

Due to the fact that this Institutional
[Lieber Correctional] and all state institutions
was locked down due to the Hurricane Irma,
I was unable to mail my response by the 11th
and hereby mail it at my first opportunity. I
pray that this Honorable Court accept and consider
these issues that are very important to my
case that shows the violations of my constitutional
rights. I thank you in advance for your help
in this matter.

RECEIVED

SEP 18 2017

S.C. SUPREME COURT

A handwritten signature in black ink, appearing to read "Gwin", is written to the right of the court's receipt stamp.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
HONORABLE ROBERT E. HOOD CIRCUIT COURT JUDGE

ALBERT J. CAVE Jr.
PETITIONER,

V.

STATE OF SOUTH CAROLINA
RESPONDENT,

APPELLATE CASE NO 2016-'002383

PRO SE RESPONSE

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SEP 18 2017

S.C. SUPREME COURT

I ALBERT J. CAVE #189002, by way of "PRO SE"
hereby submit this memorandum in response to the
Johnson petition filed by my attorney Mr. David Alexander.
I submit this response with issues I believe this court
should consider in my appeal. The order of dismissal was
prepared by the Attorney General's office and the order
contains erroneous facts of findings and it fails to make appropriate
findings of fact with respect to each issue presented. The
order of dismissal is without evidentiary support and my
attorney failed in his duty to recognize these issues as valuable
issues with merits for appeal. I pray that this honorable
court consider these issues that are truly prejudicial to
this case.

ISSUE #1

The Court Abused it's discretion when the Court denied my application with it's ruling being without evidentiary support. See STATE V JENNINGS, 394 S.C. 473, 477-78, 716 S.E. 2d 91-93 [2011]. The evidence and testimony presented in this case is from the record of a prior burglary arrest which I was acquitted on after being found not guilty at trial. To mention or use any evidence of that prior burglary arrest is prejudicial "per se" and shows prejudice against me by the prosecution in connection to that prior charge, that involves the victim a former solicitor of their office [the Second Circuit Solicitor's Office]. The trial court held an evidentiary hearing on the admissibility of this evidence, but failed to conduct a on the record balancing test to determine the probative value of this evidence, which is substantially outweighed by the danger of unfair prejudice. The court erred when it failed to grant my application and remand my case back to the trial court to conduct a meaningful analysis to balance the impeachment value of these prior charges against the prejudicial impact as clearly required under Rule 609.(a)(1). "339 S.C. 333, 344, 529 S.E. 2d 71-76 [4 App 2000] See also STATE V CALE, 337 S.C. 622, 629, 525 S.E. 2d 246, 249 [2000]. See also STATE V GORE, 283, S.C. 118, 121, 322 S.E. 2d 12-13 [1984]. And also - STATE V HOWARD, 394 S.C. 212, 223, 682 S.E. 2d 42-48 [4 App 2009]. I WAS UNLAWFULLY ARRESTED FOR

that charge that still persist against me today in this case. Plaintiffs exhibit 3 shows that the court [Judge ERMU] found and ruled that I was correct and this evidence should have been destroyed pursuant to the statute 17-1-70. He allowed the state to use the evidence that was obtained after my arrest from the fruit of the poisonous tree, but he failed to consider the prejudicial impact that this evidence and testimony has against me and this case. The Attorney General stated in his opinion under the statute 17-1-70 of the S.C. Code of Laws that all law enforcement agencies must destroy all evidence of that record and cease the dissemination of information concerning that prior charge. The state failed to destroy all evidence of that charge. And the state failed to cease giving out information pertaining to that prior burglary charge. Page 90 line 21-25, shows that I testified that I understood that the PCR court couldn't make these evidentiary decisions but did ask the court to grant my application to have someone look into this issue which the court failed to do, which denied me the opportunity to show the prejudicial harm this evidence and testimony has against me and this case that violates my constitutional rights of due process and my right to have a fair trial.

I pray that this honorable court remand my case back to the trial court to conduct an in the record balancing test which it erred by not considering.

