

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

—

Certiorari to Dorchester County

Hon. Robert E. Hood, Circuit Court Judge

—

ANTONIO TERRELL JACOBS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

—

APPELLATE CASE NO 2017-001740

—

RESPONSE

—

July 25, 2018.

/s/

Antonio Terrell Jacobs

ANTONIO TERRELL JACOBS
990 Wisacky Highway
Bishopville, SC 29010
Petitioner, Pro se

ISSUES PRESENTED

- 1.) Was trial counsel ineffective for failing to place the States case to a meaningful adversarial test?
- 2.) Was trial counsel ineffective for failing to request a continuance in open court, where counsel's communication with Petitioner, about his case was brief?
- 3.) Was trial counsel ineffective for failing to file a timely notice of appeal?
- 4.) Was trial counsel ineffective for failing to have the State present all exculpatory evidence they planned to use against Petitioner?
- 5.) Was trial counsel ineffective for failing to advise Petitioner that under his 5th Amendmnet right and South Carolina Statute § 17-19-10, that he did not have to answer to any crime whether "it be capital or infamous unless on a presentment of indictment of a legal grand jury"?
- 6.) Was trial counsel ineffective for failing to have detective Martin produce alleged audio and video recordings of controlled purchases?
- 7.) Was trial counsel ineffective, where he advised Petitioner to take a plea knowing Petitioner had not seen the audio and video recordings?
- 8.) Was trial counsel ineffective for failing to attack the credibility of the confidential informant?
- 9.) Was trial counsel ineffective for failure to address how detectives never seized any buy money from Petitioner on alleged buy, and arrest date April 10, 2014 which would have been argued at trial to further discredit confidential informant as well as detective Martins supplementary report failing to utilize this evidence?
- 10.) Was trial counsel ineffective for failing to request all Rule 5 & 6 evidence favorable to Applicants case prior to the plea?
- 11.) Was trial counsel ineffective for failing to provide Petitioner with alleged crime scene photos that were a part of his Rule 5 & 6 Motion for Discovery?
- 12.) Was trial counsel ineffective for failing to attack fruitless search warrant which failed to establish a substantial basis of knowledge for a finding of probable cause?

- 13.) Was trial counsel ineffective, where the State lacked jurisdiction to convict Petitioner of "possession with intent to distribute marijuana 3rd offense," where bill of indictment does not sufficiently state the level of offense in the language, the statute, or in the body of indictment with certainty?
- 14.) Was trial counsel ineffective for failing to advise Petitioner to withdraw guilty plea, where indictment charging "possession with intent to distribute marijuana" did not sufficiently state level of offense, to independently place Petitioner on notice?

Was trial counsel ineffective for failing to place the States case to a meaningful adversarial test?

Petitioner contends that trial counsel's advice to plead guilty to alleged charges was incompetent advice. Where, based on the transcripts deriving from the bond reduction hearing, the guilty plea transcripts, and the PCR transcripts along with the lack of material evidence, the record clearly shows counsel's incompetent performance and blatant misrepresentation.

"The Constitution guarantees a fair trial through the Due Process clause, it defines the basic elements of a fair trial largely through the several provisions of the sixth Amendment, including the counsel clause." The Sixth Amendment guarantees the defendant in a criminal case the right to effective assistance of counsel to help ensure that our adversarial system produces just results. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. v. Carthorne, 878 F.3d 458, 465 (4th Cir. 2017). The Sixth Amendment also requires that "counsel act in the role of an advocate." United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); A finding of ineffective assistance ultimately will result when counsel's conduct "so undermined the proper functioning of the adversarial process" the the proceeding "cannot be relied on as having produced a just result." Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006). A defendant must be advised of the constitutional rights he or she is waiving. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Robinson v. State, 422 S.C. 78 (2018); Pittman v. State, 227 S.C. 597, 524 S.Ed.2d 623, 624 (1999); a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and mandatory minimum penalty, and the nature of the constitutional rights being waived. Harris v. Leeke, 282 S.C. 131, 318 S.Ed.2d 360 (1984), when determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing.

Petitioner states that, prior to the plea, counsel advised him that as part of the plea negotiation the State would dismiss certain charges. Those charges included, all three of the alleged distributions, the manufacturing cocaine base, and trafficking cocaine base. Petitioner holds that, he relied in part, on the Solicitors offer to "reduce third offenses to second offenses" and not the "recommended range of twenty to twenty-five years under second offenses" made in open court during the bond reduction hearing by the Solicitor, and the

assessment, and advice given by trial counsel to determine whether he should go to trial or plead guilty. (see bond reduction pp. 6, Lines 14-25:

- 14.) Mr.SORENSEN: I told Mr. Wehman--I've made him a tentative plea
15.) offer at this point in time that I'm not really sure
16.) he's had an opportunity to talk too much to his client
17.) about. But it would be my intention, if he does not
18.) wish to plea, that I would be putting him on our trial
19.) docket for December.
20.) THE COURT: Do you want to place the offer on the
21.) record?
22.) MR. SORENSON: I had told him that I would
23.) basically reduce the thirds down to seconds and allow
24.) him to -- and recommend a range of twenty to twenty-five
25.) years on second offenses, your Honor.

Petitioner argues that, being as though, the Solicitor's intentions were one of two exceptions, one, that petitioner either take the offer that was placed on the record or two, face a trial by jury the following month of December, without a fair assessment or just trial strategy prepared by trial counsel. This detriment left petitioner to rely on the only offer that he was aware of, at the time, that was placed on the record, which was pleading to second offenses. Counsel never informed petitioner about the E-mail he received from the Solicitor prior to the plea. (see PCR transcript Pp. 36, Lines, 13-25):

- 13.) MR DAVIS:
14.) Do you have -- Mr. Wehman, do you have a date on the
15.) discussion you would've had with the Solicitor following
16.) bond Court where you asked about altering the offer?
17.) A.) I believe youre referencing an e-mail that you had. I
18.) do not. I was looking through my files. I don't have the
19.) date of the conversation. It would've been about the time
20.) the e-mail came through.
21.) Q.) Okay. Do you have a copy of the e-mail or no?
22.) A.) I can't find one through my file.
23.) Q.) Okay
24.) MR. DAVIS: May I have this marked, your Honor?
25.) THE COURT: Sure.

(see PCR Transcript P.37, lines 1-25):

- 1.) (Plaintiff's Exhibit No. 1, Email, was marked for
- 2.) identification.)
- 3.) Q.) Im going show you what's been marked as Plaintiff's
- 4.) Exhibit Number 1. Take a look and see if that is the e-mail
- 5.) in question.
- 6.) Correct. So that e-mail came through, and as a result
- 7.) of that, I would've gotten in contact with the Solicitor
- 8.) Shortly after. And I don't know exactly the date, but it
- 9.) Would've been in response to this.
- 10.) Q.) Because that e-mail actually still talks about a
- 11.) trafficking and cocaine and a distribution of cocaine. Is
- 12.) that right?
- 13.) A.) Correct. Cocaine base.
- 14.) Q.) Okay. And what's the date of that e-mail?
- 15.) A.) The date of that would be November 7, 2014.
- 16.) Q.) Okay. And so it's your testimony that following that
- 17.) e-mail is when you had discussions with the Solicitor about
- 18.) changing the possession from cocaine or crack cocaine to
- 19.) marijuana?
- 20.) A.) Correct. The dissolution of cocaine base to possession
- 21.) with intent to distribute marijuana.
- 22.) Q.) That was of your own volition not after having met with
- 23.) Mr. Jacobs in the interim; correct?
- 24.) A.) Correct. I would've replied and tried to get an
- 25.) approved offer to take to him.

Petitioner argues that, counsel stated on the record that he met with Petitioner after the bond reduction hearing on November 13th, 2014 and December 5th, 2014, but never once stated having discussions with the solicitor about altering the plea offer that was placed on the record.

To establish a claim of ineffective assistance of counsel, a PCR petitioner must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the Petitioner's case. Strickland v. Washington, 466

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Custudio v. State, 373 S.C. 4, 9-10, 644 S.E.2d 36 (2007); Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct.App. 1999), states that a defendant does not have a constitutional right to plea bargain, a trial Judge is not required to accept a plea bargain, and that ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court approved plea of guilty.

However, absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. Reed, 333 S.C. 688, 511 S.E.2d at 402; State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct.App. 2001), enforcement of an agreement not to prosecute is subject to two conditions (1) the agent must be authorized to make the promise; (2) the defendant must rely to his detriment on the promise. Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding.

Petitioner also argues that, on December 8th, 2014, counsel only advised him to accept the plea. Moreover, during the PCR hearing, counsel never once stated that, prior to plea he mentioned to petitioner, of his receiving an E-mail or negotiating with the solicitor to alter the plea offer which already existed on the record. (see PCR Transcript P. 38, Lines, 1-15): Cross-examination of Mr. Wehman by Mr. Davis

- 1.) Q.) And again, your thinking was that the offer that's on
- 2.) the e-mail consists of two strikes?
- 3.) A.) So it consists of two strikes. The maximum possible
- 4.) penalty of the distribution would've been 30 years. The
- 5.) maximum possible penalty of the P.W.I.D., third offense, is
- 6.) actually 20 years, which was the bottom of the range we were
- 7.) trying to get. The strike, I thought, was a benefit also.
- 8.) I knew that the Judge would be writing down at least one
- 9.) 20-year sentence. That was the thinking behind it.
- 10.) Q.) And the State would've then, when they agreed to that,
- 11.) that's when they presented you with the proposed sentencing
- 12.) sheets?
- 13.) A.) Correct. we actually got the proposed sentencing

- 14.) Sheets the day of the plea. That's when we typically get
- 15.) those.

Petitioner argues that, there is nothing in counsel's testimony that addresses him discussing with Petitioner, his intent to alter the already existing plea offer, and not only that, his attempts to allegedly negotiate with the solicitor a better plea besides the offer he received through an e-mail from the solicitor alleging two strikes. Petitioner maintains that, prior to the plea, he had no knowledge of this because counsel failed to advise him about any of this.

