

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

RECEIVED

NOV 15 2021

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge**

S.C. SUPREME COURT

Case No. 2020 – 001418

John Garvin..... Petitioner,

v.

The State of South Carolina..... Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

John Garvin,
Pro-se

Lieber Correctional Institution
136 Wilborn Avenue
Ridgeville, S.C. 29472

SELF-REPRESENTATION

TABLE OF CONTENTS

QUESTION PRESENTED.....iii

STATEMENT OF CASE.....1

STATEMENT OF FACTS.....2

STANDARD OF REVIEW.....3

ARGUMENT.....5

- I. Whether the PCR Court erred in failing to grant Petitioner, a new trial under circumstances where: (1) “there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice,” that the PCR Court failed to rule on pursuant to S.C. Code Ann. §§ 17-27-20(A)(4); (2) the constitutional errors in Petitioner’s trial has deprived the jury of critical exculpatory evidence that would have established insufficient evidence of guilt and would have proved his innocence’s; and (3) the prosecutorial misconduct emanating from Petitioner’s State proceedings denied him the right to a fair trial, by committing extrinsic fraud upon the court when presenting a falsified inculpatory confession statement as evidence and failing to correct the false testimony given by State witnesses about the trustworthiness of the alleged confession statement, then vouching for the credibility of the State witnesses in his closing argument was in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), *Giglio v. United States*, 405 U.S. 150 (1972) and *Donnelly v. Dechristoforo*, 416 U.S. 637 (1974).....5

- II. Whether the trial courts denial of Petitioner’s Motion to Relieve Counsel and his objections to appointed counsel’s representation of him during his trial, did place an actual conflict of interest upon Petitioner when he filed a complaint with the Office of Disciplinary Counsel and a complaint in the Federal District Court against his Court-Appointed Counsel and the prosecuting Assistance Solicitor prior to trial, did constitutionally prejudiced his right to effective assistant of counsel and to a fair trial as guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina State Constitution Article One, §§ 3 and 14, and pursuant to *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *United States v. Cronin*, 466 U.S. 648 (1984).....28

III. Whether the evidence that was provided at Petitioner’s trial, derived from an illegal arrest and the misrepresentation of facts that was provided by Spartanburg County Sheriff Officer Lt. Ken Hancock; ATF Special Agent, David Pait; and SLED Agent, Ashley Asbill; is police misconduct, that would not have come to light if not for the illegal actions of the above-mentioned law enforcement officers, whereas, the evidence that was presented at Petitioner’s trial was obtained by the exploitation of that illegality.....49

IV. Whether the trial court abused it’s discretion, and created a manifested constitutional error, in giving the Judge’s jury charge, “The Hand of One, Is The Hand of All,” to a Defendant, who was charged as a principal for drug trafficking in heroin, and did not receive adequate Sixth Amendment notice that he may be convicted guilty as an accomplice, had an identifiably negative impact on the trial to such a degree that the constitutional rights of Petitioner were compromised, pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993).....53

CONCLUSION.....56

QUESTIONS PRESENTED

This is a case that involves questions of exceptional importance, concerning the violation of the Petitioner's constitutional rights, by the arresting police officers, the prosecuting assistance solicitor, and the attorney, who constructively denied Petitioner effective assistance of counsel.

The questions are presented as followed below:

- I. Whether the PCR Court's denial of Petitioner's Motion for Summary Judgment to obtain a Declaratory Judgment to determine the legality and constitutionality of his grand jury proceedings, allowed the State to maintain his conviction and sentence that lacked subject matter jurisdiction, and resulted from an illegal grand jury, a void indictment and criminal acts that are supposed to be within the legalities and constitutionality of his constitutional rights that guarantee him proper due process and was an abuse of discretion by the PCR Court in violation of the Petitioner's Fifth and Fourteenth Amendment right to the United States Constitution and to rights secured under the laws and Constitution of South Carolina Article One §§ 3, 11, 14 & 22 and Article Five § 22.
- II. Whether the PCR Court erred in failing to grant Petitioner, a new trial under circumstances where: (1) "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice," that the PCR Court failed to rule on pursuant to S.C. Code Ann. §§ 17-27-20(A)(4); (2) the constitutional errors in Petitioner's trial has deprived the jury of critical exculpatory evidence that would have established insufficient evidence of guilt and would have proved his innocence's.
- III. Whether the trial courts denial of Petitioner's Motion to Relieve Counsel and his objections to appointed counsel's representation of him during his trial, did place an actual conflict of interest upon Petitioner when he filed a complaint with the Office of Disciplinary Counsel and a complaint in the Federal District Court against his Court-Appointed Counsel and the prosecuting Assistance Solicitor prior to trial, did constitutionally prejudiced his right to effective assistant of counsel and to a fair trial as guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina State Constitution Article One, §§ 3 and 14, and pursuant to *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *United States v. Cronin*, 466 U.S. 648 (1984).
- IV. Whether the prosecutorial misconduct emanating from Petitioner's State proceedings denied him the right to a fair trial, by committing extrinsic fraud upon the court when presenting a falsified inculpatory confession statement as evidence and failing to correct the false testimony given by State witnesses about the trustworthiness of the alleged confession statement, then vouching for the credibility of the State witnesses in his closing argument was in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), *Giglio v. United States*, 405 U.S. 150 (1972) and *Donnelly v. Dechristoforo*, 416 U.S. 637 (1974).

- V. Whether the evidence that was provided at Petitioner's trial, derived from an illegal arrest and the misrepresentation of facts that was provided by Spartanburg County Sheriff Officer Lt. Ken Hancock; ATF Special Agent, David Pait; and SLED Agent, Ashley Asbill; is police misconduct, that would not have come to light if not for the illegal actions of the above-mentioned law enforcement officers, whereas, the evidence that was presented at Petitioner's trial was obtained by the exploitation of that illegality.
- VI. Whether the trial court abused its discretion, and created a manifested constitutional error, in giving the Judge's jury charge, "The Hand of One, Is The Hand of All," to a Defendant, who was charged as a principal for drug trafficking in heroin, and did not receive adequate Sixth Amendment notice that he may be convicted guilty as an accomplice, had an identifiably negative impact on the trial to such a degree that the constitutional rights of Petitioner were compromised, pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993).

STATEMENT OF THE CASE

The following pertinent procedural and factual history is necessary to understand the issues presented by Petitioner for Post-Conviction Relief. On July 17, 2012, Petitioner, John Garvin, was falsely arrested without a proper finding of probable cause for the crime of drug trafficking in heroin (S.C. Code § 44-53-370(e)). (See App. pp. 1122, 1125). Petitioner was convicted as charged on Indictment No. 2012-GS-42-5979 after a jury trial that was held on May 21-23, 2013, in Spartanburg County Court of General Sessions and was sentenced to a term of twenty-five (25) years in prison and fined \$250,000.00 (McIntosh, L. at trial and sentence). (See App. p. 299).

A Notice of Appeal was timely filed, on June 6, 2013, (see App. pp. 300 – 301), the South Carolina Court of Appeals granted Petitioner permission to appeal *informa pauperis*. On October 10, 2013, Indictment No. 2012-GS-42-5978 was dismissed, due to a lack of probable cause and video evidence that proves his innocence. On November 24, 2014, the Remittitur was issued on Indictment No.: 2012-GS-42-5979, affirming Petitioner's conviction. (See App. pp. 302 – 304).

An application for Post-Conviction Relief (PCR) was dated and submitted to the Spartanburg County Court of Common Pleas on October 28, 2015 and was filed on November 18, 2015. (See App. pp. 358 – 368). The State filed its return to Petitioner's PCR application on July 5, 2016. (See App. pp. 369 – 378). An evidentiary hearing into the matter was held on July 19, 2019, and was continued on July 31, 2019, at the Spartanburg County Courthouse. The Petitioner, John Garvin, was present at the hearing and represented himself as *pro-se*. The Respondent was represented by Johnny E. James, Jr., Asst. Att'y. General. An order was filed on July 10, 2020, denying Petitioner post-conviction relief with prejudice. (See App. pp. 859 – 886). On August 6, 2020, Petitioner filed a Rule – 59(e), Motion for Reconsideration to Alter/Amend Judgment with supporting affidavit. (See App. pp. 887 – 1095). On September 11, 2020, the PCR Court would

deny Petitioner's Rule – 59(e), Motion. (See App. p. 1096). On October 22, 2020, Petitioner would file a Notice of Appeal in this Court for a Petition for Writ of Certiorari. Petitioner now presents this Petition for Writ of Certiorari before this Court for proper judicial review of the PCR Court's denial of his PCR application.

STATEMENT OF FACTS

A fraudulent investigation and an unlawful seizure by arrest, detention, prosecution, conviction and incarceration by Spartanburg County Sheriff Officer, Ken Hancock, and Asst. Solicitor, James E. Hunter, acting alone and together and in concert, with Scott D. Robinson, Esquire; SLED Agent, Ashley Asbill; and ATF Special Agent, David Pait, violated the procedural and substantive rights guaranteed to Petitioner by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution and to rights secured under the laws and Constitution of South Carolina Article One §§ 3, 10, and 22.

On July 17, 2012, Petitioner was falsely arrested and was charged with drug trafficking in heroin. (See App. pp. 1122, 1125). From that illegal arrest a fabricated involuntarily Confession statement was conceived by SLED Agent, Ashley Asbill. (See App. p. 1100). Petitioner was denied bail and had requested a preliminary hearing, (see App. p. 1032). Scott D. Robinson Esquire, was appointed to represent Petitioner for the criminal charges on or about August 28, 2012. (See App. pp. 975 – 976). The requested preliminary hearing was scheduled for an October 25, 2012, hearing by Asst. Solicitor, James E. Hunter, who would move before the Court on the day of the scheduled preliminary hearing for the Court to waive Petitioner's preliminary hearing for failure to appear. (See App. p. 11, Ln. 15 – 19).

On January 13, 2013, Petitioner would file a complaint against Asst. Solicitor, James E. Hunter and his Court-Appointed Trial Counsel, Scott D. Robinson, Esq., with the Office of

Disciplinary Counsel (ODC), (see App. pp. 1003 – 1004), for depriving Petitioner of a requested preliminary hearing in violation of his due process. Then on February 12, 2013, Petitioner would file a petition for writ of habeas corpus in Federal District Court. (See App. pp. 1006 – 1018).

On or about April 9, 2013, during an attorney legal visit at Spartanburg County Detention Center, Petitioner asked Counsel Robinson to relieve himself as Counsel. Inasmuch as Counsel Robinson would file a motion to relieve himself as Counsel on April 10, 2013, with the Spartanburg County Clerk of Court and with the Solicitor's Office. (See App. p. 1036). But then he would withdraw that motion after talks in chambers with Asst. Solicitor, James E. Hunter and Circuit Judge, R. Lawton McIntosh, on or about April 12, 2013, (see App. pp. 11 – 12, Ln. 25, 1-4), to orchestrate an extra-judicial conspiracy to keep exonerating evidence from the decision-makers.

Scott D. Robinson, Esq., as the representative of the Petitioner, deliberately failing to subject the State's prosecution to meaningful adversarial testing. Thus, constructively denying Petitioner effective assistance of counsel. Counsel Robinson would conspire and/or aid and abett Asst. Solicitor, James E. Hunter, on April 12, 2013, in committing extrinsic fraud upon the court by knowingly submitting a fabricated document, (see App. p. 1100), and the false testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, who's testimony was perjury, that was utilized to obstruct Petitioner's adversarial trial with the sole intent to prevail upon the Courts for the appearance of presenting and establishing the trustworthiness of an alleged inculpatory confession statement that was allegedly made by the Petitioner, John Garvin. The solicitor would closed by vouching for the credibility of three State witnesses in his closing rebuttal argument. (See App. pp. 254 – 259, Ln. 10 – 13).

After the State's closing rebuttal argument, the trial judge gave a jury charge, (see App. Pp. 277 – 279, Ln. 23 – 25), that constructively amend and/or impermissibly enlarged the indictment and failed to put Petitioner Garvin on notice of the trafficking in heroin charge that he was called upon to answer at trial. Petitioner did not receive constitutionally adequate notice through trial testimony that he may face accomplice liability for drug trafficking in heroin after being charged as a principal. Petitioner was convicted as an accomplice and was sentenced to a term of twenty-five (25) years in prison and fined \$200,000.00. (see App. p. 299).

On June 15, 2015, Petitioner inadvertently discovered evidence that actually relates to his case. (See App. p. 1097). Then on July 16, 2019, Petitioner discovered additional evidence that can also prove his innocence and prove that fraud was committed upon the Court to prevent Petitioner from fully exhibiting and trying his case. (See App. p. 1098). Evidence of material facts, not previously presented and heard, (see App. pp. 1097 – 1098), that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. §§ 17-27-20(A)(4) or 17-27-45(C).

STANDARD OF REVIEW

This Court's original jurisdiction sits as both the finders of facts and finders of law. See S.C. Code Ann. § 14-3-340; also see *Sanford v. S.C. State Ethics Comm'n.*, 385 S.C. 483, 497, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009). The burden is on the applicant in a PCR proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if any evidence of probative value in the record exists to support the finding of the PCR court. *Id.* at 119, 386 S.E.2d at 626.