Issue #2

the Court erred and abused its discretion when the Court denied my application with its ruling being without evidentiary support. See STATE v. JENNINGS, 394 S.C. 473, 477-78, 716 S.E. 2d 91-93 [2011]. The evidence presented at court recuses the Second Circuit Solicitor's office from prosecuting this case. The prosecution violated a court order and unlawfully prosecuted me for this charge that is alleged to be related to the charges listed in the order of recusal. Not only is this charge alleged to be related to that charge, but this charge is also a part of that same pattern of criminal activity that is listed in the court order, that also included that prior Burglary charge. The Second Circuit Solicitor's office did not have jurisdiction to prosecute this case. [See Plaintiff's exhibit]. The State challenged the validity of the order by violating it. See, e.g., US v. MARQUADO, 149 F.3d 36, 42 [1st Cir 1998] (even when party challenges state as unconstitutional or vague, court order carries initial presumptions of validity until challenged through established procedure). See also, Harris v. STATE of Philadelphia, 47 F.3d 1333, 1338 [3rd Cir. 1995] (even when party believed court order incorrect, absent stay, party must follow order pending appeal). See also, US v. CUTLER, 58 F.3d 825, 832 (2d Cir 1995). [Even when court order violated 1st Amendment and was transparently invalid, party could not challenge order by violating it without making good faith effort to seek emergency relief]. The court stated that it could not recuse the Second Circuit Solicitor's office, but failed to remand my case back to the trial court to hold an evidentiary hearing on this order of recusal. The collateral bar rule requires that a party must follow the court order and cannot challenge it by violating it. USC § 401 [Failure to follow court order constitutes contempt punishable

by FINE OR IMPRISONMENT]. The Court Order of Recusal is a void court order that makes the judgement of this case void! The Court Order of Recusal Evidence introduced at hearing shows that my 5th, 14th Amendments of the U.S. Constitution And Art I S. 2. Constitution Due-Process, was violated. PLAINTIFF believes the Prosecution prosecuted him with Prejudice And bias in connection to the Prior Burglary charge that's listed in the order. PLAINTIFF strongly believe that if he was prosecuted by the agencies listed in the order, he would have received a lesser plea deal, or a fair trial heard by a tribunal with the power to decide this case. its plain error to see that my rights were violated by the state when the second circuit solicitors prosecuted this charge. the court erred when the court failed to grant my application to allow me the opportunity to be heard by a fair tribunal who has the authority and power to decide this case which is my constitutional right of due process. the second circuit solicitor's office received a copy of this order when the order was granted. Page 147, LN. 12-14 shows that Counselor testified the he did not know whether the charging of Prosecution would have been advantageous or not, he don't know. the court erred when it denied my application when the evidence proves this issue.

Issue # 3

The Court also erred when the Court denied my Application with its erroneous findings of fact.

The Court found the testimony of Solicitor to be credible and persuasive. It applied those testimonies in its decision to deny Application. Solicitor gave false and misleading statements under oath, his conduct defies the authority and dignity of the Court and thus making the Court's finding of facts erroneous.

Solicitor Miller testified that he and Attorney Mr. Hayes made the argument [of the motion to suppress] at a pretrial hearing before my trial and at my trial. He testified that Judge Early said no, I'm not suppressing the finger-prints. See [Pg 99, LN. 23-25, Pg 100 LN. 1-2]

He testified on Pg 100 LN 12-14, that Judge Early said I was not entitled to have the fingerprint-card expunged. This is a false statement which Court records will show that this issue was never argued until after trial. Attorney Hayes testified that he never made them motions. See - Pg. 126 LN 14-16].

Solicitor stated that Judge Early ruled that the evidence came in at trial.

Subsequently Mr. Hayes was relieved as counsel.

Solicitor Miller committed perjury when he gave these false statements under oath. His testimony misled the Court in its ruling.

Solicitor also stated on Pg. 108 LN. 10-16, Judge Early -- when the motion was made at trial [which it wasn't]

Judge EARLY didn't issue a written order but because it had come up so much, by the time he heard it again for the plea he actually issued a written order. A false and misleading statement. Solicitor also gave false testimony when he stated that he did not know that the initial match to the prints came from that 2008 arrest card. See [Pg. 121 LN 20-22]. PLAINTIFFS Exhibit 3, Footnote proves that the solicitor did know that match came from the 2008 burglary arrest, and the state did not contest the fact that it came from that card.

