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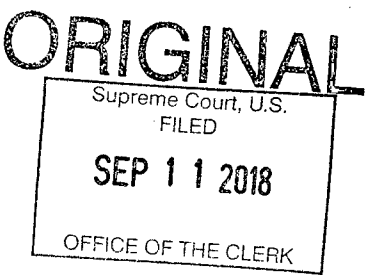

IN THE

SUPREME COURT OF THE UNITED STATES

Webster Douglas Williams, III - PETITIONER

vs.

United States - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

4th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Webster Douglas Williams, III, 24879-171
P.O. Box 999
Butner, NC 27509

QUESTIONS PRESENTED

1. When police officers attempt to gain voluntary admittance to a residence by use of a ruse, which fails, and are peacably asked to present a search warrant, does it violate the homeowner's Fourth Amendment right to be free from unreasonable search and seizure if invading officers, instead of presenting a search warrant, suddenly and without warning, forcibly rob a third-party of a key to the home, and use the stolen key to break in?

2. Does it violate the due process rights and/or unconstitutionally prejudice a defendant if a district court disregards a flagrant Fourth Amendment violation, and admits evidence under a "totality of the circumstances" standard, to admit otherwise unconstitutionally seized evidence in a criminal proceeding?

3. Does it violate a defendant's Sixth Amendment right to effective assistance of counsel if a defense attorney deliberately mis-informs his client that certain unconstitutional acts by officers who invaded his residence for the purpose of search and seizure did not violate his Fourth Amendment rights when the facts prove otherwise, and the attorney refuses to inform the court or question the witness regarding these facts, purposefully sabotaging his client's defense and causing severe negative consequences for his client?

4. Does an attorney violate his client's Sixth Amendment right to effective assistance of counsel if the attorney fails to ensure that the amount of restitution demanded by the prosecution as a part of his client's plea agreement comports with the dictates of Doyle Randall Paroline v. United States, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2011); the Consumer Credit Protection Act (15 USCS § 1673); and (because petitioner is a citizen of South Carolina) South Carolina State statute § 15-41-30(10)(E) which prohibits the garnishment of a South Carolina disability pension by any court?

5. Does an attorney provide Constitutionally deficient representation if he fails to demonstrate to his client that the sentence and restitution demanded by the prosecution as part of the plea agreement is not disparate from similarly situated defendants, and comports with the dictates of 18 USC § 3553(a)(6), when circumstances prevent the defendant from discovering disparities until after being sentenced, and the failure to inform prevents the defendant from entering a knowing and intelligent plea?

6. Does a violation of 18 USC § 2234 in combination with a violation of 18 USC § 3109 by officers invading a private residence for the purpose of executing a search warrant give rise to a Fourth Amendment violation requiring application of the exclusionary rule?

7. Does a Miranda violation caused by a defendant's attorneys refusal to remain present during an FBI questioning session occurring after indictment and before the entering of a plea, when his client demands that he remain present, violate that defendant's Sixth Amendment right to effective assistance of counsel?

8. Does it violate a defendant's Eighth Amendment right to be protected from cruel and unusual punishment or deprive him of his Fifth or Fourteenth Amendment due process rights, if the sentence he received exceeds his expected lifespan, when a lesser sentence would have served justice and the dictates of 18 USC § 3553, when the defendant is elderly, infirm, and poses no danger to the community?

9. Does it violate an appellant's right to equal treatment under the law and/or an appellant's due process rights under the Fifth and/or Fourteenth Amendment if a district court denies the appellant the right to invoke Fed. R. Civ. P. Rule 6 and/or Fed. R. Crim. P. Rule 45 to strike an untimely filed government response to a motion under 28 USC § 2255, when there has been no determination of excusable neglect, and the government response was filed four days beyond the court-imposed deadline to file?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 30, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 31, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Bill of Rights

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment: ...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy... to have the assistance of counsel for his defense.

Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, section 1.: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United 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 the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 USC § 1673(a) and 15 USC § 1673(c):

(a) **Maximum Allowable Garnishment.** Except as provided in subsection (b) and in section 305 [15 USCS § 1675], the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

1) 25 per centum of his disposable earnings for that week, or

2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 USCS § 206(a)(1)] in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall, by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(c) **Execution or enforcement of garnishment order or process prohibited.**: No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

18 USCS § 2234:

Whoever, in executing a search warrant, willfully exceeds his authority **or** exercises it with unnecessary severity, shall be fined under this title or imprisoned not more than one year, or both.

18 USCS § 3109:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, **if**, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself

or a person aiding him in the execution of the warrant.

18 USCS § 3553(a)(1); (a)(2); (a)(3); and (a)(6)
(voluminous)

28 USCS § 2255
(voluminous)

Federal Rules of Civil Procedure Rule 6

(voluminous)

Federal Rules of Criminal Procecure Rule 45

(voluminous)

South Carolina State Statute(s)

§ 15-41-30(10)(E) (1976) The following real and personal property of a debtor domiciled in South Carolina is exempt from attachment, levy, and sale under any mesne or final process issued by any court or bankruptcy proceeding; the debtors right to receive payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or lenth of service.

ISSUE ONE SUMMARY

1. The petitioner will prevail because his Fourth Amendment right to be free from unreasonable search and seizure was violated by the Horry County Police Department during the execution of their search warrant upon the petitioner's residence. The petitioner's Fifth and Fourteenth Amendment Due Process rights, as well as his Sixth Amendment guaranty of effective assistance of counsel are also implicated because this petitioner's defense attorneys committed intentional acts and made omissions which sabotaged this petitioner's defense.

STATEMENT OF THE CASE (ISSUE ONE)

2. This petitioners defense attorneys deprived him of effective assistance of counsel by knowingly concealing facts from the court that would have led the court to apply the exclusionary rule, which would have changed the outcome of this trial. These omissions of fact caused the court to admit unconstitutionally obtained evidence, which was used as a cudgel by the prosecution to coerce a guilty plea from this petitioner.

3. The facts concealed from the court consisted of an egregious and flagrant violation of the reasonableness clause of the Fourth Amendment during the execution of the search warrant upon this petitioner's residence.

4. The petitioner was prevented from discovering the cunning, guile, and deceit of his attorneys because he was incarcerated in pre-trial detention without access to legal research materials which would have enabled him to discover the Constitutionally inadequate performance of his lawyers. These conditions forced the petitioner to accept his attorneys deliberately false legal advice as true.

5. This petitioner's attorneys acts and omissions in the courtroom and in private consultations prejudiced the petitioner by witholding knowledge of official misconduct by invading officers conducting the

search from the court. The petitioner's attorneys insisted that the petitioner communicate with them in court using hand gestures and by passing notes to prevent the court from learning the facts concerning the unconstitutional search. When the petitioner demanded that his attorneys inform the court, they refused, and "shushed" him when he tried to inform the court himself. Their acts caused a complete breakdown of this petitioner's defense.

6. Defense attorneys refused to question defense witness LeRoy J. Marcotte regarding the unconstitutional police acts during the petitioner's suppression hearing, though they told this petitioner that this was the reason he was being placed on the witness stand.

7. The deliberate acts and omissions by defense attorneys during the suppression hearing prejudiced this petitioner from receiving a fair and just hearing, causing him to receive an excessive sentence and oppressive restitution. A defendant:

> "must be able to... participate in the making of decisions on his own behalf." Riggins v. Nevada, [redacted]
> "has the right to counsel's undivided loyalty."
> Woods v. Georgia, 397 US 759, 770-71 (1970)

8. "The movant alleges facts which establish that a sentence would have been more lenient absent counsel's errors." Royal v. Taylor, 188 F.3d 239, 249 (4th Cir. 1999).

9. The petitioner asserts that his attorneys deliberately provided a defective defense due to prejudice caused by the nature of the government's allegations.