Counsel also acknowledges that, he received the offer and the proposed sentencing sheets the day Petitioner was scheduled to go to trial or accept the plea. Counsel's advice then, as stated to Petitioner was that, if he proceeded to trial, he was facing a life sentence without the possibility of parole. The trial and plea advice given by counsel, was contrary to the courts understanding, of what it was Petitioner thought he was pleading guilty to, and the charges and potential sentence he was facing if he proceeded to trial. As stated within the plea transcripts is the courts understanding at the time during the plea proceedings. (see Plea Transcript PP. 4, Lines, 12-18):

- 12). THE COURT: Mr. Jacobs, you're scheduled for a Jury
- 13.) trial here on these two indictments.
- 14.) Do you understand that?
- 15.) MR. JACOBS: Yes, ma'am.
- 16.) THE COURT: I understand you wish to plead guilty;
- 17.) is that correct?
- 18.) MR. JACOBS: Yes ma'am

Judge Harrington stated that, Petitioner was scheduled for a Jury trial on two indictments, where as, counsel informed Petitioner that he would be tried for all three distributions and everything allegedly found inside the residence. Judge Harrington also stated that, Petitioner was not facing a life sentence if he proceeded to trial, where as, counsel advised petitioner that, if he proceeded to trial he was facing life without parole if found guilty.

(see Plea Transcript Pp. 9, Lines, 7-12):

- 7.) THE COURT: So at some point, I'm going to sentence
- 8.) you to somewhere between twenty to twenty-five years.
- 9.) should you commit -- after that release, should you
- 10.) commit a serious or most serious or a combination, the
- 11.) State could seek for you to serve life without the
- 12.) possibility of parole.

Petitioner argues and urges the Court to understand his position regarding his acceptance of the plea, where counsel, who failed to investigate, gave petitioner erroneous trial advice, but allowed petitioner to accept a guilty plea, in which, counsel negotiated, but further neglected to consult with petitioner or advise him of his actions, which resulted in petitioner unknowingly, involuntarily, and unintelligently accepting the plea.

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding", including when he enters a guilty plea. Lafler v. Cooper, 566 U.S. 156, 165⁶ 132 S.Ct. 1376 (2012); Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366 (1985); Lee v. United States, 582 U.S. - - , 137 S.Ct 1958, 1964 (2017); Robinson v. State, 422 S.C. 78, 85, 810 S.Ed.2d 32 (2018); Terry v. State, 383 S.C. 361, 680 S.E.2d 277, 282 (2009), stating that, "Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorney's in criminal cases'." (citing Strickland v. Washington 466 U.S. 668.

Petitioner asserts that, trial counsel's advice to plea was erroneous in regards to him advising petitioner of the risks of going to trial, as well as, counsel failing to object or advise petitioner to withdraw the plea. see (PCR Transcript pp.39, Lines, 9-23):

- 9.) Q.) You advised Mr. Jacobs he should plea guilty rather
- 10.) than go to trial; correct?
- 11.) A.) I advised him of the risks of going to trial. The
- 12.) Solicitor had threatened if he were to try this case, to
- 13.) break it up: distribution, distribution, distribution, and
- 14.) then everything from the search warrant. And that his

15.) Intent would be once he acquired the number of strikes, to
16.) serve him with an LWOP notice. That was the threat.
17.) Q.) And how was that conveyed to Mr. Jacobs?
18.) A.) We talked. That would've probably had been, like I
19.) said, November 13th or December 5th, one of those two
20.) meetings. We discussed the fact that the solicitor was
21.) threatening to LWOP him at some point if he decided to go to
22.) trial. But he was not LWOP eligible at the time of his
23.) plea.

Petitioner further argues that, counsel's advice regarding the charges that he would face if he proceeded to trial was contrary to that which the solicitor stated, who revealed at the bond reduction hearing the exact charges petitioner was indicted for and would be facing if he proceeded to trial. see (Bond Reduction Transcript pp.4, Lines, 4-13):

4.) MR. SORENSON: before you is Antonio Jacobs
5.) Antonio Terrell Jacobs. He is represented by Mr.
6.) Wehman. He currently has five indictments pending here
7.) In Dorchester County: 2014-GS-18-497, 498, 499, 500 and
8.) 501, indicting him for one count of distribution of
9.) cocaine base, third offense or greater that stems out of
10.) an incident that allegedly occurred back on February 4th
11.) of 2014, when he is alleged to have sold .7 grams of
12.) cocaine base to a confidential informant with the
13.) Dorchester County Sheriff's Office.

As stated above, Petitioner asserts that, the record clearly shows that, counsel could not have properly advised petitioner in regards to trial advice. Mr. Sorenson clearly stated for the record the five initial charges petitioner was indicted for, where he specifically states that, petitioner was indicted for one count of distribution. Petitioner even argued that, the detectives sought a search warrant based solely on one controlled buy. (see (PCR Transcript pp.26, Lines, 25)

25.) Q.) And the other charges that the State dropped against

see (PCR Transcript pp.27, Lines, 1-15)

- 1.) you, those were like the CI buys and the State alleged that
- 2.) they had bought crack from you?
- 3.) A.) No. That was -- there was the CI buys as well as the
- 4.) evidence.
- 5.) Q.) Okay.
- 6.) A.) Because some of the evidence was seized in the
- 7.) apartment.
- 8.) Q.) Okay. And there were -- I believe the State alleged
- 9.) that there were three different CI buys tht they had
- 10.) against you?
- 11.) A.) Yes.
- 12.) Q.) And that's what they used to get a search warrant?
- 13.) A.) One of them.
- 14.) Q.) They used one of them to get a search warrant?
- 15.) A.) Yes, sir.

Petitioner argues that, what is noteworthy about his case is that, the measure of counsel's erroneous advice and mistakes clearly throughout every procedure derive from his lack of investigation and blatant disregard for initial facts stated by petitioner about his case and evidence that could have been presented to discredit questionable witnesses.

Petitioner asserts that, if counsel would have thoroughly investigated he would have discovered that, Petitioner was only charged and indicted for one distribution bearign arrest warrant # H-619870.

see (Exhibit E, Paragraph #2, Detective Martins Supplementary Report):

Antonio Terrell Jacobs was apprehended duringg a traffic stop by Summerville patrol units and transported to Summerville Police Department to await service of arrest warrant # H-619870.

Petitioner further contends that, counsel's misleading advice became evident from his lack of investigation. Petitioner states that, this impaired his ability to properly make a knowing, voluntary, or intelligent decision, regarding whether, going to trial would have yielded a better result or whether pleading guilty was the better option. Petitioner even argues at the PCR

hearing that, he was never given those options, nor were they proposed to him, as a way to, or in a way to, discredit testimony during a trial setting and further weaken evidence potentially presented by the defense.

see (PCR Transcript pp.26, Lines 16-24):

- 16.) A.) Well, if counsel woul've advised me that I had these
17.) other avenues, I would not have pled guilty anyway. I was
18.) trying to go to trial. I mean, you know, but he never did
19.) that. so how would I know that?
20.) Q.) And what are the other avenues that you're talking
21.) About?
22.) A.) Like as far as, like, challenging the evidence and
23.) things like that. He never told me that. I mean, so I
24.) never had that option.

A defendant is incompetent if he "lacks the capacity to understand the nature and object of the proceeding against him." Drupe v. Missouri, 420 U.S. 162, 171, 95 S.Ct 896, 43 L.Ed.2d 103 (1975). "The purpose of the 'knowing an voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced."

Petitioner argues that, even though counsel was aware of the changes within the offered negotiation, he still allowed Petitioner to plea without first advising him of these changes that were made. Petitioner was clearly unaware of the changes regarding the charges, the offense level, as well as the significant changes of the nature and potential consequences surrounding each individual charge.

Petitioner further argues that, he entered into the plea unaware of the potential risk and circumstances he was facing prior to the signing of the waiver form, which seems to have been altered in itself. Counsel even admits at the PCR hearing that he recieved the proposed sentencing sheets and states EXHIBIT #1 on the day he was scheduled to prepare for trial or accept the plea. On November 13th 2014, or December 5th 2014, counsel never informed Petitioner of any new plea negotiation he devised with the solicitor and neither did counsel prepare Petitioner for a trial.

see (PCR Transcript pp.38, Lines, 16-25)

16.) Q.) Did you recall discussing with Mr. Jacobs the risks of
17.) going to trial?

18.) A.) I remember this -- so I was actually appointed to
19.) represent him, I want to say, it was in August, middle of
20.) August. It was transferred to me. And up until that bond
21.) hearing in November, we were working on a bond. we were'nt
22.) even talking about trial. It was getting the discovery. so
23.) everything kind of came together on December 5th and
24.) November 13th would be -- anything we talked about trial
25.) would have been one of those two dates.

see (PCR Transcript pp.39, Lines, 1-8)

1.) Q.) And on State's Exhibit Number 1, can you tell by
2.) looking at State's Exhibit Number 1 when you completed that
3.) form?

4.) A.) It does not have a date on it. This would have been
5.) though, at the courthouse. The day of the plea is when I
6.) bring these to do that.

7.) Q.) December 8, 2014

8.) A.) Correct

Petitioner argues that, he was unaware, as to which negotiation he was actually pleading guilty to. There was actually three separate offers made by the solicitor and Petitioner states that, he was only aware of one of those offers, and that offer was placed on the record at the bond reduction hearing.

see (Bond Reduction Transcript pp.6, Lines, 20-25):

20.) THE COURT: Do you want to place the offer on the
21.) record

22.) MR. SORENSON: I had told him that I would
23.) basically reduce the thirds down to seconds and allow
24.) him to -- and recommend a range of twenty to twenty-five
25.) years on second offenses, your Honor.

Was trial counsel ineffective for failing to request a continuance in open court, where counsel's communication with Petitioner, about his case

Was brief?

Petitioner asserts that, the initial e-mail recieved by counsel on Friday November 7th, 2014 at 2:46PM, which occurred approximately two days after the bond reduction hearing contained a second offer of "Distribution of cocaine base 3rd and trafficking cocaine 10-28 grams 2nd" was never discussed with Petitioner on November 13th, 2014 or December 5th, 2014. See (Exhibit #1). Petitioner states that, his understanding of the offer was that, the offer he pled guilty to was the initial offer presented on the record at the bond reduction hearing containing the same level of offense, but was actually a third offer. See(Bond Reduction Transcript pp.6, Lines, 20-25); (Exhibit #1); supra, (PCR Transcript pp.37, Lines, 10-25). Petitioner contends he was never informed of the second offer presented to counsel via e-mail.

