; where the burden was not on the State, but the accused. Petitioner submits that the "moral certainty" element of the jury charge invited the jury to convict him on proof below that required by the Due Process Clause.

Petitioner submits that applying this Court's holding that a jury instruction must be viewed in its entirety and not in isolation, that there is a reasonable likelihood the jury applied the improper instruction in [a] way that violates the constitution;[3] the reasonable doubt instruction in question here shifted the burden to Petitioner to completely avail himself of any doubt "wholly and in every particular" (App. 1777, line 3) and to a "moral certainty." (App. 1777, line 2).

Applying the *Strickland v. Washington* analysis counsel's performance was objectively unreasonable in failing to object to a jury charge found constitutionally deficient ten (10) years before Petitioner's trial. The constitutionally impossible standard

[3] *State v. Battle*, 382 S.C. 197, 204, 675 S.E.2d 736, 746 (2009)

set by the trial court's instruction prejudiced Petitioner where the State's burden of reasonable doubt was shifted to Petitioner to defeat with "moral certainty."

The circuit court's Order was based on errors of fact and law where (1) the PCR court failed to conduct a proper analysis of the reasonable doubt charge. And (2) the PCR court erred where it based its finding of law on "this charge has been modified since the Applicant's trial, that modification is not enough to warrant a reversal had trial counsel objected," Order, p. 2125. The holding in *State v. Manning* has remained unchanged since 1992, more than a decade prior to Petitioner's trial and PCR hearing.

The circuit court's Order was based on an objectively unreasonable application of the facts to clearly established law presented in support of the claim and the PCR court neither provided legal precedent to support its finding or correctly applied the facts.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. There is no evidence in the circuit court's Order to support that the trial court's hybrid jury instruction on reasonable doubt and circumstantial evidence did not violate Petitioner's constitutional right to due process. However, there is evidence in the circuit court's finding that the circuit court made an error of law as to whether South Carolina's modification of the reasonable doubt instruction occurred before or, as the circuit court applied here, after Petitioner's trial. There is no evidence to support the court's finding that counsel provided effective representation in failing to object to the deficient reasonable doubt charge.

Furthermore, this Court should reverse the PCR judge's decision where it is controlled by such an error of law.

III. **Did the circuit court err in holding petitioner's trial counsel was not ineffective in failing to object to improper opinion testimony of witnesses not qualified by the trial court to give expert opinions on scientific matters?**

**(a) Witness Constance Sonnefeld**

In a multi-county drug conspiracy case predicated entirely on circumstantial evidence, SLED Agent Constance Sonnefeld, not qualified as an expert witness by the trial court, interjected inadmissible opinion testimony on scientific evidence, without objection by counsel, in part:

> "...[I] believe a five gallon gas container containing some chemicals. There is a bag that contains more chemicals...there is a coffee bean grinder that had some residue in it." App. 305, lines 19 – 25.
>
> "...[t]his was a plastic container that had some chemicals in it." App. 306, lines 11 – 12.
>
> "We just identified it as what I thought it was," *Id*, line 21.

**(b) Witness Ronnie McAllister**

Greenwood County Sheriff's Department Major Ronnie McAllister, similarly not qualified as an expert witness by the trial court, interjected opinion testimony on scientific matters, without objection by counsel, in part:

> "...[a]nd analysis was conducted by SLED and it was deemed to be anhydrous ammonia contained in the tank." App. 445, lines 21 – 23.

Petitioner submits here that Major McAllister's testimony in addition to being improper opinion testimony, was shown to be false when SLED's Forensic Chemist (Quincy Ford) actually testified that there was no way to confirm a presumptive test on the tank, App. 606, lines 3 – 20, that SLED would not ever perform an analysis on that tank, *Id.*

No tests were performed in which Agent Sonnefeld or Major McAllister were qualified as experts to testify. Further, the tank was actually stolen from the Greenwood business in which it was stored, App. 446, lines 17 – 18, yet the tank was still introduced as evidence via photos, App. 449, lines 7 – 10, which was corroborated by the unqualified expert witnesses and lessened the reasonable doubt of Petitioner's innocence.

Major McAllister's testimony again referenced the "anhydrous ammonia tank" improperly identified, App. 449, lines 11 – 14.

> "This bag contained a number of pills, ephedrine based pills such as Sudafed and other antihistamines and cold tablets." App. 450, lines 15 – 17.
>
> "...[p]ills, the red pills, some of them are red and some of them are white." *Id*, lines 20 – 22.
>
> "...[s]ome medicine containers, ephedrine based medicine containers had been burned." App. 458, lines 23 – 25.

Counsel objected at this point as to the expert testimony of how fire burned, App. 459, lines 5 – 7, which implies that counsel was cognizant of whether or not Agents Sonnefeld or McAllister were qualified as experts.