10. The petitioner's decision to accept a guilty plea was influenced by his defense attorneys deliberate false legal advice, because absent the unconstitutionally obtained evidence, the petitioner would have insisted on going to trial.

11. Because the petitioner's attorneys failed to provide constitu-

tionally effective representation, the petitioner was prevented from receiving a just, full, and fair process, and call into question the reliable result of the court's proceedings.

12. Allowing the petitioner's conviction to stand would violate and contradict the findings in Maples v. Thomas, 565 US 266 (2012), which states in relevant part:

> "Common sense dictates that a litigant cannot be held responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word...".

The petitioner's conviction holds him constructively responsible for his attorney's ineffectiveness in witholding exculpatory evidence concerning the unconstitutional search from the court.

13. The event in question occurred on or about November 11, 2011.

14. Detective Neil Frebowitz, a detective with the Horry County (South Carolina) Police Depeartment, directed the petitioner's son, Webster Douglas Williams, IV, to telephone and falsely inform the petitioner that his home alarm system had gone off, and that the police wanted to go inside to see if anything had been stolen. He told the petitioner that police needed a key to get inside so they can investigate. Detective Frebowitz directed him to tell the petitioner to "send someone with a key".

15. The petitioner was 300 miles away from home attending a funeral in Richmond, Va. Webster D. Williams, IV did not tell the petitioner the purpose for requesting a key was to admit police for the purpose of executing a search warrant.

16. The petitioner contacted LeRoy James Marcotte, a former U.S. Army Military Police Officer, who was a disabled firefighter, and 30-year acquaintance of the petitioner to respond from his home 5 miles away with a key. Marcotte was regularly paid a token wage to tend the Williams family home because the petitioner frequently travelled. Sometimes Marcotte would stay overnight in the home.

A fee-for-hire relationship existed between the petitioner and Marcotte. Marcotte was the only choice to send because he was the only local who knew the alarm passcode and had a key.

17. As Marcotte approached the petitioner's home, he phoned him and kept him on an open phone line. Marcotte told the petitioner the home was secure and that the alarm was not activated.

18. The petitioner told Marcotte to tell the police officers to leave, and to check the house after they left.

19. Marcotte complied, and told Detective Frebowitz to leave, that he (Marcotte) would take care of things.

> "When an occupant withdrew consent, the officer should have promptly departed the premises." Painter v. Robinson, 185 F.3d 557, 567, (6th Cir. 1999).

20. Detective Frebowitz refused to leave. He did not tell Marcotte that he possessed a search warrant. Frebowitz insisted that he be admitted based solely on his ruse that a break-in had occurred. Marcotte again denied entry per the petitioner's instruction, and added: "I know Mr. Williams's Fourth Amendment rights, and I can not let you in without a search warrant."

21. "Under the Fourth Amendment, the defendant had a Constitutional right to insist that inspectors obtain a warrant to search, and that he may not constitutionally be convicted for refusal to consent to the inspection." Camara v. Municipal Court, 387 US 523, (1967).

22. "Had the respondent not objected to the officer's entry of her house without a search warrant, she might have waived her Constitutional objections. The right to privacy in a home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here." District of Columbia v. Little, 339 US 1 , (1950).

23. Instead of informing Marcotte (and the petitioner, for he was listening over the open phone line) of the true purpose for his presence in compliance with 18 USC § 3109, Frebowitz immediately physically attacked Marcotte, still under guise of his ruse that he wanted to inspect the premises for signs of a burglary. This act denied Marcotte and the petitioner the opportunity to comply with a warrant, if Frebowitz possessed one at all. Frebowitz twisted Marcotte's arm painfully behind his back and forced the house key from his hand while Marcotte yelled:""You're hurting my arm! You're hurting my arm!", causing intense pain to the disabled veteran.

24. Frebowitz then unlawfully forced the key to the petitioner's home from Marcotte, and immediately used the key obtained by use of unlawful strong-arm robbery to force entry into the petitioner's home in violation of 18 USC § 3109, which states that officers may not "break into a residence without first announcing their authority and purpose". Further, statute 18 USC § 2234 states that officers may not "execute a search warrant in an unnecessarily severe manner". Frebowitz neither announced his authority nor purpose prior to using a stolen key to break in. A sworn affidavit attesting to these facts is at Appendix E.

25. Marcotte lawfully denied entry because no officer told him they possessed a warrant to search the premises. Invading officers depended only on voluntary consent, which was denied. The petitioner told Marcotte to deny entry because no claim had been made that any officer had a search warrant for his home.

> "When a police officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.": Bumper v. North Carolina, 391 US 543, 550 (1968).
>
> "Inasmuch as the prosecution had relied only on voluntary consent to justify the search, the admission into evidence of objects contained in the search was error; and the accused's convictions... were accordingly due to be reversed." Bumper v. North Carolina, supra.
>
> "The basic principle of Fourth Amendment law [is] that searches and seizures inside a man's house without a warrant are per-se unreasonable in the absence of a number of well-defined "exigent circumstances"" Coolidge v. New Hamp-

shire, 403 US 443 at 477-78 (1971).

26. "It is... well established that the police may not invade a person's house without a warrant except under very limited circumstances **or an occupant's consent**." [emphasis added] United States v. McMullin, 576 F.3d 810, 814, (8th Cir., 2009).

27. "Police officers may not manufacture an exigency..." DeMayo v. Nugent, 517 F.3d 11, 16, (1st Cir., 2008).
"The government will not be allowed to plead it's own lack of preparation to create an exigency justifying warrantless entry." United States v. Collazo, 732 F.2d 1200, 1204 (4th Cir., 1984)

28. The lack of the presence of a warrant caused Marcotte and the petitioner to lawfully deny entry, reaching the logical conclusion that officers did not possess a warrant. Marcotte was under no obligation to surrender the key or permit entry to allow officers to "inspect the premises to see if anything had been stolen". No officer claimed to possess a warrant, which would have permitted a search.

29 "When a... law enforcement officer demands entry, but presents no warrant, there is a presumption that the officer has no right to enter. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protections on the say-so of the officer. The Fourth Amendment gives him a Constitutional right to refuse to consent to entry and search." [emphases added] United States v. Harris, 2006 U.S. LEXIS 59406 (9th Cir., 2006); Camara v. Municipal Court, 387 US 523, 528-29 (1967.

30. When Marcotte denied admission because officers possessed no search warrant, he was within his rights. However, he was physically attacked and robbed of the key to the premises. Entry could not, and would not, have occurred absent the unlawful acts of the invading officers.

"One cannot be penalized for passively asserting this right [to deny admission absent a search warrant] regardless of one's motivation." Cole v.

United States, 329 F.2d 437, 442 (9th Cir., 1964); United States v. Courtney, 236 F.2d 921, 923, (2nd Cir. 1956); United States of America,v. Saundra Prescott, 581 F.2d 1343, 1351, (9th Cir. C. of A., 1978).

31. "Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing." United States of America v. Saundra Prescott, supra.

32. "Passive refusal to consent to a warrantless search is privileged conduct... If the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a Constitutional right and future consents would not be "freely and voluntarily given'". Bumper v. Noth Carolina, 391 US 543, 548 (1968); Simmons v. United States, 390 US 377, 389-94 (1968).

33. "The right to refuse [a warrantless search] protects both the innocent and the guilty, and to use it's exercise against the defendant would be, as the court said in Griffin, a penalty imposed by the courts for exercising a Constitutional right." United States v. Saundra Pescott, supra.

34. Marcotte's denial of admission to the officers was Constitutionally protected conduct, yet Frebowitz violently attacked him the moment he exercised this right to refuse admission absent a search warrant. The attack brings rise to a violation of 18 USC § 2234 and the reasonableness clause of the Fourth Amendment.

35. "The purpose of the reasonableness clause of the Fourth Amendment is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted, even if a later, less virtuous age should become accustomed to considering all sorts of intrusions as reasonable." Richards v. Wisconsin, 520 US 385, 392-396 (1997).

