No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ERNESTO WILFREDO SOLANO GODOY,
Petitioner,

V.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FOURTH CIRCIUT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Ernesto Solano.
ERNESTO WILFREDO SOLANO GODOY # 1453412

Augusta Correctional Center

1821 Estaline Valley Road

Craigsville VA 24430

Petitioner

QUESTIONS PRESENTED

1-Petitioner alleges that his trial counsel was ineffective by allowing testimony and evidence to be presented to the jury in violation of the Confrontation Clause in the U.S. Constitution. Petitioner was convicted in large part due to the admission of the phone records that were identified by a statement of a detective as to the petitioner phone number records, then the phone records were used to rebut petitioner's version of the events. Without the statement of this detective the Commonwealth could not had linked the phone records to Petitioner, and without these phone records, and the subsequent expert testimony regarding them, the jury might have had reasonable doubts as to my guilt on every charge, rather than, as the Court related at sentencing, finding me incredible. In denying the petition for a Certificate of Appealability, deny leave to proceed in forma pauperis and dismiss the appeal the Fourth Circuit concluded that Petitioner has not made the requisite showing. The case thus presents the following question.

Did the Fourth Circuit Err in deferring to the State Court finding that Petitioner has failed to satisfies the 'performance' or the 'prejudice' prong of the two part test enunciated in Strickland. When trial Counsel allowed testimony and evidence to be presented to the jury in Violation of the Confrontation Clause and when the Fourth Circuit decision was based on an unreasonable determination of the facts?

2-Petitioner alleges that his trial counsel was ineffective by failing to call his wife to testify at trial to contradict the Commonwealth's version of the events. Petitioner was convicted in part due to the commonwealth's argument that Petitioner's phone could not receive any phone calls from his wife as petitioner said. The omitted witness would have

testified that she called petitioner the night of the events as petitioner said. In denying the petition for a Certificate of Appealability, deny leave to proceed in forma pauperis and dismiss the appeal the Fourth Circuit concluded that Petitioner has not made the requisite showing. The case thus presents the following question.

Did the Fourth Circuit Err in deferring to the State Court finding that Petitioner has failed to satisfies the 'performance' or the 'prejudice' prong of the two part test enunciated in Strickland. By his trial counsel's failure to call a witness who would have impeached the State's argument when the Fourth Circuit decision was based on an unreasonable determination of facts and a flagrant misreading of the trial record?

3-Petitioner's alleges that his trial counsel was ineffective by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt. Petitioner's was convicted in part because of how the prosecutor manipulated the evidence when presented this to the jury and not challenged by counsel. This arguments that appellate counsel omitted from my direct appeal despite his belief that they were meritorious during his argument at trial, that there existed no evidence to support a lack of consent to the sexual activity, is much stronger that 6 of the 13 presented at appeal, If he felt they were important to raise at trial, why would he omit them from the reviewing courts for error on appeal. In denying the petition for a Certificate of Appealability, deny leave to proceed in forma pauperis and dismiss the appeal the Fourth Circuit concluded that Petitioner has not made the requisite showing. The case thus presents the following question.

Did the Fourth Circuit Err in deferring to the State Court finding that Petitioner has failed to satisfies the 'performance' or the 'prejudice' prong of the two part test

enunciated in Strickland. By Counsel's failure to argue the sufficiency of the evidence, and the lack thereof, to establish guilt when the Fourth Circuit decision was based on an unreasonable determination of the facts and a flagrant misreading of the trial record?

4-Petitioner's alleges that his right to due process was violated when the evidence in its totality was insufficient to support guilt of each element beyond a reasonable doubt. No consent from the victim—that the evidence simply cannot support, first to start with the assumption that a crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that I was guilty of the charges alleged. The prosecution has attempted to accomplish only the first alternative, not the second. In denying the petition for a Certificate of Appealability, deny leave to proceed in forma pauperis and dismiss the appeal the Fourth Circuit concluded that Petitioner has not made the requisite showing. The case thus presents the following question.

Did the Fourth Circuit Err in deferring to the State Court finding that petitioner claim is Procedurally Barred. When a claim attacking the sufficiency of the evidence is an independent cognizable claim subject to habeas review under 28 U.S.C.A.§2254 (f). Because it presents an issue of Constitutional importance and as is referenced above in claim (6) that trial counsel was ineffective by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt, should have overcome an otherwise procedurally defaulted claim and When the Fourth Circuit decision was based on an unreasonable determination of facts and misreading of the trial record?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTITORARI

Petitioner, Ernesto Wilfredo Solano Godoy, respectfully prays that a Writ or Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals, rendered in these proceedings on May 10, 2017.

OPINION BELOW

The Fourth Circuit Court of Appeals affirmed petitioner's conviction in its cause no.16-7531. The opinion is unpublished, and is reprinted in the appendix to this petition at page#, *infra.* The order of the Fourth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page #, *infra.*

JURISDICTION

The original opinion of the Fourth Circuit Court of Appeals was entered May 10, 2017. A timely motion to that court for rehearing was overruled on June 16, 2017.