**(c) Opinion testimony and the failure to object**

The trial court erred in the admission of opinion testimony from those not qualified as an expert. Trial counsel failed to provide effective representation by submitting the State's case to true adversarial testing by failing to object to either witness' testimony where not qualified as an expert.

The testimony regarding chemicals and residues in various containers was inadmissible because it was expert opinion testimony. Neither Agent Sonnefeld nor Major McAllister were qualified to provide expert scientific opinion to the jury. Those

portions of Sonnefeld's and McAllister's testimony, *supra*, were improperly admitted without objection by counsel.

The admission of incompetent evidence having some probative value upon a material issue of fact in a case is ordinarily presumed to be prejudicial, *see, Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988); thus, Petitioner submits failure to object in this circumstance constitutes deficient representation by counsel.

A police office "may only testify regarding his direct observations unless... qualified as an expert," *State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985).

The admission of improper evidence is prejudicial if "there is a reasonable probability the jury's verdict was influenced by the [challenged] evidence," *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Petitioner submits that prejudice may be shown where the trial for a drug conspiracy which lacked any drugs as direct evidence is bolstered by the testimony of government officials, not qualified as experts in the field, to place "evidence" of drugs before the jury. Counsel had a duty to enter an objection.

This Court may find refreshed guidance in this area where our Court of Appeals has very recently decided a case of opinion testimony of a non-expert, *see, Fowler v. Nationwide Mut. Fire Ins. Co.*, 2014 WL 3844215 (S.C. App. August 6, 2014).

The United States Supreme Court has held that "the trial judge must ensure that any and all scientific testimony or evidence admitted in, be not only relevant, but reliable," *see Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The Supreme Court has also held that the Sixth Amendment right to confrontation extends to

the giving of expert reports and testimony thereon, *see, Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

Trial counsel's failure to object to the testimony of Sonnefeld and McAllister prejudiced Petitioned where said testimony so infected the trial with unfairness as to result in a denial of due process, *see Donnely v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974).

The circuit court's order is based on an error of fact and law where (1) the trial court did not qualify the witnesses; (2) the testimony was not cumulative to any other evidence introduced by the State; and (3) trial counsel had a duty, under the *Strickland* standard, to object to scientific testimony by non-expert(s), Order, 2123 - 2124.

There is no evidence in this matter, or cited by the circuit court, to support the circuit court's finding that the opinion testimony was cumulative where neither Sonnefeld or McAllister was qualified as an expert or that counsel was not ineffective in failing to object to the unqualified expert testimony. To reiterate, SLED Forensic Chemist Quincy Ford contradicted McAllister's testimony that SLED performed an analysis on "the tank," App. 606, lines 3 – 18.

The circuit court's Order was based on an objectively unreasonable application of the facts to clearly established law presented in support of the claim (App. 1952 – 1956) and the PCR court neither provided legal precedent to support its finding or correctly applied the facts.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. There is no evidence in the circuit court's Order to support that trial counsel's failure to object to unqualified expert testimony did not

violate Petitioner's constitutional right to due process or effective representation.

Furthermore, this Court should reverse the PCR judge's decision where it is controlled by such an error of law.

IV. **Did the circuit court err in holding petitioner's trial counsel was not ineffective in failing to request a suppression hearing for evidence retrieved from Georgia in which the chain of custody was unreliable?**

The constitutionality of evidence seized in a criminal matter must be challenged in a suppressions hearing, *see United State v. Mendenhall*, 446 U.S. 544, 551 (1980); *State v. Abraham*, 395 S.C. 645, 720 S.E.2d 491 (S.C. App. 2011). Hearings are generally required when the legality of the seizure itself, or the person, or the identity of the criminal defendant is challenged, and, as here, the unique question of the jurisdiction of the evidence seized and chain of custody thereof.

In *State v. Blassingame*, 271 S.C. 44, 244 S.E.2d 528 (1978), clearly 20 years before the instant matter, this Court pronounced a bright-line test for when a Fourth Amendment suppression hearing is required in South Carolina. Whenever evidence allegedly obtained by conduct, which violated a defendant's constitutional rights is introduced; the defendant is entitled to an *in camera* evidentiary hearing.

In 2003, Georgia resident Gene Saylors contacted Abbeville Police to report [his] possession of certain items allegedly left with Saylors by Petitioner, App. 543, and lines 12 - 14. These items were eventually retrieved by Agent Sonnefeld and taken to South Carolina to be used in the prosecution of Petitioner.

During testimony, Mr. Saylors indicated that Petitioner sought to conceal the items, App. 537, lines 16 - 22. Mr. Saylors testified the items were left in his possession, at his house, but that when Petitioner left "[I] immediately left with them" to a place "maybe a mile, two miles from my house," App. 540, lines 14 - 19. Mr. Saylors testified the items were left on property whose ownership he did not know, *Id.* Mr. Saylors

testified he did not test the contents of the red jug, App. 541, line 19 – p. 542, line 1, later introduced and referenced by both Agent Sonnefeld and Deputy McAllister.

