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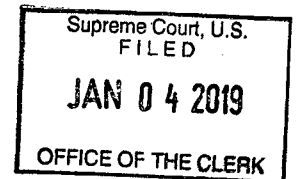
No. USCA 4 case No.

18-6994

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Ndokley Peter Enow — PETITIONER
(Your Name)

vs.

Rickey Foxwell, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals For The Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ndokley Peter Enow
(Your Name)

RCI, 18701 Roxbury Road
(Address)

Hagerstown, Md 21746
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) Did the trial court err by admitting into evidence of the illegally obtained wiretapped tape recording of the defendant's oral conversations with the Montgomery County Police (MCP) undercover agent?
- 2) Was the evidence sufficient to show that the defendant was the solicitor, or was he merely a solicitee who acquiesced to the state agent solicitation?
- 3) Did the guilty plea vider establish that the defendant had the requisite understanding of the nature and elements of the crime of solicitation to commit first degree murder?
- 4) Did the trial court err in determining that the defendant's guilty plea was knowingly and voluntarily entered with understanding of the true nature of the charges and the consequences of the guilty plea?
- 5) Did the trial court err in depriving the defendant of his constitutional rights to all post conviction rights including the right to file a motion to reconsider and request a three-judge panel or appeal?
- 6) Does the use of solicitation as a common law crime violate the 8th and 14th amendment of the United States (U.S.) Constitution?
- 7) If the crime of solicitation occurred, did it occur at a time prior to the time charge in the indictment?
- 8) Did the trial court err in charging the elements of the solicitation crime?
- 9) Was the alleged solicitation crime too vague and indefinite to support a conviction?

LIST OF PARTIES

- ☒ 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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TABLE OF AUTHORITIES CITED

CASES

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STATUTES AND RULES

Title 18 U.S.C. §§ 2510 - 2522
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md. rule 4-611, md. rule 8-204, md. rule 4-345

OTHER

md. crim. Law §§ 2-201 and 2-208
CJP §§ 10 - 401 et seq.

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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 United States district court appears at Appendix B 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 C 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12/04/2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 01/02/2019, and a copy of the order denying rehearing appears at Appendix D.

☐ 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 06/23/2017.
A copy of that decision appears at Appendix E.

☐ 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

This case involves Amendment XIV to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States (U.S.), and subject to the jurisdiction thereof, are citizens of the U.S. 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 U.S.; 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.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Amendment is enforced by Title 28 U.S.C. § 2254. Article I, § 9 (2) of the United States Constitution

Statement of The Case

1. That on 06/06/2014, the petitioner was entrapped by a Montgomery County Police (MCP) Confidential Informant (CI) Michael Faison, and was illegally wiretapped by an MCP undercover agent, Detective Bullock, ID# 1426, at the 100 Block University Boulevard, West, in Silver Spring, Maryland, without probable cause, or a court order pursuant to Maryland rule 4-611 and Maryland Courts and Judicial Proceedings (CJP) §§ 10-406 and 10-408, or Title 18 U.S.C. §§ 2516 and 2518, or the petitioner's consent in violation of the Maryland and federal wiretap statutes, under CJP §§ 10-402 (a)(c)(3) and 10-406, or Title 18 U.S.C. §§ 2511(c)(2)(C) (d). See (Appx E - Plea Proceeding transcript page 7 and page 21-25).
2. That on 06/06/2014, after the illegal wiretapping sting operation, the petitioner was arrested without probable cause, or a warrant in violation of the Fourth amendment to the U.S. Constitution or CJP §§ 10-401(11) and 10-406, or Title 18 U.S.C. §§ 2510(7) and 2516 near University Boulevard, East, and Piney Branch Road, in Silver Spring, Maryland. See (Appx E - District court ~~do~~cket entry under case No. 3D00318321 and MCP police report #14026856).
3. That on 06/07/2014, the self-impose complainant, Detective Michael Carin, ID# 9448, filed unfounded

criminal charges against the petitioner in the District Court for Montgomery County, Maryland, under district court case no. 3D00318321 without probable cause and charged the petitioner with two counts of felony offenses: (1) solicitation to commit first degree murder, and (2) attempted first degree murder without a weapon or the alleged victim, at the crime scene. See (Appx-F - District Court docket entry under case no. 3D00318321 and Tracking no. 146337232635).

4. That on 06/11/2014, the petitioner retained defense counsels, Howard R. Chelis, ESQ., Maryland Bar ID# 14189 and Philip H. Armstrong, ESQ., Maryland Bar ID# 1531 under District Court case no. 3D00318321 and defense counsel, Howard R. Chelis, ESQ., entered his appearance in the District Court for Montgomery County.

