

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from YORK County, Court of Common Pleas
Alison R. Lee, Circuit Court Judge

Trey Williams,

Respondent,

THE STATE,

Appellant,

APPELLATE CASE NO.

2016-001553

RECEIVED

JAN 25 2019

SC Court of Appeals

FINAL BRIEF OF RESPONDENT

TREY ALEXANDER WILLIAMS
PRO SE LITIGANT

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STATEMENT OF ISSUES ON Appeal

I.

I. Whether the PCR Judge erred in finding Respondent satisfied his burden of proving that he did not waive his right to counsel where Respondent's prior and standby counsel testified that he explained to Respondent the dangers of self-representation. Prior and Stand By Counsel never testified that he explained the dangers of self representation.

II. Whether the PCR Judge erred in finding Respondent satisfied his burden of proving that his appellate counsel was ineffective for failing to raise the issue that his waiver of counsel was invalid where Respondent made no objection to proceeding pro se, leaving the issue unpreserved for appellate review.

STATEMENT OF THE CASE

RESPONDENT IS incarcerated with the South Carolina Department of Corrections pursuant to the York County clerk of court's order of commitment. Respondent was indicted with a certified true copy, York County Grand Jury at the May 2010 term on May, 28 2010; Two days After the Trial commenced and one month After the waiver of counsel hearing.

(See certified true bill indictment)

On April-15-16, 2010, Respondent appeared before Honorable John C. Hayes, III, for a pretrial hearing. During that hearing Ms. Colton testified erroneously that Respondent was indicted by the Grand Jury of York County on

one count of criminal sexual conduct with a minor in the first degree. See App. 2 lines 6-11. Solicitor Ms. Colton further erroneously testified an incorrect true bill indictment number and date that Ms. Colton said to be June 18th of 2009.

Furthermore Counsel Mr. Delaney and Respondent addressed the court about proceeding pro se See App. 2-10.

Solicitor Colton testified that she was hesitant to call the case to trial and defense not have all the discovery. The Court:

Honorable John C. Hayes erroneously said that he told the respondent about the dangers and disadvantages of self representation and the benefits of having an attorney and confused the Respondent with another client from another court proceeding in the self representation process that never taken place with Respondent See App. 10, lines 11-25. Invalid expert witness was in this case at trial in Child Abuse Fields.

¹ Contrary to The State's petition for writ and Final Brief/ Statement of the Case which is essentially frivolous, Respondents' Statement of Case and Brief in full needs to be investigated completely. Respondents' Statement of Case is fundamental for justice to be.

Honorable John C. Hayes further stated that the Respondent will be without an attorney if the Respondent convinces him to Cease Mr. Delaney from representing Respondent. The Judge further states that If Mr. Delaney is relieved, the Respondent will not have an opportunity to get another attorney and Mr. Delaney was Relieved as Counsel on April 16, 2010, see App. 13 lines 1-8.

The Process and procedure of Relieving Counsel and going pro se is conducted from Appendix Pg. 2-13 lines 1-8.

After Counsel was Relieved, Judge John C. Hayes briefly explained the role of Mr. Delaney as stand by Counsel and Solicitor Cotton lied about Respondent having all the Brady material essential to the case as well as stating that Respondent may be waiving certain discovery material.

The Court: John C. Hayes said that he does not believe that Respondent is really waiving discovery.

The Respondent asked could he get an attorney if he wanted one on May 24, 2010 and the Judge, John C. Hayes said that Respondent could not get another Counsel appointed and could only get

Another Counsel if Respondent hired one between May 24, 2010 and May 26, 2010 see APP. 17-21, lines 10-22.

A Jury Trial was erroneously taken Away see APP. 22 lines 1-5.

Respondent then on May 26, 2010 prior to trial Requested A jury trial And The Court: Honorable Judge John C. Hayes said that he was certainly not shocked, that he almost Anticipated the Respondent Changing HIS mind About A Jury trial. The Judge further Stated that the Respondents tactics was Avoidence

in effort to manipulate the Courts, see APP. 23-24.

The Solicitor then erroneously called the case IN A invalid

non existing Indictment number 2009-GS-46-2646

which IS Diverse From The Indictment Number At the

Time OF Respondent's Pro Se proceeding which was 2009-GS-46-02

636) Judge Hayes found Respondent Guilty and Sentenced

him to imprisonment of 30 Years. Respondent Filed

a Notice of appeal at the South Carolina Court of Appeals.

Direct Appeal Attorney Lanel C. Durant Filed her Brief For

Respondent After the Respondent Filed their Brief And She

Said Mr. Williams knowingly, intelligently And voluntarily

Waived counsel and jury trial and neglected to state

that trial Judge Abused his Discretion. Her initial brief should have been filed first before Respondent see APP. 134-147.

On November 18th 2014, an evidentiary hearing was conducted in front of the Honorable Allison Renee Lee, at the York County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. The State by Rutledge Johnson, Assistant Attorney General.

At this hearing, Applicant petitioned the PCR Council to have present to testify the following people, see "Judicial Notice of adjudicative facts", and applicant testified on his own behalf. The applicant through witness, and through counsel introduced a number of exhibits. Testifying on behalf of the State was Erik Delaney, Esquire, the applicants trial counsel, and State's Counsel. The Court had before it a copy of the trial transcript, the records of the York County Clerk of Court and the South Carolina Department of Corrections.