Saylors testified that Petitioner brought the stored items to his home in August / September of 2003, App. 538, lines 3 - 5. However, Petitioner had been incarcerated since the previous year [September 24, 2002], App. 1886. Without a doubt the party that brought said items to Saylors, if they were not Saylor's originally, cannot be verified, and given that the materials were out of even Saylors' possession, no chain of custody can reasonably be established.

Petitioner submits the seizure; the integrity of the chain of custody, and the reliability of the evidence itself is in question and was subject under the Fourth and Sixth Amendments to have counsel move for a suppression hearing in order to subject the State's case to true adversarial testing.

Quite clearly, Petitioner's Sixth Amendment right to effective representation encompasses a motion *in limine* for suppression of evidence where (1) the legality of the seizure is in question. (2) The person is in question. (3) The identity of the criminal defendant is challenged. (4) The chain of custody from the possessor's receipt; and (5) the jurisdiction of the evidence present unique questions to be settled. Under an analysis applying the *Strickland* standard, at the very minimal, professional norms and objective reasonableness dictate that counsel had a duty to request a suppression hearing and that Petitioner suffered prejudice where this evidence was untested and introduced in violation of the Fourth Amendment without a suppression hearing.

The circuit court's order found that the chain of custody was complete in this matter based solely on Mr. Saylors' testimony and that counsel was not ineffective for failing to challenge the admissibility via a suppression hearing, Order, 2124.

There is no evidence in this matter, or cited by the circuit court, to support the circuit court's finding that support trial counsel was not ineffective in failing to request a suppression hearing challenging the chain of custody of evidence allegedly in the possession of Mr. Saylors. The circuit court's Order was based on an objectively unreasonable application of the facts to clearly established law presented in support of the claim (App. 1965 – 1971) and the PCR court neither provided legal precedent to support its finding or correctly applied the facts.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. There is no evidence to support the court's finding that counsel provided effective representation in failing to request a suppression hearing on the reliability of the chain of custody of the challenged evidence.

Furthermore, this Court should reverse the PCR judge's decision where it is controlled by such an error of law. Fourth Amendment cases should be reviewed with the clear error standard, *see State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).

V. **Did the circuit court deny petitioner access to discovery materials to research and amend federal constitutional claims and did that denial render the PCR hearing an inadequate corrective process?**

Petitioner's trial was a result of the State Grand Jury investigation "Crank Down" (2002-GS-47-0032), App. 2152 – 2153; 2160 - 2161.

Petitioner has diligently and tenaciously sought discovery of materials in possession of the State Grand Jury. Those materials had been withheld under an unconstitutional application of S.C. Code Ann §§ 14-7-1700 and 14-7-1420, to n which he was entitled under *Brady v. Maryland*, 373 U.S. 83 (1963) in order to discover exculpatory evidence or develop issues and theories of defense at trial, on direct appeal, and during collateral review.

Judge Wyatt T. Saunders renewed the original protective order to seal the discovery in this matter on January 6, 2006, Supp. App. 14 - 16.

Following conviction, on October 27, 2006, while on direct appeal, Petitioner sought to have the original protection order rescinded, Supp. App. 9 - 11. On November 2, 2006, Appellate Counsel Robert M. Dudek communicated to Petitioner that Judge Saunders informed counsel that the protective order would not end "until all appellate courts have ruled on [your] appeal. He requested that I instruct you accordingly," App. 2009, lines 7 – 12; Supp. App. 12 - 13.

Mr. Dudek, via the Attorney General's Office, obtained permission for the files to be sent to Lieber Correctional Institution where Petitioner could view them in a controlled setting in the administrative area of the institution, App. 2009, line 23- p. 2010, line 11. However, the State, via Martha Gilmore, Classification Supervisor, interpreted the Protection Order that Petitioner could ***not*** view the files and ***refused to***

***allow Petitioner any access to the files***, (Supp. App. _____). Petitioner was unable to view the material prior to direct appeal.

Following an the Court of Appeals affirming the conviction and sentence on direct appeal and denial of certiorari,[4] and in preparation for post-conviction relief, Petitioner again diligently sought to obtain discovery of the materials denied throughout this case, to ascertain federal constitutional claims for PCR, see March 12, 2012 Motion for Discovery, App. 1993 - 1995.

In response, on October 26, 2012, the Honorable James R. Barber, III, issued a renewed Protective Order that in part provided Petitioner and counsel the legal access to which Petitioner was entitled, but erroneously continued previous protective orders that were no longer authorized by South Carolina statutory law, App. 1998 – 1999.

At the PCR evidentiary hearing on November 30, 2012, the Honorable R. Lawton McIntosh addressed the matter of discovery first, App. 2004, line 14 - p. 2016, line 15. It is uncontested that Petitioner has ***never*** had the opportunity to fully view the Grand Jury materials (or trial counsel's) in which to develop claims. PCR counsel (Compton) stated all that was available from trial and appellate counsel were "letters," App. 2007, lines 6 - 11. PCR counsel informed the Court that "to look at them today" is "not enough time," App. 2008, lines 1 – 3.