“[A] Rule – 59(e) motion must be filed if issues are not adequately addressed in [the] order to preserve the issues for appellate review.” *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266 (2007). “Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific finding of fact[s] and state expressly the conclusions of law relating to each issue presented.” *Id.* “The purpose of Rule – 59(e), SCRPC, to alter or amend the judgment [,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’ ” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992).

ARGUMENT

I.

THE PCR COURT ERRED IN FAILING TO GRANT PETITIONER, A NEW TRIAL UNDER CIRCUMSTANCES WHERE: (1) “THERE EXISTS EVIDENCE OF MATERIAL FACTS, NOT PREVIOUSLY PRESENTED AND HEARD, THAT REQUIRES VACATION OF THE CONVICTION ... IN THE INTEREST OF JUSTICE,” THAT THE PCR COURT FAILED TO RULE ON, PURSUANT TO S.C. CODE ANN. § 17-27-20(A)(4); (2) THE CONSTITUTIONAL ERRORS IN PETITIONER’S TRIAL HAS DEPRIVED THE JURY OF CRITICAL EXCULPATORY EVIDENCE THAT WOULD HAVE ESTABLISHED INSUFFICIENT EVIDENCE OF GUILT AND WOULD HAVE PROVED HIS INNOCENCES; AND (3) THE PROSECUTORIAL MISCONDUCT EMANATING FROM PETITIONER’S STATE PROCEEDINGS DENIED HIM THE RIGHT TO A FAIR TRIAL, BY COMMENTING EXTRINSIC FRAUD UPON THE COURT WHEN PRESENTING A FALSIFIED INCULPATORY CONFESSION STATEMENT AS EVIDENCE AND FAILING TO CORRECT THE FALSE TESTIMONY GIVEN BY STATE WITNESSES ABOUT THE TRUSTWORTHINESS OF THE ALLEGED CONFESSION STATEMENT, THEN VOUCHING FOR THE CREDIBILITY OF THE STATE WITNESSES IN THE SOLICITOR’S CLOSING ARGUMENT WAS IN VIOLATION OF NAPUE v. ILLINOIS, 360 U.S. 264 (1959), GIGLIO v. UNITED STATES, 405 U.S. 150 (1972) AND DONNELLY v. DECHRISTOFORO, 416 U.S. 637 (1974).

A. Actual Innocence:

A Wrongfully Convicted Defendant Who Demonstrates Actual Innocence Has An Independent Basis For Relief Under The United States Constitution, The South Carolina Constitution, and Federal and State Law

The continued incarceration of a convicted defendant who demonstrates that he is actually innocent of the crime of which he was convicted is contrary to fundamental notions of justice and fair treatment that are enshrined in the United States and South Carolina Constitutions. A growing

body of authority recognizes that continued incarceration of such a defendant violates the defendant's right to due process of law. See U.S. Const. Amends. V, XIV § 1; S.C. Const. Art. I, § 3. Continued imprisonment of an actually innocent defendant also constitutes cruel and unusual punishment. See U.S. Const. Amend. VIII; S.C. Const. Art. I, § 15.¹ These provisions of the United States and South Carolina Constitutions mandate a remedy for any actually innocent incarcerated defendant.

1. The Existence of Evidence of Material Facts, Not Previously Presented And Heard, Requires Vacation of Petitioner's Conviction, In the Interest of Justice, Whereas, the PCR Court Failed to Rule on the Evidence that was Presented Before the Court, Pursuant to S.C. Code Ann. §§ 17-27-20(A)(4) and 17-27-45(C).

The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) allows an applicant to file an application for relief “[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence.” See S.C. Code Ann. §17-27-20(A)(4) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts “could have been ascertained by the exercise of reasonable diligence”). See also S.C. Code Ann. § 17-27-45(C).

So therefore, guided by the language of sections 17-27-20(A)(4) and 17-27-45(C) of the PCR Act, when a PCR applicant seeks relief on the basis of newly discovered evidence following a [trial], relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after [trial] and, in the exercise of reasonable diligence, could not have been discovered prior to the [conviction at trial]; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the

¹ The “cruel or unusual punishment” clause of the South Carolina Constitution is disjunctive, and thus provides greater protection to defendants just like the State of Michigan’s Constitution, than the “cruel and unusual” punishment clause the Eighth Amendment of the United States Constitution. *Cf. People v. Bullock*, 440 Mich. 15, 485 N.W.2d 866 (1992)(The Michigan Supreme Court explained that the ban under the state constitution of “cruel or unusual” punishments was broader than the proscription of “cruel and unusual” punishments in the Eighth Amendment of the United States Constitution.)

“interest of justice” requires the applicant’s [conviction] to be vacated. *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014).

Turning to the facts of this case, the newly discovered evidence, (see App. pp. 1097 – 1098), namely evidence that corroborates and relates to Petitioner’s testimony and his defense theory of being tricked/mentally coerced into signing a blank statement that was later filled in by SLED Agent, Ashley Asbill, (see App. pp. 295 – 300, Ln. 14 – 2); (also see App. pp. 214, 220, Ln. 8 – 15, 2 – 11), which Petitioner discovered after being convicted at trial for drug trafficking in heroin, on June 15, 2015, and on July 16, 2019, does constitute as evidence of material facts not previously presented and heard that, in the interest of justice, requires Petitioner’s conviction to be vacated on a petition for post-conviction relief (PCR).

Furthermore, the weight and quality of Petitioner’s newly discovered evidence as “evidence of material facts, not previously presented and heard” severely corroborates Petitioner’s theory of being tricked/mentally coerced into signing a blank statement that was later filled in by SLED Agent, Asbill. See S.C. Code Ann. § 17-27-20(A)(4) (emphasis added). Specifically, the newly discovered evidence, (see App. pp. 1097 – 1098), tends to show that the States Witnesses provided false testimony about the trustworthiness of an alleged confession statement, (see App. p. 1100), allegedly made by the Petitioner. The newly discovered evidence also impeaches and contradicts the States Witnesses testimony about not coercing Petitioner into making a statement. Therefore, the newly discovered evidence does constitute evidence of material facts within the language of section 17-27-20(A)(4), and that Petitioner’s conviction was based without the knowledge of the potentially newly discovered evidence does constitute an injustice that would change the result of a new trial if had.

2. The Constitutional Errors in Petitioner's Trial Has Deprived the Jury of Critical Exculpatory Evidence That Would Have Established Insufficient Evidence of Guilt and Would Have Also Proved His Innocence.

A trial error, which is an “error which occurred during the presentation of the case to the jury,” may “be quantitatively assessed in the context of other evidence presented in order to determine whether it’s admission was harmless beyond a reasonable doubt.” *Arizona v. Fulminante*, 499 U.S. 279, 308 – 309, 111 S.Ct. 1246 (1991). Some constitutional trial errors “which in the setting of a particular case are so unimportant and insignificant that they maybe, consistent with the Federal constitution be deemed harmless ... [and do not require an] automatic reversal of the conviction.” *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824 (1967). “Indeed, “the harmless-error doctrine is essential to preserve the ‘principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error.’” quoting *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013)(citation omitted).

In sum, the right of an accused to effective assistance of counsel in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused’s right to relieve counsel “is either respected or denied; it’s deprivation cannot be harmless.” *Mckaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944 (1984). As such, the error is structural in that it is “ ‘so basic to a fair trial that [its] infraction can never be treated as harmless error.’ ” *Fulminante*, 499 U.S. at 289, 111 S.Ct. 1246 (quoting *Chapman*, 386 U.S. at 23, 87 S.Ct. 824).

In this case, the trial court denied Petitioner’s Motion to Relieve Counsel, thus, depriving Petitioner of his right to relieve Scott D. Robinson, Esquire, as his attorney, who would constructively deny him effective assistance of counsel at his trial. The deprivation of Petitioner’s

sixth amendment constitutional right to effective assistance of counsel in his defense and his Fourteenth Amendment right to due process, due to the prosecutorial misconduct at his trial cannot be harmless and, as such, are constitutional errors that have occurred during Petitioner's trial in violation of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *United States v. Cronin*, 466 U.S. 648 (1984), *Napue v. Illinois*, 360 U.S. 264 (1959), *Giglio v. United States*, 405 U.S. 150 (1972) and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

a. Newly Discovered Evidence

“The PCR Act provides that “[a]ny person who has been convicted of, or sentenced for, a crime and who claims ... that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice” is entitled to seek post-conviction relief. S.C. Code Ann. § 17-27-20(A)(4) (2014). Thus, by its plain language, the PCR Act affords “any person” the ability to seek post-conviction relief on the basis of newly discovered evidence.” quoting *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014). Pursuant to South Carolina Code sections 17-27-20(A)(4) and 17-27-45(C), a person who has been convicted of certain crimes, like drug trafficking, may petition for post-conviction relief to present newly discovered evidence and have a hearing on that evidence that was not presented at trial. To obtain an order granting relief, the Petitioner must present *prima facie* proof that, among other things, the evidence is material to exonerating the Petitioner as the perpetrator of the charged offense and that a reasonable probability exists that the Petitioner would not have been convicted of the charged offense if the exculpatory evidences had been presented at trial. See *Edmond v. State*, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2002) (“The burden is on the applicant in a PCR proceeding to prove the allegations in his application.”). If the newly discovered evidence is favorable to the Petitioner, then the court must order appropriate relief, which may include a new

trial. See S.C. Code Ann. § 17-27-80. A petition filed pursuant to this statutory authority is considered a petition for post-conviction relief. See S.C. Code Ann. §§ 17-27-20(A)(4) and 17-27-45(C).

A Petitioner claiming that he is entitled to relief on the basis of newly discovered evidence must establish the following:

(1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (citing *McCoy v. State*, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n.1 (2013) (quoting *Clark v. State*, 315 S.C. 385, 387 – 88, 434 S.E.2d 266, 267 (1993)). Regarding the first factor that is most critical, the defendant must raise a strong presumption that the result at any subsequent trial in all probability would be different. See *Clark*, 315 S.C. at 388. In determining whether the newly discovered evidence will probably produce a different result, the post-conviction court, should have consider the “weight and quality” of Petitioner’s newly discovered evidence, which a reasonable trier of fact would give the proffered evidence and the probable impact of it in light of all the facts and circumstances shown at the original trial of the case. *Id.* at 388.

In this case, since the completion of Petitioner’s trial and the entry of judgment on May 23, 2013, and the appellate courts affirming of Petitioner’s conviction on November 26 2014. There exists evidence of material facts, not previously presented and heard, (see App. pp. 1097 – 1098), that requires vacation of the conviction or sentence in the interest of justice, pursuant to S.C. Code Ann. §§ 17-27-20(A)(4) or 17-27-45(C), evidence that Petitioner inadvertently discovered that actually relates to his case was discovered on June 15, 2015. (See App. p. 981). Then again on July 16, 2019, Petitioner discovered additional evidence that can also prove his innocence and prove

that fraud was committed upon the Court to prevent Petitioner from fully exhibiting and trying his case. (See App. p. 982 – 983).

The after-discovered evidence refers to evidence of facts existing at the time of trial of which Petitioner was excusable ignorant to, because of being forced to rely on insidious counsel. Who would deliberately fail to present this exculpatory evidence to the court and would pursue an unreasonable trial strategy that would fail to subject the State's case to adversarial testing at the expense of a different viable trial strategy. (See App. p. 485).

During Petitioner's state proceedings, his trial counsel, Scott D. Robinson, received from Asst. Solicitor, James E. Hunter, discovery evidence on November 8, 2012, and on December 10, 2012, (see App. pp. 978 – 979), after filing a Motion for Discovery Evidence on or about October 19, 2012. When Counsel Robinson, was given the discovery evidence while the case was pending in the Spartanburg County Court of General Sessions, it included information that was not utilized by Counsel Robinson at Petitioner's trial, namely two Report of Interview by SLED Agent, Ashley Asbill, (1) stating that he "conducted an interview with subject Jonathan Perez at the Spartanburg County Sheriff's Office following his arrest." (see App. p. 1097). And (2) stating that he "conducted an interview with subject Jonathan Garvin at the Spartanburg County Sheriff's Office following his arrest." (see App. p. 1098).

The evidence, is two Report of Interviews by SLED Agent Asbill, shows that extrinsic fraud upon the Court was committed by the State and SLED Agent Asbill, who fabricated those two documents, in all actuality three fabricated documents, to the State that was in Petitioner's December 10, 2012, discovery evidence, (see App. p. 979), by claiming to have conducted an interview with Jonathan Perez at the Spartanburg County Sheriff's office following Perez's arrest. (See App. p. 1097). The second, one is a statement claiming that Petitioner made a signed

confession to him that he wrote and claims that Petitioner was to nervous to write himself. (See App. p. 1100). The third, one claims to have conducted an interview with Jonathan Garvin at the Spartanburg County Sheriff's office following Jonathan Garvin's arrest. (See App. p. 1098). Agent Asbill stated in those two Report of Interviews that, after Jonathan Perez and Jonathan Garvin was read *Miranda* warnings, Perez/Garvin stated that each one wanted to cooperate with Agent Asbill, but stated they both would refuse to provide a written statement. (See App. pp. 1097 – 1098). ATF Special Agent, David Pait, would also make the same assertion in his July 17, 2012, Report of Investigation. (See App. pp. 1070 – 1071).