The jurisdiction of this court is invoked under 28 U.S.C.§1254.(1)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. XIV

Section1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unite States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody

pursuant the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) The applicant has exhausted the remedies available in the courts of the State; or

(B)(i) There is an absence of available State corrective process; or

(ii) Circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

(d) An applicant for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to , or involved an unreasonable application of ,clearly established Federal law , as determined by the Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State Court proceedings the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on—

(i) a new rule of constitutional law , made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable ; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence ; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State Court proceeding to support the State Court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the

sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the officials records of the State court , duly certified by the clerk of such court to be a true and correct copy of a finding , judicial opinion , or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceeding brought under this section, and any subsequent proceedings on review , the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel , except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority . Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner was charged and convicted of, burglary, rape, forcible sodomy, and two counts of object sexual penetration to (K.A.A.) According to the victim in the early morning hours of June 4th, 2011 she awoke to see a masked individual picking up her infant child from her bed and placing the infant in his crib nearby. When she asked who was there, petitioner approached her and brandished a large knife, which he dragged across the length of her body while indicating she remain quite. That petitioner then raped and sodomized the victim repeatedly, at one point threatening to return the following day and kill her. Then following the attack, the victim stated that Petitioner demonstrated to her that he had not harmed her three children's who were sleeping in a different room. The victim called police after the alleged intruder left her home , and stated that she could not identify her assailant .She was examined by a sexual assault nurse examiner (SANE). Police detectives showed a composite sketch to persons with whom the victim worked, and according to a police statement at trial, the employer suggested it reminded him of the petitioner, a former employee. Up to that point, the victim declared that the petitioner could not be the perpetrator and told the SANE nurse the perpetrator was Middle Eastern and not Spanish speaker, but later changed her mind after police found and arrested petitioner.

Petitioner testified and told police he and the victim had been involve in a sexual liaison and he had visited her on the evening in question with her permission. Petitioner represented that the victim allowed him in through the front door and willingly had sex with him. Petitioner also told police, and later testified, that the victim had taken his phone when petitioner's wife began calling and the victim locked him out on her balcony

while she teased petitioner by pretending she would answer the phone calls, and later assured him she had not done so. The victim, however, denied a relationship with petitioner, and this led police to suspect and eventually arrest petitioner.

Police gathered evidence of DNA and finger/palm/shoe prints at the victim's apartment. They also collected the petitioner's DNA through a buccal swab, and they delivered DNA samples to the forensic lab for analysis.

During the trial, the Commonwealth used cellular phone records, supposedly belonging to petitioner's phone, to have an expert rebut his testimony of the events which transpired inside the victim's home; specifically that petitioner was receiving calls from his wife and that the victim was teasing petitioner with the phone. The Commonwealth expert testified that the phone records indicated petitioner could not have received calls when he said his phone was ringing inside the apartment that evening.

At trial Petitioner was found guilty and sentenced to an aggregate of forty-five (45) years imprisonment with ten (10) years suspended.

Petitioner conviction was affirmed on direct appeal. Godoy v. Commonwealth, The Supreme Court of Virginia refused Petitioner's petition for a further appeal on December 12, 2013, and refused rehearing on March 7, 2014. On March 9, 2015, Petitioner filed a petition for a state writ of habeas corpus in the Supreme Court of Virginia and the Supreme Court of Virginia Dismissed the petition on November 17, 2015. Godoy v. Director, Va. Dep't of Corr., Petitioner then filed a Habeas Corpus action under 28 U.S.C. § 2254. The District Court dismissed the petition with prejudice on September 28, 2016. Petitioner then filed an application for a certificate of appealability and the motion was denied and the appeal dismissed on May 10, 2017. Lastly petitioner

filed a petition for rehearing on the Issues presented in this petition and also was denied by the Fourth Circuit Court of Appeals on June 16, 2017.

At trial the Commonwealth used cellular phone records, supposedly belonging to petitioner's phone, to have an expert rebut my testimony of the events which transpired inside the victim's home, specifically that I was receiving calls from my wife and that the victim was teasing me with the phone. The Commonwealth called Ronald Witt a T-mobile records custodian to introduce phone records allegedly to be mine. Witt stated that his primary duties as a custodian of records was to produce records pursuant to request from the courts who subpoenas court ordered search warrants .Then the commonwealth showed the phone records to the custodian to see if the records accurately reflect T-mobile telephone records, and the witness said yes, but then when the commonwealth moved to introduce the phone records into evidence, defense counsel objected to the admission of the records on grounds that the relevance to this case have not yet been established; the trial court asked to the commonwealth how they connected with this case and the commonwealth stated that they were petitioner's cell phone records, and asked to the records custodian to read the number of the records and he said the number # 571-332-5716 , after that the commonwealth moved to introduce the phone records into evidence, but defense counsel objected and stated that there is no relevance to this case , that all we have is a record that shows calls from a phone but don't know which phone other than the phone number, the commonwealth said she that was under the impression that petitioner had testified about what my phone number was . But if I had not at that point, the commonwealth can excuse the records custodian, and call another witness to establish that the phone records are of petitioner cell phone number and then move the

