THE STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

RECEIVED

MAR 0 6 2018

S.C. SUPREME COURT

Benjamin Paul Green,

Petitioner,

V.

State of South Carolina,

Respondent.

APPELLATE CASE No. 2017-CP-001388

PRO SE PETITION FOR A WRIT OF CERTIORARI

Benjamin Paul Green
2323 East Boundary Rd
Columbia, South Carolina 29223
Pro Se Appellant

INDEX

Index.....i

Issues Presented.....1

Statement of the Case.....3

Arguments.....5

Conclusion.....24

ISSUES PRESENTED

1. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to request a jury instruction or object to improper instructions on the definition of an attempt.
2. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to adequately research the attempt charge, whereas he would have been able to provide the case law needed to prove the proper elements that constitute an attempt, even though counsel had used the lack of the "present ability" element as a **main** point of defense.
3. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to properly object to the use of a supposed incriminating statement that was never submitted to the jury to determine the voluntariness, as is required by Federal and State law.
4. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to argue against the voluntariness of a supposed incriminating statement during the Jackson Denno hearing, instead focusing on the reliability of the statement.
5. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to contemporaneously object to trial judge's improper comments made in the presence of the jury.
6. The PCR court erred in holding that petitioner's trial counsel was not

ineffective in failing to sufficiently investigate Yahoo Messenger's Auto Archive feature, which would have led counsel to discover the facts needed to contest the State's claims on how the auto archive feature functions.

7. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to move for the suppression of evidence, whose probative value was substantially outweighed by the danger of unfair prejudice.

8. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to maintain adequate knowledge of relevant details of case law that counsel provided to the trial judge.

9. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to call into question the integrity of conflicting testimony from the prosecution's witnesses.

10. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing to raise an obvious reversible error on direct appeal that had clearly been preserved for appeal.

11. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing to exercise due diligence when researching die preserved issues, in spite of having filed for multiple extensions.

12. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing failed to include meritful issues.

STATEMENT OF THE CASE

Petitioner was convicted of attempted criminal sexual conduct with a minor in the second degree [16—3—655(B) and 16—I—80] and criminal solicitation of a minor [16—15—0342] after a jury trial held before the Honorable Doyet A. Early, III on June 15-17, 2009, in Aiken County. Respective sentences of twelve (12) and ten (10) years were imposed. Michael D. McMullen, Esq. was trial counsel. Susana Ringler, Esq. and Susan O. Porter, Esq. were the assistant solicitors, (App. P. 1-p.291). On September 15, 2009, a motion to reconsider was heard, (App. P.292-p.311). On the conviction of solicitation, the motion was denied. On the conviction of attempted criminal sexual conduct with a minor, the motion was granted with a two (2) year reduction.

On February 23, 2012, oral argument was given on behalf of petitioner by State appointed Wanda H. Carter, Esq. on a direct appeal before the Supreme Court of South Carolina. On April 4, 2012, the Supreme Court of South Carolina filed an affirmation of the petitioner's convictions under opinion number 27108.

An application for post-conviction relief was filed on February 27, 2013, (App. P.312-320). Respondent filed a return dated June 18, 2013, (App. P. 321-p.327). An evidentiary hearing was held on September 11, 2015, before the Honorable Edgar W. Dickson. Petitioner was present and represented by Aimee J. Zmroczek, Esq. Respondent was represented by Daniel F. Gourley, Assistant Attorney General. Petitioner, the petitioner's expert witness Christopher Watkins, and trial counsel Michael D. McMullen, Esq. testified at the hearing, (App. P.328-p.409). Another

evidentiary hearing was held on June 30, 2016, where Christopher Watkins testified in greater detail, (App. P. 410-p.470). On December 29, 2016, Judge Dickson issued an order denying and dismissing petitioner's application for post-conviction relief, (App. P. 471-p.480).

A Motion to Reconsider pursuant to Rule 59(e) SCRCP was filed on January 22, 2017, by petitioner's PCR counsel, Aimee J. Zmroczek. An order denying petitioner's Motion to Reconsider was issued by Judge Dickson on March 14, 2017.