The Record before this Court indicates that the Applicant is presently ~~and~~ confined at Lee Correctional Institution with in the South Carolina Department of correction pursuant to orders of commitment from the York County Clerk of Court. The applicant was indicted by the York County Grand Jury on May, 2010 term, for criminal Sexual Conduct with a minor, First degree. The applicant was represented by Charles T. Brooks III.

On May 26th 2010, the applicant proceeded to trial before the Honorable John C. Hayes in York County. After, the applicant was found guilty by way of bench trial, applicant requested that State's Counsel file a direct appeal.

Issues Presented

1) Involuntary, Unknowing and Unintelligent trial Counsel Waiver

In his application "the applicant alleges", that said Counsel waiver was not done knowingly, intelligently, and or in compliance with due process. Said waiver was involuntarily made because "applicant" had to choose between the right to self representation and "poor Counsel" making his choice of the former involuntary.

This Court has had the limited opportunity to review the trial transcript and has heard the testimony and evidence presented at the evidentiary hearing. This Court has had the opportunity to observe the witnesses and to pass on their credibility and has weighed the testimony accordingly. Below are the relevant findings of facts and conclusions of law as required by SC Code Ann § 17-27-80.

In his allegations, applicant alleges that his waiver of trial counsel was unknowingly, involuntary, and unintelligently made, due to coercion, and threats from trial court. Also the Record and Trial Counsel's prior testimony does not reflect a waiver in compliance with "Faretta" inquiry or due process of law.

Findings of Fact and Conclusions of Law

Therefore, this Court finds from the transcript, testimony of witnesses and evidence presented at this hearing the applicants waiver did not meet the requirements of due process, was not supported by the Record to be knowingly, voluntarily or intelligently made. Due process was violated when the State unjustifiably hindered self representation by denying applicant meaningful access to research materials.

STATEMENT OF FACTS

Regarding the process of proceeding pro se on the written record prior to and leading up to the Counsel being Relieved from Representation of Respondent Starts on April 16, 2010 Appendix 13. lines 1-8 and April 15th. Any date or Appendix pages or lines after what is mentioned above is irrelevant or in zero relations to trial Judge and Mr. Delaney discussing any warnings, dangers and Disadvantages of proceeding pro se.

See the State's Petition for Writ of CERTIORARI, PCR Judge Order etc it will state that Respondent was Indicted the MAY 13, 2010 term of the York County Grand Jury which is conflicting with Respondent being pro se in April 2010, invalidly waiving and being Denied Counsel And Jury trial while not being Indicted See App. 17-21 lines 10-22 and App. pg. 23-24.

Two days after the trial the Indictment was stamped at the York County Clerk of Court as A Certified true copy Seal on MAY 28, 2010 1:04 PM.

MR. Delaney stated on the record that Respondent does not trust him or believe that Mr. Delaney is being honest with Respondent along with Counsel/ office of Disciplinary Counsel Being written on several occasions. See App. 5-8. In this case it was zero evidence of rape, Speculation and erroneous testimony from Solicitor and inadequate expert witnesses and Assault and Battery High AGGRAVATED nature time serve was the Plea. Pg. 32-36, Pg. 57-63, Pg. 68-75.

Time Served to A lesser included offense WAS A offer on several occasions See PCR Testimony From Mr. Delaney. It was honestly the only plea offered.

Mental Health Records, expert witnesses, witnesses, documents of evidence and investigator was petitioned and requested to be produced at the PCR Hearing in favor of Respondent BY WAY OF PCR Counsel See APP. ~~268~~ 269-280 Amended PCR Application titled "Judicial Notice of Adjudicated Facts".

Respondent was Denied A Fair/Full Bite At the Apple.

ON Direct Appeal the State Filed their Respondents Brief Before Direct Appeal Attorney Lane Canter Durant's Initial Brief And Both Briefs was compatible as it was the Initial Brief Filed First which indicates fraud. Reviewing the record as a whole to see the conduct of the accused, the sophistication, nature and circumstances surrounding the totality of the case is substantial to be presented, reviewed, investigated in a case involving invalid waiver of counsel where medical doctors, forensic specialist, trial, Criminal Sexual Conduct 1st degree with a minor is at BAR. Mr. Williams always stated his innocence and acknowledged his confusion at trial on the stand. It was discovery not allowed to be used in Mr. Williams favor because of hearsay allegedly and he was prejudiced by medical procedures, investigations and prosecutors case See APP 18

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STANDARD OF REVIEW

In Criminal cases, the appellate court sits to review errors of Law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E. 2d 216, 220 (2006). Thus, An Appellate court "is bound by the [circuit] court's Factual Findings unless they are clearly erroneous." "Id" This court does not re-evaluate the facts based on its own view of the Preponderance of the evidence but simply determines whether the [circuit courts]'s ruling is supported by any evidence." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E. 2d 827, 829 (2001). Appellate court Scope of Review is Limited to whether there is any evidence of Probative value. and Great deference to the PCR Judge's Credibility determinations. *Drayton v. Eratt*, 312 S.C. 4, 430 S.E. 2d 517 (1993). This deference Requires the courts to Accept the PCR Judges finding that A Witness is credible even where the PCR Testimony is Directly Refuted by the trial or Guilty Plea Record. See - *Solomon v. State*, 313 S.C. 526, 443 S.E. 2d 540 (1994). See - *Kolle v. State*, 386 S.C. 578 (2010), 690 S.E. 2d 73, See - *Smith v. State*, 369 S.C. 135, 138, 631 S.E. 2d 260, 261 (2006), *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E. 2d 812, 814 (2005). This court Gives Great Deference to the Post Conviction Relief (PCR) court's findings of facts and Conclusions of Law.