records into evidence after the witness has testified that the number in the records was petitioner phone number. Thus, The commonwealth called detective Kroll and asked him if during an interview conducted by this detective with petitioner, I had told him my cellular phone number , and the detective said yes , the commonwealth then asked if the detective remember it off hand or would looking at the transcript to help refresh his recollection at what the number was ? The detective said taking a quick peek of the transcript. Defense counsel objected and asked "I would like to know before he looks at it if he actually prepared this transcript or somebody else prepared it"? Because what we are offering the transcript now, not to refresh his recollection but for the truth of the matter that happens to be in the transcript prepared by an unknown party. The trial court said that he understands the objection and that the detective maybe remembers the number but he's reluctant to take the chance that he would so incorrectly without taking a look at the number in the transcript and see if it does not confirm what he believes to be correct. And for that purpose was proper and overruled the objection. Thereafter the commonwealth suggested to the detective, looking at Page 4 of the transcript, does that refresh your recollection as to what petitioner told you his cellular phone number was? The detective said "this is what he told me his cellular phone number was", and asked by the commonwealth read the number # 571-332-5716. After that the detective was excused and the commonwealth recalled the records custodian to introduce the phone records, defense counsel objected and said "I still believe that they have not satisfied all the elements for business records. I will not repeat what they are because I don't want to help the commonwealth with its case. But I think there's at least one element missing. The trial court overruled and the commonwealth introduced the phone records. After the

phone records were admitted into evidence the custodian of the records was free to go by the commonwealth and the trial court and was not subject to further cross examination with regard to any statement obtained from the phone records in which he prepared. Finally the commonwealth called the witness Kenneth Lavictoire (a supervisory special agent with the F.B.I.) to analyze the phone records. This expert witness testified that the phone records indicated I could not have received calls when I said my phone was ringing inside the apartment that evening, because the phone was either turned off , it's battery was dead , or it was otherwise the outside the range of service and could not connect to any cell tower.

1-At the state post-conviction petition, petitioner Claimed: In violation of my 6th Amendment right to counsel, my attorney at trial provided ineffective assistance by allowing testimony and evidence to be presented to the jury in violation of the Confrontation Clause. These "testimony and evidence" refuted my representation that I was at the victim's house as a guest and that we had initially argued, then reconciled and later parted on bad terms due to my unwillingness to replace her recently departed boyfriend. In the absence of these records, the Commonwealth could not have put on its expert rebuttal evidence regarding the activity of my cellular phone, and therefore could not have directly challenged my veracity and honesty, or the accuracy of my version of events. Without these phone records, and the subsequent expert testimony regarding them, the jury might have had reasonable doubts as to my guilt on every charge, rather than, as the Court related at sentencing, finding me incredible. In the absence of the phone records, guilt would not appear to be overwhelming and therefore, the error is not insignificant. Defense counsel was ineffective at trial by allowing the police officer,

suggested by the Commonwealth, to testify in rebuttal as to my cell phone number by reading the transcript prepared from an interview of petitioner with this officer. This telephone number was then used to compare to telephone records proffered in rebuttal for use by an expert witness. Finally, the Court permitted the police witness to speculate, using hearsay testimony, as to the ownership of the cellular telephone, in an effort to attribute the phone number, matching the telephone records, to petitioner. At petitioner's direct appeal defense counsel raised a claim for the use of the transcript by the police officer that violate petitioner's right to confront because the transcript was testimonial; the court of appeals decision was that the trial judge did not err in permitting this detective to refresh his recollection by reviewing the transcript of petitioner statement to him and testifying as to petitioner's cell phone number; and defense counsel failed to present this argument to the trial judge , and rule 5A:18 bars consideration of the argument on appeal. Petitioner also argues that his trial counsel was ineffective by allowing evidence to be presented to the jury in violation of the confrontation clause, in this case the phone records; the phone records were used as rebuttal evidence to challenge claims made by me. I had told police, and testified, that my phone was lighting up and ringing while I was visiting the alleged victim, and that she was teasing me, after she trapped me on her balcony, by pretending she would answer calls made to me by my wife, and later assured me that she had not done so. The Commonwealth's expert testified that the phone records, (CW Ex. 47), indicated my phone could not have been ringing or lighting up as I had testified. The problem arising from this practice is that this witness used by the prosecution was not the custodian of the records who could verify as to "who" the records belonged to, "who" was in use of the phones during the time, and

more importantly, to attest to the validity of the records themselves. Moreover the records do not qualify as business records because the T-Mobile records custodian through whom they were introduced did not satisfy the elements for the business record exception; the witness testified that he was a custodian of records for his company and his primary duty was to produce records pursuant to "subpoenas and search warrants", that the records were self-generating as calls were made, that they were kept in the normal course of business. Finally, he testified that he relies upon the records in caring out his duties. The witness failed to indicate that the records were created 'specifically for him or that they were of the type relied upon by those who created them' or 'for whom they were created'. He also failed to testify that they were produced by persons, or an entity, having a duty to keep a true and accurate record. He merely indicated that they were computer generated by T-mobile, but did not provide any assurance that the persons who caused the computers to generate the records did so for any purpose other than for his use. He did not even account for why his company provides the records for litigation, of whether the provision of records to courts was a regular business activity for his employer or if the records needed to be true and accurate. Consequently, he failed to testify that the records were regularly kept and that they were relied upon in the transaction of business by T-mobile personnel. In fact, he could not point to any person, other than himself or parties to litigation, that used the records, and he did not indicate how these activities, or uses, constituted the transaction of business by T-mobile. He specifically neglected to indicate how use by, or in, courts constituted the business of T-mobile. Defense counsel objected to the admission of the records on grounds of relevance and later pointed out that a proper foundation had not been laid for their