But at Petitioner's trial, Jonathan Perez testified that he didn't give a statement at all to police. (See App. pp. 239 – 240, Ln. 21 – 25, 1 – 8). Whereas, Petitioner testified that the statement he gave related to events that transpired in Pennsylvania and New Jersey. (See App. pp. 203 & 213, Ln. 18 – 19 & 15 – 23). Not to mention, the fact that Petitioner testified that he was tricked/coerced into signing a blank statement by Agent Asbill that was later filled in by Agent Asbill. (See App. pp. 203, 206, 207, 213, Ln. 18 – 23, 20, 2 – 7, 15 – 23, 2 -15). The question is why would Petitioner sign an inculpatory statement, but would refuse to sign a statement that talks about drugs being distributed in New Jersey and Pennsylvania. Had Counsel Robinson utilized this evidence at Petitioner's trial, he would have cross-examined, Agent Asbill and ATF Special Agent Pait, regarding how those statements came to be during their interview of Petitioner and the truthfulness and voluntariness of the alleged confession statement that was written by Agent Asbill, as the newly discovered evidence is exculpatory. It was Counsel Robinson's deliberate strategy to omit this information on cross-examination. Rather, Counsel Robinson would cross-examine SLED Agent Asbill and ATF Special Agent Pait on how they conducted their interview

of Petitioner with no evidence to support their testimony, but each other's own testimony. (See App. pp. 173 – 174; 183 – 184, Ln. 13 – 19; 6 – 16).

Counsel Robinson's sole defense at trial was one of mere presence. (See App. p. 729, Ln. 2 – 17). A defense that he himself did not believe. (See App. p. 1099). In all retrospect and viewing Petitioner's Motions and attachments, (see App. pp. 480 – 488, 489 – 511, 523 – 552, and 919 – 921), Petitioner believes that Counsel Robinson's failure to utilize the discovery material, his lack of preparation, omissions at trial, both singly and considered together, constitutes ineffective assistance of counsel.

b. Involuntarily Confession: Police Misconduct

1. SLED Agent, Ashley Asbill Has Falsified An Inculpatory Statement That The Petitioner Did Not Make or Even Write and Was Tricked/Mentally Coerced Into Signing

The manufacturing of evidence by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, is deplorable police conduct. There are circumstances and factual evidence in this case that was not presented and heard during Petitioner's trial that will reveal that Petitioner Garvin's will was overborne by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait deplorable police conduct, so as to render the alleged confession statement, (see App. p. 1100), that the officers said Petitioner gave, to be involuntary. The officers did trick or coerce Petitioner Garvin into signing a blank statement that SLED Agent Asbill filled in later in his own words. (See App. pp. 295 – 309, Ln. 14 – 2); (also see App. pp. 214, 220, Ln. 8 – 15, 2 – 11). Petitioner contends that the alleged confession statement should have been suppressed, because ATF Special Agent Pait and SLED Agent Asbill did engaged in a "question-first" manipulation of Miranda forbidden by *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010).

“A statement may be held involuntary if ... obtained by the exertion of improper influence.” quoting *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996). Any statements that are produced as a result of a *Miranda* violation must be suppressed. See *Miranda v. Arizona*, 384 U.S. 436, 458, 86 S.Ct. 1602, 1619 (1966)(Police interrogation is inherently coercive, and unless adequate protective devices are employed, no statement can truly be voluntarily given); *Id.* at 479, 86 S.Ct. 1602 (“[u]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.”). The manufacturing of false documents by police officials offends the traditional notions of due process of law under both the Federal and State Constitutions. See U.S. Const. Amends. V, XIV; S.C. Const. Art. I, § 3, 12.

Petitioner states that his *Miranda* rights were violated and that this Court must suppress the alleged confession statement, because Petitioner did not give a knowingly and intelligently subsequent valid waiver that was voluntary. It was determined, after Petitioner’s *Jackson-Denno* hearing, that the inculpatory confession statement was voluntary, that the Petitioner was advised of his right under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), despite the fact that he did not sign a form waiving those rights or was ever question during his trial about being *Mirandized*.

Petitioner, to the contrary, argues that even when a defendant has waived his *Miranda* rights, a subsequent incriminating statement may not be admissible at trial if the statement and the waiver were obtained as a result of improper police coercion. citing *State v. Reed*, 133 N.J. 237, 627 A.2d 630 (1993).

Here in this case, a manufactured document was admitted as substantive evidence against Petitioner. The fabricated document should have been suppressed because it was the product of

police trickery and coercion during a police interview. On May 21, 2013, a *Jackson-Denno* hearing was conducted to determine whether Petitioner did make an alleged inculpatory confession statement knowingly and voluntarily concerning a drug trafficking crime that would be admissible at trial on the second indictment. (See App. pp. 1043 – 1044). ATF Special Agent, David Pait and SLED Agent Ashley Asbill testified on behalf of the State and describe their roles in the taking of Petitioner’s alleged confession statement. Petitioner’s attorney would advise him to not testify at his *Jackson-Denno* hearing. Insomuch as, Petitioner’s trial attorney would stipulate that Petitioner Garvin was read his *Miranda* rights, (see App. p. 56, Ln. 1 – 4), despite the fact that the Petitioner did not sign a form waving those rights and was not questioned during his *Jackson-Denno* hearing or at his trial about receiving his *Miranda* warning. The trial court did not conduct a lengthy colloquy to determine the voluntariness of Petitioner’s alleged confession statement. The record will show that Petitioner never stipulated on record that he was properly *Mirandized*.

“Failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warning and getting a waiver generally produces a virtual ticket of admissibility, with most litigation over voluntariness ending with waiver finding.” quoting *Missouri v. Seibert*, 542 U.S. 600, 601, 124 S.Ct. 2601, 2603 (2004).

Asst. Solicitor, James E. Hunter, did submit to the courts a fabricated document (see App. p. 1100)² and the perjured testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait, in the trial against Petitioner, testifying with the sole intent to prevail upon the courts for the appearance of presenting and establishing the trustworthiness of an alleged confession statement that was allegedly made by the Petitioner to be within the legal standard of *Jackson v.*

² During Petitioner’s PCR hearing he would present to the court material exculpatory evidence, (see App. pp. 1097 – 1098), that his Court-Appointed Attorney, Scott D. Robinson, would fail to present to the courts to prove his innocence.

Denno, Supra., and *Miranda v. Arizona, Supra.*, then it was placed into evidence after being redacted, with no objection from Petitioner's Court-Appointed Attorney, Scott D. Robinson. (See App. p. 72, Ln. 7 - 20).

When in truth and in fact, as Asst. Solicitor, James E. Hunter, very well knew, the alleged confession was the fruit of an arrest that was unsupported by probable cause and evidence of an opportunity to commit the crime charged was insufficient in order to establish the *corpus delicti* for drug trafficking. Asst. Solicitor, James E. Hunter, did not provide any facts that corroborate facts contained in the confession; any facts that establish the crime which corroborate facts contained in the confession; or facts under which the confession was made that show that the confession is trustworthy or reliable, taken together with the statement, that allow a reasonable inference that the crime of drug trafficking in heroin was committed. The details of Petitioner's alleged confession was not corroborated by SLED Agent, Ashley Asbill and ATF Special Agent, David Pait's testimony during Petitioner's *Jackson-Denno* hearing and trial.

The testimony of SLED Agent, Asbill and ATF Special Agent, Pait does not state or corroborate that Petitioner Garvin knew of or was even involved with the drug transaction. Asst. Solicitor, James E. Hunter, did not prove or corroborated that Petitioner actively participated in the underlying drug trafficking crime with advanced knowledge to provide sufficient independent evidence to support the trustworthiness of Petitioner's alleged confession to SLED Agent, Asbill and ATF Special Agent, Pait. The lack of independent evidence, taken together with the unincorporated alleged confession, does not present a reasonable inference that the crime of drug trafficking was committed by Petitioner Garvin.

The Petitioner argues that the admission of the incriminating statement as evidence violated his Fifth Amendment Constitutional right against self-incrimination. The method used to elicit the

alleged confession statement in this case deserves close scrutiny. Because ATF Special Agent, David Pait and SLED Agent, Ashley Asbill, devised a ruse to trick Petitioner into signing a blank statement that was later filled in by SLED Agent, Asbill with an incriminating inculpatory statement in SLED Agent, Asbill's own words. (See App. pp. 295 – 300, Ln. 14 – 2).

Where there is conflicting evidence about a confession, the court must first make a finding as to the validity of the statement. *State v. Atchison*, 268 S.C. 588, 235 S.E.2d 294 (1977), cert. denied, 434 U.S. 894, 98 S.Ct. 273 (1977)

Here, the purpose of questioning Petitioner was to obtain information about drug crimes in North Jersey and Pennsylvania that Petitioner had witnessed, not to elicit a confession or incriminating information about an alleged involvement in the crime of drug trafficking in heroin in South Carolina.

2. The Trial Judge Erred In Admitting An Involuntary Confession That Was Redacted To Hide The Fact About Police Misconduct.

The trial judge erred in denying Petitioner's pre-trial *Jackson-Denno* hearing motion to exclude the evidence of an alleged confession. Petitioner argues that the State did not present sufficient evidence to satisfy the *corpus delicti* rule as express by the United States Supreme Court in *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158 (1954) and expressed by the South Carolina Supreme Court in *State v. Osborne*, 335 S.C. 172, 179 – 80, 516 S.E.2d 201, 204 – 05 (1999). In particular, Petitioner asserts that the alleged confession was the fruit of an arrest that was unsupported by probable cause and evidence of opportunity to commit the crime charge was insufficient in order to establish the *corpus delicti*.

This court should apply an abuse of discretion standard in reviewing the trial court's decision to deny Petitioner's *Jackson-Denno* motion to suppress. A Judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error

of law; or (3) is based on an error of fact. *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (S.C. App. 2013). Moreover, Petitioner states that his Jackson-Denno hearing was totally lacking a reliable evidentiary base that demonstrates the proper judicial review of the procedural safeguards that's effective to secure the privilege against self-incrimination. *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) (citing *Miranda*, 384 U.S. at 144); also see S.C. Const. Art. I, § 22.

Here in this case, the details of Petitioner's alleged confession was not corroborated by Officer Asbill and Officer Pait's testimony during Petitioner's *Jackson-Denno* hearing and trial. There is testimony evidence in the record, that Petitioner made a claim that his confession was false and that he was coerced into signing it. (See App. pp. 203, 206, 207, 213, Ln. 18 – 19, 20, 2 – 7, 15 – 21); (also see App. pp. 295 – 300, Ln. 14 – 2).

The evidence presented at Petitioner's *Jackson-Denno* hearing and trial did not prove or corroborate that Petitioner Garvin was knowingly involved in the commission of a criminal act, or that there had been some planning an agreement between him and his co-defendant, Jonathan Perez pertaining to the act. The State did not prove or corroborated that Petitioner actively participated in the underlying drug trafficking crime with advanced knowledge to provide sufficient independent evidence to support the trustworthiness of Petitioner's alleged confession to SLED Agent, Asbill and ATF Special Agent, Pait. Furthermore, the lack of independent evidence, taken together with the unincorporated alleged confession, does not present a reasonable inference that the crime of drug trafficking was committed by Petitioner Garvin.

c. Conspiracy:

- 1. Asst. Solicitor, James E. Hunter, Has Conspired With Petitioner's Appointed Counsel, Scott D. Robinson, to Deprive Him of His Rights And Privileges Guaranteed By the Federal and State Constitution**

“A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence.” *McMillan v. Oconee Mem’l. Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (citation omitted). The elements a plaintiff must demonstrate in order to prove a civil conspiracy are (1) the combination of two or more people; (2) for the purpose of injuring the plaintiff; and (3) which cause special damages. *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). “[I]n civil [conspiracy] actions, the gravamen of the tort is the damage resulting to [the] plaintiff from an overt act done pursuant to a common design.” *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989).

Here in this case, the Petitioner will show by the record. That on or about April 5, 2013, Petitioner had told Counsel Robinson to relieve himself as counsel on his case during an attorney/client visit at Spartanburg County Detention Center. Then on April 10, 2013, Counsel Robinson would file his Motion to Relieve Counsel as requested with the Spartanburg County Clerk’s Office and the Spartanburg County Solicitor’s Office. (See App. p. 1036, Counsel Robinson’s filed Motion to Relieve Counsel). Whereas, a motion hearing date was scheduled for that motion to be heard on April 12, 2013. “But that motion never made it before the court. It was just discussed in chambers,” with Asst. Solicitor, James E. Hunter, Counsel Robinson and Circuit Judge, R. Lawton McIntosh. (See App. pp. 11 – 12, Ln. 25 – 4).

The record would respectfully show this court that on or about April 12, 2013, Petitioner’s Court-Appointed Pro-bono Attorney, Scott D. Robinson, Esq., withdraw his Motion to Relieve himself as Counsel then would combine forces with Asst. Solicitor, James E. Hunter and entered into an extra-judicial conspiracy, that was discussed off the record in Judge McIntosh’s chambers,

to injure Petitioner Garvin by having him convicted of drug trafficking on May 23, 2013, then causing Petitioner to receive a sentence of 25 years with a \$250,000.00 fine in the following manner.

It can be determined from the record that on April 12, 2013, Asst. Solicitor, James E. Hunter and Petitioner's court-appointed pro-bono attorney, Scott D. Robinson, Esq., did conspire to convict Petitioner, as it was discussed in Circuit Judge, R. Lawton McIntosh's chambers. (See App. pp. 11 – 12, Ln. 25 – 4).

d. Fraud:

1. The Assistance Solicitor and Petitioner's Trial Counsel Deliberately Conspired to Scheme to Defraud the Courts, Knowingly and Intentionally.