Petitioner further asserts that, counsel's thinking that the offer on the e-mail, consisted of two strikes, was deficiently interpreted, where under South Carolin law, the recidivism statute, 17-25-45, does not include "Distribution of cocaine base" among the list of drug offenses that would count towards being considered as a strike, stemming out of the most serious violent category or as being considered a serious offense potentially enhancing prior convictions, falling under a particular class of offenses. Also counsel's failure to request that both the possession with intent to distribute marijuana and trafficking charge be treated as one offense under S.C. section 17-25-50, consequently deriving from one incident was also accountable to counsel's deficient performance. These deficiencies squarely underling counsel's performance and show how he began aligning himself up with the Solicitor's case, especially, once he decided against challenging the alleged buys and the fruits of the alleged search, and the procedures that led up to the search warrants issuance.

Was trial counsel ineffective for failing to file a timely notice of Appeal?

Petitioner asserts that, counsel was ineffective for first failing to object at the plea hearing, where, prior to the plea based on discussions he had with the Solicitor, he discovered that the detectives never recorded the controlled buys. And further, counsel's failure to file a timely Motion to Suppress was also deficient performance.

Was trial counsel ineffective for failing to have the State present all

exculpatory evidence they planned to use against Petitioner?

To show substantial basis for crediting hearsay, Affidavit in support of a search warrant, must inform the Magistrate of underlying circumstances on which affiant concludes that informant is credible and underlying circumstances on which informant bases his conclusion that, that person whose residence is to be searched is engaged in criminal activity, but if informant's tip is found inadequate on basis of such requirements, Magistrate can find probable cause to believe tip if it can be fairly said that tip, when corroborated by independent sources, is as trustworthy as tip which would fulfill such requirements without independent corroboration. U.S. v. Fuller, 441 F.2d 755 (4th Cir. 1971); Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725, 735, 4 L.Ed.2d 697 (1960); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 588, 21 L.Ed.2d 637 (1969); State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981); State v. Thompson, 419 S.C. 250, 257-58, 797 S.E.2d 716 (2017).

Petitioner asserts that, the Affidavit is deficient and fails to sufficiently set forth the "credibility" or "Reliability" of the confidential informant, and substantial basis for crediting hearsay was based on controlled buys the detectives never recorded as an attempt to provide to the Magistrate to establish probable cause. Petitioner further asserts that, the initial buys are what allegedly began the detectives investigation, where the affidavit alleges nothing else that gave rise to the belief illegal substances would be located within the alleged residence. Petitioner states that, counsel revealed at the PCR hearing for the first time that, the detectives never recorded at all.

See (PCR Transcript pp.35, Lines, 15-22)

- 15.) Q.) And did you speak with your client about credibility or
- 16.) believability of a CI?
- 17.) A.) we talked about only because the videos in this
- 18.) case were poor based on the preliminary hearing we had and
- 19.) discussions with the Solicitor. The videos were
- 20.) nonexistent, essentially. They didn't record. so we
- 21.) would've had to have -- it would have been completely the
- 22.) credibility of that CI. They didn't have a video to go by.

Petitioner argues that, counsel never advised him that, if he would have been permitted to give testimony at the suppression hearing. Petitioner states that, given the chance to refute the testimony provided by the states witnesses could have substantially revealed the true strength of the prosecutors case uncovering facts such as, unrecorded buys and the reasons petitioner was never charged with the buy which allegedly occurred on April 10, 2014, and why pre-recorded buy money was never retrieved off of Petitioner's person the day of the alleged buy, as well as, the request and execution of a search warrant.

"When a defendant testifies in support of a motion to suppress evidence on fourth Amendment grounds, his testimony may not be thereafter admitted against him at trial on the issue of guilt unless he makes no objection". "This rule not only imposes a condition which may deter a defendant from making a Fourth Amendment objection; as a practical matter, it makes a defendant who wishes to establish standing do so at the risks that his words may later be used to incriminate him". "It is intolerable that one constitutional right should have to be surrendered in order to assert another". Simmons v. United States, 390 U.S. 377, 389-94 (1968); Mapp v. Ohio, 367 U.S. 643, 657, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 (1914); The exclusionsary rule is an essential part of both the Fourth and Fourteenth Amendments.

Petitioner asserts that, counsel's inert decision not to file a timely Motion to suppress created a disturbing impact on the outcome of Petitioners case, had counsel's exercise of precise measures regarding these procedures been exhausted, there is a strong presumption these issues could have been resolved.

So as a result of counsel failing to object and filing a timely Motion to suppress, issues were not preserved for Appellate review, therefore making it pointless to file a timely notice of appeal.

Petitioner asserts that, counsel's failure to object to the Solicitor charging possession with intent to distribute marijuana 3rd offense on the sentencing sheet, where the indictment was controlling, as indicated, by the "As Indicted" box being checked off on the sentencing sheet. The Indictment clearly does not state 3rd offense, clearly making this an issue determinative

of Petitioners legal liberty. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923).

Petitioner asserts that, counsel was deficient for failing to object allowing petitioner to plea to charges that could have been challenged on numerous aspects, where a plea of guilty, by petitioner if any, could have been counsel's last line of defense.

"We held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1034 (2000)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, announcing that "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below on objective standard of reasonableness," *Id.*, at 688, 104 S.Ct. 2052, and (2) that counsel's deficient performance prejudiced the defendant, *Id.*, at 694, 104 S.Ct. 2052. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.*, at 688-689, 104 S.Ct. 2052. Rather, courts must "Judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Id.*, at 690, 104 S.Ct. 2052, and "Judicial scrutiny of counsel's performance must be highly deferential," *Id.*, at 689, 104 S.Ct. 2052."A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *Rodriguez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); cf. *Peguero v. United States*, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed2d 18 (1999)("When counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"), *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974); *Simuel v. State*, 390 S.C. 267, 270-71, 701 S.E.2d 738 (2010), counsel must make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)(citation omitted)(Turner I); see also *Turner v. State*, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal (Turner II). "In the absence of an intelligent waiver by the defendant, counsel must either initiate

an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); Turner, 380 S.C. at 224, 670 S.E.2d at 374 (2008); Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738 (2010), [Footnote #2] "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal". Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462; 465 (2004).

Petitioner also contends that, counsel's failure to object to this deficiency within this particular indictment, which clearly had an impact on the Judges discretion, where petitioner was sentenced to the maximum possible sentence, which was 20 years under this statutory provision. S.C. Ann. Code 44-53-370.

Petitioner asserts that, counsel's understanding, not his investigation of the facts led him to believe that detective Martins testimony, in relation to the investigation would overshadow the procedural value required by statute(s) or State, and Federal Constitutional Amendments established that the confidential informants testimony would outweigh the lack of material evidence the State failed to acquire where initially there was never any to obtain.

"The history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness" Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, 1197, 2 L.Ed.2d 1332 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted. Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed 520 (1927); Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949). Petitioner asserts that, counsel advised him to plead guilty, where as, he was aware of detective Martins shortcut methods used to obtain a search warrant that was issued solely off of tainted testimony known to be false, but relayed to the Magistrate, at the preliminary hearing, and then, at the grand Jury proceeding.

Counsel's failure to advise petitioner of these avenues and there distorting effects, deprived petitioner of the right in his decision making process to make a just determination as to whether he should stand trial or plead guilty.

See (PCR Transcript pp. 44, Lines, 13-25:

13.) Q.) Mr. Wehman, Just one final thing back to influencing
14.) your advise whether to go to trial or not. There were
15.) alleged three different buys; correct?
16.) A.) Correct.
17.) Q.) And the final one that led to the search warrant was
18.) alleged to have occurred the day that the search warrant was
19.) executed. Do you recall that?
20.) A.) I'd have to look back. If you say that's what the
21.) discovery says, I mean, I have no reason to doubt you. But
22.) I know it was close in time to when the search warrant was
23.) sworn out.
24.) Q.) Well, let me rephrase it this way. Was the
25.) final purchase alleged to have occurred the same day that

See(PCR Transcript pp.45, Lines, 1-18)

1.) Mr. Jacobs was arrested. Do you recall that?
2.) A.) I do not specifically recall the date of the buy when
3.) he was arrested.
4.) Q.) Do you recall, however -- he was arrested in the
5.) vehicle; correct?
6.) A.) Correct.
7.) Q.) Do you recall that there was no buy money seized from
8.) Mr. Jacobs?
9.) A.) Correct. That's correct.
10.) And despite the information, again, your advice based
11.) on the offer was for him to accept the offer, not go to
12.) trial on these charges?
13.) A.) Based on the charges all stemming from the search of
14.) the home, yes.
15.) Q.) Okay.
16.) A.) And those distributions were dismissed.
17.) Q.) As part of the plea?
18.) A.) Correct.

Was trial counsel ineffective for failing to advise petitioner that under his 5th Amendment right and South Carolina statute 17-19-10, that he did not have to answer to any crime whether "it be capital or infamous unless on a presentment of indictment of a legal grand Jury??"

Petitioner first argues that, counsel erroneously negotiated charges that petitioner was neither charged with or indicted for. See (Exhibit #1).

This E-mail clearly identifies the five pending charges that petitioner was initially indicted for; Distribution of cocaine base 3rd, PWID marijuana, PWID cocaine base 3rd, Trafficking cocaine 3rd, and manufacturing cocaine base 3rd. The record does not reflect two additional distributions for counsel or the Solicitor to use in negotiating any form of a plea deal.

No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand Jury or on a presentment ... S.C. Const., Art. 1 § 11; 17-19-10.

Was trial counsel ineffective for failing to have detective Martin Produce alleged audio and video recordings of controlled purchases?

Petitioner argues that, counsel disregarded facts specific in connection with the alleged buys, where allegedly the last buy occurred April 10, 2014. This allegation was actually conferred the day petitioner was arrested in a vehicle, taken to jail, and searched, where no illegal narcotics or buy money was ever retrieved off of his person. Counsel was not even able to recall this date which petitioner was arrested. See (Exhibit E, detective Martins supplementary report, paragraphs 1,2); See (Booking Report, Exhibit B).

On this date April 10, 2014 a confidential informant was utilized to conduct the third controlled purchase from the suspect Antonio Terrell Jacobs at Ashley Gardens Apartments Summerville South Carolina in Dorchester County. Upon successful completion of the controlled purchase an arrest warrant was obtained for Antonio Terrell Jacobs, and a search warrant for his residence located at Ashley Gardens apartment #9, Summerville South Carolina in Dorchester County.

Antonio Terrell Jacobs, was apprehended during a traffic stop by Summerville

patrol units, and transported to Summerville Police Department to await service of arrest Warrant # H-619870.