5. That the petitioner never had District Court preliminary hearing pursuant to Maryland rule 4-213 or pretrial proceedings and the case was forwarded to the Circuit Court for Montgomery County, Maryland. See (Appx-F - District Court docket entry under case no. 3D00318321 and tracking no. 14633723235) (Circuit Court case no. 125462-C).

6. That on 07/31/2014, the petitioner was illegally indicted under indictment no. 125462 by the Montgomery County grand jury pursuant to

Maryland rule 16-107, without probable cause and charged the petitioner with two counts of common law charges: (1) solicitation to commit first degree murder, and (2) solicitation to commit first degree assault, using an illegally obtained wiretapped evidence in violation of CJP §§ 10-405(a) and 10-407(c) or Title 18 U.S.C. §§ 2515 and 2517(3). The petitioner was indicted using a fabricated name known as Ndokey Peter Enow, with date of birth (DOB) 09/22/1974, that the prosecutor knew was only supported by false evidence and bind to the petitioner's natural body, when in fact, the petitioner's true identity is Ndokey Peter Enow, with DOB 09/22/1976. See (Appx-F-District Court docket entry [under case no. 3D00318321 and Circuit court docket entry # 1-7 and Plea Proceeding transcript page 7 and page 21-31).

7. That on 08/14/2014, defense counsel, Howard R. Cheris, ESQ., entered his appearance in the Circuit court for Montgomery county, Maryland under case no. 125462-C and requested for Speedy trial pursuant to Maryland rule 4-271 and discovery material pursuant to Maryland rule 4-263, and filed defendant's motion pursuant to Maryland rule 4-252 including points and authorities. See (Appx-F-Circuit Court docket entry # 12-13).

8. That on 10/14/2014, the State's Attorney filed State's opposition to defendant's Omnibus pretrial motions. See (Appx-F- Circuit court docket entry # 17).
9. That on 12/05/2014, the defense counsel, Philip H. Armstrong, ESQ., withdrew the petitioner's defendants pretrial motion pursuant to Maryland rule 4-252 filed under docket # 12 without consulting with the petitioner nor having him in court during pretrial hearing on motion to suppress, and status hearing in violation of Maryland rule 4-231. See (Appx-F- Circuit court docket entries # 22 - 29).
10. That on 09/09/2015, the petitioner was induced and coerced under duress of iron chains and shackles by the prosecution, the trial court and the defense counsels by deception of extrinsic fraud to plea guilty involuntarily and unintelligently in violation of Maryland rule 4-242(c) and the due process clause of the fourteenth amendment to the U.S. Constitution, CJP §§ 10-405(a) and 10-407(c), or Title 18 U.S.C. §§ 2515 and 2517 (3), Maryland rules 4-271, rule 4-202(a), Md. Crim. Proc. § 6-103, and Md. Crim. Law Art. §§ 2-201(b) and 2-208. See (Appx-E- Plea proceeding transcript page 7-20 and page 21-31); (Prosecution Plea offer letter dated: 12/05/2014).

11. That on 02/27/2015, the circuit court judge, Honorable Steven G. Salant, illegally sentenced the petitioner without competent jurisdiction to a Split Sentence of forty (40) years all suspended but 20-year term imprisonment with five years supervised probation above bar to the Maryland Division of Correction (DOC) commencing 06/07/2014, in violation of the Maryland Sentencing Guidelines pursuant to Md. Crim. Proc. § 6-216 and Md. Crim. Law Art. § 14-102; Maryland rule 4-345(a); CJP §§ 10-401(12) and 10-406, or Title 18 U.S.C. §§ 2510 (9)(a)(b) and 2516, and the due process clause of the fourteenth amendment to the U.S. Constitution, see (Appx-F-Circuit court docket entry # 45-47).
12. That on 03/23/2015, the petitioner filed an application for leave to appeal under Appeal No. 0178 to the Court of Special Appeals of Maryland pursuant to Maryland rule 8-204 and CJP § 12-302(e); see (Appx-F-Circuit court docket entry # 53).
13. That on 07/23/2015, the petitioner filed defendant's petition for Maryland's Uniform Post Conviction relief in the circuit court for Montgomery County, Maryland pursuant to Md. rule 4-401 through 4-408 and Md. Crim. Proc. §§ 7-101 et seq. see (Appx-F-Circuit court docket entry # 72).
14. That on 08/12/2015, the petitioner's defendant's application for leave to appeal to the Maryland

court of Special Appeals pursuant to Maryland rule 8-204 and CJP §12-302(c) under docket no. 0178 was summarily denied. See (Appx-F-Circuit court docket entry # 87).

15. That on 10/19/2016, the petitioner had a post conviction hearing in the circuit court for montgomery county, maryland, pursuant to maryland rule 4-406 and the petitioner presented newly discovered evidence pursuant to maryland rule 4-263. See (Appx-F-Circuit court docket entry # 133 - 140).