A Notice of Appeal was filed by Aimee J. Zmroczek on June 20, 2107.

A Johnson Petition for Writ of Certiorari was filed by appointed appellate Defender Robert M. Pachak, on January 22, 2018.

This petition follows.

ARGUMENTS

1. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to request a jury instruction or **object to improper instructions on the definition of an attempt**.

Counsel allowed an erroneous instruction on attempt that was devoid of the necessary *"present ability"* element that is needed to prove an attempt crime according to state law. State v. Nesbitt App.200I 550 S.E.2d 864; State v. Quick 19 S.E. 2d 102 (1942), even though counsel had previously and repeatedly argued the fact that this element was missing. [App. p.22:1-6/ p.215:9-16/ p.220:1-5 (while arguing for the lesser)/ p.252:16-21]. A jury charge is correct if it contains the correct definition of the law when read. *"The purpose of instructions is to enlighten the jury and to aid it in arriving at a conclusion."* State v. Kelly 540 S.E. 2d 851 (2001). This failure by trial counsel to request or object prejudiced the trial outcome by not allowing the jury to make an informed decision based on all of the proper and essential elements relevant to the charge of ACSC w/minor 2nd, a decision that more than likely would have been in the defendant's favor considering the jury would have been able to determine that an essential element was missing. This failure also prejudiced the outcome by not allowing the issue to be preserved for appellate argument. *"It is the duty of the court regardless of request to instruct the jury on each of the essential elements of the crime charged, and the failure to so instruct constitutes reversible error, regardless of whether the defendant requested such*

instruction" (Utah—State v. Roberts, 711 P.2d 235). " When instruction purports to set forth all elements of a crime necessary to conviction, instruction is fatally defective if necessary element is omitted (Ind.—Smith v. State. 459 N.E. 2d 355). "***Error is not cured just because the court upon review, is satisfied the jury would or could have found that the state proved the missing element had jury been properly instructed.***" (Conn.—State v. Gabriel, 473 A.2d. 300). "Instructions which fail to correctly define the elements ofthe offense charged, so that the jury may decide whether they have been established beyond a reasonable doubt, are constitutionally deficient, and constitute prejudicial error, requiring reversal." (Colo.—Key v. People, 715 P. 2d 319/ W. Va.—State v. Barker, 346 S.E. 2d 344). "Complete omission of issue—(in this case present ability)—*as central to criminal trial as part of definition of crime charged deprives jury of guidance it must have to properly decide case.*" (111.—People v. Ogunsola. 429 N.E. 2d 861/ Also see Neb.—State v. Bridger. 388 N.W. 2d 831, for "...failure to define word constituting essential element of crime charged."). Considering that the trial court also commits reversible error if it fails to give a requested charge on an issue raised by the evidence (State v. Harrison, 539 S.E. 2d 71), the failure to request the full definition of attempt charged based on the whole law, deprived the defendant of a preserved obvious reversible error to be addresses at the post- trial level, at which the appellant would

have been granted the reversal as a matter of law. As can be seen, trial counsel was ineffective for failing to request an instruction that included a main theory of the defense (Riddle v. State. 418 S.E. 2d 308, 1992; Gray v. Lynn. 6. F. 3d 265), thereby allowing an improper instruction to the standard of proof beyond a reasonable doubt.

2. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to adequately research the attempt charge, whereas he would have been able to provide the case law needed to prove the proper elements that constitute an attempt, even though counsel had used the lack of the "present ability" element as a **main** point of defense. [App. p.22:1-6/ 252:16-21/ 272:20-273:3]. Counsel was ill prepared to prove an essential element of the charged crime, an element that if included in the jury instructions, would have enabled the jury to undoubtedly conclude that the State could not prove this element, and thereby rule in the defendant's favor. This lack of research and preparation deprived the jury of vital information and hindered it from ruling in the defendant's favor, prejudicing the trial outcome. Inadequate investigation and preparation is, in effect, ineffective assistance of counsel People v. Labree, 34 N.Y. 2d 257, 1974; People v. Donovan, 585 N.Y.S. 2d 70 (1992). *"A criminal defense attorney has a duty to perform a reasonable investigation, including at minimum...to make an independent investigation of the facts and circumstances of the case'.'* Lounds v. State, 670 S.E. 2d 646(2008); State v. Evans, 216 S.C. 328, 57 S.E. 2d 756 (1950); State v.