A judgment may be set aside on the ground of fraud only if the fraud is "extrinsic" and not "intrinsic." Extrinsic fraud is collateral or external to the trial of the matter. See *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714 (2000). "Extrinsic fraud is fraud that induces a person not to present a case or deprived a person of the opportunity to be heard. Relief is granted for Extrinsic fraud on the theory that the fraud prevented a party from fully exhibiting and trying his case." quoting *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605 (2003).

The subornation of perjury and the submission of a fabricated document unto the courts by Asst. Solicitor, James E. Hunter, are actions which constitute extrinsic fraud. "[W]here an attorney – an officer of the court – suborns perjury or intentionally [submitted a fabricated] document[], he ... effectively precludes the opposing party from having his day in court.³ These actions by an attorney constitute extrinsic fraud." quoting *Chewning*, 354 S.C. at 82. Attorney fraud calls into

³ See *Chewning*, 354 S.C. 72, n. 5, 579 S.E.2d 605 (2003) (internal citation omitted)(attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony).

question the integrity of the judiciary and erodes public confidence in the fairness of South Carolina's system of justice. Where[as,] an attorney [that] embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs. *Id.*⁴

Asst. Solicitor, James E. Hunter and Scott D. Robinson, Esquire, had a mutual understanding to commit extrinsic fraud upon the court, to convict Petitioner, John Garvin of drug trafficking in heroin, their conduct and the circumstances that are within the record that creates circumstantial evidence that's susceptible to a reasonable inference that they did in fact conspire to commit those acts for collateral purposes on April 12, 2013. See *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) ("In order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. [The] [c]onspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances.").

Here, the "factual" basis for the fraud-based issue that's before this court and that form Petitioner's "collateral attack" on his underlying conviction consists of the alleged acts by Asst. Solicitor, James E. Hunter; SLED Agent, Ashley Asbill; ATF Special Agent, David Pait and Petitioner's trial attorney, Scott D. Robinson in furtherance of their shared scheme to commit a fraud upon the court by utilizing the suborn testimony of SLED Agent, Ashley Asbill and ATF Special Agent, David Pait to prevail onto the courts for the appearance of presenting and

⁴ "[B]ecause fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not establish prejudice. [T]he perpetrator of the fraud upon the court should not be allowed to dispute the effectiveness of the fraud after the fact." *Id.* at n7.

establishing the trustworthiness of an alleged confession statement that was allegedly made by the Petitioner. Whereas, Petitioner's trial attorney, Scott D. Robinson would deliberately fail to advise the Court's of an existing conflict of interest and to inform Petitioner of and to utilize exculpatory evidence (see App. p. 1097 – 1098), to impeach SLED Agent, Asbill and ATF Special Agent, Pait. All these acts, individually and collectively, constitute "extrinsic" fraud. As such, they are grounds for setting aside Petitioner's conviction.

e. Prosecutorial Misconduct:

1. Asst. Solicitor, James E. Hunter Has Abused the Judicial Process of the Petitioner With His Official Lawlessness in the Enforcement of South Carolina Statute § 44-53-370(e), Whereas, He has Shown Bad Faith, Has Prosecuted the Petitioner's Case Maliciously and Sadistically to Cause Harm to Him With the Use of False Evidence

Petitioner states that Asst. Solicitor, James E. Hunter, "knowingly used false testimony" and a fabricated document as evidence to obtain Petitioner Garvin's conviction in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972), and his trial counsel, Scott D. Robinson, was ineffective for failing to object. Petitioner will show that the solicitor's misconduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974).

"A convicted defendant is entitled to a new trial if he can establish that the Government intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key Government witness at the trial." quoting *United States v. Harris*, 498 F.2d 1164,1168 (3rd Cir. 1974). "The fact that a defendant knows that the [S]tate is attempting to secure his conviction on the basis of false evidence does not necessarily discharge the prosecutor from his duty to correct the false testimony [and evidence] or immunize the state from a claim that the

defendant's right to due process was violated." quoting *Gomez v. Commissioner of Correction*, 336 Conn. 168, 243 A.3d 1163 (2020).

However, the grant of a new trial based upon a *Napue/Giglio* violation is proper only if: (1) the statements at issue are shown to be actually false; (2) the prosecution knew they were false; and (3) the statements were material. *United States v. O'keefe*, 128 F.3d 885, 893 (5th Cir. 1997). Indeed, the PCR court does have a duty to correct because *Napue* and *Giglio* does apply to merely "misleading" testimony in the first instance. Rather, those two cases require the prosecutor to correct only testimony that is substantially misleading or false.

Under the present facts, the State allowed to go uncorrected false testimony about the trustworthiness of a fabricated document in relation with two of its witnesses. Although the State had within it's possession exculpatory evidence, (see App. pp. 1097 – 1098), that would contradict it's witnesses, the State, in it's opening argument, knowingly told the jury that Petitioner "confessed to it," "[h]e confessed to buying four grams of heroin in North Carolina." ... "[L]ook at the evidence, both the evidence that we present through exhibits and the evidence that you hear from the officer's testimony, from Mr. Jerman's testimony." (see App. pp. 86 – 87, Ln. 15 – 17, 25 – 2). Furthermore, there was testimony provided by the Petitioner that he was coerced into signing a blank statement (see App. pp. 203, 213, Ln. 18 – 19, 15 – 21), (also see App. p. 207, Ln. 2 – 7), and the testimony provided by his co-defendant, Jonathan Perez, that he didn't make a statement to the police. (See App. pp. 239 – 240, Ln. 21 – 25, 1-8). In addition, to the fact, that "[Petitioner] didn't have any involvement, (see App. p. 231, Ln. 11 – 13), and that "[Petitioner] did not know of [his] intentions of whatever [he was] gonna do at all." (see App. p. 231, Ln. 23 – 24), (see App. p. 234, Ln. 1 – 8). The PCR court's findings are not supported by competent evidence of probative value in the record to support its findings.

A “prosecutor’s deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. The failure to correct false evidence is as reprehensible as it’s presentation.” quoting *Riddle v. Ozmint*, 369 S.C. 39, 47 – 48, 631 S.E.2d 70 (2006) (citing *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (quoting *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972))).

2. Asst. Solicitor, James E. Hunter, Has Vouched For the Credibility of the State’s Witnesses, that Have Committed Perjury During Petitioner’s Trial

The Due Process Clauses in both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty “without due process of law.” U.S. CONST. AMEND. V; *Id.* XIV, § 1. To find whether the Assistant Solicitor, James E. Hunter’s comments in closing argument violated the Petitioner’s due process rights. This court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986) (“The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” (quoting *Donnelly v. Dechristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974))); *United States v. Chorman*, 910 F.2d 102, 113 (4th Cir. 1990) (Stating “the test for reversible prosecutorial misconduct” in a prosecutor’s closing argument is “the prosecutor’s remarks or conduct must in fact have been improper, and ... such remarks or conduct must have prejudicially affected the defendant’s substantial rights so as to deprived the defendant of a fair trial” (citation omitted)).

Petitioner did not receive a fair trial due to, Asst. Solicitor, James E. Hunter, vouching for the creditability of the State’s witnesses within his closing argument. (See App. pp. 254 – 259, Ln. 10 – 13). This, Solicitors may not vouch for a witness’s credibility, as doing so improperly invades

the province of the jury and places the government's prestige behind the witness. *Id.* (citing *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony"). This, solicitor[] must confine [his] closing remarks to the record and the reasonable inferences that may be drawn therefrom. *Id.*

Here, Petitioner's trial counsel's closing argument did not invite the solicitor to repeatedly assert that the State's witnesses were truthful in their testimony and had no motive to lie. Rather, trial counsel's presentation merely pointed out that the confidential informant, Fredrick Jerman's motive for testifying, (see App. pp. 245 – 254, Ln. 21 – 5), which could do no more than invite the solicitor to point out the defendant's witnesses motive to testify.

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." "[A] prosecutor cannot vouch for a witness' credibility. A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." quoting *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citation omitted). "[A] solicitor's comments "so infect[s] [a] trial with unfairness as to make the resulting conviction a denial of due process."” *Id.* at 170, 607 S.E.2d at 75. (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868 (1974).

Accordingly, there is evidence in the record to support the Petitioner's claim of prosecutorial misconduct for Asst. Solicitor, James E. Hunter's repeated vouching for the State's witnesses credibility. Petitioner's trial counsel was deficient for failing to object to the Solicitor's vouching for it's witnesses. The prejudicial impact of Counsel Robinson's failure to object is evident from the record, prejudice has clearly flowed from counsel's error.

f. Due Process Violation

Next, Petitioner states that his conviction was obtained in violation of the due process clause of the Federal and State constitutions. Petitioner's argument is based on his court appointed counsel constructively denying him effective assistant of counsel and the State's presentation of false testimony and a fabricated document as evidence to obtain Petitioner's conviction in violation of *United States v. Cronin*, 466 U.S. 648 (1984), *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972). Whereas, Asst. Solicitor, James E. Hunter, vouched for the credibility of the States Witnesses testimony in his closing rebuttal argument. (See App. pp. 254 – 259, Ln. 10 – 13). The solicitor's misconduct "so infected[ed] [the Petitioner's] trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974).

The Petitioner further states, that his Napue/Giglio claim is cognizable because there is evidence that indicate that the State has committed extrinsic fraud upon the court. (See App. p. 110); (see App. pp. 1097 – 1098). The Petitioner also asserts that under the present facts, the PCR court chose to ignore this fact by stating in it's order of dismissal, that "there has been presented no evidence tending to establish that the State's witnesses provided perjured or false testimony, fabricated evidence used against the applicant in his trial, or that the prosecutor fraudulently or improperly relied upon that testimony in the prosecution of the applicant's case." "Applicant's claim of prosecutorial misconduct have no merit and relief on those grounds are there denied." (see App. p. 876). The PCR court has allowed to go uncorrected false information and evidence about its relationship with two of the state witnesses that was presented at the Petitioner's trial. The Indiana Supreme Court has stated, "[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal."

Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

The Petitioner would also point out that, Asst. Solicitor, James E. Hunter, knew or should have known it's evidence and the testimony that was provided by the State's Witnesses was false and misleading, if he would have properly investigated the discovery evidence he received from the Spartanburg County Sheriff Officers. That is, the falsity of the evidence was uniquely within the knowledge of the prosecution. Because the "false" nature of the evidence arises from it's supposed relevance in light of a police interview conducted by SLED Agent, Ashley Asbill, and ATF Special Agent, David Pait, after Petitioner was arrested on July 17, 2012. The newly discovered evidence, (see App. p. 1097), existed and was deliberately not presented at Petitioner's trial by his appointed counsel. In short, this is new evidence about this particular claim of actual innocence.

The PCR court's order of dismissal determined that "[Petitioner] has presented no additional evidence relevant to the issue and has failed to provide credible evidence proving that the "involuntary confession" was "involuntary" and is in fact false. [Petitioner's] claim has no merit and relief on that ground is therefore denied." (see App. p. 880). "[Petitioner] has further failed to establish any other ground permitted under S.C. Code Ann. § 17-27-20 entitling the [Petitioner] to relief from his conviction or sentence and therefore, the application requesting post-conviction relief should be and is therefore denied and the application **DISMISSED** with **PREJUDICE**." (See App. p. 886).

Clearly, the PCR court has overlooked the evidence that the Petitioner has presented before the PCR court. Specifically, Petitioner's exhibits – 1 and 2, (see App. pp. 1097 – 1098), establishes that he was prejudice by Counsel Robinson's deficient performance to present exculpatory evidence that would have proved Petitioner's innocence.

II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO RELIEVE COUNSEL AND HIS OBJECTIONS TO APPOINTED COUNSEL'S REPRESENTATION OF HIM DURING HIS TRIAL, DID PLACE AN ACTUAL CONFLICT OF INTEREST UPON PETITIONER WHEN A COMPLAINT WAS FILED WITH THE OFFICE OF DISCIPLINARY COUNSEL AND A COMPLAINT WAS FILED IN FEDERAL COURT AGAINST HIS COURT-APPOINTED COUNSEL AND THE ASST. SOLICITOR PRIOR TO TRIAL, DID CONSTITUTIONALLY PREJUDICED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR TRIAL AS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) AND *UNITED STATES v. CRONIC*, 466 U.S. 648 (1984).

A. Substitution of Court-Appointed Counsel

In deciding whether Petitioner's trial court abuse it's discretion in denying his motion to relieve counsel or to substitute counsel, the South Carolina Supreme Court has articulated and applied the three factors to evaluate when faced with a motion to relieve counsel, in *State v. Sims*:

- 1) Timeliness of the motion;
- 2) Adequacy of the trial judge's inquiry into the defendant's complaint; and
- 3) Whether the attorney-client conflict amounts to a total lack of communication.

304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) (citing *U.S. v. Gallop*, 838 F.2d 105 (4th Cir. 1988)).