16. That on 12/28/2016, the petitioner's defendant's petition for post conviction relief under the maryland's uniform post conviction Procedure Act, Art. 27, 55645 A to J was denied. See (Appx-F-Circuit court docket entry # 141),.

17. That on 01/13/2017 the petitioner filed defendant's application for leave to appeal the denial of post conviction relief to the Maryland court of Special Appeals pursuant to maryland rule 4-408 and rule 8-204, and CJP §12-302(c). See (Appx-F-Circuit court docket entry # 142); Appeal No 02510

18. That on 06/23/2017, the petitioner's defendant's application for leave to appeal the denial of post conviction relief was summarily denied, see (Appx-F-Circuit court docket entry # 153).

19. That on 07/05/2017, the petitioner filed defendant's

petition for federal writ of habeas corpus relief under Title 28 U.S.C. § 2254 in the U.S. District Court for the District of Maryland, see (Appx-B - Opinion of the U.S. District Court).

20. That on 08/07/2017, the U.S. District Court issued an order to show cause against the respondents pursuant to rule 5(e) (2012) governing Title 28 U.S.C. § 2254 cases in the U.S. District Court under civil action case no. PWG-17-01912, see (Appx-B).
21. That on 09/18/2017, the respondents filed an answer to the order to show cause date 08/07/2017.
22. That on or about 09/21/2017 the petitioner filed a traverse in opposition to the respondents answer.
23. That on 07/23/2018, the U.S. District Court for the District of Maryland denied the petitioner's petition for writ of habeas corpus relief and declined to issue a certificate of Applicability pursuant to Title 28 U.S.C. § 2253(c)(2) (2012).
24. That on 08/01/2018, the petitioner filed application for a Certificate of Applicability (COA) with the U.S. Court of Appeals for the fourth circuit under no. 18-6994.
24. That on 12/04/2018, the U.S. Court of Appeals for the fourth circuit denied the petitioner's application for COA and dismissed the appeal, see (Appx-A - Opinion of the U.S. Court of Appeals for the fourth circuit).

25. That on 12/14/2018, the petitioner filed a petition for rehearing en banc pursuant to Fed. R. App. P. 41(d)(1).

26 That on 01/02/2019, the petitioner's petition for rehearing en banc was denied, see (Appx-D-Order for Petition for rehearing en banc to the U.S. Court of Appeals for the fourth circuit).

Reasons for Granting The writ

This case presents a fundamental question of the interpretation of this court's decisions in *Henderson v. Morgan*, 426 U.S. 637, 645 N.13 (1976) (quoting *Brady v. U.S.*, 397 U.S. 742, 755 (1970)). The questions presented are of great public importance because they affect the administration of the criminal justice systems in all 50 states including the District of Columbia. The issue's importance is enhanced by the fact that the lower courts in this case at bar have seriously misinterpreted the Supreme court case in *Henderson* and *Brady*.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, this Honorable court en banc may not grant relief on a claim adjudicated by a state court unless the adjudication resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal laws, as determined by the U.S. Supreme Court, or --- resulted in a decision that was

based on an unreasonable determination of the facts in light of evidence presented in the state court criminal proceeding. See 28 U.S.C. § 2254(d)(1) & (2).

A state court's decision is deemed contrary to clearly established federal law if it relies on legal rules that directly conflict with prior holdings of the U.S. Supreme Court, or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts. See *U.S. v. Crabtree*, 545 F.3d 887, 888 (4th Cir. 2009) (quoting *Katz v. U.S.*, 389 U.S. 347, 359 (1967) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000))). A state court's decision constitutes an unreasonable application of clearly established federal law if it is objectively unreasonable. See *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (quoting *Williams*, 529 U.S. at 409)).

When the U.S. District Court denies Habeas Corpus relief on the merit, the petitioner must satisfy that this standard by demonstrating that reasonable jurists would find that the U.S. District Court's assessment of the constitutional claims is debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-EL v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the U.S. District Court denies Habeas Corpus

relief on procedural grounds, the petitioner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. See *Slack*, 529 U.S. at 484. As explained below, when assessed under 28 U.S.C. § 2254(d)(1)(2), as construed in *Williams* and its progeny, the petitioner's petition for federal writ of Habeas Corpus relief should be granted for reasons stated as follows;