admission as business record exceptions. Counsel declined to identify however, in open court, the exact elements which were missing from the foundational requirement, and explained his reluctance to assist the Commonwealth in correcting its oversight(s) in that regard. At direct appeal Defense counsel argued that the trial court erred in admitting exhibit # 47, which were telephone records for a cell phone, as a business records because the "witness failed to indicate that the records were created specifically for him or that they were of the type relied upon by those who created them or for whom they were created." The court decision was that rule 5A:18 require that objection to a trail court's action or ruling be made with specificity in order to preserve an issue for appeal. See Per Curiam (September12, 2012). Attached

The Supreme Court of Virginia denied relief of this claim for the following reasons: in a portion of claim (a), petitioner contends that he was denied the effective assistance of counsel because counsel failed to object to the admission of petitioner's phone records. Petitioner contends counsel should have argued admission of the records violated petitioner's right to confront the witnesses against him because the phone records are affidavits, which fall within the " core class of testimonial statements" protected by the Confrontation Clause under Crawford v. Washington . The Supreme Court holds that this portion of claim (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland v. Washington. The record, including the trial transcript, demonstrates that the commonwealth admitted petitioner's cellular telephone records through Ronald Witt, a custodian of records for T-Mobile telephone Company. Witt explained the records were "self-generating automatically through the computer system as the calls are received or made" without human assistance. Affidavits are

"declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law dictionary 62 (8th ed. 2004). Counsel could reasonably have determined any argument that the records were inadmissible affidavits would have been merit less. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. In another portion of claim (a), petitioner contends he was denied the effective assistance of counsel because counsel failed to object to a police officer's testimony, which included petitioner's cell phone number and linked petitioner to the cell phone records admitted through Witt .Petitioner further contends counsel was ineffective for failing to object to the testimony of the Commonwealth' expert in cellular phone technology. Petitioner contends counsel should have objected to the testimony of these witnesses because neither was a custodian of the cell phone records, neither could verify who the records belonged to or who was using the phones identified in the records at the time, and neither could attest to the validity of the records. The Supreme Court holds that this portion of claim (a) satisfies neither the "performance" nor the prejudice "prong" of the two-part test enunciated in Strickland. The record, including the trial transcript, demonstrates that the commonwealth admitted the records through Witt, who was the custodian of the records. Witt testified the records were kept within the normal course of business and were relied upon by employees to perform work-related functions. Witt examined the records and they accurately depicted T-Mobile's records. Counsel could reasonably have determined it was not relevant to the admissibility of their testimony that the officer and the commonwealth's expert were not the custodian of the records and that the validity of the

records had been established by Witt. The record further demonstrates that the officer testified petitioner told him that the number associated with the records was petitioner's cell phone record. Petitioner subsequently testified that he was in possession of the cell phone at the time of the offenses, which was also the time period covered by the records. Counsel could reasonably have determined any question as to the Witnesses ability to state who the records belonged to and who was using the phone during the relevant time period was not relevant to the admissibility of their testimony. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Reviewing the denial of habeas corpus relief by the District Court, the Fourth Circuit Court of Appeals found that Petitioner has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis and dismiss the appeal.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANTS THIS COURT'S ATTENTION.

The fourth Circuit Court of Appeals decision misapplied the Strickland test for prejudice in different ways. When stated that Petitioner has not made the requisite showing in their review of the record and hold the District Court opinion: First the Court flagrantly misstated the record. It stated that the argument of petitioner, that the phone

records were equivalent to affidavits and therefore protected by the confrontation clause is misplaced, that Crawford is inapposite because it addressed the issue of when a defendant has the right to confront an out-of-court declarant; and the phone records at issue were computer generated automatically and involved no out-of- court declarant. Such determination is unreasonable because the Fourth Circuit ignores that records custodian was free to go after the introduction of the phone records into evidence and was not subject to further cross-examination concerning to any statement obtained from the records which he prepared; The Fourth Circuit also ignores the materiality of the phone records, and its value as testimonial evidence. The United States Supreme Court broadened the holding in Crawford to include affidavits such as the phone records. As far as the records being admitted during the testimony of a T-Mobile records custodian, this custodian regularly testified on behalf of the prosecution. The custodian testimony was subject to challenge because he did not partake in the records retrieval. The records were important to the prosecution's case because they provided "Testimony" to rebut my alibi defense, the specific of violation of Crawford, and the specific reason counsel should have objected .The Fourth Circuit also ignores that the phone number tied with the phone records was obtained from a transcript of a police interrogation with petitioner; this transcript was used by the prosecution to refresh the police witness recollection of what petitioner phone number was, and for this reason the transcript is testimonial and petitioner has the right under Crawford to confront the out-of-court declarant who prepared this transcript, thus counsel performance was deficient and prejudiced petitioner.