Petitioner submits that the lack of a record during this issue [containing multiple off-the-record conferences, App. 2010, lines 12 - 13, (40 minutes in length); App. 2017, lines 21 – 23; p. 2018, lines 7 – 9; and p. 2079, lines 16 – 18] denied Petitioner an inadequate corrective process in which to raise and litigate potential federal constitutional claims where the State intentionally interfered with Petitioner reviewing materials to raise

[4] *State v. Miller*. 375 S.C. 370, 652 S.E.2d 444 (2007) cert. denied

an initial defense under *Brady v. Maryland*, or on collateral review to have this matter preserved for appellate review. The PCR Court limited Petitioner and PCR counsel Compton to approximately forty (*40*) *minutes to review approximately 5,000 to 8, 000 pages* of materials for potential claims, App. 2010, lines 12 - 13. The circuit court's Order merely found Petitioner's discovery motion was "moot as Applicant was given access to all materials related to his conviction and sentence and the motion is dismissed," Order, App. 2119 – 2120. Petitioner suggests PCR counsel Compton sought a continuance to have time to prepare with the materials, App. 2004, lines 7 – 15; p. 2008, lines 14 – 19; p. 2010, lines 20 – 25; p. 2011, lines 11 – 13. Counsel clearly informed the circuit court he did not have sufficient time to view the files, App. 2010, lines 14 - 19; counsel further informed the court that he had only reviewed "one-fourth of the materials," App. 2016, lines 3-4.

It is uncontested, whether hidden behind the veil of secrecy statutes (S.C. Code Ann. §§14-7-1700 and 14-7-1720) or outdated and unconstitutionally applied protective orders, Supp. App. 14 - 16, that the State failed to disclose evidence favorable to the accused, *see Brady, supra.* Additionally, the State failed to disclose "*Brady*" evidence that is in the possession of investigative agencies (State Grand Jury) to which the State had access, *see, Kyles v. Whitley*, 514 U.S. 419 (1995). Further, and at the heart of the matter, the State has failed to provide to the defense material for impeachment of the prosecution's informants, *see Giglio v. United States*, 405 U.S. 150 (1972). Quite literally, the State, under its veil of State Grand Jury secrecy, even at the post-conviction stage has failed to provide confidential records that were material to the defense, *see, Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The State rules of evidence here (§§14-7-

1700 and 14-7-1720) were applied in such a way, even after their statutorily designated time-frame, as to deny Petitioner the right to present a complete defense, *see Holmes v. South Carolina*, 547 U.S. 319 (2006). The circuit court may not ask Petitioner what material was relevant to a claim (App. 2011, lines 9 – 10) if Petitioner was ***never*** given access to the materials to ascertain available defenses, witness impeachments or claims.

Petitioner suggests potential claims or possible impeachments, without full and fair access or discovery, are constrained by the burden of having to disprove the State's case with a blindfold on as to what information the State possesses or conceals.

In *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), this Court perceived that Whipple reviewed what this Court described as "voluminous materials," [479 pages of new materials]. The Court gave Whipple from 10:00 am to 4:00 pm (six (6) hours) to review only 479 pages. Where Whipple's counsel requested a continuance for not being prepared, Whipple himself, upon colloquy with the Court, conceded he was ready to proceed. Petitioner here was not afforded a fraction of the time provided in Whipple to review some twenty (20) times the volume of materials.

In the case of *State v. Orr*, 225 S.C. 369, 82 S.E.2d 523 (1954) the Court gave every consideration to safeguard all the Appellant's rights concerning the record. Here, the circuit court declared [he] saw no issues, (App. 2012, lines 4 – 6; 11 – 15; p. 2012, line 23 – p. 2012, line 1, 11 – 13, and 14 – 15). Petitioner submits that it is not the province of the circuit court to determine the issues for a party, or to make objections for a party *sua sponte*. Petitioner also submits that South Carolina Code Ann. § 17-27-150 vests the circuit court with authority to allow discovery in PCR. The circuit court should protect a non-capital PCR Applicant's rights in a unique situation, as here, ***where no***

***record has ever been made*** of the possible federal claims and where there is a lack of guiding precedent of this particular section (§17-27-150). Upon federal habeas corpus review, the federal court will apply deference and a presumption of correctness to the State PCR Court findings, pursuant to 28 USC. §2254(d) and *Sumner v. Mata*, 449 U.S. 539 (1981); upon which Petitioner would be required to overcome by clear and convincing evidence (28 USC §2254(e) (2)). Plainly, the off-the-record conferences, *supra*, to which Petitioner was not privy, settled matters relating to the question of discovery, which denied Petitioner due process under the Fifth and Fourteenth Amendments to obtain materials for his defense and raise collateral federal claims.