A Whether The Indictment Was Based on an
Illegal Wiretap And False Evidence

A defendant who pleaded guilty in a state court criminal proceeding did not forfeit his or her rights to pursue constitutional or statutory claims in federal habeas corpus relief under Title 28 U.S.C. § 2254 proceeding where the federal wiretap statute permits the petitioner to challenge the legality of electronic surveillance investigation and grand jury's hearing and indictment of the petitioner's intercepted oral conversations as testimony. See Title 18 U.S.C. §§ 2515 and 2517 (3) (citing *In re Grand Jury Proceedings (Ghibaudy)* 757 F.2d 108, 114-15 (7th Cir. 1984) (quoting *Geibard v. U.S.*, 408 U.S. 41, 47, 49-50 (1972)). Although the fourth Amendment exclusionary

rule may only be invoked in criminal trial, see *U.S. v. Calandra*, 414 U.S. 338, 349-50 (1974) (evidence obtained in violation of the 4th Amendment is admissible in grand jury proceedings), the federal wiretapping statutory exclusionary rule may be invoked in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, this State, or a political subdivision thereof, if the disclosure of that information or evidence derived therefrom maybe in violation of this Chapter. See Title 18 U.S.C. § 2518(10)(a) (citing *U.S. v. Crabtree*, 565 F.3d 887, 888 (4th Cir. 2009) (quoting *Berger v. New York*, 388 U.S. 41, 63 (1967))).

As in this case at bar, On June 06, 2014, the petitioner was entrapped by MCP Confidential informant, Michael Faison, and illegally wiretapped by MCP undercover agent, Detective Bullock, ID# 1426, at the 100 block University Boulevard, West, in Silver Spring, Maryland, without a probable cause, or a court order pursuant to Maryland rule 4-611 and Title 18 U.S.C. § 2518, or the petitioner's consent in violation of the federal wiretap statute, under Title 18 U.S.C. §§ 2511(a)(2)(C)(d) and 251b. Furthermore, on July 31, 2014, the petitioner was illegally indicted by the Montgomery county grand jury pursuant to Maryland rule

16-107 and charged the petitioner with two counts of common law offense: (1) solicitation to commit first degree murder, and (2) solicitation to commit first degree assault without probable cause using the illegal obtained wiretapped tape recording of the petitioner's conversations with the MCP undercover agent in violation of Title 18 U.S.C. §§ 2515 and 2517(3), Md. Crim. Law Art. §§ 2-201(b) and 2-208, and Maryland rule 4-202(a). See (circuit court docket entry #1-7 and Plea Proceeding transcript page 7 and page 22-31).

Title 18 U.S.C. § 2515 provides that whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. See *U.S. v. Crabtree*, 565 F.3d at 888. To determine whether the disclosure of the intercepted wire or oral communication by the MCP officials is in violation of this chapter, it is necessary to look at Title 18 U.S.C. §§ 2511(a)(2)(C)(d) and 2517(3), the former makes it

unlawful for any person or law enforcement official to intentionally disclose to any other person or third party, the contents of a wire or oral communication knowingly or having reasons to know that the interception of a wire or oral communication was in violation of this chapter. See *Gelbard v. U.S.*, 408 U.S. at 50 (quoting *Katz v. U.S.*, 389 U.S. 347, 359 (1967)).

Furthermore, under Title 18 U.S.C. § 2517(3), however, provides in relevant part, that any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceedings. See *In re Perisco*, 491 F.2d 1156, 1161 (2d Cir. 1974) (quoting *Berger v. New York*, 388 U.S. at 63). When the evidence of "offenses other than those specified in the order of authorization" was submitted to the grand jury without prerequisite "subsequent application" required by § 2517(5), it was done in violation of this chapter as proscribed by § 2515. That dismissal of the indictment is the only remedy upon disclosure

to the grand jury of communications intercepted beyond authorized limits is the only reasonable sanction. see *Helbard v. U.S.*, 408 U.S. at 50.

However, under Title 18 U.S.C. § 2517(3) of the federal wiretap statute, the MCP undercover agent, Detective Bullock, ID# 1426, MCP Investigative Detective Michael Carin, ID# 9448 and the State's Attorney for Montgomery County, Maryland were not entitled to disclose the illegally obtained intercepted oral conversations of the petitioner with the MCP undercover agent, or to produce, identify and testify about the evidence derived therefrom to the Montgomery grand jury, or the trial court only if they had received the petitioner's recorded conversations by means authorized by this chapter and the interception was in accordance with the provisions of this chapter, may they disclose the contents or evidence of that communication. There is no doubt that the MCP undercover agent, Detective Bullock, intercepted the petitioner's oral conversations without probable cause or a court order, or the petitioner's consent, or acquired it through the execution of a search warrant, the validity of which is in dispute in this case at bar. The question here is, whether the interception of the petitioner's oral conversations was in accordance with the provisions of this chapter

or Title 18 U.S.C. § 2511(c)(2)(C)(d). See (Plea proceeding transcript page 7 and page 21-31), see also *US. v. Crabtree*, 565 F.3d at 888 (quoting *Gelbard v. US.*, 408 U.S. at 50 (citing *Berger v. New York*, 388 U.S. 41, 63 (1967))).