Nesbitt, App. 2001 550 S.E. 2d 864.

3. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to properly object to the use of a supposed incriminating statement that was **never submitted to the jury to determine the voluntariness, as is required by Federal and State law**.

Jackson v. Denno. 378 U.S. 368 (1963-64) [App. p. 134:17-24/ 136:19-21; Det. Platt] [App. p.179-180, Ofc. Ziegler/ p.183:9-20, Ofc. Ziegler cross] Trial counsel had four opportunities to object to and to move to suppress an incriminating statement, supposedly made by the defendant, that was being used as a confession. Twice Det. Platt admitted that he did not know what "Mr. Green said verbatim". Det. Platt was also inconsistent in his attempts to recollect the statement. Trial counsel twice had the opportunity to object to or to suppress Det. Platt's attempts to use this statement, and trial counsel failed at both instances. Trial counsel also had two more opportunities during the testimony of investigator Ziegler, who also could not remember what Mr. Green said verbatim. The trial counsel failed to object to and move to suppress the statement as it was, and by allowing it to stand and prejudice the trial outcome by influencing the jury as a statement of confession, his performance was deficient. Had the jury not had this fabricated statement on record, it would have been even more difficult for them to prove all of the elements of ACSC w/ minor 2nd in their deliberations. Counsel also failed to highlight the disparity in the testimonies of Det. Platt and Investigator

Ziegler in regards as to when the statement was supposedly made. Det. Platt stated that the statement was made "after" the he mirandized the defendant. However, Investigator Ziegler testified that the statement was made "before" Platt mirandized the defendant, which reveals that the statement was involuntary in accordance with the defense. Trial counsel failed to notice this conflict and apply it towards the suppression of the statement [App. p. 179-180/ 183:9-20]. This prejudiced the outcome severely against the defendant, **allowing for a conviction founded, in whole or in part, upon an involuntary confession, depriving defendant of due process, thereby violating constitutional provisions.** In addition, the trial court erred in failing to submit the issue of voluntariness to the jury for consideration as is required by law, in light of the defendant's disputing not only voluntariness, but also the exact content of the statement. The jury was never charged that they must find and establish beyond a reasonable doubt that the defendant was given and understood his rights and that the statement was given freely and voluntarily, before the statement could be considered in deliberations. **This is tantamount to a reversible error of which there is no appropriate remedy except for a vacating of the conviction and sentencing.** State v. Victor. 387 S.E. 248, (1989); State v. Dravton, 337 S.E. 2d 216, (1985). Trial counsel failed to request an appropriate charge in regards to the statement, thereby allowing the trial court to abuse its discretion and bypass the mandated jury consideration of involuntariness,

further prejudicing the trial outcome towards a verdict against the defendant, at minimum, partly founded on the statement. Furthermore, trial counsel's failure prejudiced the defendant at the post trial appellate level, as the State Supreme Court used the statement as an "admission" of intent in its published opinion, which could have been prevented had trial counsel properly objected, and requested the statement stricken or suppressed. This failure allowed the State Supreme Court to **erroneously affirm an unconstitutional conviction**, and was extremely deficient in allowing the trial jury to be exposed to the statement, thereby **depriving the defendant of his due process rights.** Rivera v. State, 677 S.E.2d 596 (2009). *See United States v. Hoac*, 990 F.2d at 1107 (where a defendant raises a genuine issue at trial concerning the voluntariness of a statement, **the trial court is obligated by statute** to instruct the jury concerning the weight to be accorded that statement). Repsondent's Julie Coleman also showed blatant disregard for truth and equity in her persistent forcing of this intentionally contrived, invalidated by unreliable testimony, and uncharged statement on the petitioner's expert witness Chris Watkins in the PCR evidentiary hearing even **though the function of such proceedings is to determine ineffective assistance of counsel or other trial misconduct, not to establish guilt or innoncence.** [App. p. 448:2-9]

4. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to argue against the voluntariness of a supposed

incriminating statement during the Jackson Denno hearing, instead focusing on the reliability of the statement.