Solicitor Miller also gave false statements when he testified that he didn't know about the order of recusal when the evidence shows that a copy of the order was provided to the second circuit solicitors office when that office was recused in 2008. The false testimonies given by solicitor was erroneous and thus making the courts findings of fact erroneous.

ISSUE #4

The Court erred when the Court denied my application for ineffective of counsel for not making the proper motion of suppression.

The State admitted that the fingerprint card that it used to match me for this charge was from the arrest record of my 2008 burglary charge. This evidence was illegally obtained in violation of the State Statute Section 17-1-40 of the S.C. Code of Laws. Counselors failure to seek suppression of the illegally obtained evidence in violation of statute was prejudicial because the evidence would have been excluded had he made the motion. Plaintiff's Exhibit 3 shows that the Court Judge Early found and ruled that I was correct and that fingerprint card from my 2008 burglary arrest should have been destroyed pursuant to the statute when I was acquitted of that charge. He allowed the state to use the identification evidence obtained after my arrest, but ruled that the print card should have been destroyed. The same ruling the court would have made according to law if counselor had made the proper motion. Counselor testified on pg 149, line 5-7 that without this evidence, the state had no case. Prejudice was established. To mention that prior burglary arrest is prejudicial "per se" and is grounds for dismissal as stated by the

Attorney General who stated in his opinion under the statute 17-1-10 that all law enforcement agencies must cease giving out information concerning that charge. It is against the law for the state to mention or use any evidence of that record in a court of law against me. Counselor's failure to make the proper motion to suppress that fingerprint card from my 2008 burglary arrest was ineffective and prejudice was established. Therefore the court erred when it denied my application for this issue which is prejudicial to this whole case. It is plain error that on record that my constitutional right to have effective assistance of counsel was violated.

I would also like to note; that in the court order of dismissal, the order stated that I made the motion to deny those prints and was denied. All court records will show that a motion was never made to suppress that fingerprint card from my 2008 burglary arrest. The only motion made was made to suppress the identification evidence that came after my arrest. In that order the court ruled I was correct and my counselor's failure to seek suppression of that evidence was ineffective and it effected the outcome of my case which would have been different had he done so.

ISSUE # 5

The Court erred when the Court denied my application for ineffective OF ASSISTANT Counsel for his failure to properly handle my appeal.

See. *Salis v. US*, 252 F.3d 289, 295 - (3rd Cir 2001). (if counsel did not honor defendant's request for appeal, 6th Amendment right to counsel was violated). The record of defendant's plea transcript shows that defendant wanted and was concerned about his appeal see [Page M, line 1-6]. Counsel had discussion with defendant about his appeal. The appealant records will show that counsel did file appeal for defendant but fail to properly handle appeal hearing to defendant's appeal being dismissed. The record will show that counsel tried to get appeal a new hearing which was denied due to him not properly responding with issue to show why appeal should grant his motion. Counselor failed to give defendant the appeal that he is entitled to, and was concerned about. The PCR Court refused to address issues introduced in his application because the issues was not raised on appeal. Defendant was denied his right to prove prejudice on the behalf of the prosecution who prosecuted this with misconduct that's connected to the prior Bureau change that involves their office.

The Record will show that the State do not contest the fact that the fingerprint card it used to arrest and indict me for this charge is from the record of my prior 2008 Burglary - Arrest. This act is in violation of the State law. Once the prosecution mentioned that prior charge it prejudiced this whole case along with the evidence they used from that charge. The State violated my right to due process which the PCR court dismissed with prejudice. Counsel testified that he did not recall whether he filed or whether defendant filed. The Record will show that he filed but his failure to do so correctly had the appeal dismissed denying defendant his right at appeal.

The court erred when it denied application for ineffective assistance of counsel when all records prove that counsel did not honor defendant's request for appeal. His failure also denied me the opportunity to appeal the fact that the court (trial court) erred when it denied my motion for suppression without holding an on the record balancing test to determine the prejudice harm this evidence has towards me and this case.

ISSUE # 6

The Court erred when the Court denied my APPLICATION for brady violation, when the STATE FAILED to Prove that it Provided defendant with the Rule 5.6 MATERIAL that defendant testified he needed to Prepare his defense or he Couldn't go to trial. see [Pg. 79 LN 14-21] there-For Forcing defendant to take Plea.