36. A violation of 18 USC § 3109 requires exclusion of the evidence when a residence is broken into by officers who fail to state their authority and purpose. See Smith v. United States, 357 F.2d 486, (5th

Cir.,,1966); William Miller v. United States of America, 357 US 301, (1958); Bellote v. Edwards, 629 F.2d 415 (4th Cir. C. of A., 2011).

37. "No exigent circumstances justified police intrusion without taking the few seconds it would have required to show authority to lawfully enter the movant's home." United Sttes v. Whaley, 781 F.2d 417 (5th Cir., 1986).

38. Police use of an unauthorized key is, by definition, "breaking". "Entrance into defendant's room by use of a key furnished by a room clerk was a breaking and, hence, an illegal entrance, and entrance without prior notice of identity, request for admittance, and statement of purpose for which entrance was sought rendered the arrest illegal." Ker v. California, 374 US 23 (1963); Stoner v. State of California, 376 US 483-484 (1964).

39. Frebowitz was denied voluntary consent to enter. He attempted to obtain voluntary consent from the petitioner over the phone after he had already broken the law by breaking in without permission.

40. The petitioner was charged with offenses which include, as an essential element, possession of the unconstitutionally seized evidence. "Any evidence seized from the defendant in a criminal case in violation of his rights under the Fourth Amendment prohibiting unreasonable search and seizures is inadmissible at his trial, and the fruits of such evidence is inadmissible as well." Alderman v. United States, 394 US 165 (1969).

41. "...warrantless, non-consensual entry into a suspect's home... was violative of the Fourth Amendment." Payton v. New York, 445 US 573 (1980); United States v. Johnson, 457 US 537 (1982).

42. The petitioner's attorneys untruthfully denied that the circumstances violated his Fourth Amendment rights, and refused to defend him on these grounds, concealing the facts from the court. Attorney Brittain told the petitioner he would inform the court, then failed to do so when given the opportunity. This caused the petitioner to accept a guilty plea based on ineffective assistance of counsel.. "Because ours is predominantly a criminal justice system of guilty pleas, not trials, it is critical that a defendant has effective assistance in this area." Missouri v. Frye, 132 S. Ct. 1399 (2012).

"Errors of law that lead defense counsel to give improvident advice about whether a defendant should accept or reject a plea offer may render such assistance ineffective." Lafler . Cooper, 132 S. Ct. 1366, 1376, (2012); Hill v. Lockhart, 474 US 52, (1985).

"The right to effective assistance of counsel extends to pre-trial motions." Kimmelman v. Morrison, 477 US 365 (1986).

This petitioner's attorneys failed to provide Constitutionally effective representation when they falsely told him his Fourth Amendment rights were not violated during the egregious unlawful search warrant execution, witheld this information from the court, and this deliberate act sabotaged this petitioner's suppression hearing.

43. "The American Bar Association's" Criminal Justice Standards states:

"Defense counsel, in a non-capital sentencing proceeding should: promptly investigate the circumstances and facts relevant to sentencing and present the court with any [emphasis added] basis that will help achieve an outcome favorable to the defense..." Wiggins v. Smith, 539 US 510 (2003).

This petitioner's conviction was obtained only because of facts deliberately omitted by his defense attorneys, who purposefully misinformed him, and these omitted facts pervasively effected all hearings and proceedings. The result based on omitted facts calls into question the reliable result of this petitioner's hearings.

44. "Regulation of Lawyers" (2006), DR-701(A) states:

"A lawyer shall not intentionally:

1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules."

The petitioner's defense attorneys failed to seek the petitioner's lawful objectives, derailing his defense, violating attorney rules, and dooming their client's defense.

45. "The search of the defendant's home was suppressed under the Fourth Amendment because the search was unreasonable under the circumstances since the agent refused to present the warrant without justification." United States v. Terry Thompson, 667 F. Supp. 2d 758 (6th Cir. 2009).

46. "In light of developments after the arrests, there is a temptation to look upon these appellants and say, "But it did turn out that they are theives, so why not let the searches and convictions stand?" The Constitution takes a longer view; it looks beyond the immediate gain and considers the baleful result that would follow in the trail of judicial validation of illegal searches only because they are productive." United States v. Di Re, 332 US 581 (1948); Elkins v. United States, 364 US 206 (1960); Jones v. Payton, 411 F.2d 857 (4th Cir. C. of A., 1969).

47. "A search is not to be made legal by what it turns up. In law, it is good or bad when it starts, and does not change character from it's success." United States v. Peisner, 311 F.2d 94, (4th Cir. C. of A., 1962).

48. "Any idea that a search can be justified by what it turns up was long ago rejected in our Constitutional jurisprudence. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light." Byars v. United States, 273 US 28, 29, (1927); Henry v. United States, 361 US 98, (1959); Bumper v. North Carolina, 391 US 543 (1968).

49. "Ever since it's inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. Without it, the Constitutional guarantee against unreasonable searches and seizures would be a mere form of words." Mapp v. Ohio, 367 US 643 (1961); Terry v. Ohio, 392 US 1, 12, (1968).

50. "The immunity from unreasonable searches and seizures afforded by the United States Constitution Fourth Amendment has been denied the accused in a criminal prosecution in a federal district court." Weeks v. United States, 232 US 383, (1914).

51. "Standing to invoke the exclusionary rule is limited to cases in which the prosecutor seeks to use the fruits of an illegal search or seizure against the victim of police misconduct." United States v. Leon, 469 US 897, 919, (1984).

In the petitioner's case, the evidence was used as a cudgel to bludgeon the petitioner into accepting a guilty plea. The prosecutor said he would use the unconstitutionally obtained evidence if the petitioner went to trial.

52. "Under the Fourth Amendment, the manner in which a seizure was conducted is as vital a part of the inquiry as whether it was warranted at all." United States v. Place, 462 US 696 at page 113 (1983).

53. "The outcome would have been substantially less without the illegally obtained evidence that would have been excluded but for his counsel's ineffectiveness." Kimmelman v. Morrison, 477 US 365, 375, (1986).

54. "An evidentiary hearing is required when a movant presents a colorable claim showing disputed material facts and a credibility determination is necessary to resolve the issue." United States v. Coon, 205 F. Appx. 972, 973, (4th Cir. 2006); United States v. Witherspoon, 231 F. Appx. 923, 925-927, (4th Cir. 2000).

55. This petitioner's assertions are not "conclusory allegations" which would indicate that a hearing is unnecessary. The allegations can be accepted as true because they are not contradicted by the record, they are not inherently incredible, and they are not conclusory rather than statement of fact. Petitioner's assertions are supported by the sworn affidavit of LeRoy James Marcotte at Appendix E.

56. The petitioner's claim is colorable. His Fourth, Fifth, Sixth, and Fourteenth Amendment Constitutional rights were violated by his attorney's acts and omissions when his attorneys refused to ask the defense witness exculpatory questions while he was on the witness stand, and prevented the petitioner from doing so himself. Defense attorneys acts and omissions prevented and prejudiced this petitioner from receiving just process, and coerced this petitioner into agreeing to accept a guilty plea only due to their ineffectiveness.

57. This petitioner seeks a writ of certiorari permitting the withdrawal of his guilty plea, the exclusion of unconstitutionally obtained evidence, and the reversal, dismissal, and expungement of all charges because the prosecution relied on unconstitutionally obtained evidence to coerce him into a guilty plea. The petitioner also seeks full restoration of all Constitutional rights surrendered as a result of the unconstitutional conviction.

ISSUE TWO SUMMARY

57. The petitioner's Sixth Amendment right to have an attorney present for questioning by government officials after indictment, and before entering a plea, was violated because his attorneys refused to remain present, and the government, fully aware that the petitioner's attorney was not present, but questioned him anyway, in violation of of Miranda v. Arizona, 384 US 436, 479 (1966).