[App. p. 13:13-19:23] This failure defeated the whole purpose of the Jackson Denno hearing, which would have been prevented had counsel argued the appropriate merits of *involuntariness*, such as when the statement was actually made, "before" or "after" the defendant was mirandized. Counsel also here demonstrated a lack of preparation that amounted to deficient representation that prejudiced the outcome of the trial by allowing a potentially damaging statement past the Jackson Denno stage, instead of successfully suppressing the statement, thereby keeping it away from the jury and eventually the State Supreme court, thereby increasing the defendant's probability of a not guilty verdict, **or a reversal of a conviction at the appellate level.** Trial counsel failed to show an adequate level of investigation into the prosecution's witness testimonies, which would have led counsel to discover the conflicting versions of when the supposed statement was made, thus enabling counsel to prove involuntariness at the Jackson Denno and have the statement suppressed. This heavily prejudiced the trial outcome as the supposed incriminating statement was **utilized adversely against the defendant during the guilt or innocence phase and at the post trial appellate phase.** Again, *"A criminal defense attorney has a duty to perform a reasonable investigation, including at minimum, the duty' to interview potential witnesses and to make an independent investigation*

of the facts and circumstances of the case." Lounds v. State, 670 S.E. 2d 646 (2008). To fail to perform this minimal duty is ineffective assistance of counsel People v. Donovan, 585 N.Y.S. 2d 70 (1992). *"Counsel's conduct was deficient because he failed to adequately prepare and present evidence that would have established truth."* Roberts v. State, 602 S.E. 2d 768 (2004).

5. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to contemporaneously object to trial judge's improper comments made in the presence of the jury.

Though counsel preserved this issue in a motion for a new trial, his failure to object at the time of the comments prejudiced the trial outcome by allowing the judge to bolster the prosecution in front of the jury by saying that he would hate to be prosecuted by the Aiken county witnesses for the State. Prejudice clearly flowed from not only the Judge's unlawful comments that reflected the judge's vouching of the prosecution's credibility, but also from the trial counsel's erroneous failure to object to the court's comments at the moment they were made, instead waiting until after a conviction and objecting in a motion for a new trial. Counsel's failure not only allowed undue vouching of the prosecution's credibility to be impressed upon the jury Gilchrist v. State, 565 S.E. 2d 281 (2002); Sosobee v. Leeke, 362 S.E. 2d 22, (1987), counsel failed to properly preserve the issue on the trial record, as *"such comments constitute an error of law and are inherently prejudicial"* Matthews v. State, 565 S.E. 2d 766, (2002), and if preserved properly, could have been

addressed at the post trial appellate stage, with a reversal on behalf of defendant/ appellant.

6. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to sufficiently investigate Yahoo Messenger's Auto Archive feature, which would have led counsel to discover the facts needed to contest the State's claims on how the auto archive feature functions. [App. p.35:4-36:6 (Porter)/ 39:7-24 (Porter)/ 110:16-25 (no objection)/ 114:1-21 (objection)/ 167:21-168:21 (cross)/ 256:17-257:9 (Defense close)/ 263:3-4 (State close)]. Counsel's failure to investigate and be sufficiently knowledgeable about the operation of Yahoo Messenger's auto archive feature prejudiced the outcome of the trial by allowing the State to **deliberately make materially false statements and untrue claims** as to how the auto archive functions thereby supporting the inclusion of the questioned archived chat conversation as evidence despite it being an incomplete representation, **violating rules 106 [remainder] and 1002 [original] of the S.C. Rules of Evidence**, which counsel unsuccessfully attempted to argue [App. p. 33:5-38:20]. A thorough inquiry by trial counsel would have revealed that the auto archive feature of Yahoo Messenger saves every line of an archived chat, and that it always has, by design. This discovery would have proved a conspired perjury on the parts of the Attorney General's Office and the State's key witness from the Aiken County Sheriff s Department, Detective Tommy Platt, and would have prevented a vital piece of state evidence from being admitted into the