State proceedings are not sufficiently "full and fair" if an indigent prisoner was denied an adequate opportunity to adduce the relevant facts or legal claims, was obstructed by state officials in other ways, as here, or was subjected to otherwise deficient or unconstitutional procedures.

Petitioner, asserting a due process violation under *Brady*, because of the "absences in the record" removing the hearing from a "full and fair opportunity" to present claims, cannot then show the evidence was favorable; ***but*** has demonstrated the material was *always* in possession of the State; that it is material to guilt or innocence or, impeaching of State witnesses. Where this *Brady* violation is evident, post-conviction relief must be granted if there is a reasonable probability the result of the proceeding would have been different, which cannot be demonstrated ***unless*** the material is reasonably disclosed. The question thus is that, "without this impeachment evidence, did the Petitioner receive a fair trial resulting in a verdict worthy of confidence?" *See, e.g., Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006).

Petitioner did not discover until the November 30, 2013 PCR hearing that PCR counsel Compton was allowed access since November 13, 2013, but ***never*** informed Petitioner or made provision to review the material in any manner or form with Petitioner.

The circuit court's order merely found Petitioner's discovery motion was "moot as Applicant was given access to all materials related to his conviction and sentence and the motion is dismissed," Order, App. 2120. Petitioner submits PCR counsel properly sought a continuance to have time to prepare with the materials, App. 2004, lines 8 – 11; p. 2008, lines 1 – 19; p. 2010, lines 20 – 25; and p. 2011, lines 11 - 13, and clearly informed the court he did not have sufficient time to view the files, App. 2011, lines 12 - 13. Counsel further informed the court that he had only reviewed "one-fourth of the materials," App. 2016, lines 3 - 4.

The circuit court's failure to order reasonable discovery of the materials for Petitioner to research and present evidence and federal claims constitutes an inadequate corrective process. It is the "solemn duty of [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims," *see Mooney v. Holohan*, 294 U.S. 103, 113 (1935) and *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Indeed, a state must provide an adequate hearing, when it deprives a person of his freedom, the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface, *see Carter v. Illinois*, 329 U.S. 173, 174 (1946).

There is no evidence in this matter, or cited by the circuit court, to support the circuit court's finding that support the circuit court's decision that the issue was "moot" where Petitioner had "access to all materials related to his conviction and sentence..."

There is a plethora of testimony from Petitioner and PCR counsel that Petitioner was ***never*** given access to certain materials and was thus unable to develop defenses or impeach witnesses at trial or raise federal claims on those matters on collateral habeas review. Petitioner submits that the circuit court finding of mootness is based solely on the circuit court not personally seeing relevance of material to issues [already] raised in the application. The circuit court's Order was based on an objectively unreasonable application of the facts to clearly established law presented in support of the claim and the PCR court neither provided legal precedent to support its finding or correctly applied the facts.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. Furthermore, this Court should reverse the PCR judge's decision where it is controlled by such an error of law.

VI. **Did the circuit court deny petitioner the right to amend and raise a federal constitutional claim that the assistant attorney general misrepresented facts about the State Grand Jury plea process during the *Jackson v. Denno* hearing?**

The circuit court denied Petitioner his right to amend a federal constitutional issue at the state PCR evidentiary hearing. Petitioner sought to raise the issue of ineffective assistance of trial counsel for failing to object to the prosecutorial misconduct. Assistant Attorney General Jennifer Evans (State Grand Jury) misrepresented facts to the trial court regarding State Grand Jury plea procedures during Petitioner's *Jackson v. Denno*[5] hearing for the purpose of supporting and introducing fruits of Petitioner's plea performance (debriefing) to which Ms. Evans reneged, see May 15, 2003 bond hearing transcript, Supp. App. ____, and App. 2026, lines 5 - 11. It was at the May 15, 2003 bond hearing when Ms. Evans originally reneged and trial counsel Varner should have been on notice that the plea being memorialized in writing was an issue, and subsequently, PCR counsel Compton should have known was cognizable on PCR. The issue was presented again in Petitioner's Rule 59(e) motion, Supp. App. 6 - 8. In the very least trial counsel should have requested an *in camera* hearing to determine the testimony regarding the plea process where the resulting prejudice was the introduction upon which the State reneged – which Petitioner submits was Ms. Evans' sole purpose for testifying.

The circuit court failed to allow this issue at the PCR hearing (App. 2026, lines 12 – 16) and thus denied Petitioner a full and fair opportunity for a state court evidentiary hearing to review a dual federal constitutional claim of ineffective assistance of counsel and prosecutorial misconduct.

[5] 378 U.S. 368 (1964)

The circuit court held the only issues to be addressed were those that "were raised in the petition, App. 2026, lines 17 - 18. Petitioner specifically made a motion for the PCR Court to address all issues raised pursuant to S.C. Code § 17-27-80, App. 1984.