STATEMENT OF THE CASE (ISSUE TWO)

58. Miranda (supra) requires that a number of conditions be met in order to preserve the Constitutional rights of a defendant being questioned.

59. Among the requirements of Miranda are that a defendant:

A) Has the right to remain silent;

B) Be notified that anything he says can be used against him in a court of law;

C) That he has the right to the presence of an attorney;

D) That if he cannot afford an attorney, one will be appointed for him prior to questioning if he so desires.

60. The petitioner's attorneys scheduled the questioning session, and made all the arrangements for the FBI to come to the Dillon County Detention Center for the purpose of questioning the petitioner. The petitioner's attorneys scheduled the day and the time. They knew when the FBI agent was going to arrive. The petitioner's attorneys arrived approximately 30 minutes to an hour early to confer with the petitioner privately before the agent arrived.

61. During the private meeting between the petitioner and his attorneys, attorneys told the petitioner to, in Brittain's and Simmons's own words: "to truthfully answer every question the FBI agent asks you." The petitioner, believing his attorneys would halt the questioning if any incriminating questions were asked, agreed.

62. The petitioner's attorneys then surprised the petitioner by telling him they were leaving, and would not be staying for the questioning session. This angered the petitioner, because he had paid his attorneys $320,000.00 for representation. Attorneys Brittain and Simmons craftily took advantage of the petitioner's naivite in legal/criminal matters, and convinced him that the questioning outside of their presence would provide the court with a reason to grant a downward variance and a downward departure for his cooperation.

63. The petitioner was unable to persuade his attorneys to remain present while the FBI questioned him. Attorneys Brittain and Simmons were angry with the petitioner for insisting they remain present, and the petitioner, angry with his attorneys, stopped speaking to them. There began a complete breakdown of communications.

64. The petitioner's attorneys demanded that the petitioner violate his Fifth Amendment right to remain silent, and that he fully incriminate himself. They told the petitioner that, "after the questioning session is over, [the petitioner would] no longer be allowed to plead "not guilty'".

65. The petitioner believes he was swindled by his attorneys because they provided what is commonly known as a "dump truck" defense. It is called this because criminal defense attorneys who use this practice do everything they can to make it appear to the court that they are providing Constitutionally sufficient representation, while deliberately planning all along to do as little work on their client's case as possible. Their goal is to have their client plead guilty in the end, saving them from the effort of mounting a proper defense. This leaves them more time to seek additional billable clients. Essentially, the attorney "dumps" his client on the government for whatever plea is offered.

66. Because this petitioner's attorneys ruthlessly abandoned him to government questioning without representation he paid them for, they unquestioningly abandoned the petitioner at a critical phase of trial.

67. "The Sixth Amendment requires not merely the provision of counsel to the accused in a criminal prosecution, but assistance, which is to be for his defense, and thus, the core purpose of the consel guaranty is to assure assistance..." United States v. Cronic, 466 US 648, 658, 659, (1984).

68. "A trial is unfair if the accused is denied counsel at a critical stage of his trial." United States v. Cronic, supra.

69. "The Cronic rule states that courts may presume that a defendant has suffered "unconstitutional prejudice" if he is denied counsel at a critical stage of his trial." Woods v. Donald, 135 S. Ct. 1372, 1378, (2015).

70. "The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings. Critical stages include... post-indictment interrogations." [Emphasis added.] Missouri v. Frye, 566 US 134 (2012).

71. "Ineffective assistance is presumed when counsel is totally absent or prevented from assisting the accused during a critical stage of the proceeding." [Emphasis added] Kimmelman v. Morrison, 477 US 365, (1986).

72. "Any conflict between the defendant's right to consult with his attorney... must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." Geders v. United States, 424 US 80, 91, (1976).

73. "A litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word..." Maples v. Thomas, 565 US 266 (2012).

74. The petitioner's attorneys were absent at a critical stage of his proceedings. Attorneys Brittain and Simmons flagrantly refused to remain present for FBI questioning, which:

A) Occurred after the finding of the indictment;
B) Occurred before the entering of a plea;
C) Occurred outside the presence of the petitioner's attorneys, making the session a "secret interrogation".

75. Any proceedings held afterwards could not have been fair because of the United States Supreme Court's holding in:

> Massiah v. United States, 377 US 201 (1964): "Under the Federal Constitution, any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and fundamental rights of persons charged with a crime.

76. In United States Attorney William E. Day's response to this petitioner's motion under 28 USC § 2255, he states that because the government did not use the information obtained in the questioning against the petitioner, it makes the conviction "fair". This narrow view fails to give due consideration that the answers given were used to coerce a guilty plea.

77. This premise is also contradicted by the United States Supreme Court.

> "A fair trial does not preclude prejudice from counsel's ineffective assistance. The right to effective assistance of counsel was not solely to ensure a fair trial, and there was no indication that the fair trial cured counsel's error." Lafler v. Cooper, 566 US 156 (2012).

78. The petitioner's Sixth Amendment right to have counsel present during questioning was violated, and he was unconstitutionally prejudiced by his attorneys absence at a critical stage of the proceedings.

79. Because a fair trial did not cure counsel's error, the petitioner asserts that he was unconstitutionally convicted, and asks for a writ of habeas corpus, which withdraws his guilty plea, dismisses and expunges all of his convictions, and full restoration of all Constitutional rights surrendered as a result of the unconstitutional conviction.

ISSUE THREE SUMMARY

81. The petitioner's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment due to similarly situated defendants receiving substantially lesser sentences and restitution, and government-provided statistics appear to support a finding that the great majority of defendants with similar charges receive only one-third as long prison time as compared to the petitioner. The petitioner's attorneys failed to advise him during the discussion of the plea that the petitioner was going to receive three times the sentence as other similarly situated defendants because they performed no analysis of what other defendants were receiving for similar crimes. Further, attorneys failed to discuss the plea with the defendant prior to him appearing for the purpose of a plea, which forced him to enter a "snap-decision" plea with no time for any negotiations. The statement of the case for issue three will show ineffective assistance of counsel occurred.

STATEMENT OF THE CASE (ISSUE THREE)

82. The petitioner received a 327 month sentence and a penalty of $487,500.00 in restitution in a plea he was given only moments to consider. The entire time allotted to consider the plea was only 15 to 20 minutes at best, which took place immediately prior to entering the plea. These circumstances assured inadequate preparation, and allotted no time for negotiations. The petitioner asked his attorneys for seven days to consider the plea and negotiate, but was denied. Petitioner's attorneys browbeat him into accepting the plea.

83. The time element alone prevented the petitioner from entering into a plea knowingly, intelligently, and fully informed. Further, the petitioner's attorneys demanded that, during the plea colloquy, that the petioner "say what the judge wants to hear so that the plea would be accepted". The petitioner, being naive regarding legal matters, and a first-time offender, blindly followed his attorneys unethical de[redacted] knowing no better but to obey his attorneys.

84, The petitioner was held in pre-trial detention at the Dillon County Detention Center, which possessed no legal library, preventing the petitioner from discovering his attorneys ulterior agenda, which was to coerce the petitioner to sign whatever plea was offered without zealous rebuttal. Additionally, the petitioner was receiving Constitutionally inadequate medical care for his serious medical conditions during his 26 months as a pre-trial detainee. (See 6:16-cv-1236-RMG, settled in the petitioner's favor, where the DCDC nurse admitted violating the petitioner's First and Fourteenth Amendment rights by witholding hundreds of doses of the petitioner's cancer chemotherapy and other drugs, and punishing him when he and his attorneys filed written complaints with jail authorities.) Petitioner's attorneys convinced him he would have better medical care in prison to convince him to accept the plea as-written. Petitioner truly believed he would die if he remained in pre-trial detention. The petioner's defense attorneys unethically advised the petitioner to agree to the plea immediately even though the pre-trial medical circumstances contributed to the coercion and unethically influenced the petitioner to enter a guilty plea due to the Constitutionally deficient medical care he was receiving in DCDC custody.