Solicitor Miller gave FALSE STATEMENTS UNDER OATH. When he STATED that Counselor Filed for my Rule 5 material and he gave it to him. see - [Pg. 97- LN 4-9]. Counselor, mr KATONAK testified on Page 150, line 19-20, that i had everything when he met me. the records will show that mr. KATONAK Never Filed for my discovery material. the records will show that defendant testified that the ONLY evidence Provided to him in his discovery WAS the IDENTIFICATION evidence that WAS obtained AFTER defendant's Arrest, see - Pg. 69 LN 14-20]. defendant's Plea transcript will show that this issue WAS brought to the Courts Attention, which the Court FAILED to Correct and ONLY told State to CALL MY CASE for trial. Counselor testified that he do NOT Remember what we talked About when we went to the back. he STATED that there WAS nothing else to show, he had the Same material that i had.

See [Pg. 150 LN 13-18]. defendant testified that he was never provided the Chain of Custody Report or the Identification evidence showing where he was matched in this case to be arrested, and there was nothing showing the prints the state alleged they obtained from the crime scene. See [Pg. 69 LN 23-25, Pg 70, LN 1-4]. the state never proved that they gave me this Rule 3.6 material that was not in defendant's discovery. the identification evidence of this case will prove that i was identified after my arrest. PLAINTIFFS exhibits 3, 4 also proves this fact. the footnote in PLAINTIFFS exhibit 3 shows that the initial match used to arrest me was from the 2008 Burglary Arrest Record. the state excluded the initial match used to arrest me and only presented the identification evidence they obtained after my arrest. the evidence they excluded from this case is favorable to me and my defense which i testified i could not properly prepare a defense without. the court ruled that evidence the state excluded should have been destroyed. the state excluded that evidence and only used the evidence they obtained after my arrest. Counselor's motion to suppress was to suppress the identification evidence that was obtained after arrest. this was the only

evidence presented in defendant's discovery material. The Court erred when it denied my application for Brady violation where the record proves that solicitor lied about giving this - material to my counsel after he filed for my Rule 5 material. It's plain error to see that my Brady rights were violated and the Court erred by not granting my application.

ISSUE #7

The Court erred when the Court denied my application for involuntary plea where the records show that defendant was forced to take plea after the Court abused its discretion and denied defendant's motion for suppression. The trial court abused its discretion when it denied motion - without conducting an on the record analysis to determine the prejudicial impact that this evidence has towards this case that substantially outweighed by unfair prejudice. To allow the prosecution to use this illegally obtained evidence in violation of the state statute, encourages police misconduct. The defendant was informed that he could not re-argue this issue at trial, see [Pg. 5, Ln 10-21]. This was erroneous information that inconsistent with what the Court stated at PCR hearing when it informed me that I could show the jury in my defense how the prosecution was being allowed

to use this evidence. See [Pg. 92, ln 16-21].
the Lower Courts decision to Allow the Prosecution
to use this evidence Forced defendant to
take Plea then to risk life in Prison which his
Attorney Mr. KATONAK Stated to the Court that to
Move Forward WAS EXTREMELY LIKELY the Jury
would find defendant guilty, see [Pg. 6, ln 12-20].
therefor defendant had to take Plea because
he WAS denied the right to have this evidence
destroyed Pursuant to the Statute. the Court
Found And Ruled that I WAS Correct And this
evidence should have been destroyed, but still
WAS Allowing the Prosecution to use this evidence
Against the defendant - this misconduct allowed
by the State Forced me the defendant to take
Plea.

ISSUE # 8

The Court erred when it denied my
APPLICATION For Prosecutorial misconduct when
the Records Shows that the lower Courts
decision to Allow the Prosecution Conduct
constitutes "plain error". the Court would
Not Address these issues Presented under
Prosecutorial misconduct which WAS Not Addressed
on Appeal because defendant's Appeal WAS
dismissed For Issues Not Caused by defendant.
the Court erred when the Court denied my

APPLICATION For Prosecutorial misconduct

which the records show WAS plain error and therefore the Court CAN and should have addressed these issues. the Court erred when it denied MY APPLICATION For Prosecutorial misconduct. . I would note that i the defendant has tried to challenge and present these issues with every aspect through the judicial process but has been turned down at every aspect. All courts has rejected and dismissed my legal arguments and complaints without considering this misconduct which is plain error and therefore can be address at PCR - hearing. the Court erred when it denied my MY application.