Assistant Attorney General Hood (prosecuting), conducted examination of Ernest Covan at trial. Mr. Hood asked Covan when was the *first time* [he] ever sat down with anybody from the Attorney General's Office or law enforcement and gave a statement. Mr. Covan responded, "*When you all came to Kershaw.*" Mr. Hood asked Mr. Covan if [he] gave a *statement pre pleading guilty*, to which Mr. Covan responded, "*No, sir.*" Mr. Hood then asked Mr. Covan if [he] *ever sat down with SLED* to be debriefed, to which Covan responded, "*No, sir.*" App. 778, lines 16 – 25.

Ms. Evans testified at the *Jackson v. Denno* hearing that "the only time we ever make plea offers is when we send out a formal written plea offer," App. 138, lines 9 – 10.

Ms. Evans' misstatements of material facts were quite literally used to obtain Petitioner's conviction. This has been clearly established law for decades, *see, Berger v. United States*, 295 U.S. 78 (1935), of which the parties were aware. Indeed, Ms. Evans knowingly used perjured testimony to help obtain a conviction and prejudice to the Petitioner resulted, *see, Napue v. Illinois*, 360 U.S. 264 (1959).

At trial, Mr. Varner stated that Ms. Evans misrepresented herself, App. 201, lines 22 - 25. Mr. Varner further stated that Petitioner detrimentally relied on the 8 – 12 year representation of the plea deal, App. 209, lines 8 - 11, that Ms. Evans did not want to go through with the agreement but they wanted to get the fruits of the agreement, and its one or the other, App. 218, lines 7 - 13. Mr. Varner offered, via motion, to produce cell

phone records that the phone conversations between trial counsel and Ms. Evans transpired, App. 84, lines 7 – 11.

In ruling on the *Jackson v. Denno* hearing, the trial court (Judge Saunders) relied on Ms. Evans' misrepresentation to allow the statement into evidence following the broken plea agreement. Judge Saunders held "*this judge is also aware of the policy and procedures followed in such matters as we now are considering, and the court fully and completely embraces the testimony of Assistant Attorney General Jennifer Evans with regard to there is no plea agreement offered to any defendant until after that defendant has been debriefed.*" App. 219, line 19 – p. 220, line 1.

Trial counsel had an absolute duty to subject the State's case to adversarial testing where the State's prosecuting agent, Assistant Attorney General Jennifer Evans, exhibited misconduct by intentionally misrepresenting the facts of the State Grand Jury plea process to the trial court during Petitioner's *Jackson v. Denno* hearing. Ms. Evans used the fruits of Petitioner's bargained-for debriefing as evidence against Petitioner at trial. The hearing considered debriefing statements Petitioner provided in exchange for the 8 – 12 year plea offer, which was reneged and now being used as Petitioner's "confession" at trial. Counsel's failure to object to Ms. Evans' prosecutorial misconduct fell below objectively reasonable professional norms. Petitioner suffered the ultimate prejudice in having statements provided in the agreed upon plea agreement used to convict [him] where counsel failed to provide assistance at a critical stage. This transcends even the *Strickland* analysis and should be analyzed under the constructive abandonment by counsel under the standard in *United States v. Cronic*, 466 U.S. 648 (1984).

The standard of prosecutorial misconduct where the conviction was obtained as a result of such conduct [as Ms. Evans', here] falls under the clearly established law of *Darden v. Wainwright*, 477 U.S. 168 (1986).

There is evidence to show that Assistant Attorney General Evans misrepresented the facts to the trial court to prejudice Petitioner at the *Jackson v. Denno* hearing, with counsel's knowledge, and counsel failed to object.

Petitioner is prejudiced where he is denied the "full and fair opportunity" to raise and litigate this matter in the PCR court, disallowing appellate review and federal habeas corpus review of the federal constitutional claims, *see State v. Finklea*, 255 S.E.2d 447 (1979). An inadequate state corrective process arises where the State provides no post-conviction means of raising all or certain kinds of federal constitutional institutions, *see Young v. Ragen*, 337 U.S. 235 (1949). Thus, there is no evidence to support the PCR Court's failure to allow this issue to be raised on PCR.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. There is no evidence to support the circuit court's ruling not to allow this federal constitutional issue to be raised on post-conviction relief. The circuit court's ruling was objectively unreasonable where it failed to allow the amendment, identify the correct legal principle or precedent involved; and extend it to the facts of the issue herein. This Court should reverse the PCR judge's decision where it is controlled by such an error of law, the failure to allow litigation of federal claims on state post-conviction.

## VII. Did the circuit court deny petitioner the right to amend and raise a claim of ineffective assistance of counsel when trial counsel failed to secure the plea agreement in writing?