ARGUMENT

I. The post-conviction Relief Judge did not error in finding Respondent satisfied his burden of proving that he did not properly waive his Right to Counsel.

Underlying Facts

Respondent was not Indicted on April 16, 2010 when Counsel was Relieved which affected the trial Judges Subject matter Jurisdiction to Relieve Counsel as well as A Plethora of other pre and trial / post trial processes, however the Indictments purpose and Non existence incontrovertibly deprived Respondent of knowing what he would be facing in the totality of the criminal process. The Respondent was never officially Indicted in 2009 as The Solicitor Ms. Colton Stated on the record, furthermore the True Bill Indictment was not A Certified Court document until two days After the trial was over.

When the Respondent Mr. Williams addressed the courts for the first time he said "Uh, Your Honor, Yes, sir. I Think I want to represent myself today. Could I be able to represent myself throughout my case today?" See App. 5-6. See: State v. Baker, 390 S.C. 56, 700 S.E. 2d 440 (Ct. App. 2010) where surrounding circumstances the court found that Baker was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges approximately two weeks before trial the State presented Bakers Counsel with new Indictments. In this case At bar Another Indictment was erroneously on the record seconds before trial see: App. 25 lines 8-11.

The Judge told Respondent that it would be dangerous for the Respondent to represent himself because the respondent is not an attorney. The Judge informed Respondent that it was A Right to hire An Attorney and to Waive A Right to Counsel without going into Any detail of the Benefits of an attorney or the diversification between A Right to hire an attorney and have one appointed because the Respondent WAS poor peasantry with Indigent public defender. The Respondent was 22 years of Age without any mentioning of his Age, educational background, criminal trial experience or court record being questioned by the Judge, attorney or any State government agent. At the time of Waiver, Respondent's mental health or history was never questioned and the Respondent was Facing Life in prison while nothing Showing Intelligence, Legal knowledge And understanding was on display from MR. Williams. See App. 6 lines 12-14 where the Respondent said that he does not wish to bother his attorney right now when the nature of the circumstances involving Life, Limb, Liberty is at ~~at~~ Risk, that is A Lack of understanding.

The record never reflected counsel saying he advised, informed specifically anything essential to satisfy the understanding of the Defendant in Such A Serious decision making process.

Mr. Delaney did make it clear that Mr. Williams did not trust or believe that counsel was being honest with the case and that disciplinary counsel was written several times which points to mistreatment possibilities that would make the waiver result from mistreatment. The record reflected that Mr. Williams filed speedy trial motions and wanted the earliest trial date possible which prove Mr. Williams, (Respondent) never attempted to delay or manipulate the proceeding. In the process of Respondent going pro se the Respondent was asking about bond being set, the trial judge was discussing when I could go to trial, trial judge mistaken court proceedings of Respondent with

Another person regarding going pro se. Counsel was relieved because the judge felt that Respondent convinced him to do so according to the judge testimony see App. 10-13 lines 1-8. See App. 20 lines 11-13 where the judge asks defendant was he planning to opt to go without an attorney and Respondent says yes sir. See App. 21, lines 9-21 when Respondent was asked about any questions about his rights and Mr. Williams asked could he get an attorney and was denied by the judge to get counsel. Respondent clearly did not understand what was going on.

When attempting to determine the Voluntary and Intelligent nature of A Waiver or plea, the colloquy ordinarily serves as confirmation that A criminal defendant is Waiving the right to raise certain constitutional claims. See - *Rivers v. Strickland*, 264 S.C. 121, 213 S.E. 2d 97, 98 (1975).

The General Rule is that A plea of Guilty, Voluntarily and Understandingly made, Constitutes a Waiver of non-jurisdictional defects and defects and defenses, including claims of violation of constitutional rights prior to the Plea. However "[G]iven the seriousness of the matter, the Constitution insists, among other things, that the defendant enter A Guilty plea that is Voluntary and that the defendant must make other waivers knowingly, intelligently and sufficient awareness of the relevant circumstances and likely consequences. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Specifically, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 537 S.E. 2d 649, 651 (2000), citing *State v. Hazel*, 275 S.C. 392, 271 S.E. 2d 602 (1980). The validity of a defendants waiver does not turn on his communication with counsel, but rather on the presence of A Record supporting the validity of that Waiver.