Petitioner asserts that, the arrest warrant was for an alleged controlled buy, which allegedly was dated and reported to have taken place on February 4th, 2014, two months prior to an alleged buy or search of the residence, in which alleged controlled purchases were never recorded to support any of detective Allen or Martins allegations, neither through surveillance by detectives occurring around the time of alleged criminal acts, where petitioner was never observed around the residence. See (Exhibit E, detective Martins Supplementary Report, Paragraph #3).

Prior to executing the search warrant, detectives observed Grady Ashe Jr. drive into the apartment complex in a maroon Dodge Magnum bearing South Carolina JPA183 and entering apartment #9.

Was trial counsle ineffective, where he advised Petitioner to take a plea knowing Petitioner had not seen the audio and video recordings?

Petitioner argues that, the record clearly indicates that Petitioner was never seen on the day in question leaving the alleged residence engaging in illegal activity or approaching the alleged residence engaging in illegal activity. Detective Martins Supplementary Report even details who they observe inside the residence. See (Exhibit E, detective Martins Supplementary Report Paragraph #5, Line #1)

Upon entry into the residence, detectives observed Grady Ashe Jr. sitting on the living room couch, and Donnell Jacobs at the kitchen table.

Even further, it was discovered for the first time by Petitioner at the ^{PCR hearing} PCR hearing that the buys were never recorded to establish whether probable cause existed or not. Petitioner argues that, counsel never discussed this issue with him, because if he did, Petitioner states that he would have advised counsel to file a motion to supress evidence no matter what the outcome may have entailed, being as though the preliminary hearing was unsuccessful, but engaged in that proceeding anyway.

See (PCR Transcript pp.35, Lines, 23-25)

23.) Q.) And the credibility of a CI combined with a search

24.) Warrant?

25.) A.) Sure. We did talk about the search warrant and that

See (PCR Transcript pp. 36, Lines, 1-8):

- 1.) the fact that the video was not recorded didn't null the
- 2.) search warrant. But that it was possible that the CI would
- 3.) have to be called for the search warrant if we tried to
- 4.) supress it at trial.
- 5.) Q.) Okay. But the strength of the case wasn't in the audio
- 6.) and video?
- 7.) A.) Correct. The strength was the search warrant,
- 8.) everything got through the search warrant.

Was trial counsel ineffective for failing to attack the credibility of the confidential informant?

Petitioner argues that, counsels failure to challenge the credibility of the confidential informant was clearly erroneous, where based on this fact the affidavit itself is completely dependant upon alleged confidential informant buys that are allegedly recorded with audio and video transmitters, was never recorded as a basis for crediting hearsay or a way to establish probable cause to obtain a warrant did exist.

In determining the sufficiency of the affidavit, the applicable standard is set forth in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); U.S. v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); State v. Baccus, 367 S.C. 41, 48-53, 625 S.E.2d 216 (2006). The affidavit must describe some of the underlying circumstances necessary to enable a neutral and detached magistrate to judge the validity of the informers conclusion that illegal narcotics were where he claimed they were; and (2) the affidavit must describe some of the underlying circumstances from which such magistrate can determine that the affiant officers unnamed informant, whose identity need not be disclosed, was credible or his information reliable.

Petitioner asserts that, counsels failure to research the contents of the affidavit clearly reflects the distorting effects of his judgment, devising or calculating proper trial strategies or even assisting petitioner with making proper and informed decisions. Also counsels assessment regarding

detective Martin's and the confidential informant's testimony, were not facts specific lacking material evidence, to indicate whether the credibility and reliability of their testimony could establish probable cause, and should have been challenged at a suppression hearing and determined by a Judge of law.

When the information forming the basis of probable cause comes from an informant, the informants "veracity" and "reliability" are critical to the totality of the circumstances test. Wilhelm, 80 F.3d at 119 (quoting Illinois v. Gates, 462 U.S. at 233, 103 S.Ct. 2317 (1983)). "A judicial officers assessment of probable cause must include a review of the "veracity" and "Basis of knowledge 'of persons supplying hearsay information'." United States v Lull, 824 F.3d 109, 118 (2016); (citing United States v. Perez, 393 F.3d 457, 461-62 (4th Cir. 2004)(emphasis added).

Petitioner argues that, the affidavit fails to set forth any underlying circumstances concerning the confidential informants alleged observation of any illegal narcotics in plain view. See (Exhibit L, pp.1 Warrant Affidavit).

Petitioner asserts that, detective Martin was aware that, prior to the issuance of the search warrant Petitioner was registered to a different address, but disregarded this fact and relayed instead, Petitioner's mothers address to the Magistrate, as though it was Petitioner's, in order to secure a warrant for that alleged residence. See (Exhibit #2, address on rapsheet); (Exhibit L, pp. #1).

Address on the rapsheet: [response: Dors 0006] To: Dors 0006-2565

From: DMV-1490275 20140124 16:10:11 2711000420

TXREF SC01800002711000420

XREF

ID No. 0007750546

Jacobs, Antonio Terell

235 Forest Cir. Lot #91

Summerville, SC 294832851 Dorc CNTY

Sex:M, HgT,5'09" WgT185, Birth 03/07/1978

Status-DL: Suspended CDL:disqualified

I Identification only: Issued 04/01/2013

Petitioner asserts that, counsel failed to realize the addresses were completely different and that his actual address was not 403 East 3rd North Street, Apt #9, and that prior to the search detective Martin was aware of that fact when he conducted a utilities search, then two months later during the search of the residence, discovered personal belongings of Petitioners,, which included personal mail bearing the address 235 Forest Cir. Lot#91, and Petitioners identification card matching the address on the mail.

See (PCR Transcript pp.40, Lines 12-25):

- 12.) Q.) And during your discussions with Mr. Jacobs, he
- 13.) would've indicated to you that he had a different residence;
- 14.) right?
- 15.) A.) Correct. Well, he at least said that he didn't live
- 16.) there.
- 17.) Q.) Fair enough. And during your discussions with
- 18.) Mr. Jacobs, he indicated to you he didn't even have a key to
- 19.) his mothers residence. Isn't that right?
- 20.) A.) I dont recall that specifically.
- 21.) Q.) Okay. Well, at least to the first two, despite the
- 22.) fact that he was addressed at a different location indicated
- 23.) he did not reside at the location where they found the
- 24.) drugs, still your advise that he should accept this plea?
- 25.) A.) They found his mail inside, so. And also they had

See (PCR Transcript pp.41, Lines, 1-8):

- 1.) officer testimony or they would've had officer testimony and
- 2.) CI testimony that he sold from that residence. One of buys
- 3.) is alleged to have taken place, I believe, at the door of
- 4.) that residence where they had police surveillance. And also
- 5.) you have the risk of the confidential informant coming in
- 6.) and testifying to that as well.
- 7.) Q.) Without the benefit of a video -- buys?
- 8.) A.) Sure. That was my understanding.

As stated above Petitioner argues that, counsel's performance was deficient and failed at standing up to the Solicitors case simply because

he abandoned his role as the adversary. Counsel's poor understanding of the controlled buys was deficient. Counsel was ineffective for believing and understanding this theory because the Solicitor even states on the record at the Bond reduction hearing that Petitioner was never charged for the alleged buy on April 10, 2014. Supra, (See Bond Reduction Transcript pp.4, Lines, 7-9). Further adding support to this claim was the fact that, the controlled buys were never recorded and pre-recorded U.S. currency was never retrieved off of Petitioner's person either, to infer from testimony, as to whether, Petitioner allegedly sold any narcotics. This explains why the Solicitor opted to dismiss the buys, but counsel failed to challenge the Solicitors tactics, in which violated Petitioners rights that he ended up waiving, also violating his due process right.

~~X Was trial counsel ineffective for failing to attack fruitless search warrant which failed to establish a substantial basis of knowledge for a finding of probable cause? X~~

Petitioner argues that it is imperative within its own meaning to believe that counsel's failure to attack the affidavit, as well as, the fruitless search warrant was of sound trial strategy, when both affidavit and search warrant were lacking indicia of probable cause. The affidavit fails to state any underlying circumstances that would give the magistrate reasons to believe probable cause existed and narcotics would have been located within the residence. Also, they never recorded alleged buy to testify that it was controlled.

"Our good'faith inquiry is confined to the objectively ascertainable question whetehr a reasonably well-trained officer would have known that the search was illegal despite the magistrates authorization" United States v. Leon, 468 U.S. 897, 922, n.23 (1984); Our common law has long recognized a "reasonable division of functions," Baker v. McCollan, 443 U.S. 137, 145 (1979), the gathering of information is the province of the police, and the weighing and judging of that information is virtually the exclusive province of the magistrate. Leach v. Three of the King's messengers, 19 How.St.Tr. 1001, 1027 (1765) quoted in United States v. United States District Court,

407 U.S. 297, 316 (1972).

The specific section on detective Martins unsworn affidavit which states "Reasons for affiants belief that the property sought is on the subject premises" uses the words of incorporation "see attached affidavit" referring towards detective Allens affidavit which is signed by detective Martin making it unclear as to who was sworn before the magistrate.

Counsel's failure to challenge the truthfulness of detective Martins testimony, was deficient because detective Allen relied upon detective Martins well-training and experience to relay information to the magistrate. Through counsel's lack of investigation he failed to realize that detective Martins affidavit was blank. See (Exhibit L, Affidavit, pp.2).

Petitioner argues that, detective Martins affidavit is unsworn and fails to state any underlying circumstances because it is blank, except one section which states "see attached affidavit". The affidavit bears the signatures of detective Martin, the Judge, as well as the time it was signed, but fails to illustrate whether he was sworn or authorized by the magistrate to testify that he received credible hearsay information from a confidential source or was in fact, the affiant who received first hand knowledge from prior observations of this confidential source to establish probable cause.

A defendant must identify the specific portions of the affidavit that he claims are false and show why they are false. United States v. Tate, 524 F.3d 449, 454 (4th Cir. 2008). The defendant "must also furnish affidavits or sworn or otherwise reliable statements of witnesses or explain their absence" in order to meet his burden and be entitled to a hearing. (quoting Franks, 438 U.S. at 171).