The issue of the voluntaries of the plea in this matter has previously been the subject of this Court's opinion.[6] Petitioner sought to raise the matter of counsel's failure to secure the contested plea in writing for Petitioner's benefit as a denial of the Sixth Amendment guarantee to effective representation. Petitioner was denied his right for a full and fair opportunity to raise this federal constitutional issue in the post-conviction court,[7] which is given deference and a presumption of correctness on federal habeas review, thus rendering this state PCR hearing an inadequate corrective process. The matter was properly before the court on a motion to alter or amend, App. 2133, and was denied by Judge McIntosh, App. 2140 – 2041.

Trial counsel should have protected Petitioner's rights at this critical stage by ensuring that the negotiated plea agreement was memorialized in writing, based on the factors: 1) the nature and depth of the State Grand Jury investigation in this case. 2) The level of cooperation of Petitioner required, and 3) the oral conversation(s) / agreement(s) between Assistant Attorney General Jennifer Evans and counsel Kim Varner, which resulted in an oral 12 year plea agreement, *see, e.g., Spoone v. State*, 379 S.C. 138, 465 S.E.2d 605 (2008) and *Narcisco v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012).

On cross-examination Assistant Attorney General Hood, reviewing the issue of the plea offered by Ms. Evans, asked Varner if it wasn't important enough to send a letter in writing, App. 207, lines 20 – 22. Mr. Varner responded "You know, when you trust someone's integrity and someone vouches for it, no. You know what, I made a terrible

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[6] *State v. Miller, supra*

[7] *Finklea v. State, supra; Mooney v. Holohan*, 294 U.S. 103, 113 (1935); *Murray v. Carrier*, 477 U.S. 478, 489 (1986)

mistake by trusting somebody." *Id*, lines 23 – 25. Mr. Hood asked Varner if he received the plea agreement in writing, App. 208, lines 1 – 2, to which Varner responded "Some three months later I got a plea offer that was totally contrary to what we had discussed, Id, lines 3 – 4.

Mr. Varner's failure to secure the plea in writing fell below objectively reasonable professional norms under the *Strickland* analysis and the resulting prejudice was that under contract principles, Petitioner detrimentally relied upon the plea offer from Assistant Attorney General Evans conveyed by Mr. Varner to provide the statements as performance. When the State reneged on the eight to twelve year plea and Petitioner proceeded to trial, the State subsequently introduced the bargained-for statements. During the *Jackson v. Denno* hearing, Assistant Attorney General Evans misrepresented the facts of the plea process and the trial court found the bargained-for statements voluntary and admissible as confessions. Had trial counsel secured the plea in writing, the State would have been required by the Court to specifically perform the contract.

The circuit court's Order dismissing the Rule 59(e) motion did not specifically address the issue under S.C. Code Ann. §17-27-80.

There is no probative evidence to support the circuit court's lack of a factual finding on this violation under *Santobello v. New York*,[8] or whether trial counsel was ineffective for not securing the plea agreement in writing, to where Assistant Attorney General Evans intentionally misrepresented facts into the trial record at the *Jackson v. Denno* hearing.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. There is no evidence to support the circuit court's

[8] 404 U.S. 257 (1971)

ruling not to allow this federal constitutional issue to be raised on post-conviction relief. The circuit court's ruling was objectively unreasonable where it failed to allow the amendment, identify the correct legal principle and precedents involved, and extend those principles to the facts of the issue herein. This Court should reverse the PCR judge's decision where it is controlled by such an error of law, the failure to allow litigation of federal claims on state post-conviction.

## VIII. Did the circuit court deny petitioner the right to amend and raise a federal constitutional claim of personal jurisdiction where both the United States Bureau of Prisons and the State of South Carolina forfeited jurisdiction over petitioner's sentence(s)?

The circuit court denied petitioner his right to amend a federal constitutional issue where Petitioner sought to raise the issue of the personal jurisdiction of federal versus state jurisdiction of his person and sentence. The circuit court held the only issues to be addressed were those that "were raised in the petition, " App. 2026, lines 13 - 14. Petitioner made a Rule 59(e) Motion (Ground One), App. 2131-2135, attempting to have the PCR Court alter or amend the March 25, 2013 Order of Dismissal. Judge McIntosh subsequently denied the Rule 59(e) Motion, App. 2140-2141.

Petitioner was denied his right to a full and fair hearing opportunity to raise this federal constitutional issue in the PCR Court,[9] which will be given deference and a presumption of correctness on federal habeas review, which must be rebutted by clear and convincing evidence. The circuit court barring amendment and litigation of this claim renders this post conviction hearing an inadequate corrective process as no record is made to rely upon at certiorari or federal habeas review.

Petitioner was arrested in South Carolina on September 24, 2002 on State Grand Jury Indictment 02-GS-47-32, App. 2152-54, 2160-61. Petitioner was tried *in absentia*, App. 23, lines 12 – 23.