Turning to the first factor, Petitioner stated at his trial, that during the month of December, 2012, that he wrote a letter to the Chief Administrative Judge, J. Derham Cole, about Petitioner wanting to relieve Scott D. Robinson, Esq., as his counsel. (See App. p. 82, Ln. 12 – 18). Then on or about April 9, 2013, during an attorney legal visit at Spartanburg County Detention Center, Petitioner Garvin asked Counsel Robinson to relieve himself as Counsel. Whereas, Counsel Robinson filed a motion to relieve counsel on April 10, 2013. (See App. p. 1036, Scott D. Robinson's filed Motion to Relieve Counsel). But then withdrew that motion on the day of the motion hearing after talks in Chambers with Asst. Solicitor, James E. Hunter and Circuit Judge,

R. Lawton McIntosh, on April 12, 2013. (See App. p. 11 – 12, Ln. 25, 1 – 4). After Counsel Robinson would withdraw his motion to relieve counsel, Petitioner would then file his own pro-se motion to relieve counsel on May 12, 2013. (See App. pp. 1093 – 1094). Whereas, his motion would be denied without a hearing or an order being issued on May 14, 2013, by Circuit Judge McIntosh. (See App. p. 998, Court Docket, Judge McIntosh Denied Petitioner’s May 12, 2013, Motion to Relieve Counsel). Then on May 21, 2013, on the day of trial, Counsel Robinson requested to be relieve as counsel and Petitioner also requested to Judge McIntosh to relieve Scott D. Robinson as his attorney. (See App. p. 7 – 13, Ln. 11 – 4).

The trial court in this matter was certainly put on notice that Counsel Robinson wished to withdraw as Counsel after his first motion was filed, but then withdrew that motion after talks in chambers with Asst. Solicitor, James E. Hunter and Circuit Judge, R. Lawton McIntosh. (See App. pp. 11 – 12, Ln. 25, 1 – 4). As such, this factor weighs in Petitioner’s favor, due to the interference from Circuit Judge McIntosh and Asst. Solicitor, James E. Hunter, with attorney-client relationship that caused Counsel Robinson to withdraw his motion to relieve himself as counsel.

Turning to the second factor, however, the record reveals that the trial court failed to engage in an adequate inquiry. “When a defendant raises a seemingly substantial complaint about counsel, the judge ‘has an obligation to inquire thoroughly into the factual basis of defendant’s dissatisfaction.’ ” *United States v. Mullen*, 32 F.3d 891, 896 (4th Cir. 1994)(internal citations omitted). “An inquiry into the reasons for a defendant’s dissatisfaction with his or her lawyer is necessary for the trial court to determine whether good cause for substitution of counsel exists.” *Id.* (internal citations omitted). “The [trial] court [and this court] is far better situated ... to observe and inquire into the state of the relationship between a defendant and his appointed counsel, and thus, where the [trial] court has met it’s ‘obligation to inquire thoroughly into the factual basis of

defendant's dissatisfaction', ... [thus] apply[ing] the ordinary standard of review to its factual findings: clear error." *United States v. Smith*, 640 F.3d 580, 590 (4th Cir. 2011) (citing *Mullen*, 32 F.3d at 896). "While motions to substitute counsel often arise at the defendant's urging, [but] when the attorney also seeks to withdraw, the Court must thoroughly inquire into the factual basis of any conflicts asserted by counsel." quoting *United States v. Blackledge*, 751 F.3d 188, 194 (4th Cir. 2014).

In this case, the trial court did not meet its obligation to thoroughly inquire into the extent of the communications breakdown or the basis of the asserted conflict. Despite the representation from Counsel Robinson and Petitioner Garvin on the morning of trial that they both moved for Counsel to be removed, the trial court did not ask when they had last seen each other or communicated about the case.⁵ Tasked with reviewing the motions to relieve counsel *de novo*, because the trial court erred in failing to examine how the communications between Petitioner Garvin and Counsel Robinson had come to a breakdown in communications prior to trial. The trial court would emphasize on Counsel Robinson's competence as a lawyer to file a "Rule – 5 [and/or] Brady motion" (see App. p. 12, Ln. 10 – 12), but an attorney's competence cannot cut short the inquiry because, "[e]ven if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense." quoting *Blackledge*, 751 F.3d at 195 (citation omitted). Most significantly, the trial court failed entirely to inquire about the internal ethical

⁵ Despite Counsel Robinson's assertion that he and Petitioner Garvin had a breakdown in communication and that he expressed to the Court that Petitioner Garvin does not feel comfortable with him representing him and that he does not feel comfortable representing Petitioner Garvin (see App. p. 8, Ln. 2 – 7), Judge McIntosh infers that they were indeed able to communicate from the fact that Counsel Robinson filed a "Rule – 5 [and/or] Brady Motion," on or about October 19, 2012. However, the fact that Counsel Robinson filed this pleading on Petitioner Garvin's behalf does not establish that they were actually able to communicate prior to Petitioner Garvin's May 21, 2013 trial, and indeed, such an inference is undermined by the fact that Counsel Robinson moved before the Court for a second motion to withdraw the day of trial. Had the trial court followed the "best practice" of making "an express finding on the record about the state of communication between defendant and Counsel," *Blackledge*, 751 F.3d at 195 n. 4, then perhaps this court would not be left wondering when Counsel Robinson and Petitioner Garvin had last meaningfully communicated about his defense.

conflict that Petitioner Garvin was trying to present to the trial court (App. pp. 9 – 10, Ln. 14 – 25, 1 – 22); (App. pp. 81 – 85, Ln. 15 – 2) or the breakdown in communication that Counsel Robinson presented to the Court (App. pp. 7 – 8, Ln. 22 – 7) and whether their internal ethical conflict had been resolved at all. The trial court’s failure to probe deeply into the basis of Petitioner Garvin’s and Counsel Robinson’s conflict seriously undermined it’s decision, and this factor weighs heavily against the trial court’s ruling.

Turning to the third factor, because the trial court failed to engage in an adequate inquiry, it’s factual determination that there was “insufficient grounds to warrant relieving Mr. Robinson as [the] attorney,” is a clear error. (See App. p. 84, Ln. 14 – 15). If this court were to review this finding for clear error, however, this factor likewise weighs against the trial court’s ruling.

Firstly, a conflict of interest emerged once Petitioner Garvin filed a complaint with the “ODC” on January 13, 2013, (see App. pp. 1003 – 1004, “ODC” lettered complaint), against Counsel Robinson and Asst. Solicitor, James E. Hunter, for Counsel Robinson’s failure to be present at Petitioner’s preliminary hearing and his abandonment of Petitioner at Petitioner’s requested preliminary hearing and Asst. Solicitor, James E. Hunter for postponing Petitioner’s preliminary hearing two times and then moving before the Court for it to be waived for failure to appear, thus, depriving Petitioner of a requested preliminary hearing. Then on February 12, 2013, Petitioner would also file a petition for writ of habeas corpus alleging ineffective assistance of counsel and for the Solicitor’s control of docket are in violation of his constitutional rights. (See App. pp. 1006 – 1018, a filed petition for writ of habeas corpus). Petitioner find useful the D.C. Court of Appeals decision in *Douglas v. United States*, 488 A.2d 122 (D.C., 1985) and the Hawai’i Supreme Court decision in *State v. Harter*, 134 Hawai’i 308, 340 P.3d 440 (2014) citing the

Douglas case, explained how a defense attorney's personal interest interferes with representation under similar circumstances to this case.

In this case, this court needs to decide whether Counsel Robinson actually had a personal, potentially conflicting interest as in *Douglas* and *Harter*, because a conflict arose from Petitioner Garvin's two complaints that was filed, inasmuch as, to whether Counsel Robinson's failure to identify it and report it to the trial court was an error. The Fourth Circuit Court of Appeals has recognized in the context of federal habeas proceedings that "a clear conflict of interest exists in requiring ... counsel to identify and investigate potential errors that they themselves may have made ..." *Blackledge*, 751 F.3d at 195 (quoting *Gray v. Pearson*, 526 Fed. Appx. 331, 334 (4th Cir. 2013)). This conflict exists irrespective of whether Counsel Robinson is ultimately found to have erred, for failing to present a conflict of interest to the trial court. This conflict further undermined Petitioner's trust in Counsel Robinson and strained their ability to communicate.

Secondly, Petitioner simultaneously also filed a complaint against Asst. Solicitor, James E. Hunter, and Scott D. Robinson, Esq., with the "ODC", (see App. pp. 1003 1004), and a petition for writ of habeas corpus in federal court, (see App. pp. 1006 – 1018), thus, stating to the trial court that he "feels as though [he's] being [blind]-sided. He feels like it's two attorneys against me, cause I don't feel as though I'm fully being represented because I filed a complaint against them both with the Office of Disciplinary Council and I filed one in the federal court against them." (see App. p. 83, Ln. 1 – 10).⁶ However, in this case, Petitioner filed a seemingly non-frivolous complaint with the "ODC", (see App. pp. 1003 – 1004), and in Federal Court, (see App. pp. 1006 – 1018), against Counsel Robinson and the prosecuting Solicitor, about being deprived of his preliminary hearing that he requested on July 18, 2012. (See App. p. 1032). Petitioner asked

⁶ Petitioner filed a complaint about the accuracy of his trial transcript to the court reporter of that case.

Counsel Robinson to Relieve himself, at which he file a motion to relieve counsel with the courts, but then withdrew that motion after talks in chambers with the Asst. Solicitor, James E. Hunter, (who Petitioner also filed a complaint against) and Judge McIntosh a month before Petitioner's May 21, 2013, trial. (See App. pp. 11 – 12, Ln. 25 – 4). The complaints that Petitioner filed against Counsel Robinson, forced Counsel Robinson to choose between protecting his own reputation and arguing in his client's best interest during Petitioner's trial.

Thirdly, the trial court had before it an internal ethical conflict, and failed to conduct an adequate inquiry, it is very clear that this conflict was never resolved at trial or prior to trial. Moreover, the trial court made no inquiry whatsoever into the scope and nature of this conflict. As a result of the trial courts failure to inquire, there is no way of knowing whether the internal ethical conflict was indeed so significant that it required Counsel Robinson's withdrawal as counsel. See *Mickens v. Taylor*, 240 F.3d 348, 357 – 58 (4th Cir. 2001)("[A] trial court must inquire into a conflict of interest 'when it knows or reasonably should know that a particular conflict exists.')(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708 (1980)). Indeed, despite the fact Counsel Robinson did opine that he doesn't feel comfortable representing Petitioner Garvin, this assertion can be isolated from his protestation that he stated on the record. (See App. p. 8, Ln. 3 – 7).

Notwithstanding the trial court's failure to inquire and the lack of clarity as to the extent of the internal ethical conflict, Counsel Robinson's withdrawal of his motion to relieve counsel and the complaints that were filed with the "ODC" and the federal habeas corpus complaint filed in federal court against Counsel Robinson and Asst. Solicitor, James E. Hunter, taken together, created a conflict of interest. As such, this court must consider whether the conflict resulted in a total breakdown in communications preventing an adequate defense. "A total lack of

communication is not required,” *Blackledge*, 751 F.3d at 197 (citation omitted)(emphasis added), but rather this court should be concern with “a ‘breakdown’ of attorney-client communication so great that the principal purpose of the appointment – the mounting of an adequate defense incident to a fair trial – has been frustrated.” *Id.*

The most telling evidence of the extent of the breakdown and it’s impact on Petitioner Garvin’s defense is the assertion from Garvin on the morning of the trial that they failed to engage in trial preparation and that they haven’t really spoken, (see App. p. 82, Ln. 6 – 10), and Counsel Robinson’s assertion that it was “ very difficult for [him] to continue in this case.” (see App. p. 9, Ln. 9 – 10). The trial court would take the fact that Counsel Robinson stated that Petitioner Garvin has received the discovery and that “Counsel Robinson” himself reviewed the tape in the case.

In this case, Counsel Robinson did labor under a conflict of interest that caused his communications with Petitioner Garvin to be so broken that a “fundamental step for adequate representation” — basic trial preparation — failed to occur. The Fourth Circuit Court of Appeals has previously noted, “it is the marriage of the attorney’s legal knowledge and mature judgment with the defendant’s factual knowledge that makes for an adequate defense.” *Blackledge*, 752 F.3d at 197 (citing *Smith*, 640 F.3d at 588). Now, because of the communications breakdown, Counsel Robinson deliberately presented no exculpatory evidence, (see App. pp. 1097 – 1098), that he had within his possession, that could’ve corroborated Petitioner Garvin’s testimony of being tricked/mentally coerce into signing a blank statement during his trial proceeding. (See App. pp. 295 – 300, Ln. 14 – 2). Also the record shows that Counsel Robinson deliberately failed to subject the State’s prosecution of Garvin to adversarial testing. This factor therefore weighs against the court’s ruling.

Weighing all three *Sims* factors, the trial court did abused it's discretion. Counsel Robinson filed a motion to be relieved as counsel a month before Petitioner's trial date on April 10, 2013. (See App. p. 1036). Then on the date of the motion hearing on April 12, 2013, Counsel Robinson withdraws that motion after talks in chambers with the Asst. Solicitor, James E. Hunter and the trial judge. (See App. pp. 11 – 12, Ln. 25 – 4). On the day of trial Counsel Robinson renews that motion after visiting Petitioner the day before trial. Asst. Solicitor, James E. Hunter and the trial judge's interference with attorney-client relationship on April 12, 2013, is a conflict that needs to be inquired into. The trial court has failed to perform an adequate inquiry here in this case, the record in this case nonetheless reveals that the above-discussed conflict resulted in a communication breakdown that prevented Counsel Robinson and Petitioner Garvin from mounting an adequate defense. As such, Judge McIntosh abused his discretion in denying the Petitioner's motion to relieve counsel.