Petitioner argues that, counsel's failure to request a Franks hearing to challenge the validity of the detectives affidavit once he discovered the buys were non-existent [PCR Transcript pp.35, Lines, 19-22], also detective Martins affidavit is blank and detective Allens affidavit is deficient. This deliberate falsehood and/or reckless disregard for the truth could have been used as an avenue to challenge and discredit testimony that did hinder counsel's determination and further attempts at motioning for evidence to be suppressed.

Under the Fourth Amendment, which applies to the states through the Fourteenth Amendment Mapp v. Ottio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), "no warrants shall issue, but upon probable cause, supported by oath or affirmation" U.S. Const.Amend. 4; S.C.Const.Amend.Art.1 § 10; S.C. Code Ann. 17-13-140 (2014).

A criminal defendant has the right to challenge the veracity of statements made in an affidavit supporting an application for a search warrant. Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). A defendant must first "make a substantial preliminary showing" of the in intentionality and materiality prongs; if the defendant does so, "the Fourth Amendment requires that a hearing be held at the defendants request." U.S. v. Lull, 824 F.3d 109, 115-116 (2016); State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000), "Both the Fourth Amendment of the United States Constitution and Article 1§10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." The purpose of the statute requiring that a warrant be issued only upon affidavit is to provide for timely recording of facts presented to a judicial officer. S.C. Code Ann. 17-13-1401(2014); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975); State v. Robinson, 415 S.C. 600, 606, 785 S.E.2d 355, 358 (2016). To mandate an evidentiary hearing, there must be 'Allegations of deliberate falsehood or of reckless disregard for the truth ... and those allegations must be accompanied by an offer of proof' ... second, ... the courts must consider the affidavits remaining content, with the affidavits false material set to one side, to determine if it is sufficient to establish probable cause!" The defendant must "establish the falsity by a preponderance of the evidence."

Was trial counsel ineffective for failure to address how detectives never seized any buy money from Petitioner on alleged buy, and arrest date April 10, 2014 which would have been argued at trial to further discredit confidential informant as well as detective Martins supplementary report failing to utilize this evidence?

Petitioner argues that, counsel disregarded relevant facts that would

have raised suspicion, regarding issues in connection with the residence and how it was pertinent detectives obtained a search warrant when the affidavit omitted facts and was "designed to mislead." United States v Cdkley, 899 F.2d 297, 200 (4th cir. 1990), the omission must be "designed to mislead" or must be made "in reckless disregard of whether it would mislead." Id. at 301; State v. Owen, 275 S.C. 586, 588, 274 S.E.2d 510, 511, "In passing upon the validity of the warrant, a reviewing court may consider only the information brought to the magistrate's attention."

Petitioenr further asserts that, the detectives knew prior to requesting for a search warrant that, petitioner resided at a totally different address than that presented to the magistrate. Detectives blatantly disregarded this fact and presented misleading evidence as if this was true in residential regards. As a result of conducting a utilities check and a background search detectives discovered petitioners address as 235 Forest Circle, Lot #91 Summerville, South Carolina.

See (PCR Transcript pp. 40, Lines, 12-16)

- 12.) Q.) And during your discussions with Mr. Jacobs, he
- 13.) would've indicated to you that he had a different residence;
- 14.) right?
- 15.) A.) Correct. Well, he at least said that he didn't live
- 16.) there.

Petitioner asserts that, counsel's awareness that petitioner was in fact registered to a different address along with alleged controlled purchases that were non-existent making it unclear whether purchases occurred as alleged or monitored even by detectives. Pre-recorded U.S. Currency was never identified or allegedly seized from Petitioner the day the alleged buy occurred. When a warrant affidavit provides no indicia of an informants reliability, "courts insist that the affidavit contain substantial independent police corroboration." United States v. Frazier, 423 F.3d 526, 532 (6th Cir. 2005). See (Exhibit L, pp.1-2 affidavit).

Petitioner argues that, besides unsupported testimony by detective Martin, who was the only one that testified at the preliminary hearing, and the testimony of an unidentified confidential informant, nothing in the

records establish a sufficient nexus involving illegal activity between Petitioner and the alleged substances allegedly discovered inside the residence in question. The confidential informant never stated whether he saw illegal substances inside the residence, which raises questions regarding his actual presence inside the alleged residence.

"There must be a 'nexus between the place to be searched and the evidence to be sought'" United States v. Frazier, 423 F.3d 526, 532 (6th Cir. 2005); United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004); United States v. Lalor, 996 F.2d 1578, 1582 (4th Circuit 1993), in determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988), Cert. Denied 488 U.S. 1031 (1989), "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inference of where one would likely keep such evidence."

Petitioner argues that, normal inferences should not have been drawn from charges petitioner was never indicted for. Based upon unsupported facts, these inferences should not have been drawn from alleged buys that were non-existent to concur that, illegal activity occurred from the alleged residence, Petitioner was connected to alleged activity, or illegal substances would be located on the subject premises when the alleged confidential informant never stated to detectives whether he observed anything in the residence. Petitioner was never seen in or around the residence on the day in question. Normal inferences cannot suggest these allegations or conclude this as facts, that petitioner committed alleged acts, where a complete lack of material evidence to support the initial investigation never existed to support such testimony or suggest these surrounding allegations would support such testimony or hold any weight. Detective Martin was never sworn in before a magistrate making his testimony subject to waiver as well as perjury. Petitioner further states that detective Allen was allegedly sworn before the magistrate, but his affidavit was never signed by him to confirm under penalty of perjury that these a allegations would be confirmed as true.

Was trial counsel ineffective for failing to request all Rule 5 & 6 evidence favorable to petitioners case prior to the plea?

Petitioner argues that counsel was ineffective for failing to request or provide petitioner with certain brady material that could have been used to discredit detective Martins allegations, where prior to the plea, detective Martins deliberate disregard for the truth in association with detective Allens affidavit, would have revealed petitioners registered address as the actual address he was aware of prior to the entry and search of the alleged residence to be true.

The brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006); Brady V. Maryland, 373 U.S. 83,87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)) "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220, (1998). A "reasonable probability" is demonstrated when the suppression "undermines confidence in the outcome of the trial." United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375 (1985). The State must disclose brady evidence even when a criminal defendant does not specifically request the evidence. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). An applicant "may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged brady violation," Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999); State v. Hill, 368 S.C. 649, 657, 630 S.E.2d 274, 279 (2006), we utilized the following framework to evaluate the success of a PCR applicant's claim: (1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution know of or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilt or punishment. Gibson, 334 S.C. at 524, 514 S.E. 2d at 324 (citations omitted). "A brady violation is material when there is a

reasonable probability that, but for the government's failure to disclose Brady evidence, the defendant would have refused to plead guilty and gone to trial." Id. at 525, 514 S.E.2d at 325 (citations omitted).

Petitioner asserts that, evidence in question was favorable to him, where if counsel would have obtained or provided petitioner with the remaining portions of this material, certain photos suppressed from petitioner could have been used to show standing to challenge the search warrant, and show as well that petitioner was indeed registered at a different address. Petitioner kept some clothes inside the guest bedroom of his mother's residence for nights he would stay over and assist her. A few peices of petitioner's mail was located there as well along with his identification card, where both listed the address of 235 Forest Cir. Lot #91, also indicating petitioners residence to be that of another residence. Petitioner further asserts that, from observing the photos you would also notice that no illegal substances were located inside the guest room to indicate or place in connection with Petitioners belongings either. Also the mere fact that information regarding the buys and their existence was suppressed from petitioner to make a knowing and intelligent decision to stand trial or voluntarily accept a guilty plea. See (PCR Transcript pp.12, Lines, 10-25):

- 10.) Q.) Did he send or bring to you your Rule 5; your discovery
- 11.) paperwork?
- 12.) A.) He sent my Rule 5 to me. But after being incarcerated,
- 13.) I recieved the other portion of my Rule 5 as well.
- 14.) Q.) Explain it a little better to the Judge. What do you
- 15.) mean after being incarcerated? Because you said you never
- 16.) made bond on these warrants; correct?
- 17.) A.) After I was sentenced and sent to SCDC, I recieved the
- 18.) pictures and everything else that I was requesting before I
- 19.) went -- before we ever -- before I ever pled guilty.
- 20.) Q.) So you got some more discovery once you got to the
- 21.) Department of Corrections after you pled guilty?
- 22.) A.) Correct.
- 23.) Q.) Were there any discussions about any potential defenses
- 24.) to these arrests?

25.) A.) No, there was not.

See (PCR Transcript pp.13, Lines, 1-9):

- 1.) Q.) Did you have -- were you able to observe paperwork
- 2.) dealing with the search of the residence?
- 3.) A.) That was, like, part of the other evidence that I
- 4.) recieved, pictures and stuff like that. I never had any of
- 5.) that, so I didn't know what they had, you know, when it came
- 6.) to that.
- 7.) Q.) Before you pled guilty, you didn't know what the police
- 8.) had from the search?
- 9.) A.) No, Sir. I did not.

Was trial counsel ineffective for failing to provide Petitioner with alleged crime scene photos that were part of his Rule 5&6 Motion for Discovery?

Petitioner asserts that, counsel's failure to provide him with this material evidence rendered his decision to stand thial or plead guilty involuntarily. This decision was coercively inducive, where this failure to provide all evidence of benefit to the Petitioner squarely left him blind to a degree of accurate judgment under crucial circumstances.

Petitioner also asserts that, providing this same degree towards the withholding and suppression of information regarding the existence of the controlled buys, also shifted the balance further making it that much more impossible for Petitioner to guage whether standing trial was a better option or pleading guilty.

Petitioner further argues that, the information regarding the buys was never discussed by counsel, where petitioner states that if counsel would have provided him with this information he would hot have pled guilty but would have insisted on going to trial. Petitioner states that this would definitely hold true once he would've discovered the prosecutor was willing to dismiss these alleged buys as part of the negotiated plea, but the buys held no substantial weight. This essentially meant the root of the prosecutors case was unsupported by facts and material evidence to infer or conclude Petitioners guilt.

Petitioner asserts that, counsel should have objected at the plea hearing once he became aware of this information. Counsel completely abandoned his role as the advocate against the State once he allowed the solicitor to infer from the tainted evidence the mere premise that, non-existent buys could be used as a bargaining chip to negotiate plea deals. Counsel's failure to object was deficient and brushed to the side as harmless, but counsel should have challenged this discrepancy in the material evidence, where the reliance on these controlled buys, by the solicitor, as a bargaining chip, could have been deterred.