See [cite as: 399 S.C. 641, 732 S.E.2d 871] In this case ~~the trial court~~ The trial court and the PCR court both conducted a deficient analysis of petitioners waiver. The record is devoid of any evidence to support the PCR Courts finding that trial counsel's discussions regarding the waiver were at "Length" or detailed. Petitioners trial counsel ~~at that time~~ could not testify that he definitely explained to petitioner the differences between A Jury trial and A Bench trial. He Also could not testify whether petitioner had any questions regarding that distinction because he could not recall, but he inexplicably was able to testify that petitioner definitely wanted to move forward with A Bench trial. The record reflects that there was no colloquy between the court and petitioners trial counsel or petitioner regarding the waiver. Petitioner testified that he completed only the 7th Grade and that he cannot read or write At his PCR. A "colloquy" is defined as "any formal discussion, such as an oral exchange between A judge, the prosecutor, the defense counsel and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and the Defendants Rights. Black's Law Dictionary 221 (8th ed. 2005) Also defined colloquy as A "high level serious discussion", Webster's Ninth New Collegiate Dictionary 260 (9th ed. 1989), See New World Dictionary 280 (2d ed. 1976) defining colloquy as A "conversation, esp. a formal discussion, conference. In Larry Gene Moore, V. State of South Carolina,

(Cite 25-399 S.C. 641, 732 S.E.2d 871)

The exchange that took place did not meet even A banal definition of colloquy, and falls far short of the "high level serious discussion" necessary to support the waiver of A defendants constitutional rights. Trial Counsel's Testimony at the PCR hearing does not meet the "Any evidence standard," and did not require the court to ~~confirm~~ Affirm the PCR Judge ruling. The PCR court found that petitioner waived his right to A jury trial, however the only evidence supporting that erroneous determination is trial counsel's testimony. That testimony illustrates A Trial Strategy and decision-making process, incompatible with the demands of this courts waiver jurisprudence. The bare fact that the testimony exist, does not mean that the testimony constitutes evidence of A valid waiver even under deferential standard review. The waiver in this case ~~is not~~ supported by A complete record. The PCR court erred in finding that petitioner made A knowing and voluntary waiver of A sacrosanct right found in both the State and federal constitutions. In this case At BAR Appellate case No. 2016-001553 See App. 246-262 (PCR order granting PCR) which will show striking similarities. The supreme court held that waivers of such are effective only if made knowingly and voluntarily. *Id.* at 142, 665 S.E. 2d at 607. The court examines the particular facts and circumstances in the case, background, experience and conduct of accused. *Id.* at 143, 665 S.E. 2d at 607. See - *Spoone v. State*, 379 S.C. 138, 665 S.E. 2d 605 (2008).

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U.S.V. Conceding, 621 F.3d 575, 578-79 (6th cir 2010) Right to counsel may not be knowingly and intelligently waived when defendant does not understand nature of charges, Statutory offense, Range of allowable punishments, and possible defense; Brooks v. McCaughy, 380 F.3d 1009, 1013 (7th cir 2004); Enzo v. Tovar, 541 U.S. 72, 89 (2004) The Tovar court explained that "the information a defendant must have to waive counsel intelligently will depend... upon the particular facts and circumstances surrounding the case. Id. at 92 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938) Among the case specific factors to be considered are "the defendant's education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding. Id. at 88; See also Patterson v. Ill. 487 U.S. 285, 299 (1988) (Same); Torres v. U.S. 140 F.3d 392, 401 (2d cir 1998) Court should conduct on the record discussion to ensure defendant aware of risk and ramifications of self representation; U.S. v. Jones, 452 F.3d 223, 238-29 (3d cir 2006) Court must go beyond "SP Interlocking questioning" and specifically warn defendant of dangers of proceeding pro-se, including that he must conduct defense in accordance with Federal Rules of evidence and criminal procedure; U.S. v. Williams 641 F.3d 758, 766-67 (6th cir 2011) Court should follow model inquiry of 13 questions about defendant's familiarity with legal system and charges against defendant, followed by "strong admonishment" that the court recommends against defendant proceeding pro-se; U.S. v. Tard, 424 F.3d 525, 531-32 (7th cir 2005) Court should not just confirm defendant desire to proceed without an attorney, but should also "impress upon... defendant the disadvantages" of proceeding pro-se; See, U.S. v. Hantzis, 625 F.3d 525-579-80 (9th cir 2010) Court must ensure defendant understands nature of charges, possible penalties, and dangers of self representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.

The Supreme Court has not prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." Tovar, 541 U.S. at 88. However, circuit courts have developed various lines of questioning. See U.S. v. McBride 362 F.3d 360, 366 (6th cir 2004) valid waiver because court presented defendant with 12 of 13 questions on model inquiry and complied with essence of last question by reviewing maximum penalty. In this case at bar, the record is void of any questions to the defendant or inquiry into the nature of the offense or maximum penalty. See U.S. v. Gerwin, 471 F.3d 197, 198-200 (DC cir 2006) Waiver valid because court engaged in extensive discussions of charges, punishments, procedures, and dangers of self representation with defendant. In this case at bar, again the record is void of any extensive discussions between defendant, counsel, or the courts. Regarding charges, punishments, or procedures that he must comply with. See, U.S. v. Jones, 452 F.3d 223, 231-32 (3d cir 2006) Waiver invalid because court failed to identify potential problems of obtaining evidence when proceeding pro-se. Some circuit courts have articulated a three factor test to be used in determining whether a defendant knowingly and intelligently waived the right to counsel. (1) the nature of the charges against him (2) possible penalties and (3) the danger and disadvantage of self representation. The Court must determine that defendant "understands the nature of

The charges, the range of possible punishment, potential defenses, technical problems that may be encountered, and any other facts important to a general understanding of the risks involved (quoting) *U.S. v. Appers*, 302 F.2d 120, 132, 134 (3d Cir 2002).