1. Conflict of Interest Grounds

a. Trial Court Duty to Inquire

A trial judge is required to conduct a “penetrating and comprehensive” inquiry when he or she “reasonably should know” that a conflict of interest exists. *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708 (1980). Once this duty to inquire is triggered, “it cannot be discharged by a perfunctory inquiry,” but rather, the duty is only met with “probing and specific questions” about the potential conflict. See Wayne R. LaFave et al., *Criminal Procedure* § 11.9(b) (3d ed.) (quoting *Atley v. Ault*, 21 F.Supp.2d 949 (S.D.Iowa 1998), *aff'd*, 191 F.3d 865 (8th Cir.1999)).

In this case, Circuit Court Judge, R. Lawton McIntosh, was required to conduct an inquiry into the potential conflict of interest on May 21, 2013, at Petitioner trial, that was apparent during Petitioner's state proceedings. The conflict of interest emerged once Counsel Robinson

deliberately failed to show up for Petitioner's October 25, 2012, preliminary hearing, thus, causing Asst. Solicitor, James E. Hunter, to move before the Court for it to be waived for Counsel Robinson's failure to appear.⁷ Insomuch as, causing Petitioner to file a complaint with the Office of Disciplinary (ODC) against both Counsel Robinson and Asst. Solicitor, James E. Hunter, for depriving him of a requested preliminary hearing in violation of his due process, in the form of a lettered complaint dated January 13, 2013, (see App. pp. 1003 – 1004), and again in a petition for writ of habeas corpus alleging ineffective assistance of counsel and the solicitor's control of docket dated February 12, 2013. (See App. pp. 1006 - 1018). Then on or about April 9, 2013, during an attorney legal visit at Spartanburg County Detention Center, Petitioner ask Counsel Robinson to relieve himself as counsel. Whereas, Counsel Robinson filed a motion to relieve himself as counsel on April 10, 2013. (See App. p. 1036). But then he would withdrew that motion after communications in chambers with Asst. Solicitor, James E. Hunter and Circuit Judge, McIntosh, on or about April 12, 2013. (See App. pp. 11 – 12, Ln. 25 – 4).

A complaint filed with the ODC and the filing of a petition for writ of habeas corpus in federal court pitting Petitioner Garvin against his attorney certainly suggests divided loyalties and gives the attorney “a personal interest in the way he conducted [Garvin's] defense — an interest independent of, and in some respects in conflict with, [Garvin's] interest in obtaining a judgment of acquittal.” quoting *Douglas v. United States*, 488 A.2d 121, 136 (D.C. App., 1985)(finding a conflict of interest when defendant filed a complaint against his retained counsel with the Office of the Bar Counsel); also see *State v. Harter*, 134 Hawai'i 308, 340 P.3d 440 (2014).

⁷ Petitioner's failure to appear was to no fault of his own because he was being held in the Spartanburg County Detention Center without bail and his failure to appear was because the Asst. Solicitor deliberately did not call the Spartanburg County Sheriff Deputy to bring him to the Court for the October 25, 2012, preliminary hearing.

In *Douglas*, the D.C. Court of Appeals explained how a defense attorney's personal interest interferes with representation under similar circumstances to this case. The defendants in *Douglas* and *Harter* both filed a complaint against their defense counsel with the Bar Counsel's Office, which led to the Bar Counsel launching an investigation into the defense attorney's conduct. *Id.* at 127-28.⁸ The D.C. Court of Appeals noted that as soon as the defense counsel learned of the investigation of the defendant's complaint, "he acquired a personal interest in the way he conducted his client's defense — an interest independent of, and in some respects in conflict with, his client's interest in obtaining a judgment of acquittal." *Id.* at 137. For example, given a fear that the complaint would be expanded to include claims of ineffective assistance of counsel at trial, the defense attorney "would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for *post hoc* criticism of his efforts." *Id.* at 137. This could compromise the attorney's judgment about the best means of defending the case and encourage the most conservative trial strategy. In addition, concern about the pending investigation might chill communications between the defendant and his attorney resulting in a weakened defense. *Id.* The court also noted that the defendant would have been entitled to a new trial on sixth amendment grounds had he been convicted."

Counsel Robinson was in a similar situation as the defense counsels' in *Harter* and *Douglas*, and he went so far as to tell Judge McIntosh directly that there's been a breakdown in communication, that Garvin doesn't feel comfortable with him, that Garvin threatened him, and stated on two occasions that he doesn't feel comfortable representing him at this point. (See App.

⁸ The defendant's complaint did not come to light until the second day of trial, when the defense counsel informed the court that he had just received a letter from the Office of Bar Counsel notifying him of the complaint and that the Bar Counsel was opening an inquiry into his conduct. *Douglas v. United States*, 488 A.2d 121, 128 (D.C.1985). Even though the defendant and defense counsel indicated to the court that they wanted to go forward with the trial, the trial court declared a mistrial *sua sponte*. *Id.* at 129.

pp. 7, 8, 9, Ln. 19 – 25, 1 – 7, 8 – 10). This concern was confirmed during Petitioner’s July 19, 2019, PCR hearing on cross-examination when Counsel Robinson stated in court that Petitioner Garvin told “[him] to go F-U-C-K [him] self” and that after that comment it kind of bothered him and that Garvin was not cooperative in assisting him. (See App. pp. 726, 727, Ln. 21 – 25, 16 – 23). Counsel Robinsons’ personal interest had the potential of seriously interfering with his “professional judgment about the best means of defending” Garvin. *Id.* In light of the absence of a proper colloquy directed at ascertaining the risks, it cannot be discounted that defense counsel’s personal interest could potentially have also influenced his strategic decisions or encouraged him to use an overly “conservative trial strategy.” *Id.* Consequently, in the absence of any examination by Judge McIntosh into the underlying circumstances, the record in this case indicates there was a conflict of interest between Petitioner Garvin and Counsel Robinson. During Petitioner’s trial, “good cause” was demonstrated to grant his motion to relieve counsel.

b. Ineffective Assistance of Counsel Due to a Conflict of Interest

In this case, Judge McIntosh was informed of a potential conflict of interest between counsel and the Petitioner, and Judge McIntosh did not conduct an inquiry into the conflict to support a finding that no actual conflict existed. Nonetheless, this Court should decide whether a finding of prejudice is required in this case because the record demonstrates that Judge McIntosh’s denial of the Petitioner’s motion to relieve counsel has resulted in him being constructively denied effective assistance of counsel. Assistance is ineffective where there is “(1) a relationship giving rise to a conflict of interest ... between defense counsel and his/her clients; and (2) either the relationship adversely affected defense counsel’s performance, or the client did not consent to the relationship.” quoting *Harter*, 134 Hawai’i at 328, 340 P.3d at 478 (internal citation omitted). As

presented to this court, the record demonstrates a conflict of interest due to Counsel Robinsons' personal interest in the case, and that Judge McIntosh did not elicit any information to the contrary.

Petitioner Garvin did not voluntarily consent to the attorney-client relationship with Counsel Robinson as required for cases dealing with a conflict of interest. See *Thomas v. State*, 346 S.C. 140, 144-45, 551 S.E.2d 254, 256 (2001). At the end of Petitioner's May 21, 2013, pretrial hearing, Judge McIntosh would deny Petitioner's motion to relieve counsel and went forward with the trial, (see App. p. 13, Ln. 3 – 4), with Counsel Robinson as Petitioner Garvin's attorney. The very next day at the beginning of Petitioner's trial, he would address the court about the problems he had with his indictment and about his due process being violated for not having his requested preliminary hearing, that he didn't even go over the fine points about the case or any type of defense with Counsel Robinson and again was trying to relieve Counsel Robinson as his attorney and how he didn't really want him as his lawyer. Petitioner Garvin, would again try to explain that he filed a complaint against both the attorneys (Scott D. Robinson and Asst. Solicitor, James E. Hunter) and that it felt like he was being blind-sided by the two attorneys and that it was two against one, because of the complaint that Petitioner filed against them with the Office of Disciplinary Council (ODC) and the one that was filed in federal court, just because of his due process being violated. (See App. p. 83, Ln. 1 – 10). Judge McIntosh would state that to his understanding that the complaint with ODC's office was dismissed and that was his understanding from the attorneys. Even though Petitioner tried to explain that the federal complaint wasn't dismissed and that Petitioner was not given the chance to explain that the ODC complaint was being appealed. (See App. pp. 81 – 84, Ln. 15 – 25, 1 – 25, 1 – 25, 1 – 25). Albeit, with that being said, Petitioner Garvin was not even given the opportunity to make an informed and knowledgeable decision to waive Counsel Robinson's conflict of interest, but instead, Petitioner

was forced to proceed to trial accepting Scott D. Robinson as his attorney. See *Thomas*, 346 S.C. at 144, 551 S.E.2d at 256 (“To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.”) (citing *United States v. Swartz*, 975 F.2d 1042, 1048 – 49 (4th Cir. 1992) (waiver not knowing, intelligent, and voluntary unless defendant knows of precise form of conflict of interest that eventually results)).

Therefore, this court should hold that Judge McIntosh clearly abused his discretion in denying Petitioner Garvin’s motion to relieve counsel.

2. Assistance Counsel, Scott D. Robinson Has Violated Petitioner’s Right to Adequate Legal Representation:

The Petitioner raises numerous complaints that his trial counsel, Scott D. Robinson’s, deficient performance failed to function as effective assistance of counsel as guaranteed by both the South Carolina and the United States Constitution. Whereas, in this case Petitioner asserts that trial Counsel’s performance has constructively denied him effective assistance of counsel during the critical stages of his State proceeding and that he failed to subject the State’s prosecution of him to meaningful adversarial testing, due to the above-mentioned conflict of interest, pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

a. Petitioner Was Constructively Denied the Assistance of Counsel in His Defense

To establish a *prima facie* claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984), and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), which this court adopted in *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988). Under the *Strickland-Cronic-Frett* standard, the first issue is whether counsel’s performance was deficient. Petitioner points to several aspects of counsels’ performance as being deficient. Nevertheless, Petitioner will demonstrate within the record that his trial counsel, Scott

D. Robinsons' conduct and lack of action, that the cumulative effect of his casual and superficial representation of Petitioner's interests constitutes deficient performance.

The second, and far more difficult, prong of the *Strickland-Cronic-Frett* test is whether there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra*, 466 U.S. at 694, 104 S.Ct. at 2068. Petitioner assert that the patently-inadequate preparation by his court-appointed attorney, Scott D. Robinson, Esq., and the combine effect of the twenty-three failures that was presented at the PCR hearing, displays a *prima facie* case of ineffective assistance of counsel, pursuant to *Cronic, supra*.

A breakdown in the adversarial system compels an application of the *Cronic* exception to the *Strickland* prejudice test for ineffective assistance of counsel. *Cronic*, at 659-60, 104 S.Ct. 2039. In addition *Cronic*, also explains what it considered to be "meaningful adversarial testing":

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted ... the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *Id.* at 656 – 57, 104 S.Ct. 2039 (quoting *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396 (1967)); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2525, 2556 (2009) (Kennedy J., Dissenting).

The Court further explained the defendant must show either the deprivation of a constitutional right "of the first magnitude" or "specific errors of counsel [that] undermined the reliability of the finding of guilt." *Cronic*, at 659 & n. 26, 104 S.Ct. 2039. The first and second circumstances applies in this case.

As for *Cronic's* first exception, the preliminary hearing in South Carolina "sole purpose [is] to determine whether there [is] sufficient evidence against a defendant to warrant presenting their case to a grand jury and, if so, to fix bail if an offense [is] bailable was a critical stage of their

State's criminal process at which accused [are] entitled to aid of counsel." See *Cole v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999 (1970); also see *State v. Wheeler*, 259 S.C. 571, 577, 193 S.E.2d 515 (1972) ("a preliminary hearing is a critical stage in the criminal process, and that when there is a preliminary hearing an accused is entitled to the aid of counsel."). Petitioner states that he was completely denied counsel at this critical pretrial phase.

A complete denial of counsel occurs "when a criminal defendant must navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under an adversarial system of justice.'" *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997)(citing *U.S. v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991)); see *Cronic*, 466 U.S. at 655 n. 11, 104 S.Ct. 2039. "Where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237 (2002)(citing *Cronic*, 466 U.S. 648, 659-60, 104 S.Ct. 2039 (1989)(prejudice presumed where there is "the complete denial of counsel," such as "if the accused is denied counsel at a critical stage of his trial")). The most obvious example is where counsel was physically absent. Under *Cronic* the question is not whether Petitioner Garvin's trial counsel was inadequate, but whether the inadequacy rose to a complete denial of representation.

Petitioner Garvin was completely denied counsel under *Cronic* because he was not represented at his requested October 25, 2012, preliminary hearing⁹, (see App. p. 1032), prior to him being indicted on December 6, 2012, which was a 'critical stage' of his State proceedings and that South Carolina's failure to provide Petitioner with that requested preliminary hearing with effective assistance of counsel on October 25, 2012, has therefore unconditionally deprived

⁹ On July 18, 2012, Petitioner, John Garvin, made a requested demand for a preliminary hearing, pursuant to S.C. Code Ann. § 22-5-320 (Defendant's Demand for Preliminary Investigation). (See App. p. 1032).