This Court requires, in making the prejudice analysis under Strickland , that the reviewing Court consider all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-conviction stage. Strickland v. Washington, also see> Williams (Terry) v. Taylor. Under this test, it is inappropriate to consider that petitioner has not made the requisite showing as the Fourth Circuit Court Appeals concluded. It is clear that the Fourth Circuit Court of Appeals here disregarded this principle. The fourth circuit court of appeals analysis "ignored" conflicting evidence that was presented at trial but not recited by the District Court. For example, the opinion refers to the testimony of detective Kroll, "that petitioner asserts that this officer was wrongly permitted to testify about petitioner's statement regarding what petitioner phone number was and to have his recollection refreshed during the testimony". This is an apparent reference to the statement in the Supreme Court of Virginia opinion. The opinion ignores, however, the trial testimony of detective Kroll, he has his recollection refreshed, and then testified from independent memory from a transcript of a police interrogation with petitioner, without being admitted into evidence, or cross-examine the person who prepared this transcript.

These factual issues do not require the attention of this court. What does merit review is the emerging practice of the Fourth Circuit Court of Appeals of ignoring evidence while performing prejudice analysis. This was precisely the type of review that this court condemned in Williams (Terry) v. Taylor.

> [The] State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of

> the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation. [Citation omitted]. This error is apparent in its consideration of the additional mitigation evidence developed in the post-conviction proceedings...
>
> [T]he state court failed even to mention the sole argument in mitigation that trial counsel did advance --Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability....

Because the Fourth Circuit Court of Appeals has truncated the scope of Strickland v. Washington, prejudice review, this Court must grant certiorari.

THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISIONOF THE U.S. SUPREME COURT

In Melendez- Diaz v. Massachusetts, the U.S. Supreme Court confronted a situation where the court considered certificates of analysis as affidavits, which fall within the "core class of testimonial statements" covered by the confrontation clause. They asserted that the substance found in petitioner's possession was, as the prosecution claimed, cocaine of a certain weight—the precise testimony the analyst would be expected to provide if called at trial. Not only were the certificates made, as Crawford required for testimonial statements, "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, "but under the relevant Massachusetts law their sole purpose was to provide prima facie evidence of the substance's composition, quality and net weight. Melendez-Diaz was entitled to be confronted with the persons giving this testimony at trial. In petitioner case here the prosecution used a transcript prepared from a police interrogation with petitioner, to refresh a police witness recollection as to what petitioner phone number was, like the certificates in Melendez-Diaz, this transcript fall within the "core class of testimonial statement" covered by the confrontation clause. This transcript asserted as the police witness testified that petitioner's phone number was 571-332-5716, with this phone number the prosecution tied the phone records to petitioner and is how the prosecution established the relevance of the phone records to this case, this phone records were used to discredit petitioner version of the events that transpired inside the alleged victim apartment in the night on question. The phone records here also are affidavits,

which fall within the "core class of testimonial statements" covered by the confrontation clause; they asserted that phone calls were not made during the time I testified to making them, receiving them, and hearing the ringing from calls missed, the precise testimony the records custodian would be expected to provide at trial. While most hearsay exceptions generally cover statements that by they natures are not testimonial, it is not because they qualify under an exception to the hearsay Rules that they are admissible absent confrontation. Melendez- Diaz v. Massachusetts, Rather, statements such as business records or public records are generally admissible absent confrontation... because having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. This general rule applies unless "the regularly conducted business activity is the production of evidence for use at trial, in which case the statements are testimonial. Melendez- Diaz v. Massachusetts, in petitioner's case the phone records were not kept in the course of a regularly conducted business activity of T-Mobile, rather they were prepared at the request of the police, in anticipation of prosecution against petitioner, with the knowledge that any information it supplied would be used in an on going criminal investigation. See police order requesting phone records attached

This case illustrates the fact that the Fourth Circuit Court of Appeals is out of step with the U.S. Supreme Court in its consideration of the Strickland v. Washington, Prejudice prong. Certiorari should be granted to correct this error.

2-At the state post-conviction petition, petitioner Claimed: In violation of my 6th Amendment right to counsel, my attorney at trial provided ineffective assistance by failing to present defense witness to contradict prosecution evidence. Counsel failed to

call my wife to testify on trial to contradict the Commonwealth's version of the events. The Commonwealth used cellular phone records, supposedly belonging to my phone, to have an expert rebut my testimony of the events which transpired inside the victim's home, specifically that I was receiving calls from my wife and that the victim was teasing me with the phone. The Commonwealth's expert testified that the phone records indicated I could not have received calls when I said my phone was ringing inside the apartment that evening. My wife's testimony would have been that on the night of the events, she tried to call me several times throughout the night. She would have said that she called my number 571-332-5716, from her number 571-277-5820. With my wife's testimony at trial that she did called me that night of the events as I testified too, the Commonwealth's argument to discredit my version of the events would not have been considered by the jury, because I had a witness that supported my alibi. Trial counsel's failure to call her as a witness, even when she was present at trial and able to testify; caused my inability to prove my version of the events that night and I was not able to contradict the Commonwealth's "expert" witness' testimony in what was essentially a credibility contest for the jury.