Furthermore, because the record reflects the conflict of interest between counsel and client, applicant felt that counsel was being untruthful with him, deliberately misrepresented facts and material evidence, and intentionally withheld discovery evidence favorable to applicant defense. Applicant Request to have this counsel / removed, and appointed another counsel, however, he was denied and forced / threaten to proceed with counsel, when was forced to work under a conflict of interest. See *Patterson v. El*, 482 U.S. 208, 292 N.4 (1988) If defendant must choose between the right to self representation and poor counsel, the choice of former may be considered involuntary; See, e.g., *Padden v. Maurice*, 424 F.3d 303, 316-318 (3d Cir 2005) involuntarily where defendant given choice between unprepared counsel and self representation; *U.S. v. Silkwood*, 893 F.2d 249 (10th Cir 1989) involuntary where trial counsel and court impermissibly forced defendant to choose between self representation and poor counsel by attempting to persuade defendant of appointed counsel's competency instead of conducting a penetrating inquiry into decision to proceed pro-se.

Petitioner asserts, that because he was never informed of the court procedures, i.e., objection requirement, cross examination or presentation of evidence, access to evidence, discovery and such action of the court interfered with defendant's self representation, and due process; See, *Oses v. Moss*, 961 F.2d 985-87 (1st Cir 1992) defendant's right to proceed pro-se violated when judge excluded defendant from bench or lobby conference during trial, gaged and ridiculed defendant in front of jury, commented sarcastically about defendant defense, and failed to curb prosecutor's rhetorical comments. Moreover, if the state interferes with a defendant's self representation, due process may be violated; See, *Tate v. Silkwood*, 963 F.2d 20, 26 (2d Cir 1992) Remand to determine whether due process violated by defendant's confinement and administrative segregation during 10 month period between arraignment and trial because no opportunity to prepare own defense. See, *Milton v. Morris*, 767 F.2d 1443, 1446-47 (9th Cir 1985) due process violated when state unjustifiably hindered self-representation by denying meaningful access to current research materials. *Ind. v. Edwards*, 554 U.S. 164-173-75 (2008) finding schizophrenic defendant unfit to conduct pro se defense.

Petitioner asserts that the ballot listed case law was disregarded by the trial court in this case at law, See, *U.S. v. Arthurum*, 343 F.3d 712, 718 (5th Cir 2003) waiver knowing and intelligent because defendant signed waiver form, court explained form to defendant and court advised defendant of advantages and disadvantages. Also, See The South Carolina Commission on Indigent Defense, Division of Appellate defense, letter dated _____

U.S. V. Hall, 610 F.3d 727, 741 (2nd Cir 2010) knowing intelligent court conducted (Foretha inquiry); however in this case at bar, see, U.S. V. Jones, 452 F.3d 223, 232-34 (3rd Cir 2006) neither not knowing and intelligent because court failed to advise defendant of challenges to self-representation or of potential punishment; Foster v. Collins, 253 F.3d 244, 250 (6th Cir 2001) waiver can not be voluntary because court did not make defendant aware of dangers and disadvantage of self-representation or fallback courts protective role when defendant stated he was unprepared for trial and that indictment was complex; Shaffer v. Bowser, 329 F.3d 637, 647-48 (8th Cir 2003) court did not comprehensively examine defendants or adequately warn him of dangers

Furthermore, based on petitioner's education/mental level, the trial court abused its discretion by accepting petitioner's request to proceed pro-se, see, U.S. V. Purnett, 910 F.2d 51, 55 (2nd Cir 1990) defendant motion to proceed pro-se properly denied because "district court is not obliged to accept every defendant's invocation of the right to self-representation; U.S. V. Brunkoff, 613 F.3d 358, 372-74 (3rd Cir 2010) defendant motion to proceed pro-se properly denied because request was untimely; U.S. V. Bush, 404 F.3d 263, 272 (4th Cir 2005) denied because purpose of request was to delay and manipulate trial; U.S. V. Cascardine, 621 F.3d 523, 528-29 (6th Cir 2010) denied because defendant not competent to represent himself; Brooks v. Kitching, 388 F.3d 1009, 1010 (7th Cir 2004) denied because defendant deemed incompetent; U.S. V. Edelman, 458 F.3d 791, 808-09 (8th Cir 2006) denied defendant's request because it was not timely; U.S. V. Karpinski, 239 F.3d 1106, 1117 (9th Cir 2001) denied defendant request because made tactically for dilatory purposes; U.S. V. Smith, 413 F.3d 1253, 1281 (10th Cir 2005) denied because defendant not capable of representing himself, 6 days before trial; See U.S. V. Farick-El, 204 F.3d 553, 560 (4th Cir 2000) denied because untimely and tactic for delay; U.S. V. Edelman, 458 F.3d 791, 808-09 (8th Cir 2006) denied as untimely because made 5 days before start of trial

Petitioner has attempted thru "Judicial Notice of adjudicative facts" and this proposed order granting PCR Relief, to comply with the exhaustion requirements; Davis v. Strack, 270 F.3d 111, 123 (2nd Cir 2001) exhaustion requirement satisfied because applicant fairly presented due process violations by citing with specificity to U.S. Const in state court brief; Nola v. Frank, 488 F.3d 187, 199 (3rd Cir 2007); Weeks v. Angelone, 176 F.3d 249, 262 (4th Cir 1999) despite fact that highest courts decision did not discuss Federal Constitutional issues aff'd, 528 U.S. 225 (2000); Taylor v. Cain, 545 F.3d 307, 333-34 (5th Cir 2008) satisfied despite petitioner's failure to frame claim in Constitutional terms because cited in state court filings; Quinter v. Tysockiewicz, 225 F.3d 313, 315 (6th Cir 2001) satisfied because petitioner identified Constitutional violations during state court proceedings; Boyko v. Parke, 259 F.3d 781, 789 (7th Cir 2001); Hill v. Lockhart, 38 F.3d 832, 834-35 (8th Cir 1994); Williams v. Jones, 571 F.3d 1086, 1089 (10th Cir 2009); Ogle v. Johnson, 488 F.3d 1364, 1369 (11th Cir 2007) (Same)

ARGUMENT II.