"The test for reversible prosecutorial misconduct generally has two components (1) the prosecutors remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendants substantial rights so as to deprive the defendant of a fair trial." U.S. v. Fabian, 798 F.Supp.2d 647, 108 A.F.T.R.2d 2011-5341 (2011). "A conviction acquired through the knowing use of perjured testimony by the government violates due process." United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994)(citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) "This is true regardless of whether government solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972).

Petitioner asserts that, prior to the plea, counsel was in fact aware that buys never existed, but aligned himself with the Solicitor allowing him to state this as fact, or being consistent with, or an inference to, alleged material evidence discovered inside the alleged residence without ever attempting to object or challenge these allegations.

See (Plea hearing Transcript pp. 10, Lines, 23-25):

- 23.) MR. SORENSON: Thank you. May it please the Court,
- 24.) your honor.
- 25.) This stems out of an investigation that the

See (Plea hearing Transcript pp. 11, Lines, 1-15):

- 1.) Dorchester County - Summerville Metro Narcotics Unit

- 2.) opened into regarding this defendant back in January of
- 3.) this year.
- 4.) They initially -- using a confidential informant,
- 5.) they did an initial buy, controlled buy, from Mr. Jacobs
- 6.) on January 24th of this year and that was for about
- 7.) twenty-three grams of marijuana.
- 8.) They subsequently, on February 4th of this year,
- 9.) did another controlled buy where they purchased a little
- 10.) over half a gram of crack cocaine from Mr. Jacobs
- 11.) and then subsequently, on April 10th of 2014,
- 12.) actually at his residence, Ashley Garden Apartments,
- 13.) purchased \$100 worth of crack cocaine from Mr. Jacobs
- 14.) and that last buy was made at about four o'clock in the
- 15.) afternoon.

Petitioner argues that, the Solicitor's testimony, at the plea hearing should have been challenged by counsel, in regards to the truthfulness of his statements made at the plea hearing regarding the buys. Counsel's awareness of this taint deprived petitioner of the right to a fair hearing. See (PCR Transcripts pp.35, Lines, 15-20):

- 15.) Q.) And did you speak with your client about credibility or
- 16.) believability of a CI?
- 17.) A.) We talked about that only because the videos in this
- 18.) case were poor based on the preliminary hearing we had and
- 19.) discussions with the Solicitor. The videos were
- 20.) non-existent, essentially. They didn't record. ...

Petitioner argues that he was still under the impression the buys existed, based off of detective Martins testimony at the preliminary hearing, where he testified that he did view them when he was questioned about it several times by counsel.

"A conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment, Napue v. Illinois, 360 U.S. 264, 296 (1959); Mooney v. Holohan, 294 U.S. 103,

112 (1935), If the acts or omissions of a prosecuting attorney "have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as resulting in a denial of due process of law." Pyle v. Kansas, 317 U.S. 213, 216 (1942); Curran v. Delaware, 259 F.2d 707, 713 (1958); New York ex rel. Whitman v. Wilson, 318 U.S. 688, 691 (1943); White v. Ragen, 324 U.S. 760, 764 (1945); Jones v. Kentucky, 97 F.2d 335, 338 (1938); In Re Sawyer's Petitioner, 229 F.2d 805, 809 c.f. Mesorosh v. United States, 352 U.S. 1, 2-14 (1956). The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28, 31 (1957); United States ex rel. Thompson v. Dye, 221 F.2d 763 (1955); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952); United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382 (N.D. Ill. 1949); annotation, 2 L.Ed.2d 1575; United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994); United States v. Keogh, 391 F.2d 138, 148 (2nd Cir. 1968); Grundler v. State of North Carolina, 283 F.2d 798, 800-801 (1960). The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. Peoples v. Savvides, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E.2d 853, 854-855: "It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in anyway relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

Petitioner argues that, if counsel would have advised him of the potential attacks and strategies, he would not have pleaded guilty but would have insisted on going to trial. Being that counsel was aware of tainted material evidence, he failed to advise petitioner of potential avenues regarding the Solicitor's lack of material evidence allegedly linking him to the alleged illegal activity

in regards to the residence. The credibility of the detectives and the confidential informants testimony could have been challenged regarding his testimony at the preliminary hearing, being as though he was the only detective to testify in contrast to what was revealed at PCR, and presented to the grand Jury.

Petitioner argues that, counsel was deficient, where once he became aware that detective Martins testimony at the preliminary hearing was tainted, he should have objected prior to the plea and advised petitioner to withdraw the plea, based on the fact that, the buys were tainted, detective Martins testimony could not be supported to constitute probable cause, detective Martins provided misleading information to the grand Jury to indict petitioner completely disregarding the truth. This went unchallenged as counsel was aware that all of this occurred.

It has long since been settled by the supreme court that "an indictment, 'fair upon its face', returned by a 'properly constituted grand Jury,' conclusively determines the existence of probable cause." Durham v. Horner, 690 F.3d 183, 189 (4th Cir. 2012); Gerstein v. Pugh, 420 U.S. 103, 177 n.19, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)(internal quotation marks omitted); Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956), a grand Jury "Indictment ... valid on its face, is enough to call for trial of the charge on the merits." "A grand Jury's decision to indict ... will [not] shield a police officer who deliberately supplied misleading information that influenced the decision." Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989); Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988), overruled in part by, Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Miller v. Prince George's Cnty., Md., 475 F.3d 621, 632 (4th Cir. 2007), "the constitution did not permit a police officer ... with reckless disregard for the truth, to make material misrepresentations or omissions to seek [an arrest] warrant that would otherwise be without probable cause." Smith v. Munday, 848 F.3d 248, 252-254 (2017); Pritchett v Alford, 973 F.2d 307, 314 (4th Cir. 1992). A court should only consider the information the officers had at the time they sought the warrant.

Petitioner asserts that, detective Martin's name is the only name

that is presented under the section labeled "witnesses" on the indictment form, thus making it his sole responsibility as to the information that received from him and provided to the magistrate as well as the grand Jury attesting to its truthfulness. The apparent dismissal of the buys, allegedly all three, indicate a level of truth, that these alleged controlled buys were indeed weak, indicating that probable cause never existed.

Counsel's failure to challenge this tainted information, allowed the Petitioner to be indicted based off of misleading information and charged with material evidence, the state otherwise could not connect him to.

Was trial counsel ineffective for failing to attack fruitless search warrant which failed to establish a substantial basis of knowledge for a finding of probable cause?

If taken in consideration the 12 factors intertwined with the Fourth Amendments expectation of privacy, Petitioner asserts that, where he was not present inside residence at the time of the alleged search, but was person of interest, within alleged affidavit in reference to the residence, should have been granted suppression Motion. Katz v. United States, 389 U.S. 347 (1967); State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014); "The proponent of a Motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure" by demonstrating he had an expectation of privacy in the area illegally searched. Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978); Alderman v. United States, 394 U.S. 165 (1969); Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); State v. Crane, 296 S.C. 336, 340-341, 372 S.E.2d 587, 589 (1988); Courts may consider factors such as: (a.) "Whether the Petitioner owned the home or had property rights to it," United States v. Salvucci, 448 U.S. 83, 91, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); (b.) "Whether he was an overnight guest at the home," Minnesota v. Carter, 525 U.S. 83, 90, 119 S.Ct. 469 (1998); Minnesota v. Olson, 495 U.S. 91, 93, 96-97 & n.6, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004); State v. Flowers, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct.App.2004). (c.) "Whether he kept a change of clothes at the

home," Minnesota v. Olson, 495 U.S. 91, 97 n.6, 110 S.Ct. 1684 (1990); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004); State v. Flowers, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct.App.2004) (d.) "Whether he had a key to the home," Rakas v. Illinois, 439 U.S. 128, 149, 99 S.Ct. 421 (1978) (discussing Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), overruled on other grounds by Salvucci, 448 U.S. 83, 85, 100 S.Ct. 2547 (1980); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004). (e.) "Whether he had dominion and control over the home and could exclude others from the home," Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556 (1980); Rakas v. Illinois, 439 U.S. 128, 149, 99 S.Ct. 421 (discussing Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960); State v. Flowers, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct.App.2004) (f.) "How long he had known the owner of the home," Minnesota v. Carter, 525 U.S. 83, 91, 119 S.Ct. 469 (1998); Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556 (1980); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004). (g.) "How long he had been at the home," Minnesota v. Carter, 525 U.S. 83, 90, 119 S.Ct. 469 (1998); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004). (h.) "whether he attempted to keep his activities in the home private," Minnesota v. Olson, 495 U.S. 91, 99, 110 S.Ct. 1684 (1990); Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556 (1980); Rakas v. Illinois, 439 U.S. 128, 149, 99 S.Ct. 421 (discussing Katz v. United States, 389 U.S. 347, 352, 88 S.Ct. 507 (1967); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004); Bazen, 275 S.C. at 437, 438, 272 S.E.2d. at 178 (1980). (i.) "whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment," Minnesota v. Carter, 525 U.S. 82, 90-91, 119 S.Ct. 469 (1998); State v. Missouri, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004); (j.) "whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a Motion to suppress, where that admission cannot be used against him to determine his guilt)", Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556 (1980); Rakas v. Illinois, 439 U.S. 128, 149, 99 S.Ct. 421 (1978); State v. Crane, 296 S.C. 336, 340-341, 372 S.E.2d 587, 589 (1988); State v. Neely, 271 S.C. 33, 43, 244 S.E.2d 522, 528 (1978); (quoting Brown v. United States, 411 U.S. 223, 229, 93 S.Ct.

1565, 36 L.Ed.2d 298 (1973) But see Salvucci, 448 U.S. at 9c, 100 S.Ct 2547 ("we simply decline to use possession of a seized good as substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.") (k.) "whether he paid rent at the home. State v. Missouri, 107, 110, 115, 603 S.E.2d, 594, 595, 597 (2004); State v. Flowers, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct.App.2004).

Petitioner argues that, based on the testimony given at the sentencing hearing by counsel, as well as his mother and photo evidence suppressed, that was a part of his brady Motion evidence, there was more than enough evidence to prove that petitioner should have been afforded the right to challenge and seek suppression of the evidence the Solicitor used to convict petitioner. Transcripts clearly show petitioner's mother testify on his behalf at the sentencing phase, where she states reasons for petitioner being more than a mere guest within the confines of her residence.