B. Whether The Guilty Plea Was Unknowing And Involuntary

A guilty plea must be the informed and intelligent decision of the defendant. Before a guilty plea is accepted the defendant is entitled to a determination by the trial court or affirmatively shown on the record, that the guilty plea is voluntary and knowing. See Md. rule 4-242(c) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). The due process clause of the fourteenth Amendment to the U.S. Constitution imposes the minimum requirements that the guilty plea be the voluntary expression of the defendant's own choice. See *US. v. Moussavi*, 591 F.3d 263, 278 (4th Cir. 2010). A guilty plea operates as a waiver of important rights and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances. See *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. U.S.*, 397 U.S. 742, 748 (1970)). A guilty plea is invalid if a defendant pleaded guilty without being informed

of the elements of the alleged crime at some point. See *Id.* (citing *Henderson v. Morgan*, 426 U.S. 637, 646 (1976)).

The petitioner argues that his guilty plea is invalid because the elements of solicitation to commit first degree murder to the defendant pleading guilty. See (Plea Proceeding transcript page 8 - 20). The test of whether the defendant has been made aware of the nature and elements of the charges against him is whether considering the record as a whole, the trial court could fairly determine that the defendant understood the nature of the charge to which he is pleading guilty. See *Bousley v. U.S.*, 523 U.S. 614, 618-19 (1998) (quoting *Henderson v. Morgan*, 426 U.S. at 646).

Solicitation is a distinct common law misdemeanor in which the act forbidden consist of the accused person's parole or written effort to activate another person to commit a criminal offense. See *Lewis v. State*, 285 Md. 705 (1979). It is immaterial whether the solicitation is any effect and whether the crime solicited is in fact committed. See *Cherry v. State*, 18 Md. App. 252 (1973). The gist of the offense of solicitation is incitement. In brief, the gravamen of this common law misdemeanor lay in counseling, enticing, or inducing another person to commit

a crime. Inciting and soliciting another person to commit a crime is the act of the least magnitude which is punishable by common law. In such offenses, the actor does nothing himself but he or she urges others to violate the law. See *Denicolis v. State*, 378 Md. 646 (2003) (quoting *Lewis v. State*, 285 Md. 705 (1979)).

In order to hold the defendant liable for solicitation to commit first degree murder, the State's prosecutor must prove beyond a reasonable doubt that the defendant counsel, enticed, or induced the MCP undercover agent, Detective Bullock, ID# 1426, to commit each of the following; (1) an unlawful killing, (2) with malice, (3) with specific intent to kill formed after some measure of premeditation and deliberation. See *Porter v. State*, 455 Md. 220 (2017) (quoting *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citing *Brady v. U.S.*, 397 U.S. at 750)). The gravamen of the current case at bar is lack of a fair notice of the nature and elements of the charges. Unquestionably, a charging document that failed to give adequate notice of the charges pursuant to Maryland rule 4-202(a) and Md. crim. law Art. § 2-208 is deficient and is subject to dismissal of the indictment is the only remedy. See *State v. Mulkey*, 316 Md. 475 (1989) (quoting *Williams v.*

State, 302 Md. 787 (1984)]. See also (Plea Proceeding transcript page 21 - 31).

The petitioner essentially argues that on January 09, 2015, plea hearing in the circuit court for Montgomery County, Maryland, the trial judge failed to explain to the petitioner the nature and elements of the crime of solicitation to commit first degree murder and the defense counsels did not represent on the record that they have explained the nature and elements of the solicitation crime to the defendant pursuant to Maryland rule 4-242(c), and the defendant did not represent on the record that he understood the true nature and elements of the charges against him. See Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) (quoting Bouley v. U.S., 523 U.S. at 619 (citing Henderson v. Morgan, 426 U.S. at 646)). All that the defendant said was that he had talked over his guilty plea with his defense counsels. While this statement may have been adequate to assure a finding that the defendant understood the true nature of the proceedings, it did not in any way, assure that the defendant understood the elements of the charge of solicitation to commit first degree murder. See (Plea Proceeding transcript page 8 - 20 and page 21 - 31).

Consequently, the voir dire examination conducted by the trial court failed to show that the guilty plea met the required knowing, voluntary and intelligent standard of Maryland rule 4-242(c) and the constitutional standard of pleading guilty. See *Boykin v. Alabama*, 395 U.S. at 242. Accordingly, this court should allow the defendant to withdraw his guilty plea as involuntary because the trial court, or defense counsels did not explained to the defendant about the nature and elements of the crime of solicitation to commit first degree murder during the voir dire examination, see *Bradshaw v. Stumpf*, 545 U.S. at 183 (quoting *Henderson v. Morgan*, 426 U.S. at 646).