85. Attorneys Brittain and Simmons desired to cease defending the petitioner and file an Anders brief, so coerced him to sign a plea.

86. Attorneys Brittain and Simmons told the petitioner that he "was doing good to get a 327 month sentence", though they failed to provide him with any statistical proof of this. They failed to consider the petitioner's age, infirmity, and the likely survivability of such a harsh sentence. Brittain and Simmons made no effort to discover and present easily located statistics which would have shown that the draconian sentence was unreasonable and disparate from similarly situated defendants. Only after the petitioner arrived at Butner and obtained access to a law library was the petitioner able to discover how ineffective his defense was, because there is no rational basis to support the restitution or length of sentence in the petitioner's circumstances.

87. Statistics published in the National Bureau of Affairs newsletter May 3, 2017, Vol. 101, No. 5, by the United States Government, cite the sentencing statistics for crimes the petitioner was charged with. The 2nd Cir. Court of Appeals incorporated those statistics into the case of United States v. Jenkins, 854 F.3d 181, No. 14-4295-cr, (2nd Cir. C. of A., 2017). These statistics are also cited in the following:

United States v. Sawyer, 15-2276 (2nd Cir. C. of A. 2016)
United States v. Bennett, 15-0024 (2nd Cir. C. of A., 2016)
United States v. Brown, No. 13-1706, (2nd Cir. C. of A. 2016)

The government states that Jenkins relates directly to the child pornography guideline, and, according to the Bureau of National Affairs, has "General relevance to any federal sentencing".

88. The court also cited United States v. Dorvee, 616 F.3d 174 (2nd Cir., 2010) in recognizing that USSG § 2G2.2 is:

> "Fundamentally different from most guidelines and must be applied with 'great care' because it is not based on the Sentencing Commission's expertise, but rather Congress's direction, and it's four enhancements are effectively triggered for any first-time offender, and result in a range near the statutory maximum, and it irrationally recommends a higher sentence than applies to adults who actually engage in sex with minors."

89. Citing the government's own statistics in the above cases, typical sentences given to:

> "persons who engage in sex with a minor (137 months), produce child pornography (136 months), or possess, but do not distribute child pornography (52 months)."

The petitioner's attorneys failed to provide him with this, or any statistical information that would have led him to believe that a 327 month sentence was unreasonable, cruel, and unusual. A sentence that is almost three times longer than the national average is both cruel and unusual, considering the petitioner is a first-time offender, has a 25 year history of public service, is credited with saving two lives, is elderly and infirm, completed a nationally-recognized program for sexual addiction and earned a leadership position in the program. The petitioner also spoke before small and large groups (120+ attendees)

concerning the dangers of pornography after his arrest, and spent near $50,000.00 on private counseling. A 327 month sentence fails to give any weight to the petitioner's rehabilitative acts.

90. The petitioner cites the following cases as examples where the defendants received substantially less time than the petitioner for similar (but exponentially worse) crimes:

> 204 month sentence for heinous behaviors against 50 (fifty) victims, which included the insertion of live cockroaches into his victims vaginas. United States v. William Irey, 563 F.3d 1223 (11th Cir. C. of A., 2009) (Increased to 360 months on government appeal.)
>
> 188 month sentence for essentially the same charges as the petitioner, but Fogle was sentenced for 7 (seven) victims. (The petitioner in this case was sentenced for 1 (one) victim). United States v. Jared Fogle, 825 F.3d 354 (7th Cir. C. of A., 2016).

91. Fogle paid his victims $100,000.00 each in restitution. The petitioner paid one victim $330,000.00, and was charged with and paid almost $175,000.00 to two victims he has never met. These three victims are receiving hundreds of thousands of dollars garnished directly from the petitioner's disability pension, which is a protected source that never should have been used to source restitution. (See South Carolina statute § 15-41-30(10)(E).) Typical victims restitution in the cases of "Vicky" and "Amy" are $3,000.00 to $5,000.00, with outliers being in the $15,000.00 range. Further, the amount of restitution in this case inflicts wanton punishment upon the petitioner's wife, who survives on the petitioner's disability pension. The restitution also fails to comply with the dictates of Paroline v. United States, 134 S. Ct. 1710, (2011), because the petitioner had no part in the creation of the photos of "Vicky" and "Amy", who receive restitution in the instant case from the petitioner.

92. Therefore, the sentence the petitioner received violates the sentencing guidelines mandate that similarly situated defendants receive similar sentences, and shows a tremendous sentencing disparity in violation of 18 USC § 3553(a)(6). The goal of § 3553 is to "avoid

unwarranted sentencing disparities among defedants with similar records who have been found guilty of similar conduct.

93. Because this petitioner's attorneys witheld, failed to provide, or otherwise failed to inform the petitioner of statistically rational sentencing parameters, they prevented the petitioner from making a knowing and intelligent plea agreement. Attorneys unethically took advantage of their legally naive client because they knew he had no legal library to discover their erroneous legal advice.

94. The petitioner invokes the protections of the Eighth Amendment because the sentence he received is both cruel and unusual, in that it is disparate from usual and customary sentences in both length of imprisonment and excessive in restitution, and the restitution exceeds the amount of damage proximately caused in violation of Paroline (supra). The sentence is presumptively unreasonable.

95. In preparing the petitioner's pre-sentence report, the probation officer improperly calculated to a non-existant level of 46 before adjusting the petitioner's level downwards. When the seven downward levels were subtracted, the resulting sentence was far greater than if the peak calculation halted at level 43, which is the "end of the ruler's scale". The result gave the petitioner a level 39 sentence, when the maximum exposure should have been level 36.

96. The petitioner's attorneys and Brittain's paralegal (Skipper) told the petitioner in conferences to expect a sentence between 188 and 240 months.

> "A guilty plea may be involuntary when an attorney materially misinforms the defendant of the consequences of his plea or the probable disposition of the case." United States v. Rumery, 698 F.2d 764, 766 (5th Cir., 1983).

The sentence failed to comport with the petitioner's attorneys advisement to the petitioner prior to appearing for plea.

97. "A defendant must prove that the advice given by his attorney was so deficient and misleading that he was denied effective assistance of counsel." United States v. Rhodes, 913 F.2d 839, (10th Cir. 1990).

The sentence did not comport with the petitioner's attorneys advice, The petitioner's attorneys provided deficient, misleading advice because of the disparity between what they told the petitioner his sentence would be and what he actually received.

98. The U.S. Attorney in this case, William E. Day, stated in a response to this petitioner that he "did not receive a Guidelines Sentence".

> "A de-facto mandatory guidelines scheme would be just as unconstitutional as the explicit mandatory guidelines." United States v. Booker, 543 US 220, (2005)

The 327 month sentence received by the petitioner is precisely the peak number of months calculated by the probation officer. The sentence the petitioner received is a "de-facto Guidelines sentence". It is plainly obvious that the sentence was fashioned with deference to the guidelines, and applies them.

> "The Booker remedial decision... does not permit a court of appeals to treat the Guidelines policy decisions as binding." Kimbrough v. United States, 552 US 85, 116 (2007).

99. The petitioner would cite the case of Lynn Stewart, where President Bush commuted the sentence from 30 years to 28 months, and Scooter Libby, whose 30-month sentence was commuted because of their "long histories of public service". This petitioner was a volunteer firefighter for five years, and a paid firefighter/EMT for 20 years. He served with the Myrtle Beach Volunteer Rescue Squad as a teenager, served a year with Helping Hand charities, and assisted the Red Cross as a volunteer. He received two lifesaving awards, and volunteered with U.S. Army MARS for a number of years.