The Supreme Court of Virginia denied relief of this claim for the following reasons: In a portion of (b), petitioner's contends he was denied the effective assistance of counsel because counsel failed to call petitioner's wife to testify at trial. Petitioner alleges his wife would have testified that she attempted to call petitioner several times on the night of the offenses, which would have bolstered petitioner's testimony that the only reason he attempted to break into the victim's home through her balcony door was that the victim had petitioner's cell phone and petitioner could hear it ringing and knew his

wife was trying to call him. The court holds that this portion of claim (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. Petitioner fails to provide any support for his claim that his wife would have been willing and able to testify as he contends. Further, the record, including the trial transcript, demonstrates that at the time of the offenses petitioner's phone was either turned off, its battery was dead, or it was otherwise outside the range of service and could not connect to any cell tower. Therefore, even if petitioner's wife had testified that she attempted to call him, it would not have bolstered petitioner testimony that he attempted to break into the victim's home because he could hear his phone ringing. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Reviewing the denial of habeas corpus relief by the District Court, the Fourth Circuit Court of Appeals concluded that petitioner has not made the requisite showing, accordingly, we deny a Certificate of Appealability, deny leave to proceed in forma pauperis, and dismiss the appeal.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANTS THIS COURT'S ATTENTION.

The fourth Circuit Court of Appeals conclusion misapplied the Strickland v. Washington, test for prejudice when concluded that petitioner has not made the requisite

showing and hold the District Court opinion. First the Court flagrantly misstated the record. When concluded that petitioner cannot show prejudice by the absence of a witness testimony "unless petitioner demonstrates" not only that the testimony would have been favorable, but also that the witness would have testified at trial. Thus, where a petitioner fails to proffer precisely what testimony a missing witness would have provided and to supply and affidavit verifying that proffer, he does not meet his burden to demonstrate that counsel's performance was ineffective. But the Fourth Circuit review of the record ignored that in my petition I presented the statement that my wife could have provided if called at trial; this is what the court said in Strickland test, I am required to make a "specific showing of what testimony should have been", something that I presented on my petition, moreover the court ignored that my wife was present at trial from the first day, she was able and willing to testify. (See tr. Page #10, 11) Trial counsel originally offered my wife to the trial court as a witness but then failed to call her.

This Court requires, in making the prejudice analysis under Strickland, that the reviewing court consider all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-conviction stage. Strickland v. Washington, >also see Williams (Terry) v. Taylor. Under this test, it is inappropriate to consider that petitioner has not made the requisite showing as the Fourth Circuit Court Appeals concluded. It is clear that the Fourth Circuit Court of Appeals here disregarded this principle. The fourth circuit court of appeals analysis "ignored" conflicting evidence that was presented at trial but not recited by the District Court. For example, the opinion refers that my wife was not present at trial, or, that petitioner failed to proffer precisely her testimony. This is an apparent reference to the statement in the Supreme Court of

Virginia opinion. The opinion, however, neglected to take in consideration that trial counsel offered my wife as a witness on November 28, 2011 and that she was present in the trial room at that moment, but trial counsel choose to excuse her for that day and then failed to call her at all, knowing that her statement was of great value to the defense.

These factual issues do not require the attention of this court. What does merit review is the emerging practice of the Fourth Circuit Court of Appeals of ignoring evidence while performing prejudice analysis. This was precisely the type of review that this court condemned in Williams (Terry) v. Taylor. See above reference of this case

Because the Fourth Circuit Court of Appeals has truncated the scope of Strickland v. Washington, prejudice review, this Court must grant certiorari.

II.THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH ANOTHER DECISION OF THE SAME CIRCUIT

In Glover v. Miro, the Fourth Circuit Court of Appeals concluded that petitioner (1) had received ineffective assistance from his trial counsel where counsel failed to contact certain witnesses even though defendant provided him with names of potential alibi witnesses, and did not realize that a South Carolina statute allowed defendant to compel the attendance of out-of-state witnesses necessary for the defense, but the circumstances did not entitle petitioner to benefit of a presumption of prejudice sufficient to warrant relief; and deficient performance was not prejudicial, in light of strong evidence as to defendant's guilt that was presented by State. Contrary to Glover, in petitioner case my alibi witness have a strong argument to present, was already present at

trial but trial counsel failed call her to testify, moreover as petitioner states in another claim the evidence cannot support the state allegations, and the facts to weight at trial were for evaluation to the jury no to the Fourth Circuit.

This case illustrates the fact that the Fourth Circuit Court of Appeals is out of step with the U.S. Supreme Court in its consideration of the Strickland v. Washington, Prejudice prong. Certiorari should be granted to correct this error.

3-At the state post-conviction petition, petitioner Claimed: In violation of my 6th Amendment right to counsel, my attorney on appeal provided ineffective assistance by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt. A state prisoner's claim that evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt is cognizable in a federal habeas corpus proceeding. U.S. Const. Amend. 14. These are the arguments that appellate counsel omitted from my appeal despite his belief that they were meritorious during his argument at trial that there existed no evidence to support a lack of consent to the sexual activity. If he felt they were important to raise at trial, why would he omit them from the reviewing courts for error on appeal? In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. The promise of Douglas v. California, that a criminal defendant has a right to counsel on his first appeal as of right--like the promise of Gideon v. Wainwright, that a criminal

defendant has a right to counsel at trial--would be a futile gesture unless it comprehended the right to effective assistance of counsel.