Often the decision to plea guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted. See *Brady v. US*, 397 U.S. at 756. Nevertheless, the constitution permits the trial court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which the defendant may labor. See *US. v. Ruiz*, 536 U.S. 622, 628 (2002). The long standing test for determining the validity

of the guilty plea is whether the plea represents the voluntary and intelligent choice among the alternative course of action open to the defendant. See *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

If the defendant pleaded guilty based on the judge's or prosecutor's misrepresentation of facts or false information, the guilty plea was not entered voluntarily and intelligently. See *U.S. v. Fisher*, 711 F.3d 460, 469 (4th Cir. 2013) (quoting *Brady v. U.S.*, 397 U.S. at 755). In challenging the guilty plea based on misrepresentation of facts or false information, the defendant must show that he or she relied on the incorrect information when entering the guilty plea and that the defendant would not have pleaded guilty and would have gone to trial with the charges against him or her if he or she had received the correct information. See *Henderson v. Morgan*, 426 U.S. at 645 (quoting *Brady v. U.S.*, 397 U.S. at 755). The state may not induce a guilty plea through actual or threatened physical harm or by mental coercion overbearing the will of the defendant in order to avoid a greater sentence or punishment. See *Id.* (citing Prosecution Plea offer letter date 12/05/2014).

The defendant argues that the circuit court erred by concluding that his guilty plea was knowing, voluntary, and intelligent because

he did not know at the time he entered his guilty plea that the prosecutor suppressed the post electronic surveillance notice pursuant to Title 18 U.S.C. § 2518 (8)(d) and the defendant did not also know that the wiretapped evidence was illegally obtained by the MCP undercover agent, Detective Bullock, ID#1426 in violation of Maryland mle 4-611 and Title 18 U.S.C. §§ 2511(c)(2) (c) and 2516. See Katz v. US, 389 US. at 359, see also (Plea Proceeding transcript page 7 and page 21-31).

The defendant further contends that his guilty plea is constitutionally infirm for two distinct reasons: (1) the prosecutor's underlying pre-plea misconduct rendered his guilty plea involuntary under Brady v. US, 397 US. at 750, and (2) the government failed to meet its evidentiary disclosure obligations of discovery material and information under Brady v. Maryland, 373 US. 83, 87 (1963). See US. v. Fisher, 711 F.3d 460, 469 (4th Cir. 2013) (citing circuit court docket entry #12-13, #17, #190-192 and circuit court Scheduling Order dated: 07/31/2014).

The defendant further argues that the prosecutor description of the timeline of events leading to his arrest and indictment by the Montgomery county grand jury suggested a cover-up because the defendant was arrested

on June 06, 2014 and placed under the Montgomery county police custody at the detention center on June 07, 2014. The defendant did not plea guilty in the circuit court for Montgomery county under indictment no. 12546C until after 213 days in violation of Sixth amendment to the U.S. constitution and Maryland rule 4-271. See (Appx-F-Circuit court docket entry # 1-7, # 35-37 and # 45; Plea proceeding transcript page 21-27). The prosecutor's requirement that the defendant plea guilty before the court decided the defendant's Speedy trial claims was coercive and denied the defendant's fundamental right to speedy trial. See (Appx-F-Circuit court docket entry # 1-11, # 17 and the Prosecution Plea Offer letter dated: 12/05/2014).

The Sixth amendment provides a fundamental right to a speedy trial that serves to: (1) prevent undue and oppressive incarceration prior to trial, (2) minimizes anxiety and concerns accompanying public accusation; and (3) limit the possibility that a long delay will impair the ability of the defendant to present a defense. See *Klopfer v. N.C.*, 386 U.S. 213, 222-24 (1967) (right to speedy trial imposed on states by due process clause of the fourteenth amendment). The right to a speedy trial attaches at the time of the arrest, or a formal criminal charge is made, whichever comes

First. see U.S. v. Marion, 404 U.S. 307, 322 (1971) (citing District court case information under case no. 3D00318321 and tracking no. 146337232635).

The 180 days time limit for trying a case from Maryland rule 4-271 and Md. crim. Proc. § 6-103 is mandatory and that where there is no postponement of the trial date complying with the requirements of Maryland rule 4-271, the only remedy for a violation of the Maryland Speedy Trial Act is to dismiss the indictment and vacate the judgment of conviction and sentence. See Md. rule 4-271 (citing Strunk v. U.S., 412 U.S. 434, 440 (1973)). Accordingly, this Honorable court should allow the [petitioner] to withdraw his guilty plea because the prosecutor violated his fundamental right to Speedy trial. See Brady v. U.S., 397 U.S. at 755. The Brady v. United States, does not limit the government misrepresentations to prosecutorial promises designed to elicit a guilty pleas. Consequently, the first circuit of the United States has held that the government may not make plain and inexcusable misrepresentations not anchored to any permissible litigation strategy. See [] Ferrara v. U.S., 456 F.3d 278, 290 (1st Cir. 2006).