Whether the post conviction Relief Judge erred in finding respondent satisfied his burden of proving that his Appellate Counsel was ineffective for failing to raise the issue that his waiver of counsel was invalid where respondent made no objection to proceeding pro se leaving the issue unpreserved for appellate review.

The issue that direct appeal attorney Lanel C. Durant addressed was not objected to at trial and her initial brief resulted in a substantial unreasonable application of clearly established law as determined by the supreme court of the United States and her strategy and decision making process was based on a unreasonable determination of facts in light of the evidence in the trial transcript proceeding which resulted in her litigation being substantially diverse from relevant supreme court precedent. Appellate counsel litigated that Mr. Williams knowingly, intelligently and voluntarily waived counsel and jury trial rights and that the trial judge advised defendant the dangers and disadvantages of proceeding pro se. Furthermore Appellate Counsel neglected to state that the trial judge abused discretion in any pre trial or court phase. Appellate Counsel's initial brief was objectively unreasonable in its totality. See App. 278-280. See App. 270-277.

3) Appellate Counsel was ineffective, in failing to raise meritorious issues of involuntariness, unwillingness and unintelligent waiver of trial counsel, waiver of jury trial, and ineffective assistance of counsel claims.

A) Appellate Counsel failed to adequately raise issue of discretion on the trial court, for the above mentioned issues.

Petitioner is alleging that appellate counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Therefore, breach of counsel's unreasonable standard of representation, petitioner was severely prejudiced because petitioner was denied a chance to raise meritorious issues raised above. See, Smith v. Robbins, 528 U.S. 239, 120 S.Ct. 744. The highest court have stated; Counsel, however, can also deprive petitioner of the right to effective assistance, simply by failing to render adequate legal assistance. See, Casper v. Sullivan, 446 U.S. at 344, 100 S.Ct. at 1716. It also stated if counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be ineffective, counsel's errors resulted in actual actual and substantial disadvantage to the course of petitioner's defense. See, Lombard v. Lynaugh, 868 F.2d 1475, held counsel ineffective for failing to raise brief which now-frivolous issues existed for appeal.

Petitioner contends that the Record does not contain any probative evidence to support the notion that the waiver was knowingly and intelligently made, or that stand by counsel was effective in protecting petitioner's Constitutional Rights. Counsel appointed to represent an indigent appellate, ordinarily should consult with his client at least once to ascertain his clients desires with regards to the alleged trial errors which the appellant wishes to press, because counsel has a duty to press arguments initiated by his client which may arguably be supported even though counsel does not personally espouse them. Counsel must act in the role of an active advocate in behalf of his clients appeals to the best of their ability. Fundamental fairness entitled indigent defendant to an adequate opportunity to present their claims fairly within the adversary system. See, ACE v. Oklahoma, 470 U.S. 68. When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the courts must examine the Record to determine whether appellate counsel failed to present significant and obvious issues on appeal. See, Gray v. Greer, 810 F.2d 644, 646. Generally, the presumption of effective assistance of counsel will be overcome when the alleged ignored issues are clearly strong or meritorious issues. Conversely, an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a clearly strong waiver, even though counsel may have presented strong but unsuccessful claims on appeal. See, Page v. U.S 884 F.2d 300, 302; Matire v. Wainwright, 811 F.2d 1430, 1438; U.S. v. Alerre, 430 F.2d 681; U.S. v. Addison, 2001 WL 409453.

has held under duress, perjured testimony or involuntary waiver obtained by trickery or coercion and when a defendant has been inadequately represented by counsel. It is never to late for courts in Habeas Corpus proceeding to look straight through procedural smoke screens in order to prevent forfeitures of life or liberty in flagrant defiance of the Constitution. It is well settled that appellate procedural defaults should not foreclose Habeas Corpus Review of meritorious Constitutional claims. This issue has been properly raised, and likewise, preserved, this court should rule accordingly. Per counsel must file a SCRP. Rule 59(a) or (e) to assure that all issues raised are ruled on for appellate review.

Issue Presented

(3) Ineffective Assistance of Appellate Counsel

In his amended application "the applicant alleges, that appellate counsel performance was below professional norm, and that petitioner was prejudiced as of a result". This Court has had the limited opportunity to review the trial transcript, Appellate transcript, and has heard the testimony and evidence presented at the hearing. Has had the opportunity to observe the witnesses and to pass on their credibility, and has weighed the testimony accordingly. Set forth below are the relevant findings of facts and conclusion of law as required pursuant to S.C. Code Ann § 17-27-80.

In his allegations before the court, the applicant alleges that his appellate counsel performance was well below professional norm of Strickland, *Supra* and Constitutional Standards. As of a result, petitioner has been prejudiced by counsel inaction in failing to recognize meritorious issues plain on the face of the Record. I.e., (1) Involuntary waiver of trial counsel, (2), Abuse of discretion and or (3), due process violation.