ISSUE #9

The Court erred when the Court denied my APPLICATION For the issue of the State not having a probable cause to arrest me. there were no evidence presented by the State to prove that it had a probable cause to arrest ME for this crime. the only evidence to show a match in this case to arrest me is from 2 months after my arrest. the Court erred when it denied my application without addressing this issue which is a clear violation of my rights of due process.

I PRAY that this Honorable Court Consider these Issues Presented within. My 5th, 14th - Amendments of the U.S. Constitution of Due-Process was violated by the State Prosecution whom prosecuted this case with improper misconduct in connection to a prior Burglary charge that involved their office [the Second-Circuit Solicitor's Office]. IN 2008 I WAS WRONGLY ARRESTED by the State for Burglary First AGAINST the victims a former Solicitor of the Second Circuit Solicitors Office, AND the other victim the Son of the Mayor of Aiken. I WAS ACQUITTED OF those charges after being found Not guilty At trial. the Records, testimony, AND evidence presented shows that the Prosecution do not Contest the FACT that the initial evidence they used to MATCH Me for A Arrest in this case WAS FROM the Arrest Record of that prior Burglary Charge. to mention that prior charge, or to use ANY evidence from that prior charge is prejudicial AND it violates the State Law Section 17-1-40 OF the SC Code of Laws, which Requires the State to destroy ALL evidence of the record pertaining to that charge. the Trial Court Ruled that i was correct AND that evidence should have been destroyed Pursuant to the Statute. The Trial Court clearly Abused its discretion when it Failed to Consider the Prejudicial

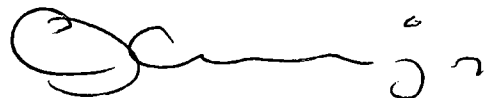
harm that this evidence has towards me and this case. Rule 609 (B) Requires The Trial Court to Articulate the Specific Facts and Circumstances Supporting its determination that the Probative Value of the evidence substantially outweighed its prejudicial effect. - U.S. v. Cavender, 578 F.2d 528 (4th Cir 1978).

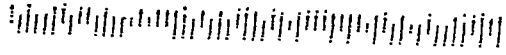
The Lower Courts Failed to Follow these Requirements and I pray this Court grant my application and remand my case back to the Trial Court to conduct an on record analysis test to allow me the opportunity to show the Court on record how I was prejudiced by the testimony and evidence presented in this case. it is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision. - I pray that this Court also grant my application and remand my case back to the Trial Court to be prosecuted by the agencies listed in the order of Recusal. the Court order of Recusal is a valid Court order that makes the judgement in this case void. the second circuit solicitor's office violated a Court order of Recusal and unlawfully - prosecuted me with evidence they illegally obtained in violation of the state statute 17-1-40 of the S.C. Code of laws. the exclusionary rule was designed not merely to deter police misconduct, but also to prevent the Court from

becoming a party to violating my constitutional rights by admitting illegally obtained evidence. This misconduct which was allowed by the lower courts is why the court order of Recusal was ordered, to prevent the prosecution from the improper acts that are being shown in this case. I was unquestionably prejudiced by the prosecution by the admission of my prior burglary charge and by the state violating the court order of Recusal.

I pray that this court consider these facts along with all the issues presented within, and grant my application which the lower court failed to properly do to allow me the opportunity to have a fair trial by a tribunal with the power to decide this case and without this illegally obtained evidence that destroys the impeachment value of its admission. The records show that my rights to due process, to have a fair trial, ineffective counsel and my Brady rights were clearly violated, and I pray this court correct these issues which the lower courts failed to correct, or refused to address for purposes other than required by law.

I respectfully submit these issues on record.

A handwritten signature in black ink, appearing to be a stylized name with a long horizontal stroke extending to the right.

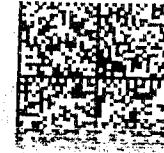


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