100. Post-arrest, the petitioner made exceptional rehabilitative efforts, including weekly participation in Sexaholics Anonymous, Sex and Love Addicts Anonymous, Celbrate Recovery (where petitioner worked his way up to a leadership position and began counseling others through their addictions), Life's Healing Choices (an outgrowth of Celebrate Recovery), and spent many hours in private therapy at his own expense at a cost of $50,000.00.

101. The petitioner points to (page 23, line item 87) and the case of United States v. Singh, No. 16-1111-cr, (2nd Cir., 2017). Judge Denny Chen cited Jenkins in Singh's case to strike down the sentence, stating it was an example of "substantive unreasonableness", further stating that the opinion in the Jenkins court "essentially functions as a manifesto on the appropriate judicial temperament with which to approach sentencing - one that emphasizes the important role of mercy and compassion in such proceedings".

102. A 327-month sentence for a chronically ill 60-year-old defendant shows no mercy or compassion, considering the nationally published sentencing statistics published by the Bureau of National Affairs which cites Jenkins (supra), which states the "typical sentence of persons who engage in sex with a minor (137 months), produce child pornography (136 months), or possess, but do not distribute child pornography (52 months)". If the petitioner's attorneys had performed any research at all, they would have discovered these statistics, and would have appropriately advised the petitioner. If the petitioner had been convicted of all three of these crimes, and received consecutive sentences, his sentence would still have fallen short of the draconian sentence imposed in the instant case.

103. The Sentencing Commission produced a report to Congress effectively disavowing the § 2G2.2 Guideline due to it's failure to meaningfully account for differences in culpability. (See the above cited Bureau of National Affairs newsletter, published May 3, 2017.)

104. The Fourth Circuit, Honorable Judge R. Bryan Harwell, "failed to perform an analysis of the low likelihood of recidivism by an older defendant. This reduced risk of recidivism has long been known to be real..." Jenkins, supra.

105. The U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2016, states: "Only 23.7% of defendants in fraud cases are sentenced within the guidelines, 43.5% receive downward departures based on an application of the factors in 18 USC § 3553(a), and 69.4%

of defendants are not being sentenced within the Guidelines.

106. The petitioner's sentence substantially fails to consider § 3553(a) factors, and the plea unlawfully garnishes his disability pension in contravention of South Carolina law § 15-41-30(10)(E) which states in relevant part:

> The following real and personal property of a debtor domiciled in South Carolina is exempt from attachment, levy, and sale under any mesne or final process issued by any court or bankruptcy proceeding; the debtors right to receive payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service. [emphasis added for clarity]

The petitioner's attorneys unethically coerced him into signing a plea that was in violation of statutory law. The garnishment of the petitioner's disability pension for restitution is unlawful.

107. The petitioner's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment and excessive fines because counsel, in contravention of the Sixth Amendment's guarantee of effective assistance of counsel, misadvised him concerning the length of sentence and restitution. Therefore the petitioner's sentence should be vacated as unconstitutional.

ISSUE FOUR SUMMARY

108. The search executed upon the petitioner's home relied on a search warrant that violated the particularity clause of the Fourth Amendment of the United States Constitution. The petitioner's attorneys were ineffective at communicating the requirement that the court apply the exclusionary rule. The circumstances make the conviction unconstitutional because the guilty plea relied on the premise that unconstitutionally obtained evidence would be used against the petitioner if he chose to go to trial, which made the plea coerced, and thus making the petitioner's conviction unconstitutional.

STATEMENT OF THE CASE (ISSUE FOUR)

109. The fact that the government so fortuitously benefitted from it's own wrongdoing eviscerates the fundamental protections provided to it's citizens who rely on the Fourth Amendment to protect them from just such unconstitutional invasions as occurred in the petitioner's case. The Honorable Judge R. Bryan Harwell created a "totality of the circumstances" standard to disembowel the Fourth Amendment rights of the petitioner, depriving him of his Constitutional right to be free from flagrant execution of a warrant that the serving officer knew (based on his own admission on the witness stand) failed the Fourth Amendment's particularity test, and should have refused to serve.

110. The search warrant served upon the petitioner's residence failed the particularity test because it was intentionally vague and ambiguously worded so as to allow invading officer to cast an impermissibly wide net by performing a "general search" of the type prohibited by the Constitution.

111. The verbage used to describe what searching officers could seize was: "any and all documents, including, but not limited to", followed by a laundry list of broad categories. No specific item was listed for seizure, and no affidavit accompanied the search warrant. The law requires the list of items to be seized to be incorporated into the

warrant, or listed on an accompanying affidavit. Invading officers possessed neither. Officers listed the items they seized as they went along searching, seizing what they wished, creating the list as they went along. The description of items to be seized in the warrant was so broad, officers were not constrained to seizing only items related to probable cause. In fact, several items unrelated to probable cause were seized because of the non-compliant warrant's defective description, which failed to comply with the Fourth Amendment's specificity clause.

112. The phrase "any and all documents" allowed seizing officers to take the petitioner's collection of antique bayonets, a .45 caliber Para-Commander Wart Hog handgun, and a Kel-Tech 9mm handgun, and a 20mm chrome-plated trophy "bullet" (inert). They also seized unrelated medical and financial records, personal correspondence, commercially produced music, movie, and software disks, all of which were clearly labelled and unrelated to probable cause. Some of these items were blatantly stolen, for they were not listed in the inventory of items seized.

113. Officers searched rooms that were not described in their warrant, and "tossed" contents of furniture that were clearly unrelated to probable cause, such as the petitioner's wife's dresser.

114. A hand-written inventory was left on the dining room table in the petitioner's home, but it was easily discernible that the list consisted of hand-written description of items seized as the search was being conducted. None of the items were listed in such a fashion on the search warrant itself, and no search warrant affidavit existed. It was completely clear that a "general search" of the type prohibited by the U.S. Constitution had taken place, because the search warrant was so inadequately written that it failed to describe with particularity what articles officers were allowed to seize.

115. "The immunity from unreasonable searches and seizures has been denied the accused in a criminal prosecution in a federal district court." Weeks v. United States,

232 US 383, (1914).

116. "The Fourth Amendment does not allow such a search warrant for the search and seizure of obscene materials because it would leave what is to be seized entirely to the discretion of the official conducting the search to decide what materials are likely to be obscene and to accomplish the seizure of such items; the Fourth Amendment does not countenance open-ended search warrants, to be completed, in the sense of specifying items to be seized as the search is being conducted and while items are being seized, or after the seizure of the items has been carried out." Lo-Ji Sales, Inc. v. New York, 442 US 319, 60 L. Ed. 2d 920 (1979).

117. Detective Frebowitz "supplemented" his search warrant with oral testimony to the magistrate judge issuing the search warrant regarding what items he wanted to seize, however, the purpose of a search warrant is to notify the person being searched of precisely what officers are allowed to seize. It is to place limits on what officers may take, and the victim of a search is unable to rely on an officer's private testimony to a magistrate to inform him of what officers have permission to sieze. The purpose of the warrant or the supporting affidavit is to describe what officers may seize to the homeowner. Detective Frebowitz's warrant failed to incorporate a list of items to be seized, and he possessed no particularized list by way of supporting affidavit of items to be seized at the time the search was conducted.

118. "Total suppression may... be required even where a part of the warrant is valid (an distinguishable) if the invalid portions so predominate the warrant that the warrant in essence authorizes a general, exploratory rummaging in a person's belongings. Common sense indicates that the court must evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant. The Fourth Amendment Particularity requirement assures the subject of a search that a magistrate has duly authorized the officer to conduct a search of a limited scope [emphasis added]. This substantive right is not protected when the officer fails to take the time to glance at the authorizing document and detect a glaring defect that is of Constitutional magnitude." Cassidy v. Goering, 567 F.3d 628, (10th Cir. C. of A., 2009).