The Supreme Court of Virginia denied relief of this claim for the following reasons: The court holds that claim (f) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland. The selection of issues to address on appeal is left to the discretion of appellate counsel, and counsel need not to address every possible issue on appeal. Barnes. Thus, petitioner has failed to demonstrates that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Reviewing the denial of habeas corpus relief by the District Court, the Fourth Circuit Court of Appeals concluded that petitioner has not made the requisite showing. Accordingly, we deny a Certificate of Appealability, deny leave to proceed in forma pauperis, and dismiss the appeal.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANT THIS COURT'S ATTENTION.

The fourth Circuit Court of Appeals conclusion misapplied the Strickland v. Washington, test for prejudice and holds the District Court opinion. The District Court

flagrantly misstated the record when concluded that the evidence of petitioner guilt was overwhelming and under these circumstances an argument that the evidence was insufficient to sustain the convictions patently would not have been stronger than those appellate counsel chose to present and also made a showing of the evidence in light more favorable to the state assertions, but this is an unreasonable determination, first no statement of the nurse or any medical report prepared by her stated that the vaginal abrasions and cervical redness is consistent with rape as the District Court states in their opinion, instead at trial she clearly said that was consistent with the allegations as far as the time frame goes, it was consistent of sex (see tr. Page #183 ,185) also the District Court make reference of a bottle of bleach found in the apartment that according to their view was used by petitioner to clean the tools also found in the balcony , but the District Court ignored that a DNA analysis was done from a swab from the Clorox lid and stated that Karen Aravia, (the victim), cannot be eliminated as a major contributor to this DNA mixture profile, but Ernesto Solano (petitioner), is eliminated as a contributor to this DNA mixture profile, also District Court ignored that the Commonwealth's fingerprints expert witness analyzed a print (see commonwealth's exhibit#37A, 37B,37C) that was founded in the landing between second and third floor in the top of the railing at the corner closer to the victim's balcony; according to the expert testimony, this print is pointing toward the inside of the landing supporting my version of the events, that I tried to get out of the apartment from the balcony and I tried to do it by the landing but was too far me and I could touch the landing but I was not able to cross from the balcony to the landing, also the Commonwealth stated that a knife found by police is belonged to petitioner and I used it to threaten the victim; a DNA analysis was done from a swab of

the knife and it was not suitable for any comparisons. No fingerprint was found in the knife even when the victim stated several times that I was not using gloves on my hands; the District Court finding that the evidence is overwhelming is an unreasonable determination of the facts in this case and unsupported by the record itself. "No consent" from Ms. Aravia— the evidence simply cannot support.

This Court requires, in making the prejudice analysis under Strickland, that the reviewing court consider all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-conviction stage. See> Strickland v. Washington,>also see Williams (Terry) v. Taylor. Under this test, it is inappropriate to consider that petitioner has not made the requisite showing as the Fourth Circuit Court of Appeals concluded. It is clear that the Fourth Circuit Court of Appeals here disregarded this principle. The Fourth Circuit Court of Appeals analysis "ignored" conflicting evidence that was presented on direct appeal but not recited by the District Court.

For example the opinion refers to the argument that "the evidence in its totality was insufficient to support guilt", would not have been stronger than those appellate counsel choose to present, and that the states court's determination that its omission did not amount to ineffective assistance of counsel accordingly must not be disturbed. This is an apparent reference to the statement in the Supreme Court of Virginia. The opinion ignored, however, that at direct appeal six (6) of the thirteen (13) issues presented by appellate counsel were barred from review because counsel failed to present the arguments to the trial court, accordingly, Rule 5A:18 bars consideration of the issues on appeal. (See per curiam) attached

These factual issues do not require the attention of this Court. What does merit review is the emerging practice of the Fourth Circuit Court of Appeals of ignoring evidence while performing prejudice analysis. This was precisely the type of review that this court condemned in Williams (Terry) v. Taylor. See above reference of this case.

Because the Fourth Circuit Court of Appeals has truncated the scope of Strickland v. Washington. Prejudice review, this Court must grant certiorari.

II. THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE U.S SUPEME COURT

In Evitts v. Lucey, petitioner challenged the constitutionality of the Commonwealth's dismissal of his appeal because of his lawyer's failure to file the statement of appeal, on the ground that the dismissal deprived him of his right to effective assistance of counsel on appeal guaranteed by the Fourteenth Amendment. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. Like the above case, petitioner here was deprived the effective assistance of appellate counsel when this failed to argue against the sufficiency of the evidence on direct appeal, even when he recognized that the evidence cannot support the statement alleged against petitioner. In Evitts v. Lucey the U.S. Supreme Court granted certiorari and affirm the Sixth Circuit Court of appeals judgment of conditional writ of habeas corpus.

These cases illustrate the fact that the Fourth Circuit Court of Appeals is out of step with this court in its consideration of the Strickland v. Washington, prejudice prong. Certiorari should be granted to correct this error.