On February 16, 2004, Petitioner was apprehended in Burke County, Georgia on Georgia state charges. On or about August 23, 2004 SLED Agent Chester Braggs transported Petitioner to Greenwood County, South Carolina. On August 24, 2004, Judge

[9] *Finklea v. State, supra; Mooney v. Holohan*, 294 U.S. 103, 113 (1935); *Murray v. Carrier*, 477 U.S. 478, 489 (1986)

Wyatt T. Saunders opened and pronounced the sealed sentence of twenty-five (25) years in the South Carolina State Penitentiary, App. 1827 - 1831.

Prevailing South Carolina law specifically states that a sentence begins from the date of pronouncement, *Crooks v. State*, 326 S.C. 171, 485 S.E.2d 374 (1997), South Carolina Code Ann. §24-13-40 (c) (Supp. 2012).

While Petitioner was serving his South Carolina sentence, without any extradition authority, the State of South Carolina relinquished Petitioner, thus terminating and satisfying his South Carolina State sentence of 25 years for Indictment 02-GS-47-32.

Upon return to Georgia, Petitioner discovered that federal authorities had taken jurisdiction of Georgia state offenses. See Supp App. 1.

Petitioner entered a plea of guilty to possession of a firearm by a convicted felon in the 11th Circuit Federal District Court on December 6, 2004, Supp. App. 4, and Entry # 7. That plea was accepted on February 22, 2005, *Id* and Entry # 8 and Petitioner was sentenced to a term of 188 months in the Federal Penitentiary, to be served consecutively to his South Carolina sentence, *Id* and Entry # 10. Petitioner was remanded to the custody of United States Marshals for commencement of his federal sentence where South Carolina had relinquished jurisdiction, *Id* and Entry # 12.

Petitioner was placed in the federal holding facility at McDuffie County Detention Center in Thompson, Georgia for approximately two (2) months, after which Petitioner was transported to the Atlanta Federal Penitentiary. After five (5) weeks in Atlanta, Petitioner was ***"designated"*** by the United States Attorney General and the Bureau of Prisons (BOP) to be transported by United States Marshals to Ashland Kentucky FCI to *begin* [his] federal sentence, pursuant to 18 USC §3585(a), *Id*. Upon

arrival at Ashland Kentucky FCI, Petitioner was processed and placed in population *to begin commencement* of his federal sentence.

Approximately eight (8) weeks after Petitioner's federal sentence commenced, the United States BOP relinquished jurisdiction to the State of South Carolina.

Pursuant to 18 USC § 3585(a) the ***sentence*** of a person convicted of a federal offense ***commences to run from the date on which the person is received at the penitentiary***. Section 3585(a) is recognized by the Fourth Circuit Court of Appeals in *Thomas v. Whalen*, 962 F.2d 358 (4th Cir. 1992) and by this Court in *Robinson v. State*, 395 S.C. 65, 495 S.E.2d 433 (1998) and *Clark v. State*, 468 S.E.2d 653 (1996).

In a case such as this, once jurisdiction has been relinquished, the federal (and in this case, South Carolina) conviction is satisfied and there is no continuing jurisdiction, *see Jones v. Rayborn*, 346 S.W.2d 743 and *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937).

Once Petitioner was designated, he cannot be compelled to serve his sentence in a piecemeal fashion, *see Ponzi v. Fresseden*, 258 U.S. 254 (1922).

Simply placed, once South Carolina, and subsequently, the United States, respectively, relinquished jurisdiction of Petitioner from his sentence[s], Petitioner's federal and state sentences are both satisfied and Petitioner is now held unlawfully.

The exercise of extraterritorial jurisdiction implicates the State's sovereignty, a question so elemental that courts have held it cannot be waived by conduct or consent.[10] Territorial jurisdiction is a fundamental issue that may be raised by a party or by a court at any point in the proceeding. This is a question of jurisdiction immune to the holding of

[10] *See* S.C. Code Ann. §1-1-10 (Supp. 2003) ("The sovereignty and jurisdiction of this State extends to all places within its bounds...")

*United States v. Cotton*, 535 U.S. 625 (2002) and followed in South Carolina by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2004).

The circuit court's Order dismissing the Rule 59(e) motion did not specifically address the issue under S.C. Code §17-27-80, App. 2140 - 2141.

There is no probative evidence to support the circuit court's lack of a factual finding on South Carolina and the United States relinquishing jurisdiction of Petitioner *in personam* and of their respective sentences.

This Court should not uphold the findings of the PCR Court where there is no probative evidence to support them. This Court should reverse the circuit court's ruling to make factual findings on the record. The circuit court's ruling was objectively unreasonable where it failed to allow amendment, identify the correct legal principles and precedents involved, and extend these principles to the facts of the issue herein.

## CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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October 14, 2014

**PETITIONER**, *Pro se*

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Abbeville County
R. Lawton McIntosh, Circuit Court Judge

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MARSHALL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001076

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CERTIFICATE OF SERVICE

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I certify that a true copy of the *pro se* petition for writ of certiorari and a copy of the second supplemental appendix in this case have been served on Ashley A. McMahan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of October, 2014.

for Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of October, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.