trial. " *The knowing use of perjured testimony by the state in a criminal prosecution is a violation of the rights of the accused under both the Federal and the State Constitutions and justifies the granting of relief under such statues or rules*" (US — Napue v. People of the State of Illinois, 79 S. Ct. 1173, 360 U.S. 264; U.S. — U.S. v. Stifel, D.C. Ohio, 594 F. Supp. 1525). " *The knowing use by the government of perjured testimony against accused to obtain a conviction constitutes a ground for vacation of the conviction and sentence*" (U.S. — Sears v. U.S., C.A. Fla., 265 F. 2d 301). *"It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State"* [16—9—10 (A)(1)]. It is readily apparent that trial counsel's failure to investigate allowed the false testimony on a contested material issue to affect the trial judgment in the result of a conviction, rather than counsel being able to suppress the incomplete chat, the State's only documented piece of evidence in their attempt to prove that a conversation actually took place, thereby removing it from consideration by the jury. Trial counsel also lost an opportunity to redirect the perjured testimony in an attempt to impeach Det. Tommy Platt, the State's key witness, which would have in effect rendered the state's key witness and a main piece of evidence against the defendant invalid, and would have been conducive to a directed verdict in the defendant's favor. *"Cases involving* ***perjured testimony which the prosecutor knew****, or should have known, that had the evidence been disclosed to the defense, there is a reasonable probability that the result of the proceeding would have been different, the evidence is material for purposes of a*

Brady violation" State v. Moses, 702 S.E. 2d 395, SC App (2010). Trial counsel was unable to take advantage of this Brady violation in the defendant's favor because he had not done the necessary and required investigation to procure the facts about Yahoo Messenger's auto archive feature, investigation that could easily have been done own his own (App. p.256:17-22 [Close]; p. 358:5-24; p.449:14-450:12), "...last three lines..." In addition, the petitioner's expert witness Chris Watkins confirmed the veracity of the petitioner's concerns of impropriety in regards to Detective Platt's and Susan Porter's false claims of the proper functioning of Yahoo Messenger's Auto Archive feature (App. p. 381:4-383:7; p.433:7-435:9). This incomplete conversation should never have been on the record.

7. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to move for the suppression of evidence, whose probative value was substantially outweighed by the danger of unfair prejudice. (App. p. 198:23-201:20). Counsel ill- advised the defendant to sign a stipulation agreeing to the admission of certain parts of a secondary chat, even though the State had explicitly noted its **intent to "put forth that chat as an admission"** (App..51:9-12). This other chat involved a living seventeen-year-old female, rather than a fictitious fourteen-year-old female. This second chat was initiated by the seventeen-year- old female, as well as was any sexual content in the chat. The specifics of this other chat were not similar to the particulars of the primary chat; nonetheless

trial counsel allowed portions of the secondary chat to be used against the defendant's character as evidence of a propensity towards sexual conduct of a criminal nature and as an admission of guilt from excerpted phrase taken out of its context. Trial counsel allowed this by first failing to move to suppress, and secondly, by misadvising the defendant to agree to stipulation. These failures affected the trial's outcome by allowing the jury to be subject to and have access to irrelevant and prejudicial information that suggested to jurors that the defendant was probably guilty of the crime for which the defendant was on trial since the defendant supposedly showed a propensity to commit such crimes. This failure to move to suppress and trial counsel's improper advice amount to ineffective assistance of counsel (People v. Donovan, 585 N.Y.S. 2d 70).

8. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to maintain adequate knowledge of relevant details of case law that counsel provided to the trial judge.