See (Sentencing Transcripts pp.6, Lines, 11-25):

- 11.) THE COURT: All right. I'll hear fom mom.
- 12.) [where upon, M. Jacobs Comes forward]
- 13.) THE COURT: Ma'am, I needd you to state your full
- 14.) name for the record --
- 15.) MS. JACOBS: Donell Jacobs
- 16.) THE COURT: -- And please spell your last name.
- 17.) MS JACOBS: J-A-C-O-B-S
- 18.) THE COURT: All right. I'll be happy--
- 19.) MS. JACOBS: First name is D-O-N-N-E-LL. Donnell
- 20.) Donnell Jacobs. That's my name
- 21.) I won't use my illness as an excuse. I know he has
- 22.) to do some time. You understand what Im saying? I
- 23.) don't -- I just don't know what to say. I really don't.
- 24.) I'm just going to miss him because, you know, he was
- 25.) taking care of me. I have others -- another son. But he

See (Sentencing Transcript pp.7, Lines, 1-3)

- 1.) Was the one that was taking care of me, you know, made

- 2.) ~~sure~~ I had a roof over my head and whatever, and stuff
- 3.) like that. And just ask you to have mercy on him.

Petitioner asserts that, there was definitely no question whether he was related to the resident, which happened to be his mother, who testified that petitioner helped take care of her and keep a roof over her head expresses more than a commercial interest within the residence. Counsel even stated for the record that petitioner was taking care of his mother, which demonstrates that, petitioner had to have relayed these things to counsel at some point in their discussion, but also shows how counsel failed to take this into consideration where this could have been used to help and ensure that a suppression Motion was granted.

See (Sentencing transcripts pp.5, Lines, 14-23):

- 14.) MR. WEHMAN: His mother does suffer from cancer. She has Polymy
- 15.) -- I cant pronounce it, your honor. Its a form of
- 16.) cancer. Her body fills up with water. She's undergoing
- 17.) treatment. She's on --
- 18.) MR. JACOBS: Polymyositis.
- 19.) MR. WEHMAN: Polymyositis.
- 20.) Her body fills up with Water. She goes through
- 21.) chemo. She goes through all these medications
- 22.) Mr. Jacobs was helping support, pay for, those
- 23.) medications

Petitioner asserts that, his mother's reflection of his obligation and actions stated during the sentencing phase, could have been used at suppression hearing to argue his right to privacy in his mothers residence, and further express his proprietary interest with her residence, not only as a guest, but as one who expressed the need to provide physical and financial support as well. Petitioner also states that he did possess a key to the residence for emergency purposes. See (Exhibit B, Booking Report, #30811), where it describes property under "Arrest Additional Info" the second item placed within petitioner's property, was listed as "1 house key", further demonstrating counsel's lack of investigation tainting the entire process altogether.

Petitioner also asserts that, PCR Judge stated that he had these transcripts and others as part of the packet the PCR counsel stated he provided. See (PCR Transcript pp.17, Lines, 3-7):

- 3.) MR. DAVIS: And, Judge, May I ask? I know I've
- 4.) obtained transcripts of that hearing into this case quite
- 5.) a bit from the attorney general's office. Do you have that
- 6.) as part of your packet
- 7.) THE COURT: I've already read it

Petitioner argues that, the search warrant was defective on its face where it failed to include any words of reference in the space reserved for "premises to be searched" to satisfy the particularity requirement of the 4th Amendment.

Petitioner asserts that, this section, which is a constitutionally mandated requirement, was left completely blank. The Warrant itself did not describe the "place to be searched", and the affidavit in support of the search warrant omitted material facts that mislead the issuing officer making it totally unreliable to establish probable cause.

The Fourth Amendment states unambiguously that "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person's or things to be seized." Groh v. Ramirez, 540 U.S. 551, 557, 124 S.Ct. 1284 (2004); Massachusetts v. Sheppard, 468 U.S. 981, 988 n.5 (1984), The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. "A warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." United States v Stefonek, 179 F.3d 1030, 1033 (CA7 1999), "The Fourth Amendment requires that the warrant particularly describe the things to be seized, not the papers presented to the judicial officer ... asked to issue the warrant."

Petitioner asserts that, the search warrant clearly does not cross-reference the supporting affidavit identifying the items to be seized with sufficient particularity. Rather, the section reserved for this language was left blank, Words of incorporation did not accompany this section, and the pre-printed language does not confer a warrants validity. Counsel's failure

to file a timely Motion to Suppress deprived petitioner in this regard. See (Exhibit L, Affidavit, search warrant pp.3).

Was Counsel Ineffective, where the State lacked jurisdiction to convict Petitioner of "possession with intent to distribute marijuana 3rd offense," where bill of indictment does not sufficiently state the level of offense in the language, the statute or in the body of indictment with certainty?

See Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000). An indictment is sufficient to convey jurisdiction if it properly apprizes the defendant of the necessary elements of the offense intending to be charged and informs the defendant of the circumstances the government intends to prosecute. State v. Parker, 344 S.C. 250, 543 S.E.2d 255 (Ct.App.2001). An indictment may pass legal muster if it "charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Reddick v. State, 348 S.C. 631, 560 S.E.2d 441 (2002).

A Circuit Court has subject matter jurisdiction to convict a criminal defendant if:

- 1.) That there has been an indictment returned "True Billed" by a grand Jury which sufficiently states the offense;
- 2.) There has been a waiver of presentment to the grand Jury Indictment; or
- 3.) The charges are lesser included charges of the crime charged in the original indictment.

Petitioner argues that, counsels failure to object and advise petitioner to withdraw the plea, where, based on the sentencing sheet, indictment for possession with intent to distribute marijuana, and petitioner's rap sheet, can be directed towards the circuit courts lack of subject matter jurisdiction.

First Petitioner asserts that the indictment was returned "True billed" by the grand Jury, but failed to sufficiently state the offense or offense level within the language of the indictment or sufficiently by reference of the statutory subsections placing petitioner on notice, as to whether, he was facing a first, second, or third offense for the indicted charge. 17-19-10;

17-19-100 Amendments of Indictments; proceedings after amendment. If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause.

Was counsel ineffective for failing to advise Petitioner to withdraw guilty plea, where indictment charging "possession with intent to distribute marijuana" did not sufficiently state level of offense to place petitioner on notice?

Petitioner argues that, counsel's failure to advise petitioner to withdraw the plea was erroneous in nature. Before Petitioner signed the sentencing sheets, counsel as petitioner's advocate, should have reviewed the indictments first hand. Petitioner asserts that, the level of offense was not included within the face of the indictment, neither was it stated within the charging language or specifically stated within the statutory language to constitute charging Petitioner and sentencing him to a third offense possession with intent to distribute marijuana, where the, "as indicted," section on the sentencing sheet specifically indicates the indictment as controlling. Also the Solicitor found no recourse when searching Petitioner's official rap sheet either, which constituted only the imposition of a second offense for possession with intent to distribute marijuana.

Next, Petitioner asserts that, located on indictment #(2014GS180498) Possession with intent to distribute, the section proscribing the waiver of presentment of legal rights to the grand Jury is blank, indicating Petitioner never waived presentment to the grand Jury, where as, if counsel would have objected and advised Petitioner to withdraw the plea this charge could have been returned to the grand Jury and corrected to apprise Petitioner of the actual offense level he faced if he decided to go to trial or plea guilty. Petitioner further states that, the sentencing sheets charged him with a 3rd offense possession with intent to distribute marijuana, but being as though the "as indicted" box is checked off the indictment still controls the offense level, and the sentencing range, where the sentencing sheets show no waiver of presentment by Petitioner either.

And Petitioner further asserts that, the third prong stated that, the charge within the sentencing sheet was not a lesser included charge, but could only have been a charge of a greater offense than that which could not be determined "plainly" so the nature of the offense charged could easily be understood.

Petitioner also asserts that, at the PCR hearing trial counsel further admits that Petitioners official rapsheet did not bare indication that would constitute petitioner pleading guilty to a third offense possession with intent to distribute marijuana.

Petitioner argues that, based off of his official rapsheet the record fails to reflect where counsel should have agreed with the prosecution that Petitioner's rapsheet indicated or constituted him being convicted under a third offense possession with intent to distribute marijuana charge.

See (PCR Transcript pp.41, Lines, 9-25):

- 9.) Q.) Mr. Wehman, did you review Mr. Jacobs prior record
- 10.) with him?
- 11.) A.) We did go over it.
- 12.) Q.) Did you review it before signing these sentencing
- 13.) sheets for the guilty plea?
- 14.) A.) I did.
- 15.) Q.) Can you tell the court what in his record allows the

16.) State to go forward on a third marijuana conviction?
17.) A.) Through our review and discussion with the Solicitor,
18.) he had --- and, again, this is based on public index. I
19.) don't know if all of this is necessarily from the rap sheet.
20.) But a conviction for possession of marijuana, and that
21.) would've been March 6th of 2014. I believe that's what
22.) shows up as the PWID that he got times served for a
23.) possession on that I think he referenced in his testimony.
24.) And, Also, out of the Charleston County, a conviction on
25.) January 25, 2011, for possession of marijuana. And I

See (PCR Transcript pp.42, Lines, 1-25):

1.) believe there's also a 1998 conviction for possession of
2.) marijuana, but these two were certainly within the five
3.) years before this plea.
4.) Q.) Do you have a copy of the sheet you reviewed with him
5.) in your file?
6.) A.) Of the sheet that I reviewed with him? I reviewed the
7.) rap sheet that you are in possession of.
8.) Q.) Are you aware that I requested a copy of your file in
9.) disc form from the public defender's office, one of the
10.) PCRs?
11.) A.) I am.
12.) Q.) Okay. And your office was kind enough to burn me a
13.) disc with all the relevant documents; correct?
14.) AA.) Correct.
15.) Q.) Okay. I'm going to show you what's been marked as
16.) Plaintiff's Exhibit number 2. It's a multipage rap sheet
17.) but it also has some notations. Can you look and see if
18.) these are your notations to the rap sheet.
19.) (Plaintiff's Exhibit No. 2, Rap Sheet, was marked for
20.) identification.)
21.) A.) (witness complies.)
22.) MR. DAVIS: While he's looking at that, your honor

- 23.) Written notations of course has been highlighted, I would've
- 24.) made the highlights on it, but as far as the written notes
- 25.) and margins.