4-At the state post-conviction petition, petitioner Claimed: In violation of my 14th Amendment right to due process, the evidence in its totality was insufficient to support guilt of each element beyond a reasonable doubt.. In a challenge to a state conviction brought under habeas corpus statute which requires federal court to entertain state prisoner's claim that he is being held in custody in violation of the Constitution or laws of the United States, the petitioner is entitled to habeas corpus relief if it is found that upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. U.S. Const. Amend. 14. A habeas corpus court must consider not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. See In re Winship. In re Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

The Supreme Court of Virginia denied relief of this claim for the following reason: The Court holds that claim (g) is procedurally barred because this non-jurisdictional issue could have been raised during the direct appeal process and, thus, is not cognizable in a petition for a writ of habeas corpus Slayton. The court ignored that while independently this claim could have been raised at trial, a claim attacking the sufficiency of the evidence

is an independently cognizable claim subject to review in a habeas proceeding because it presents an issue of Constitutional importance. Moreover my argument in claim (6) that In violation of my 6th Amendment right to counsel, my attorney on appeal provided ineffective assistance by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt alleged in claim (7) should have overcame an otherwise procedurally defaulted claim.

Reviewing the denial of habeas corpus relief by the District Court, the Fourth Circuit Court of Appeals concluded that petitioner has not made the requisite showing. Accordingly, we deny a Certificate of Appealability, deny leave to proceed in forma pauperis, and dismiss the appeal.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANT THIS COURT'S ATTENTION.

The fourth Circuit Court of Appeals conclusion misapplied the Strickland v. Washington, test for prejudice when hold the District Court opinion. The District Court misstated the record when concluded that this claim was procedurally defaulted from considerations on the merits, and that a federal court may not review a procedurally barred claim absent a showing of cause and prejudice or a fundamental miscarriage of justice, such as actual innocence. In his petition, petitioner argues that the default of claim (g) was the result of Ineffective Assistance of Counsel on appeal by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt. Also a claim

attacking the sufficiency of the evidence is an independently cognizable claim subject to review in a habeas proceeding because it presents an issue of Constitutional importance, and the District Court concluded that has not merit. And when a claim of ineffective assistance fails, it cannot furnish cause and prejudice to excuse a procedural default. According to the District Court petitioner has failed to overcome the procedural default of claim (g) and is precluded from federal review.

This Court requires, in making the prejudice analysis under Strickland, that the reviewing court consider all of the evidence in the record, both that which was admitted at the trial and that which is developed at the post-conviction stage. Strickland v. Washington, >also see Williams (Terry) v. Taylor, Under this test, it is inappropriate to consider that petitioner has not made the requisite showing as the Fourth Circuit Court Appeals concluded. It is clear that the Fourth Circuit Court of Appeals here disregarded this principle. The Fourth Circuit Court of Appeals analysis ignored that under §2254 (f) petitioner is allowed to challenge the sufficiency of the evidence. For example the opinion of the District Court refers to the argument that on Federal habeas corpus review §2254(d) mandates that a States court's finding of procedural fault be presumed correct, provided that the state court relied explicitly on the procedural ground to deny petitioner relief and that the rule relied on is an independent and adequate state ground for denying relief. The opinion ignores however §2254 (d)(1)

Unless the adjudication of the claim--

(1`) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; and neglected to consider §2254 (f): "If the applicant challenges the sufficiency

of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

These factual issues do not require the attention of this Court. What does merit review is the emerging practice of the Fourth Circuit Court of Appeals of ignoring evidence while performing prejudice analysis. This was precisely the type of review that this court condemned in Williams (Terry) v. Taylor. See above reference of this case. Because the Fourth Circuit Court of Appeals has truncated the scope of Strickland v. Washington. Prejudice review, this Court must grant certiorari.

II. THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE U.S SUPEME COURT

In Slayton v. Parrigan, the Virginia Supreme Court reasoned that; Assuming, without deciding, that petitioner was subject to an unconstitutional identification procedure, the court below erred, absent a showing of "ineffective assistance of counsel in failing to raise that question", in permitting inquiry on this question for the first time in the habeas corpus proceeding, is also stated that The Virginia Supreme Court will consider previously defaulted claims on post-conviction review if the petitioner shows

that counsel was "ineffective in failing to assert a claim or object to an error". See > Slayton v. Parrigan. Contrary to Parrigan, here petitioner asserted in claim (6) that appellate counsel was ineffective by failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt. Moreover in Murray v. Carrier the U.S. Supreme Court determined that petitioner Carrier has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his petition for review, and has "disavowed" any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim; but if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." Ineffective assistance of counsel, then, is cause for a procedural default. Thus Carrier petition for federal habeas review of his procedurally defaulted discovery claim must therefore be dismissed for failure to establish cause for the default; contrary to Carrier case, petitioner also has made clear that the cause for the procedural default was the result of ineffective assistance of counsel on appeal for failing to argue the sufficiency of the evidence, and the lack thereof, to establish guilt. Moreover petitioner claim is a cognizable claim under 28 U.S.C.A. § 2254 (f).

These cases illustrate the fact the Fourth Circuit Court of Appeals is out of step with this court in its consideration of the Strickland v. Washington, prejudice prong. Certiorari should be granted to correct this error.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eight Circuit Court of Appeals.

Respectfully submitted

Ernesto Solano

ERNESTO WILFREDO SOLANO GODOY

Petitioner