Thus, there is no [Factual] basis to support the guilty plea entered under circuit court case no. 125462-C deeming the guilty plea invalid under Maryland rule 4-242(c) and clearly established

federal laws as determined by the U.S. Supreme Court. However, this Honorable Court en banc should vacate the judgment of conviction and sentence, and dismiss the indictment for the public interest of justice in the criminal justice system. see *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Henderson v. Morgan*, 426 U.S. at 646 (citing *Brady v. U.S.*, 397 U.S. at 755)).

C. Whether The Defendant Received Ineffective Assistance of Counsel

The sixth amendment right to counsel is the right to effective assistance of trial counsel and is the benchmark for judging any claim of ineffective assistance to counsel and must determine whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984); see also *Hill v. Lockhart*, 474 U.S. 52, 57-58 (stating that the Strickland standard is applicable when challenging convictions based on guilty pleas). If the defense counsel inappropriately advised the defendant to plea guilty and the defendant can establish ineffective assistance of counsel, the guilty plea cannot meet the constitutional standard of knowing, voluntary,

and intelligent acceptance of the guilty plea. see *Missouri v. Frye*, 566 U.S. 133, 143-45 (2012).

To establish a Sixth amendment claim to ineffective assistance of counsel, the defendant must show that: (1) counsel's performance was deficient, and (2) that the deficient performance prejudice his or her defense. see *Hill v. Lockhart*, 474 U.S. at 59 (quoting *Strickland v. Washington*, 466 U.S. at 667). The principles governing ineffective assistance of trial counsels claims apply to post conviction proceedings or habeas corpus proceeding as they do on direct appeals or in a motion for new trial. see *Strickland*, 466 U.S. at 697. Indeed, the presumption that a criminal judgment of conviction and sentence is final, is at its strongest in collateral attacks on that judgment. see *Id* (quoting *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (citing Plea proceeding transcript page 18-20).

Based on counsels' uncontroverted admission, the post conviction court found as a fact that counsels' failure to lodge a timely objection to the wiretap evidence during plea bargain proceedings was not a matter of trial strategy or tactics but was instead the product of their own ignorance of the law. Because the post conviction court went on to conclude that the petitioner suffered no constitutional prejudice from that deficiency, however, the post conviction court made

no finding as to whether the deficiency fell below an objective standard of reasonableness considering all prevailing professional norms. See (Appx-F- Circuit court docket entry # 22-29, #134-141 and Plea proceeding transcript 18-20 and page 21-31).

Furthermore, after review of the record, including all findings and exhibits, the post conviction court concluded that the plea counsels accurately relayed to the defendant various benefits and potential risks of each of the defendant's various options, and recommended to the defendant to accept the prosecutor's plea offer which included the benefit to the defendant of removing the potential of the defendant receiving a life sentence. Furthermore, the post conviction court further concluded that the defendant fully understood the prosecutor's plea offer dated 12/05/2014. However, the post conviction court also concluded that after review of correspondence between the defendant and the plea counsel, the plea counsel was highly diligent, communicative and effective pursuant to Maryland rule 19-302.1 et seq. See (Appx-E- Plea Proceeding transcript page 5, page 8-20, and page 26-31 and Circuit court docket entry # 12-13, #17, #22-29, and #134-141) (Prosecution Plea offer letter: 12/05/2014). The post conviction erred in denying the defendant's claims for post conviction relief because the defendant's rights to all post conviction rights

including the right to file a motion to reconsider and request a three-judge panel or appeal, violated the defendant's constitutional rights to the due process clause of the fourteenth amendment to the U.S. constitution. See *U.S. v. Chavez-Salais*, 337 F.3d 1170 (10th Cir. 2003) (citing Plea Proceeding transcript page 5 and page 18-20).

To satisfy the first prong of the Strickland standard, it must be demonstrated that counsel's performance was not within the wide range of competency normally demanded of all attorneys in criminal cases. See *Strickland*, 466 U.S. at 687. The standard for assessing such competence is highly deferential and has strong presumption that counsel's strategy and tactics fall within the wide range of professional assistance. See *Burch v. Corcoran*, 237 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). The question here is, whether there is any reasonable argument that counsel satisfied Strickland's deferential standard. *Id.*

There can be little doubt in this case at bar, that counsel's unprofessional errors or omission to move timely to suppress the illegally obtained wiretapped evidence, the almost certain effect of which was a waiver of any objection to the evidence, satisfied the first prong of the Strickland test. Counsel correctly recognized the importance of the wiretapped evidence when they first learned of

it; contemporaneously with their discovery of the wiretapped tape pursuant to Maryland rule 4-263, they had all of the factual and legal information necessary to support a motion to suppress it; they were well aware of the requirements not only of Maryland rule 4-252(a), requiring that a motion to suppress be made before trial, but of the requirements that a contemporaneous objection be made at trial. See (Appx-F- Circuit court docket entry # 22-29 and Plea Proceeding transcript page 7 and page 21-31; and the circuit court scheduling order dated: 07/31/2014). Without detracting from the general competence demanded of trial counsels involved in this case at bar, it is clear that their omission to pursue a timely motion to suppress the illegally obtained wiretapped evidence fell significantly below the objective standard of reasonableness and that the first prong of the Strickland standard was therefore established. See *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (quoting *Strickland*, 466 U.S. at 687).