Petitioner of his Fourteenth Amendment right to due process. Whereas, his court-appointed counsel's deliberate failure to appear, (see App. pp. 74 – 75, Ln. 13 – 17, 1 – 15); (also see App. pp. 125 – 127, Ln. 1 – 15), has deprived him of his Sixth Amendment right to effective assistance of counsel during a 'critical stage' of his State proceeding and "is a complete denial of counsel." *Cronic*, 466 U.S. at 659.

Scott D. Robinson's deliberate failure to appear, (see App. pp. 125 – 127, Ln. 1 – 15), at Petitioner's requested preliminary hearing was done so that Asst. Solicitor, James E. Hunter, could legally waive Petitioner's pretrial statutory rights to a preliminary hearing for failure to appear,¹⁰ to whereas, making it possible for Asst. Solicitor, James E. Hunter, to indict and prosecute Petitioner for the alleged crime of drug trafficking in heroin without having to present any direct evidence of a proper finding of probable cause before a Spartanburg County Grand Jury,¹¹ thus, having Petitioner to thereby lose his opportunity to challenge the probable cause finding at the preliminary hearing stage. Inasmuch as, Asst. Solicitor, James E. Hunter, could bring forth and true-bill his indictments of Petitioner without presenting any direct evidence for the crime of drug trafficking, (see App. p. 11, Ln. 22 – 24), that Petitioner was arrested for on July 17, 2012. Thus, this Court can presume prejudice under *Cronic* where Counsel Robinson's failures to appear at Petitioner's requested preliminary hearing deprived him of assistance at the critical stage. *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039.

¹⁰ That preliminary hearing, "[w]hich determined the admissibility of evidence against him. Whereas, [Petitioner] clearly did not voluntarily absent himself from the proceedings. [Petitioner] was in the custody of [Spartanburg County Detention Center with denied bail], so there [should have been] no issue as to his whereabouts." (quoting *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 374, 983 N.E.2d 1227 (2013).

¹¹ Rule – 3.8(a)(c) n. [2], RPC, Rule – 407, SCACR ("The prosecutor in a criminal case shall, refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." "Accordingly, prosecutors should not seek to obtain waivers of preliminary or other important pretrial rights from unrepresented accused persons.")

Petitioner had “the right to the advice of counsel at [his preliminary hearing] [that is a] critical stage[] of [his State] proceeding, defined as `any stage of the prosecution, formal or informal, in court or out, where Counsel’s absence might be derogate from the accused’s right to a fair trial.’” quoting *United States v. Wade*, 388 U.S. 218, 226, 228, 87 S.Ct. 1926, 1932 – 33 (1967). The prejudice created from Counsel Robinson’s failure to appear was deliberate after he was put on notice by petitioner in a letter to him, (see App. pp. 681 – 683, Ln. 2 – 25, 1 – 25, 1 – 15), and if Counsel was present at petitioners preliminary hearing, petitioner could have avoided the detriment of an overreaching prostitution that brought forth two indictments without a proper finding of probable cause. (See App. pp. 1040 - 1044). In so much as, Petitioner’s rights inheres in the ability of counsel to help avoid that prejudice. *Id.* at 227, 87 S.Ct. at 1932.

This is not the first time a complete denial of counsel under *Cronic* in the pretrial phase, has occurred when Counsel was absent before trial and did not meet with his client to prepare for trial. In *Mitchell v. Mason*, the Sixth Circuit found the defendant was completely denied counsel during the critical pretrial phase, when “Counsel was suspended from the practice of law for the month preceding trial ... met with [the defendant] for no more than six minutes over the seven-month period before trial, ... and the trial court repeatedly ignored [the defendant’s entreaties for counsel who would properly prepare a defense.” See 325 F.3d 732, 742 (6th Cir. 2003). The court focused on Counsel’s duty to investigate, explaining there was no way to discharge the duty if he failed to consult with his client. The court concluded that, in these circumstances, “no effort to consult with the client was made ,” and thus the defendant was completely denied his Sixth Amendment right to the assistant of counsel during a critical pretrial stage of the proceeding. *Id.* at 744.

The facts here are similar. While Petitioner Garvin's counsel was not suspended from the practice of law, he would deliberately fail to appear at his preliminary hearing to challenge the probable cause findings of the arrest warrants that were issued. Thus, causing the Asst. Solicitor, James E. Hunter, to move before the court for the waiver of Petitioner's preliminary hearing for Counsel's failure to appear. Inasmuch as, Asst. Solicitor, James E. Hunter, would bring forth two indictments and based a probable cause finding on the arrest warrants, Petitioner's indictments were not direct indictments. (See App. p. 11, Ln. 22 – 24). Then Counsel Robinson would fail to present those indictments to Petitioner and would fail to even arrange for him to be present for an arraignment to be properly put on notice of the charge to plead his innocence before the courts after being indicted over Petitioner's entire pretrial period — requiring him to not be put on proper notice of the charges against him at the pretrial critical stage period, not to mention his failure to investigate as mentioned above. In addition, while counsel in *Mitchell* met with the defendant for no more than six minutes, Counsel Robinson did not meet with Petitioner for almost four months after receiving his *Brady*¹² material from the State before Petitioner asked him to relieve himself as Counsel. Lastly, and most significantly, Petitioner's repeated requests for Counsel to be relieved were effectively pushed aside by trial counsel and the Court. Thus, following *Mitchell* this should lead this Court to a conclusion that Petitioner was completely denied counsel under *Cronic*.

The record that's before this Court has all the elements of a *Cronic* violation, and should lead this Honorable Court to the conclusion that the Sixth Amendment demands more than the presence the morning of trial a warm body with a law degree. The Respondent cannot seriously argue that Counsel Robinson's failure to appear at Petitioner's requested preliminary hearing to challenge the probable cause findings of Petitioner's arrest in advance of trial with a client facing

¹² *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

a serious felony drug charge that carry's a lengthy mandatory minimum prison term was effective. Under the stark facts in this appeal — no meaningful advance discussion with Petitioner of trial strategy, what witnesses to call¹³, how to respond to the State's evidence, whether Petitioner should testify, and no sober conversation with Counsel outside the distractions of the morning of trial of Petitioner trying to relieve Counsel Robinson as his counsel — the Petitioner should not have to point to any specific event of prejudice and disprove the PCR court's order of dismissal that trial counsel was effective enough at trial to satisfy the Sixth Amendment. As the United States Supreme Court said in *Cronic*, some situations “ma[k]e it so unlikely that any, lawyer could provide effective assistance that ineffectiveness [i]s properly presumed without inquiry into actual performance at trial.” *Cronic*, 466 U.S. at 661, 104 S.Ct. 2039 (discussing *Powell v. State of Ala.*, 287 U.S. 45, 53 S.Ct. 55 (1932)).

Now, as for *Cronic*'s second exception, in this case. When Petitioner Garvin exercised his ultimate authority to make certain fundamental decisions, his attorney, Scott D. Robinson, Esquire, insisted on his own objective. The enormity of this conflict was some what accurately summarized by Counsel Robinson during an exchange at Petitioner's PCR hearing on cross-examination by the State. He would explain that, “I thought he was not cooperative sometimes. It's - - I can honestly say that, because he didn't - - you know, sometimes clients think that they have a better way of doing things than the attorney does. And that may be what the lack of cooperation was in this case.” (see App. p. 727, Ln. 16 – 23). So in terms of where the two ships were sailing in wanting the criminal matter to be litigated, Petitioner and Counsel Robinson were not on the same course. Petitioner Garvin's overarching strategy was to obtain a verdict of not guilty by presenting

¹³ The record will show that Counsel Robinson didn't even prepare a witness list. During the day of trial, Counsel Robinson was not going to put Petitioner on the stand or his co-defendant, Jonathan Perez. Counsel was trying to induce Petitioner to pled guilty. (See App. p. 1099).

exculpatory evidence, (see App. p. 1097), to show that he was trick/mentally coerced into signing a blank statement and that he was factually innocent. Counsel Robinson had an independent and inconsistent strategy: to obtain a verdict of not guilty by conceding that “just because [Garvin] was there doesn’t - - didn’t mean he was guilty of this charge.” (see App. p. 173, Ln. 5 – 10). He would present a mere presence defense without any evidence to support or contradict the State’s evidence that Petitioner was not knowingly involved in the drug transaction. A mere presence defense that he himself didn’t even believe. (See App. p. 1099). Counsel Robinson’s representation would fail to challenge the voluntariness of the involuntary confession statement. Counsel’s override negated Petitioner Garvin’s decisions regarding his constitutional rights, and created a structural defect in the proceeding as a whole.

Counsel Robinson’s legal representation of Petitioner, aided the solicitor with the introduction of the alleged confession statement, (see App. p. 1100), by not properly challenging the voluntariness of that involuntary confession statement during Petitioner’s *Jackson-Denno* hearing and trial. Counsel would make just a “standard motion in term of voluntariness and a regular *Jackson-Denno* objection,” without setting forth the grounds for the objection to be properly preserved for Petitioner’s direct appeal. (See App. p. 63, Ln. 11 – 13). Although Counsel Robinson did object to the State’s admittance of a falsified involuntary confession. The objection was de minimis and deficient for it omitted the grounds for the objection, pursuant to *Stone v. State*, 419 S.C. 370, 389, 798 S.E.2d 561, 571 (2017). Counsel Robinson’s failure to properly object to the State admittance of the falsified involuntary confession has allowed the jury to be influenced by the alleged confession statement. See *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993). Counsel failed to object to Asst. Solicitor, James E. Hunter’s closing argument that vouch/bolstered the credibility of the State’s witnesses. (See App. p. 255, Ln. 12 – 13); (App.

p. 256–257, Ln. 25, 1–3) and (App. p. 259, Ln. 2–6). His failure to object to comments constitute an error of law and is inherently prejudicial, whereas Counsel should have moved for a mistrial, pursuant to *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002). Counsel’s failure to request for a *Frank’s*¹⁴ hearing to challenge the arrest warrants probable cause findings and his failure to utilize exculpatory evidence to impeach the State’s witnesses that he had within his possession. (See App. p. 1097). Thus, on the issue of Petitioner’s guilt and the elements of drug trafficking in heroin, Counsel Robinson’s alignment with the prosecutor was complete. See *State v. Carter*, 270 Kan. 426, 437, 14 P.3d 1138, 1146 (2006). Indeed, Counsel Robinson did help the solicitor by introducing the fabrication of false evidence against Petitioner Garvin to build a case on inaccurate and misleading information that led to his wrongful conviction and imprisonment for the crime of drug trafficking.

“The assistance of counsel is among those constitutional rights so basic to a fair trial that their denial can never be treated as harmless error.” *Id.* at 1148 (quoting *State v. Jenkins*, 257 Kan. 1074, 898 P.2d 1121, 1127 – 28 (1995)). The legal representation and conduct of Counsel Robinson was inherently prejudicial and does not require a separate showing of prejudice, because Petitioner Garvin’s counsel negated his basic trial rights and “failed to function in any meaningful sense as the [prosecution’s] adversary .” see *Cronic*, 466 U.S. at 666, 104 S.Ct. 2039; *Carter*, 14 P.3d at 1145 (citing *Cronic*, 466 U.S. at 666, 104 S.Ct. 2039). Counsel Robinson’s legal representation was done in bad faith, his conduct so undermined the proper functioning of the adversarial process that Petitioner’s May 21 – 23, 2013, trial cannot be relied upon as having produced a just result. Accordingly, this Honorable Court should find no other alternative except to grant Petitioner a new trial.

¹⁴ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)

III.

THE EVIDENCE THAT WAS PROVIDED AT PETITIONER'S TRIAL, DERIVED FROM AN ILLEGAL ARREST AND THE MISREPRESENTATION OF THE FACTS THAT WAS PROVIDED BY SPARTANBURG COUNTY SHERIFF OFFICER, LT. KEN HANCOCK; ATF SPECIAL AGENT, DAVID PAIT; AND SLED AGENT, ASHLEY ASBILL; IS POLICE MISCONDUCT, THAT WOULD NOT HAVE COME TO LIGHT IF NOT FOR THE ILLEGAL ACTIONS OF THE ABOVE-MENTIONED LAW ENFORCEMENT OFFICER, WHEREAS, THE EVIDENCE THAT WAS PRESENTED AT PETITIONER'S TRIAL WAS OBTAINED BY THE EXPLOITATION OF THAT ILLEGALITY.

A. Falsified Arrest Warrants: Police Misconduct

1. Officer Ken Hancock Has Falsified Petitioner's Arrest Warrants By Fabricating the Facts and the Weight of Evidence Knowingly and Intentionally with Reckless Disregard for the Truth and Without a Finding of Probable Cause.

The Warrant Clause of the Fourth Amendment requires that warrants (1) be issued by a neutral and detached from judge; (2) contain a particular description of “the place to be searched, and the persons or things to be seized”; and (3) be based upon “probable cause, supported by oath or affirmation.” *Dalia v. United States*, 441 U.S. 238, 255, 99 S.Ct. 1682 (1979); see also U.S. Const. Amend. IV. The third requirement for a valid warrant – probable cause based on affirmation – is at issue here. “Probable cause exists, if under the totality of the circumstances, a showing of facts can be made sufficient to create a fair probability that evidence of a crime will be found....” *United States v. Wallace*, 550 F.3d 729, 732 (8th Cir. 2008) (citations and internal quotation marks omitted).