(App. p.348:18-352:9) (p.40:1-41:7 [State v. Murphy]; p.215:8-220:13). Trial counsel was unable to explain why the court should charge the lesser-included offenses based on the case law offered by trial counsel. Instead, the trial court was allowed to erroneously apply case law as to why it should not charge the lesser-included offenses. Trial counsel correctly cited State v. Murphy, but because of his lack of familiarity with the case, counsel allowed trial court to veer from State v. Murphy's support for the lesser [p.2I8:3-9] to

State v. Dempsey, which says that it is not proper to charge, but only because in that particular case, there were actual sexual batteries that occurred. The trial court also cited State v. Mathis, which consequently states that failure to instruct on ABHAN was a reversible error, yet trial counsel was not knowledgeable on this case either. Trial counsel was also ignorant of other case law that agreed that ABHAN is a lesser included of which a charge is entitled (see State v. White & State v. Pressley). State v. Murphy also clearly sets forth the difference between the lesser of ABHAN and AHAN being charged as to whether there was an actual battery that occurred, which in the defendant's case, did not, and so entitled the defendant to the lesser-included charge of AHAN based on the evidence.

9. The PCR court erred in holding that petitioner's trial counsel was not ineffective in failing to call into question the integrity of conflicting testimony from the prosecution's witnesses.

(App. p.352:10-355:1) Detective Platt and Investigator Ziegler had different testimonies as to when the defendant was mirandized in relation to when a supposed incriminating statement was made. Detective Platt maintained that he mirandized the defendant before the statement was made. However, Ziegler asserted that the defendant was mirandized after the statement was made. Trial counsel was ineffective for failing to make use of Ziegler's testimony on direct and cross examination for the purpose of impeaching Det. Tommy Platt, who was the State's key witness [App. p.183:14-20/ 180:12-15

(Ziegler cross and direct)/ 134:15-24 (Platt direct)/ 16:9- 14 (Platt Denno Cross)], especially in light of a material issue such as the voluntariness of a supposed incriminating statement and the discrepancies between the two testimonies. People v. Wallace. 187 A.D. 2d 998, 591 N.Y.S. 2d 129 (1992). This failure prejudiced the trial outcome by allowing the state's introduction of a supposed incriminating statement by the defendant to stand on the record and influence the jury, and the State Supreme Court at post trial in the way of a perceived admission of guilt. Detective Tommy Platt also had conflicting testimony with Mrs. Linda Williamson, the actual woman from the photo used in the Lil Mandy profile by Detective Platt on the night of Oct. 13, 2006 [App. p.154:9-16; 159-162 (Platt)/223:3-232:2I (Lynda Direct)/ 13-19; 134-136 . First, Detective Platt stated that Mrs. Lynda Williamson's husband was the individual who gave him the picture and the permission to use the picture around 2005, 2006. Platt also stated that that when he received the picture and started using it, that Mrs. Williamson was a t that time a law enforcement officer, specifically a probation and parole officer, according to her husband who had given Platt the picture [pp.154:6-18/ 160:5-19]. Det. Platt goes on to state that Lynda Williamson had knowledge of his usage of her photograph to pose as a fictitious fourteen-year-old girl [pp.172:17-173:1]. However, in Mrs. Williamson's testimony, she stated that it was she, not her husband, who gave the picture to Mark Hammond of the Aiken County Sheriff s Department, not to Det. Tommy Platt. Mrs. Williamson also said