See (PCR Transcripts pp.43, Lines, 1-25):

- 1.) A.) So there are two sets of markings. There a black set
- 2.) of marking, black ink. That would not have been me. I
- 3.) believe that's either the Solicitor or somebody at the Jail
- 4.) maybe when they review these. Everything in blue ink, I
- 5.) believe there's an indication for time served. There are
- 6.) checks by convictions and a notation acknowledging we talked
- 7.) about the PCR where he had something reversed. Those would
- 8.) be mine. So everything in blue would be me.
- 9.) Q.) So does that look familiar as to the rap sheet you
- 10.) Would've been provided by the state?
- 11.) A.) That is.
- 12.) Q.) Okay. Take your time on that. But other than a July,
- 13.) I believe its 2012, time served marijuana conviction, do
- 14.) you see another marijuana conviction on that rap sheet?
- 15.) A.) I do not. I have reviewed the rap sheet before today.
- 16.) I do not believe that there is an indication on the rap
- 17.) sheet for the prior marijuana convictions. Those would've
- 18.) come up in discussions with the Solicitor's office when we
- 19.) were trying to get this negotiation and we were going back
- 20.) and forth with possibilities. But they're not on the rap
- 21.) sheet. The other one, certainly not the 1998 one, and I
- 22.) don't believe the 2013 one is.
- 23.) Q.) So what proof were you provided of these two other
- 24.) potential marijuana convictions?
- 25.) A.) I was told about them, and I looked at them -- I mean,

See (PCR Transcript pp.44, Lines, 1-10):

- 1.) they're on the public index. But, no, they're not on his
- 2.) official rap sheet.
- 3.) Q.) And so, it's for the record, when you say public index,
- 4.) you're talking about an online website for the clerk of

- 5.) court for Dorchest County?
- 6.) A.) And Charleston County, correct.
- 7.) Q.) And Charleston County. You would not have printed
- 8.) anything from those websites when you reviewed them with
- 9.) your client, would you?
- 10.) I do not believe Mr. Jacobs saw those.

In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Hill v Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004); Smalls v. State, 422 S.C. 174, 179-181, 810 S.E.2d 836, 839 (2018); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). A defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, Franklin v. Catoe, 346 S.C. 563, 570-571, 552 S.E.2d 718, 722 (2001). The applicant must demonstrate that trial counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989)(quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

Petitioner argues that, counsel's deficient performance, failure to object, failure to file proper Motions, and failure to advise petitioner to withdraw from the guilty plea was erroneous. Counsel's advice regarding the charges petitioner was facing clearly undermined the proceeding also, because petitioner was never charged with particular charges counsel erroneously advised him about. As a result of counsel's deficient performance, the defective affidavit regarding the "credibility and reliability" of the confidential informant went unchallenged, where the detectives failed to record alleged buys that were allegedly used to establish probable cause. If counsel would have investigated even further he would have realized the search warrant

was blank, would have further raised questions, created a broader and strategic perspective granting counsel more in depth longitude advocating in petitioners defense. Petitioner argues that, if counsel would have advised petitioner of the numerous defects in his case he states that he would not have pled guilty but would have insisted on going to trial.

See (PCR Transcript pp.20, Lines, 23-25):

- 23.) Q.) Mr. Jacobs, if Mr. Wehman had told you ahead of time
- 24.) that the trafficking conviction was a strike setting up
- 25.) potential life without parole in the future, would you have

See (PCR Transcript pp. 21, Lines, 1-25):

- 1.) pled guilty to trafficking or would you have asked for a
- 2.) Jury trial?
- 3.) A.) I would have asked to go to trial.
- 4.) Q.) If you had been advised that -- I didn't ask this
- 5.) awhile ago. Were there any discussions about the fact that
- 6.) possession with intent to distribute marijuana, third
- 7.) offense, is also a no-parole offense?
- 8.) A.) No, there was not.
- 9.) Q.) or called an 85 percent offense?
- 10.) A.) No, he did not.
- 11.) Q.) On either of the trafficking or the possession with
- 12.) intent to distribute marijuana, if you had been told those
- 13.) were no-parole offenses or 85 percent offenses, would you
- 14.) have pled guilty or gone to trial?
- 15.) A.) I would've went to trial.
- 16.) Q.) I'll ask this a little more open-ended. If Mr. Wehman
- 17.) had made it clear that on the marijuana sentencing sheet
- 18.) that it lists you're pleading guilty to possession, intent
- 19.) to distribute marijuana, third or subsequent, if he had told
- 20.) you that before you signed it, what would you have done?
- 21.) A.) I would've asked him what happened with the original
- 22.) deal, the second offenses.
- 23.) Q.) Did the State -- prior to the guilty plea, did the

- 24.) State ever serve on you what is called all life without parole
- 25.) notice paperwork?

See (PCR Transcript pp.22, Lines, 1-25):

- 1.) No, Sir.
- 2.) Q.) If you had know that your were facing -- I believe we
- 3.) added it up a while ago -- a 140 years but not a life
- 4.) sentence and certainly not multiple life sentences, would
- 5.) you have pled guilty or gone to trial?
- 6.) A.) I still would've went to trial.
- 7.) Q.) The judge explained this. But there were never any
- 8.) discussions about you going to trial; right?
- 9.) A.) There wasn't. I brought it up -- I brought it to his
- 10.) attention.
- 11.) Q.) What, if anything, had Mr. Wehman done to make you
- 12.) believe that he was prepared to go to trial if he had asked for
- 13.) it?
- 14.) A.) He didn't do anything.
- 15.) Q.) And how did that influence your decision whether to
- 16.) actually go to trial or plead guilty?
- 17.) A.) I mean, it made me decide to take this plea because I
- 18.) didn't know if he was going to defend me properly or not.
- 19.) A.) A few more specific questions, Mr. Jacobs. Had he
- 20.) discussed with you at trial his ability to try to suppress
- 21.) evidence that was seized, would you have gone to trial or
- 22.) would you have pled guilty?
- 23.) A.) I would've went to trial.
- 24.) Q.) If he had discussed with you his ability to try to
- 25.) raise issues about the credivility or believability of the

See (PCR Transcript pp. 23, Lines, 1-3):

- 1.) Confidential informant involved in this case, would you have
- 2.) gone to trial on those issues or pled guilty?
- 3.) A.) I would have went to trial.

Petitioner argues that, he would not have pled guilty to the trafficking cocaine offense if counsel had advised him ahead of time, that consequentially, the trafficking was a strike or that trafficking and PWID contained similar elements making them comparable in nature to be treated as one offense he would not have pled guilty. This statutory language was never explained to Petitioner by counsel in a manner where he would understand the nature and consequences of these offenses.

Petitioner argues that, based off of the sentencing sheet and the box marked off as "as indicted", this indication put the courts on notice that the indictment was controlling in determining the nature, consequences, and sentencing range available for that particular offense. However, this controlling indictment failed to establish the specific offense level eliminating discretion, which may otherwise have been present after a careful reflection of petitioner's rap sheet.

Petitioner asserts that, counsel's failure to object to this unclear indictment, which failed to specify offense level, rendered his plea involuntary, where Petitioner states that, the actual offense level, if returned by a legally constituted grand Jury, could have influenced the Judges discretion in regards to sentencing.

Petitioner further asserts that, trial counsel even admitted that based off of petitioner's official rap sheet, there was no indication that a third offense possession with intent to distribute marijuana could be constituted. Counsel's failure to advise petitioner of such errors as well as others rendering his plea unknowing and erroneous, where counsel advised Petitioner that he was facing life if he proceeded to trial when in fact this was not the case, neither was Petitioner served with a life without parole notice paperwork to further justify advise as being such the case. For that matter counsel never began preparing for trial or created trial strategies or possibilities either.

Petitioner further asserts that, counsel's failure to file a timely Motion to suppress was erroneous, where pre-existing facts regarding the confidential informants credibility or believability could have been challenged to discredit testimony, where lack of supporting facts and details, along with

non-existent audio and video recordings could have been used to demonstrate the detectives failure to establish probable cause, issues with the search warrant being blank, and evidence suppressed pursuant to a search and seizure, resulted in counsel's ineffective assistance and poor representation, consequentially creating prejudice, undermining confidence in the proceeding altogether.

Petitioner addresses the court and request that the proper actions be taken if the PCR Court hasn't ruled upon any issues presented at the PCR hearing hindering this courts review.

The PCR Court is required to "make specific finding of fact, and state expressly its conclusions of law, relating to each issue presented" in a PCR application, including whether the applicant satisfied his burden as to each prong of the Strickland test described. S.C. Code.A.. § 17-27-80; Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007)(per curiam); McCray v. State, 305 S.C. 329, 330, 408 S.E.2d 241 (1991).

Under the issues presented above in Petitioner's case, he claims to have merit and humbly request the reviewing court to consider each claim and either re-instate his writ of certiorari or apply any other remedy the court may deem as reasonable under review.

Issues Petitioner declines to address:

- Was trial counsel ineffective where he failed to challenge whether the courts had jurisdiction to accept Petitioner's guilty plea of trafficking 2nd offense, where trial counsel failed to inform Petitioner of his right to waive presentment to the grand Jury?

- Was trial counsel ineffective where he failed to challenge the indictments, which were not filed, within the 90 day trial period that is required by States Statute?

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—
Certiorari to Dorchester County
Hon. Robert E. Hood, Circuit Court Judge


—
ANTONIO TERRELL JACOBS, PETITIONER,
v.
STATE OF SOUTH CAROLINA, RESPONDENT.

—
APPELLATE CASE NO 2017-001740

—
CERTIFICATE OF SERVICE

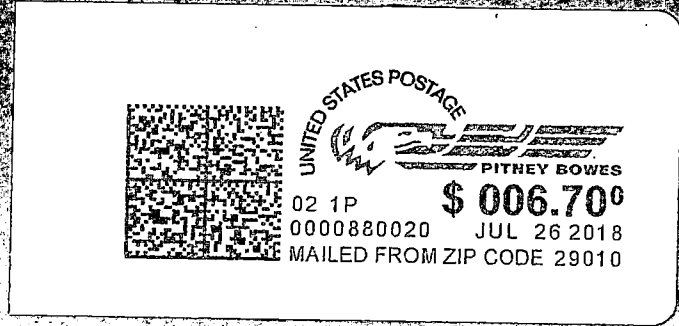
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The undersigned hereby certifies that true and correct copies of the foregoing RESPONSE were served by placing the same in the prison mail system United States Mail postage prepaid to the following addresses on July 25, 2018.

Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

/s/ 

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