Findings of Fact and Conclusion of Law

This Court finds that transcripts, testimony of witnesses and evidence presented at the evidentiary hearing, the applicant Appellate Counsel was ineffective in failing to raise meritorious issues for Review, as such petitioner is alleging prejudice, and a 6th Amend Const, violation, and due process. See, *Hawkins v. Hannigan*, 185 F.3d 1146, 1152; *Mason v. Hawks*, 97 F.3d 987, 994; *Evitts v. Lury*, 469 U.S. 387, held, that due process guarantees a criminal defendant effective assistance of counsel in his first appeal as of right; *Douglas v. California*, 372 U.S. 353; *Martinez v. California*, 386 U.S. 738; *Entsminger v. Iowa*, 386, and *Rodriguez v. U.S.* 395 U.S. 327, 89 S.Ct. 1715. In *Williams v. Taylor*, *Supra*, the courts held, that ineffective assistance of counsel claim is clearly established Supreme Court precedent within the meaning of § 2254 (D)(1).

2 Petitioner is alleging that appellate Counsel's Representations fell below an objective Standard of Reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Therefore, because of Counsel's unreasonable Standard of Representation, petitioner was severely prejudiced because petitioner was denied a chance to raise meritorious issues addressed above and below. See, *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 764. The highest court have stated, Counsel, however, can also deprive petitioner of the right to effective assistance, simply by failing to render adequate legal assistance; See, *Ciplex v. Sullivan*, 446 U.S. at 344, 100 S.Ct. at 1716. It also stated if counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be ineffective. Counsel's errors resulted in actual and substantial disadvantage to the cause of petitioner's defense. See, *Lambert v. Lyons*, 808 F.2d 1475, held counsel ineffective for filing tactics brief when non-meritorious issues existed for appeal. In *Patterson v. Leek*, 556 F.2d 1144, 4 S.Ct. 1144.

In Patterson v. Leack, 556 F.2d 1168, the 5th Cir. held that a prisoner whose claims have not been reviewed on direct appeal must first pursue the remedy afforded by S.C. Uniform Post Conviction Relief Act, S.C. Code § 17-601. Petitioner raised these claims in his PCR application, and when a state requires a prisoner to raise an ineffective assistance claim in this manner:

1) When the State Courts did not provide counsel, in the initial Review Collective proceedings for a claim of ineffective assistance of counsel:

2) Where appointed counsel in the initial Review Collateral Proceedings where the claim should have been raised, was ineffective under the Strickland standards; See, Williams v. Taylor, supra. Furthermore, counsel appointed to represent appellant in the initial Review Collateral Proceedings was ineffective under the Strickland standards; See, Williams v. Taylor, supra.

Furthermore, counsel appointed to represent an indigent appellant, ordinarily should consult with his or her client at least once to ascertain his or her clients desires with regard to the alleged trial errors which the appellant wishes to press, because counsel has a duty to press arguments initiated by his or her client which may regularly be supported even though counsel does not personally espouse them. All of which the Record reflects was not done in this case at law. Counsel must act in the role of an active advocate in behalf of his clients appeal to the best of his ability as opposed to a General of the court. Petitioner asserts that his appointed counsel had no such duty.

Petitioner asserts that his appointed counsel brief was more in favor of the prosecution than in actual defense for petitioner. ^{SEE} ~~Appellate~~ ^{Defense} counsel never consulted with petitioner ^{STAFF} and just completely abandoned petitioner's meritorious issues. See, *Salomonson v. Baxter*, 386 US 258, and *Holbert v. Michigan*, 445 US 685. The absence or ineffective assistance of counsel in these circumstances, held, violated the defendant's 14th Amendment Rights as defined in *Strickland v. California*, supra. Petitioner's Constitutional Right to effective assistance of counsel for purpose of appeal was abridged.

Fundamental fairness entitles indigent defendant to an adequate opportunity to present their claims fairly within the adversary system. See, *AKE v. Oklahoma*, 470 U.S. 68. Due process emphasizes

fairness between the State and the individual dealing with the State, see, *Ross v. Moffit*, *supra*. In *Griffin v. Illinois*, 351 U.S. at 17-18, held that when a State conditions an appeal from a conviction on the provision of a trial transcript, the State must furnish free transcript, and counsel must review all arguable issues for an appeal, and it is fundamentally unfair for counsel to argue against petitioner claims without providing an opportunity for consultation or for petitioner to seek the advice of another attorney, because it is well known that Appellate Counsel will not raise a claim of ineffective assistance of counsel on his school mark, or on his self. See, *Muston v. Conner*, 120 F.2d 812, 816 cert. denied 446 U.S. 727. It is self evident that to deny a competent lawyer's help through the technical stages of the criminal process or to deny a full opportunity to appeal a conviction because petitioner is poor, is to imperil that purpose and to infect a criminal proceeding with the clear dangers of convicting the innocent. Counsel's errors during appeal on direct review should provide cause to raise a procedural default. Petitioner was denied from complying with the States procedures "solely" due to ineffective assistance of trial counsel. See, *Wainwright v. Sykes*, 433 U.S. 72, states, a State procedural rule which requires that a "Contemporaneous objection" be made deserves great respect.