that it was actually Mark Hammond who took the photograph himself, and it was Hammond to whom she gave initial permission to use the photograph. She also stated that she was twenty-four or twenty-five years old when the photograph was originally taken in 2001, and while she was a probation officer at the time, she had not been in law enforcement at all since 2001 [224:8-225:16/ 231:7-21]. Mrs. Williamson sad that although up to that point she had not rescinded her permission to Mark Hammond, she had never authorized anybody besides Mark Hammond to use her photograph to pretend to be someone else. She also said that she had no previous knowledge before the trial that anyone besides Mark Hammond was using her photograph, including Detective Platt's usage of the photograph in a Yahoo Profile posing as a fourteen year old girl named Lil Mandy five years after Lynda Williamson was no longer in law enforcement [232:9-18/232:25-233:6/223:13-224:71. Despite the disparity between these two accounts of the same events and circumstances, trial counsel failed to highlight Det. Platt's discrepancies—who himself was trying to secure a conviction—against the testimony of the person who is actually in the photograph, an individual who has no stake in the outcome of the trial. These counsel failures allowed inconsistencies to stand on the record which clearly favored the state and prejudiced the defendant. Once again, Det. Platt, the State's key witness, was in an impeachable position, of which trial counsel did not appropriate to attack the veracity of Platt's claims, being that his testimony was vital to the

state's case against the defendant. Det. Platt was obviously misleading about how he acquired Mrs. Williamson's photograph, when he obtained the photograph, and about whether he even actually ever had the right to be using the photograph in the first place, even up to that date, eight years after she was no longer in law enforcement, a requirement for photograph usage by the 1CAC taskforce. Trial counsel again failed to use testimony, in this instance Mrs. Lynda Williamson, for the purpose of impeaching Det. Tommy Platt. Trial counsel also failed to highlight Det. Platt's unfamiliarity with ICAC rules and protocols, especially when Platt responded "I guess" when questioned about documentation and knowing that proper documentation had been a recurring issue dealing with a portion of the primary chat record being missing[pp.161:24-162:4/ 159:12-13 (written consent from ofc.)] Trial counsel also failed to utilize Platt's own inconsistent and unreliable statements about what the defendant said before the defendant was officially taken into custody [p. 13-19/ 134-136 in conjunction with Platt's other inconsistent remarks in order to impeach him. " *Trial counsel is ineffective for failing to impeach*—the State's key witness—*and failing to prepare and present evidence that would have established the truth*" (Roberts v. State, 602 S.E. 2d 768, 2004; also see People v. Wallace, 187 A.D. 2d 998, 591 N.Y.S. 2d 129, 1992). Trial counsel's failure to utilize important trial testimony for the purpose of impeachment was deficient conduct that prejudiced the trial outcome by allowing untruthful and unlawful testimony against the defendant to stand on the

record and influence the jury that said testimony was reliable and more than likely true, and in turn rule in favor of the State.

10. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing to raise **an obvious reversible error** on direct appeal that had **clearly been preserved for appeal**.

(Simpkins v. State, 401 S.E.2d 142, 1991). The admissibility of a statement supposedly made by the defendant was preserved on the motion for a new trial as well as during the Jackson Denno of the trial [pp.18:24-20:2]. Federal and State law clearly declare that **failure to submit the statement to the jury for the issue of involuntariness is a reversible error**. Failing to raise this issue deprived defendant of his entitlement to a reversal on direct appeal. In addition, appellate counsel's failure to pursue this significant and obvious error of law gave way to an unreliable affirmation of petitioner's conviction, both of which were at least partly based on an undetermined statement, which is tantamount to a deprivation of due process and is evidenced by the State Supreme Court's usage of the statement as an admission in its published opinion (No. 27108) State v. Victor, 387 S.E. 248, (1989); State v. Drayton, 337 S.E. 2d 216 (1985). Appellate counsel also failed to pursue the issue of the trial court's statement that "it may be a lesser included, but that doesn't mean I have to charge it", or his opinion that "it's either all or nothing to me in this situation" [App. p.216:1-217:6], both statements given after the trial court was exposed to several case laws that

explicitly set forth ABHAN and AHAN—with no "battery"— as lesser included offenses of CSC with a minor and that failure to charge was reversible error. **Trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence** (State v. Harrison. 539 S.E. 2d 71). Appellate counsel's failure in again **neglecting to pursue an obvious question of state law** prevented petitioner from winning his appeal (Mason v. Hanks. 97 F. 3d 902, 7th Cir. (1996).

11. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing to exercise due diligence when researching die preserved issues, in spite of having filed for multiple extensions.

This failure led to the most meritful issues being left out of the brief, thereby decreasing the chances of success for appellant. This failure also led to a deficient argument on the matter of the uncharged lesser included offenses, further hindering the appellant's chances to win his appeal [pp.2I9:I-4, 25-220:5 (denial protected)].

12. The PCR court erred in holding that petitioner's appellate counsel was not ineffective in failing failed to include meritful issues.

Appellate Counsel Wanda H. Carter failed to include several weighty preserved issues which evidenced the various forms of **judicial and prosecutorial misconduct**, that would have led the State Supreme Court to rule in the appellant's favor, such as **refused jury charges**, **involuntary statement not given to jury for consideration**, and

multiple Brady violations [App. p.38:I7-20 (Rule 106)/53:10-55:22/ 128:14-16], and **trial court's refusal to honor Rule 106 of the Rules of Evidence** (effect. 9/3/95)[App. p.115:24-116:9], all errors of law, some automatic reversals, depriving the petitioner of a fair appeal and a constitutionally entitled reversal. People v. Vasquez. 509 N. E. 2d 934,(1987); Smith v. Robbins. 120 S.C. 746

CONCLUSION

For the reasons stated above, the petitioner's conviction(s) should be vacated.

The petitioner respectfully requests this Court to grant the petition for a writ of certiorari, reverse the ruling of the PCR court and vacate the petitioner's conviction(s).

Respectfully submitted,

March 5, 2018

S/_____

Benjamin Paul Green
2323 East Boundary Road
Columbia, South Carolina 29223
(803) 736-2975
Pro Se Appellant

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Certiorari to Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

Benjamin Paul Green,

Petitioner,

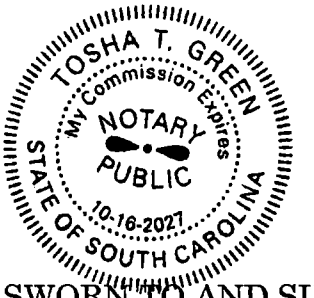
V.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of one Pro Se Petition for a Writ of Certiorari has been forwarded for filing to the Honorable Daniel E. Shearhouse, Clerk of Court for The Supreme Court of South Carolina; and a true copy to Respondent Julie Amanda Coleman, Esquire, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Columbia SC, 29201, Room 519, this 5th day of March, 2018.



Benjamin Paul Green
2323 East Boundary Road
Columbia, South Carolina 29223
Pro Se Appellant

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 5th DAY OF MARCH, 2018

Notary Public for South Carolina
My Commission Expires: 10/16/2027

Benjamin Paul Green
2323 East Boundary road
Columbia, South Carolina 29223

March 5, 2018

Honorable Daniel E. Shearhouse
Clerk of Court
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

MAR 0 6 2018

S.C. SUPREME COURT

Re: Benjamin P. Green v. State
Appellate Case No. 2017-001388

Dear Honorable Daniel E. Shearhouse:

Enclosed for filing please find a copy of the Pro Se Petition for Writ of Certiorari to be considered along with the previously filed Johnson Petition of Appellate Defender Robert M. Pachak. You will also find the Certificate of Service to The Supreme Court of South Carolina, Clerk of Court, and to the Respondent's attorney of record, Julie Amanda Coleman. Upon receipt, please return a clocked stamp copy of this correspondence, the cover sheet of said Pro Se Petition, and the Certificate of Service for my records. Thank you for your time and efforts.

Sincerely,

S/ Benjamin Paul Green

Benjamin Paul Green

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®

7016 0910 0002 3598 6429

Rd

UNITED STATES POSTAL SERVICE®

1000

29201

U.S. POSTAGE
PAID
COLUMBIA, SC
29206
MAR 05, 18
AMOUNT
$8.46
R2304M110416-19

TO:

The Supreme Court of South Carolina
Clerk of Court
Hon. Daniel E. Shearhouse
1231 Gervais St.
Columbia SC 29201