119. "A lawful search warrant leaves nothing to the discretion of the officer executing the warrant." [Emphasis included from original document.] Horton v. California, 496 US 128 (1990); Maron v. United States, 275 US 192, (1927); Andresen v. Maryland, 427 US 463, 480 (1976); United States v. Shoffner, 826 F.2d 619, 630-31, (7th Cir. 1987).

120. The description of items to be seized from the petitioner's residence was described in "boiler-plate" language, likely designed to be overtyped by a specific description a seizing officer was intended to search for, but it was not (replaced) with specifics.

121. "It would be apparent to a reasonable officer that a listing of general categories to be seized even though further details are available violates the Fourth Amendment's specificity requirement." Wheeler v. City of Lansing, 660 F.3d 931, (6th Cir. C. of A., 2011).

122. "Broadly worded categories of items to be seized are permissible under the Fourth Amendment if [emphasis added] the category is "delineated in part by an illustrative list of seizable items'". United States v. Bethel, 245 Fed. Appx. 460, (6th Cir. C. of A., 2007); United States v. Riley, 906 F.2d 841, 844, (2nd Cir. 1990).

123. No illustrative list existed when the search warrant was served. The only list that exists was the one created by officers as they went along, searching and seizing items as they saw fit.

124. "Many items seized by officers were "otherwise lawful objects'". United States v. Lyles, 2017 U.S. Dist. LEXIS 193030 (4th Cir., (2017).

125. A reasonably well-trained officer should recognize when a warrant is non-compliant with the particularity requirements of the Fourth Amendment, and would not execute such a deficient warrant. Detective Frebowitz, the serving officer, stated in his testimony on the witness stand during the suppression hearing that he was not used to drafting warrants as required by the Horry County Police Department's

computer system. He had been trained as a Washington, D.C. police officer, and he stated that warrants there required much more specificity as to what was to be seized. He stated that the H.C.P.D.'s computer system template did not permit him to craft a warrant that would comply with the requirements of the particularity clause of the Fourth Amendment. This was an admission that Detective Frebowitz was aware his warrant was likely invalid, but he served it anyway. For this reason, the Honorable Judge R. Bryan Harwell created a "totality of circumstances" standard to relieve his court of the burden of enforcing the Fourth Amendment, and this "plain error" is subject to correction in courts of appeal.

126. During the search, officers applied the extremely broad brush the overly-broad search warrant gave them to seize whatever they chose, even items unrelated to probable cause. As an example, see the items listed at #112. The prosecution has not denied that any of these items were seized in the seven years this case has been litigated. Only one of the items listed appeared in the inventory. All other items seem to have been stolen by the officers.

127. Items seized contained clearly-labelled, factory-produced computer disks with music, movie, software content, financial records, medical records, and other documents, and officers performed a general rummaging through the petitioner's and petitioner's wife's personal belonging, though his wife was not a suspect.

128. The petitioner believes the Fourth Circuit district court made a ruling in "plain error" when it admitted the unconstitutionally seized evidence.

> "A home search pursuant to a warrant that failed to describe persons or things to be seized held to violate the Fourth Amendment's particularity clause." United States v. Bynum, 293 F.3d 192, 195, (4th Cir. 2002).

The Bynum court further states that:

> "A reasonably well-trained officer would have known that the warrant was illegal despite the magistrate's authorization."

Because of this holding, the warrant could not have been served in "good faith" upon the petitioner's residence.

129. The petitioner believes the Fourth Circuit district court committed "plain error" in failing to suppress the unconstitutionally gathered evidence because Detective Frebowitz's warrant was drafted so insufficiently that he should have known that a search relying on such a document would render his search illegal. No reasonable person would say that invading officers did not exceed the scope of a search warrant authorized by the Fourth Amendment. Officers simply got "caught up in the moment" and failed to follow their own rules, feeling they were above the law due to the nature of the accusations against the petitioner. Detective Frebowitz didn't mind violating the Fourth Amendment and he didn't mind assaulting an innocent bystander or breaking into the petitioner's residence unlawfully. The petitioner was away, so he could take whatever he wanted from the petitioner's home, legal or not.

130. "A home search pursuant to a warrant that failed to particularly describe persons or things to be seized held to violate the Fourth Amendment; and the agent who led the search was not entitled to qualified immunity. A uniformly applied rule [emphasis added] is that a search conducted pursuant to a warrant that failes to conform to the particularity requirement of the Fourth Amendment is unconstitutional [emphasis added]. Under the Fourth Amendment, a warrant may be so facially deficient in failing to particularize... the things to be seized that executing officers cannot reasonably presume the warrant to be valid." United States v. Leon, 468 US 897, 82 L. Ed. 2d 677 at 681 (1984); Groh v. Ramirez, 540 US 551, 157 L. Ed. 2d 1068 at 1075 (2004).

131. "The search warrant should have been invalidated because it was facially deficient, because it failed to particularize the things to be seized, such that the executing officer could not have reasonably presumed it to be valid." United States v. Terveus Hyppolite, 65 F.2d 1151 (4th Cir. C. of A., 1995).

132. "When invading officers flagrantly seized items from a suspect's home that were not described in their search warrant, the suspect's Fourth Amendment rights were violated, which required suppression of all the evidence." [emphasis added] United States v. Medlin, 842 F.2d 1194, 1198, 1199, (10th Cir. C. of.A., 1988).

133. "The Fourth Amendment is enforceable against the states by the same sanction of exclusion of evidence as is used against the federal government, and through the application of the same Constitutional standard prohibiting [emphasis added] "unreasonable searches and seizures." Ker v. California, 374 US 23, 47, 10 L. Ed. 726 (1963). "The Fourth Amendment forbids every search that is unreasonable."

134. "Any evidence seized from the defendant in a criminal case in violation of his rights under the Fourth Amendment, prohibiting unreasonable searches and seizures, is inadmissible at his trial, and the fruits of such evidence are inadmissible as well." Alderman v. United States, 394 US 165, 22 L. Ed. 2d 176, (1969).

135 When the Honorable Judge R. Bryan Harwell admitted the evidence in the petitioner's case, he did not rule that the search didn't violate the Fourth Amendment rights of the petitioner, rather, his ruling admitted the evidence based on a created standard of "the totality of the circumstances". The petitioner believes this was an abuse of judicial discretion because of the overwhelming number of examples of case law that show that Fourth Amendment violations prohibit admission of evidence and the fruits thereof. It appears to this petitioner that Judge Harwell admitted the evidence based on the success of the search, however, the Fourth Amendment prohibits such a ruling.

136. "In order to prevail with respect to a Fourth Amendment clain, the complainant need prove only that a search or seizure was illegal, and that it violated his reasonable expectation in the item or place at issue." Kimmelman v. Morrison, 477 US 365 (1986).

137. In the petitioner's case, Judge Harwell stated that the sensitive nature of the search justified the witholding of the warrant, though officers were asked to show one to prove authorization to search.

"Search of the defendant's home was suppressed under the Fourth Amendment because the search was unreasonable under the circumstances since the agent refused to present the warrant without justification." United States v. Terry Thompson, 667 F. Supp. 2d 758 (6th Cir. 2009).

138. The search of the Thompson (supra) residence was for the same type of items the petitioner's home was searched for, so the sensitivity of the subject of the search is not a valid reason for officers to withold the search warrant from the petitioner (or his fully authorized agent/representative, Mr. LeRoy Marcotte). Facts in this case show that at the time the search was executed, officers refused to show a warrant providing authorization to search. The facts also support that Judge Harwell created his own standard to admit unconstitutionally seized evidence for use by the prosecution against this petitioner.

139. "Officers without a valid search warrant may not search a house for physical evidence or incriminating informaiton whether the owner is present or away." Alderman v. United States, 394 US 165 (1969).

The petitioner was 300 miles away when the search took place. The invalid warrant made the search unconstitutional.