Petitioner asserts that there can be no ^{dispute} of the prejudice he suffered because of ineffective assistance of trial, and appellate counsel. These errors was plain upon the face of the record, which affected substantial rights, and thereby, may be upheld although they were not brought to the attention of the courts due to ineffective assistance of counsel. See, *U.S. v. Olano*, *supra*; *U.S. v. Young*, *supra*; *U.S. v. Atkinson*, *supra* and *Chapman v. California*, *supra*.

This unprofessional performance under the prongs of *Strickland* violated petitioner's due process to a fundamental fair proceeding. Petitioner has shown in the above claims that not merely did these errors of pre trial, trial and appellate review created prejudice and invoked the involuntary waiver of trial counsel, but that Appellate Counsel failure to raise ineffective assistance of trial counsel claims, worked to petitioners actual and substantial disadvantage, affecting petitioner whole trial with errors of Constitutional dimensions. See, *Eachus*, *supra*; at 170, 120 S.Ct. at 1596. A Constitutional claim that implicates fundamental fairness... Compels review regardless of possible procedural defaults. It also held, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which must not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the courts must examine the record to determine whether appellate counsel failed to present significant and obvious issues on appeal; see, *Gray v. Greer*, 800 F.2d 644, 646. Generally, the presumption of effective assistance of counsel will be overcome when the alleged injured issues are clearly

strong or meritorious issues. Conversely an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a deserving winner, even though counsel may have presented strong but unsuccessful claims on appeal, See, *Paye v. U.S.* 884 F.2d 300, 302; *Mature v. Blumwright* 811 F.2d 1430, 1438. Courts of appeal may consider an ineffective assistance of counsel claim in this state in the first instance on direct appeal when it conclusively appears from the record that counsel was Constitutionally ineffective under *U.S. v. Alarid*, 430 F.3d 681; *U.S. v. Addison*, 2001 WL 409453.

These Constitutional claims advanced above and within, calls into question the accuracy of the preceding and petitioner's guilt. The Writ of Habeas Corpus is the fundamental instrument for safeguarding petitioner against arbitrary and lawless state action, See, *Harris v. Nelson*, 394 U.S. 236, 290-291 89 S.Ct. 1086. The Court explained in "*Engle*" that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct a fundamental miscarriage of justice, at 133, 102 S.Ct. at 1526. These cases has also established that where a Constitutional violation has probably resulted in the conviction of one who is actually innocent "as in this case at bar".

Petitioner has attempted thru "Judicial Notice" and this proposed order Granting PER SELET, to comply with the exhaustion Requirements; *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir 2001); *Nora v. Frank*, 488 F.3d 187, 199 (3d Cir 2007); *Heeks v. Angelone*, *supra*; *Taylor v. Cain*, *supra*; *Dwight v. Tyszkiewicz*, *supra*; *Bojko v. Parke*, *supra*; *Hill v. Lockhart*, *supra*; *Williams v. Jones*, *supra*; exhaustion Requirement satisfied because applicant fairly presented due process violation by citing with specificity to U.S. Const, in State Court brief. See, *William v. Taylor*, 529 U.S. 420, 437 (2000) "Entitled to a hearing because presented extensive evidence in State Court.

Petitioner asserts that this issue can be raised under Rule 52(b), under ineffective assistance of counsel, trial errors, and abuse of discretion, because it played a major role in forcing the involuntary waiver of trial counsel. The Role of the Plain Error doctrine has always been to empower courts especially in Criminal cases to correct errors that seriously affect the fairness, integrity or public Reputation of judicial proceedings. See, *U.S. Atkinson*, *supra*; It states a Rule 52(b) is one of the general provisions, applicable to all stages of criminal proceedings in Federal Courts. This Rule has been relied upon to correct errors that may have seriously prejudiced a possibly innocent defendant, See, *U.S. v. Vaughn*, *supra*, The plain error Rule mitigates the harsh impact of the adversarial system, under which the defendant is generally bound by the conduct of his lawyer, by providing relief in exceptional cases despite the lawyers failure to object at trial. PER Counsel must file a SERAP Rule 59(a) or (E) to assure that all issues are ruled on for appellate review.

Conclusion

A Criminal defendant has a due process right to have his case heard by a fair and Impartial Judge. See - Schweiker v. McClure, 456 U.S. 188, 195 (1982). Due process Demands impartially on the part of those who function in Judicial or quasi Judicial (capacities) similarly he has the right to have A Judge assigned to his case in A manner free from Bias or the desire to influence the outcome of the proceedings. Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987) The Judge in this case denied respondent Counsel, jury trial and said that he Almost Anticipated that Mr. Williams would attempt to Avoid charges, outcome of trial and manipulate the proceedings directly before trial as he objectively unreasonably Relieved counsel, denied counsel, denied jury trial.

Mr. Delaney testified At PCR hearing See App. 232 - 233 lines 1-13. See App. ~~230~~ ~~230~~ 230, lines 15-23. See App. 246-262. And see the seal on App. 264 where York County

Certified true copy is stamped. See App. 269-280 and Based on the Citings in the conclusion and all of the foregoing, Respondent has established a violation of his Constitutional Rights to counsel and Ineffective assistance of counsel, Abuse of Discretion on trial Judge Requiring this Court to Affirm the PCR Judge Order

In App. 262. Respectfully Submitted, By: Trey Williams, 341036

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