Here in this case, Spartanburg County Sheriff's Officer, Ken Hancock, submitted four affidavits on July 17, 2012, three to Magistrate Judge, Jason T. Walls, and then submitted one affidavit to Magistrate Judge James B. Paslay to obtain arrest warrants to arrest John Garvin and Jonathan Perez. (See App. pp. 1122, 1123, 1124 & 1125). (See App. pp. 1122 – 1125).

Officer Hancock's affidavits and application for the arrest of John Garvin submitted on July 17, 2012, contained the same fabricated language for an alleged drug trafficking crime that occurred on July 7, and July 17, 2012. The warrant's affidavit deliberately fabricated the statements within those arrest warrants with reckless disregard for the truth. In addition, the weight of evidence was also fabricated in warrant number: N – 158303, (see App. p. 1125), with reckless disregard for the truth, and was presented to two different magistrate judge's. Whereas, those warrants, (see App. pp. 1122, 1125), did not even set forth any facts as to why Officer Hancock believed that John Garvin knowingly committed the crime of drug trafficking, nor was the information within the affidavits corroborated.

Petitioner argues that the affiant's statement identifying Petitioner Garvin as a principle for drug trafficking in heroin was materially false and was made in reckless disregard of the truth, thus, excusing those statements is required pursuant to *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674 (1978), and *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) and any remaining statements in the affidavits do not support a finding of probable cause to arrest the Petitioner, John Garvin.

All of Officer Hancock's four affidavits within the arrest warrants in support of the warrants state that the **“WARRANT BASED ON POLICE INVESTIGATION.”** Officer Hancock's affidavits do not, directly or indirectly, provide any information by which a judge could discern how or why Petitioner Garvin even became a suspect to arrest for drug trafficking in heroin. An issuing judge “may draw reasonable inferences ... in determining whether probable cause exists.” *Wallace*, 550 F.3d at 732.

In this case, the Magistrate Judges has completely abandon their judicial role and would infer that Officer Hancock had knowledge that Petitioner Garvin “did knowingly sell, manufacture,

deliver, bring into this State and/or possess ... heroin.” In Petitioner Garvin’s arrest warrants numbers: N – 158303 and N – 158322, (see App. pp. 1122 and 1125), of the affidavit, it contains information with reckless falsity on which that determination was based. In addition, there is nothing in the warrants affidavits from which the magistrate judge could infer how Officer Hancock came to identify Petitioner Garvin as a suspect, other than the terse and conclusory statement that the “**WARRANT BASED ON POLICE INVESTIGATION.**” The affidavits contained no information about what investigation occurred to identify Petitioner Garvin as a suspect. The four arrest warrant affidavits parallel closely the conclusory statements in cases where the United States Supreme Court has ruled statements insufficient to support a determination of probable cause. See *Nathanson v. United States*, 290 U.S. 41, 44, 54 S.Ct. 11 (1933) (holding affidavit insufficient to support probable cause when it stated the officer had “cause to suspect and does believe” illegal liquor had been brought by the defendant into United States); *Giordenello v. United States*, 357 U.S. 480, 481, 486, 78 S.Ct. 1245 (1958)(holding that an affidavit that stated that a suspect “did receive, conceal, etc., narcotic drugs ... with knowledge of unlawful importation” was insufficient because, among other reasons, “it does not indicate any sources for the complainant’s belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made”); *Aquilar*, 378 U.S. at 115 – 16, 84 S.Ct. 1509 (holding affidavit insufficient to support a probable cause determination when it stated that “[a]ffiants have received reliable information from a credible person and do believe” heroin to be in the suspect’s home).

Officer Hancock’s four affidavits do not even provide sufficiently reliable information for the issuing judges to reasonably infer that the investigating officer obtained his information through a reliable source. Petitioner would cite a few cases where search warrants were found to have detailed enough facts to support a probable cause determination. In each of those cases, the

affidavits contained some greater explanation of factual information gained in the investigation than did officer Hancock's affidavits for the arrest John Garvin, (see App. pp. 1122 and 1125).. See *United States v. Reed*, 700 F.2d 638, 641 – 42, 641 n.1 (11th Cir. 1983)(upholding probable cause determination because the affidavit thoroughly describe the facts gathered in the investigation and the facts gathered were based upon the affiant's personal observation or observation of fellow officers); *State v. Willits*, 413 So.2d 791, 792 – 93, 795 (Fla. Dist. Ct. App., 1982)(upholding probable cause determination when affidavit furnished an "abundance of detail" about facts gathered in an investigation and "the affiant or his sources came about their information in a reliable way"); *State v. Jaroma*, 128 N.H. 423, 514 A.2d 1274, 1278 (1986)(upholding probable cause determination after an investigation of a check-kiting scheme when a citizen eyewitness gave evidence and the police listed specific facts gathered from the investigation).

Unlike in *Reed*, *Willits*, and *Jaroma*, Officer Hancock's four affidavits contained no information to connect Petitioner Garvin to the crime of drug trafficking in heroin, other than the bold statement that "WARRANT BASED ON POLICE INVESTIGATION." If there had been some information in the affidavit as to how the investigation so revealed – whether by Petitioner Garvin being found to have been knowingly involved, or to have actively participated in the drug trafficking crime – the result would be to adopt the magistrate judge's finding of probable cause. However, Officer Hancock's affidavits for the arrest of John Garvin, contained no such information, so the warrants should not have been issued by the magistrate judge's without further inquiry or information on why Petitioner Garvin was the suspect for the crime of drug trafficking. The PCR court lacked good reason to refuse to draw negative inference from Officer Hancock's refusal to testify as to Petitioner's repeated question about, how did [he] establish probable cause

that John Garvin knew that there was drugs involved. (See App. pp. 270 – 271, Ln. 12 – 17, 6 – 22).

IV.

THE TRIAL COURT ABUSED IT'S DISCRETION, AND CREATED A MANIFESTED CONSTITUTIONAL ERROR, IN GIVING THE JUDGE'S JURY CHARGE, "THE HAND OF ONE, IS THE HAND OF ALL," TO THE JURY. WHEREAS, THE PETITIONER, WHO WAS CHARGED AS A PRINCIPAL FOR DRUG TRAFFICKING IN HEROIN, DID NOT RECEIVE ADEQUATE SIXTH AMENDMENT NOTICE THAT HE MAY BE CONVICTED GUILTY AS AN ACCOMPLICE, HAD AN IDENTIFIABLE NEGATIVE IMPACT ON THE TRIAL TO SUCH A DEGREE THAT THE CONSTITUTIONAL RIGHTS OF PETITIONER WERE COMPROMISED, PURSUANT TO *BRECHT v. ABRAHAMSON*, 507 U.S. 619, 113 S.Ct. 1710 (1993).

A. A Manifested Constitutional Error

A challenge to the validity of the jury instructions here in this case presents a question of law over which this court has plenary review. See S.C. Code Ann. § 17-27-10. A fundamental element of due process of law is the right of a defendant charge with a crime to be fully informed of the nature and cause of the accusation and to establish a defense. See S.C. Const. Art. I, § 14. Whereas, here the challenge jury instructions involve a constitutional right, the applicable standard of review is whether there is a reasonable possibility that the jury was misled and influence in reaching it's verdict. See *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993)(In *Brecht*, the court held that a state prisoner must prove that a constitutional error substantially influenced the jury's verdict in order to reverse a conviction).

Petitioner challenges the Judge's erroneous jury charge of the "Hand of One, is the Hand of All," for the drug trafficking conviction for the first time on Post-Conviction Relief (PCR), because (1) his appellate counsel refused to rise this constitutional error of an issue on direct appeal, (2) he had no opportunity to object before the close of evidence and (3) he no obligation to raise his objection in a post-judgment motion. Because the trial court convicted Petitioner guilty as an accomplice for drug trafficking without notice.

The Judge's erroneous jury charge of the "Hand of one, is the Hand of all," is a fatal variance "that deprives [Petitioner] of fair notice of the charge and creates a difference between the allegations in the indictment, (see App. pp. 1040 – 1044), and the proof actually introduced at trial." Blacks Law Dictionary 1787 (Deluxe 10th Ed. 2014). The trial court's jury charge, (see App. pp. 277 – 279, Ln. 23 – 25), constructively amend and/or impermissibly enlarge the indictment, (see App. pp. 1040 – 1044), and fail to put Petitioner Garvin on notice of the trafficking in heroin charge that he was called upon to answer, for which has substantially influenced the jury's verdict. The instructional language is improperly conclusive and improperly shifts the burden of proof from the state to the defendant. The said instructional language is inconsistent with the holdings of the United States Supreme Court ruling in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), in addition, to the holding of South Carolina Supreme Court *State v. Price*, 289 S.C. 32, 344 S.E.2d 605 (1986). It violates Article I, §§ 3, 14, & 22 of the South Carolina Constitution, and the Sixth and Fourteenth Amendment of the United States Constitution, because the jury instruction "creates a presumption which violates the Petitioner's right to due process of the law," that creates a difference between the allegations in the indictment and the proof actually introduced at trial. It also fails to put Petitioner on notice that he maybe convicted guilty as an accomplice for drug trafficking, while being charged as a principal, did not receive adequate notice through trial testimony that he may face accomplice liability for drug trafficking in heroin in violation of South Carolina Constitution Article I, §§ 3 & 14, in addition to the Sixth and Fourteenth Amendment of the United States Constitution.

Because the jury instruction "creates a presumption which violates the Petitioner's right to due process of the law," that creates a difference between the allegations in the indictment and the proof actually introduced at trial. It also fails to put Petitioner on notice that he maybe convicted

guilty as an accomplice for drug trafficking, while being charged as a principal, did not receive adequate notice through trial testimony that he may face accomplice liability for drug trafficking in heroin. The said jury charge is in violation of South Carolina Constitution Article I, §§ 3 & 14, in addition to the Sixth and Fourteenth Amendment of the United States Constitution.

Here, the State charged Petitioner Garvin as a principal with drug trafficking, pursuant to S.C. Code Ann. § 44-53-370(e). At trial, the testimony of both Petitioner Garvin and his codefendant, Jonathan Perez, didn't support principal liability. The testimony of Officer Ken Hancock, Officer Steve Cooper, Officer Robert Rosenberg, Officer B.J. Tillinghess, Officer Roger Luther, SLED Officer Ashley Asbill, ATF Special Agent, David Pait, and Confidential Informant, Fredrick Jerman, the only other trial witnesses with first hand knowledge of the crime did not suggest whether Petitioner Garvin acted as a principal or an accomplice. In short, no evidence or testimony presented at trial implicated Petitioner Garvin as an accomplice to drug trafficking.

With that being said, the Spartanburg County General Sessions Court nevertheless convicted Petitioner Garvin guilty as an accomplice for drug trafficking. It did so by discounting Perez and Garvin's testimony as not credible and assuming that the Confidential Informant, Fredrick Jerman's testimony intertwined Perez's and Garvin's roles in committing the crime of Drug Trafficking. This reconciled Fredrick Jerman's testimony with the officers' testimony that they observed Garvin's actions during the drug transaction with Perez involved. But a defendant does not receive constitutionally adequate notice if he must assume that the finder of fact will disbelieve witness testimony and speculate that the Witness actually intended to testify to facts that would support a charge of accomplice liability.

The Petitioner further argues that he did not received notice of accomplice liability for drug trafficking through the State's closing rebuttal argument. But notice, that is provided after the close

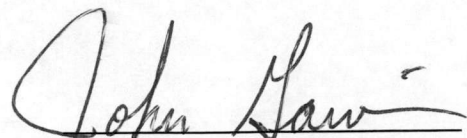
of evidence is not constitutionally sufficient. Moreover, the State's passing allusion in its rebuttal did not notify Petitioner Garvin that he faced accomplice liability for drug trafficking. Because Petitioner Garvin did not receive constitutionally adequate notice that he may face accomplice liability for drug trafficking prior to the Close of evidence, the Spartanburg County General Sessions Court erred when it convicted Petitioner guilty under that theory.

The Sixth Amendment requires the State to provide a defendant charged as a principal with adequate notice if the State also plans to pursue an accomplice liability theory. To do so, the State must either charge the defendant as an accomplice or present evidence of accomplice liability prior to the Close of evidence at trial. Here, Petitioner Garvin did not received notice of the accomplice liability theory on the drug trafficking charge through trial testimony. His trial attorney, Scott D. Robinson, Esquire, deliberately failed, to object to the accomplice liability theory and thus did not preserve Petitioner's claim for direct appeal. In contrast, Petitioner Garvin did not receive notice that the State was pursuing accomplice liability for the drug trafficking charge prior to the close of evidence. As a result, the Spartanburg County General Sessions Court erred when it convicted Petitioner Garvin guilty for drug trafficking and Garvin was under no obligation to preserve the issue during his trial, where the accomplice liability theory first appeared in the court's judgment.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, this Honorable Court is respectfully urged to grant the Petitioner's Petition for Writ of Certiorari and for Temporary and Permanent Injunctive Relief.

DATED: November 4, 2021


John Garvin, # 355509, Pro-se
Lieber Correctional Institution
136 Wilborn Avenue
Ridgeville, S.C., 29472