140. "A search that is unlawful at it's inception is not validated by what it turns up. Evidence seized during an unlawful search cannot constitute proof against the victim of the search; the exclusionary prohibition extends as well to the indirect as well as the direct products of such an invasion. The essence of the Constitutional provision prohibiting unreasonable searches and seizures is not merely that evidence so acquired shall not be used before a court, but that it shall not be used at all." Weeks v. United States, 232 US 383 (1914).

141. U.S. Attorney William E. Day threatened that the unconstitutionally obtained evidence would be used against the petitioner if he went to trial. This forced and coerced the petitioner to accept a guilty plea. Thus, when the U.S. Attorney and the petitioner's own attorneys used the unlawfully obtained evidence to coerce the petitioner into pleading guilty, they violated this petitioner's Fourth, Sixth, and Fourteenth Amendment rights.

142. The petitioner has been denied immunity from unreasonable searches and seizures in a criminal prosecution in contravention of Weeks (supra). The search and seizure had no limits placed upon it, and included the theft of some of the petitioner's lawfully-owned property.

143. The petitioner should be allowed to withdraw his guilty plea, have all evidence suppressed, and all charges dropped and expunged because his conviction relied on unconstitutionally obtained evidence in violation of his Fourth Amendment rights, and petitioner's attorneys were ineffective in defending him in violation of his Sixth Amendment right to effective assistance of counsel.

ISSUE FIVE SUMMARY

144. The petitioner was deprived of his Fifth and Fourteenth Amendment due process rights by the Fourth Circuit District Court when the court permitted the U.S. Attorney's office to file an untimely response and summary judgement in contravention of existing case law, Fed. R. Civ. P. Rule 6, and Fed. R. Crim. P. Rule 45, creating a jurisdictional defect.

STATEMENT OF THE CASE (ISSUE FIVE)

145. The petitioner timely filed a motion to strike the government's untimely-filed response to his motion under 28 USC § 2255. The government's response was four days beyond the deadline-to-file, and further, addressed a stale filing.

146. Fed. R. Civ. P. Rule 6 and Fed. R. Crim. P. Rule 45 require the courts to sua sponte strike untimely filed motions where there has been no determination of excusable neglect, however, instead of striking the government's untimely-filed motion, Judge Harwell extended the time to file by 38 days with no determination made, and no request by the government to extend the time. This prejudiced the petitioner, and caused a mandatory and jurisdictional defect to occur. This prejudices the petitioner because he is required to comply with the court's rules, but the government was allowed to trample the court's rules with impunity.

147. "Relief from an untimely filed response is mandatory and jurisdictional, absent a hearing and a determination of excusable neglect." Dread v. Maryland

State Police, 1994 U.S. App. LEXIS 11244 (4th Cir. C. of A., 1994).

148. "The tardy party must make some showing as to why (he) could not have filed (his) action within the balance of the limitations period." Harvey v. New Bern Police Department, 813 F.2d 652 at 654 (4th Cir. C. of A., 1987).

149. "Filing only a day or two after the... limitations period does not excuse the limitations period unless there is a good reason for being late." Taylor v. United States Postal Service, 1990 U.S. App. LEXIS 27269, (4th Cir. C. of A. 1989).

150. Judge Harwell's response to this petitioner regarding the late government filing was "If the response is late, it is only late by a day or two". The timely filing rule does not permit such a response, because the limitations period is mandatory and jurisdictional. It would be an abuse of judicial discretion to allow this response to stand.

"Courts have no authority to create equitable exceptions to jurisdictional rules." Keith Bowles v. Harry Russell, 551 US 205 at 214, 168 L. Ed. 2d 96, (2007).

151. "Timely filing is an issue that courts consider when deciding whether or not an appeal passes jurisdictional nexus. When notice of appeal from a final order dismissing a motion to vacate a sentence of a district court was not timely filed, the appeal would be dismissed for lack of jurisdiction." Rubin v. United States, 488 F.2d 87, (5th Cir. C. of A., 1973).

152. "We applied the virtually identical language of Fed. R. Civ. P. Rule 6(b). Under that Rule, as under this one, a court may not permit untimely filing [emphasis added] unless it finds as a substantive matter, that failure to file on time was the result of excusable neglect. ...We examined the reasons for the movant's failure to make a timely filing. Nowhere in our discussions did we mention the equities or consequences of the movant's failure to file. ...The Rule, read in it's entirety, establishes that the excusable neglect determination requires inquiry into causation rather than consequences. Unless the failure to act was the result of excusable neglect, relief is unavailable." Lujan v. National Wildlife Federation, 497 US 871 (1990).

153. The Rules (Civ. 6 and Crim. 45) are neither vague nor ambiguous. A court may not sua sponte extend time to file after the passing of the original deadline. It must do so before the deadline expires. In the petitioner's case, the deadline was May 15, 2018. The response from the U.S. Attorney was filed May 19, 2018, four days beyond the deadline.

154. The sua sponte equitable tolling abused the court's discretion, prejudicing the petitioner and depriving him of equal protection and due process.

155. Because untimely filing is a jurisdictional defect, the petitioner prays that the Honorable Supreme Court will aid him in enforcing his Constitutional rights.

> "A jurisdictional defect may be asserted at any stage of a defendant's criminal proceedings." United States v. Meacham, 626 F.2d 503, 510 (5th Cir. 1980) "A guilty plea does not bar a defendant's challenge... since a guilty plea does not waive jurisdictional defects." United States v. Harper, 901 F.2d 471, 472 (5th Cir. 1990)

156. "It is well-established, irrespective of the result that a court reaches, that when a court misapprehends or fails to apply the law with respect to underlying issues, it abuses it's discretion." Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 446 (4th Cir. 2003); United States v. Brown, 415 F.2d 1257, 1266 (11th Cir. 2005).

157. When a judge abuses his discretion, it prejudices a defendant.

158. The petitioner asserts that his due process rights have been unconstitutionally trampled by the Fourth Circuit District Court, and the Fourth Circuit Court of Appeals in denying to strike the government's untimely filed response to his motion under 28 USC § 2255 when it was four days late, and no excusable neglect determination was made pursuant to Fed. R. Civ. P. Rule 6 and Fed. R. Crim P. Rule 45. The petitioner asks this honorable court to appropriately strike the government's response and grant him a certificate of appealability, a certificate of innocence, and other relief as is appropriate.

REASONS FOR GRANTING THE PETITION

The petitioner prays that this Honorable Court will give ear to his petition. He holds a belief that he has been unjustly treated by his two attorneys, the court, and the prosecution, by having his Constitutional rights trampled in multiple ways. The petitioner's two attorneys prevented exculpatory facts from being entered into the record, causing the complete breakdown of this petitioner's defense, sabotaging his due process, and causing him to receive a draconian sentence in excess of established norms. The petitioner's serious medical conditions make it unlikely that he will have the opportunity to return to his family absent an action to correct the numerous instances of manifest unfairness in this case, at least not alive. The petitioner sets forth in this motion facts which should lead the court to draw the logical conclusion that his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated before any hearings even occurred, and petitioner has already proven in a civil case that his First and Fourteenth Amendment rights were violated as a pre-trial detainee. These facts draw into question the fundamental fairness of the entire process of this case. Statute violations show the petitioner's Constitutional rights were violated by police during their search warrant execution, and by the overly-broad description of items they wished to seize. Hearing this case will re-enforce the Constitutional rights of all American citizens, who rely on the courts to prevent Constitutional violations which seem to occur more and more frequently based on a prosecutor's opinion that a crime has been committed and that someone must be imprisoned, Constitutionally or not. The petitioner only asks this Honorable Court for a fair chance that he has been denied to demonstrate that the facts in this case call into question the just, reliable process of his case and show that this petitioner's Constitutional rights have been denied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: September 11, 2018

Resubmitted Nov. 21, 2018 with corrections per Scott S. Harris / Jacob Levitan