The second prong of the Strickland's test requires the court to consider whether counsels errors were so serious as to deprive the defendant of a fair trial whose result is reliable and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial proceedings would have been different. See *Strickland*, 466 U.S. at 690-94. In order to satisfy the Strickland's prejudice prong

in the context of a guilty plea, the defendant must show that there is a reasonable probability that but for counsel's errors the defendant would not have pled guilty and would have insisted on going to trial. See *Hill v. Lockhart*, 474 U.S. at 59. Rather, the defendant must convince the court that the decision to reject the plea bargain would have been rational under these circumstances. See *Padella v. Kentucky*, 559 U.S. 356, 372 (2010).

A claim of ineffective assistance of counsel may exist in plea bargaining cases where counsel was ignorant of the applicable laws and was unable to advise the defendant if it was best to accept a plea bargain or not, or where the defense counsel did not place the terms of the plea bargain on the record. See (Appx-E- Plea Proceeding transcript page 8-20). Moreover, a claim of ineffective assistance of plea counsel may also exist where plea counsel did not communicate the existence of the plea offer to the defendant, even when the defendant maintained his or her innocence and wanted to go to trial. See *Missouri v. Frye*, 566 U.S. at 45 (laying counsel failed to communicate a plea offer to his client).

The U.S. Supreme Court in *Hill v. Lockhart*, *supra*, held that the two-prong of the Strickland standard is applicable to ineffective assistance of counsel claims arising out of the plea bargain process. *Hill*

claims that his guilty plea was induced by false information about his parole eligibility. The court held that if a defendant claims that he or she pleaded guilty because of ineffective assistance of counsel, the second prong of the Strickland test would be satisfied by showing that, there is a reasonable probability that but for counsel's unprofessional errors, he or she would have pleaded guilty and would have insisted on going to trial. See Hill, 474 U.S. at 59. Parole eligibility is a collateral consequence of a guilty plea and, accordingly, the trial court is not required to furnish the defendant about his or her parole eligibility in order for a plea to be voluntary. See Id. at 59.

As in this case at bar, the petitioner argues that, from July 15, 2014 through January 09, 2015, the defendant's defense counsels, Howard R. Cheris, ESQ., and Philip H. Armstrong, ESQ., began inducing and coercing the defendant by deception of extrinsic fraud to plea guilty to one count of common law charge: solicitation to commit first degree murder, or risks the possibility of a life sentence if the defendant insisted on going to trial with the charges against him and mental coercion overbearing the defendant's will to plea guilty involuntarily in order to avoid a greater sentence or punishment, when in fact there was no crime actually committed.

See (Attorney - client correspondence dated '07/15/2014,' 07/18/2014,' 11/26/2014,' 12/05/2014. and 01/09/2015),

Often the decision to plea guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him or her and by the likelihood of securing leniency should a guilty plea be offered and accepted. See *Brady v. US*, 397 US. at 755. Even defense counsel misrepresentations can undermine the validity of a guilty plea. See *Tollett v. Henderson*, 411 US. 258, 266-67 (1973). For example, in *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), the US. Court of Appeals for the Fourth Circuit concluded that although the defendant need not be informed about his parole eligibility date prior to entering a guilty plea, when he or she is grossly misinformed about it by his defense counsel, and relies upon that misinformation, he or she is deprived of his constitutional right to counsel. When the erroneous advised induced the guilty plea, permitting the defendant to start over again, is the imperative remedy for the constitutional deprivation. See *Id.* at 65.

The defendant further argues that defense counsels failed to present to the defendant the prosecution ~~plea~~ plea offer letter dated 12/05/2014 for consideration. Instead, defense counsels fraudulently crafted their own plea offer letter dated 12/05/2014 and presented to the defendant for consideration by inducing the defendant under duress to plea guilty involuntary

in violation of Maryland rule 4-242(c) and the constitutional standard of pleading guilty. See *Missouri v. Frye*, 566 U.S. 133, 143-45 (2012) (citing Attorney-client correspondence dated: 12/05/2014, and the prosecution Plea offer letter dated: 12/05/2014 and Plea Proceeding transcript page 26 - 31). The only time the defendant came across the prosecution plea offer letter was after the defendant had filed a civil lawsuit against the defense Counsel on legal malpractice in the circuit court for Montgomery County, Maryland under civil case no. 404049-V during discovery proceedings. See attached exhibits.

The right of the criminal defendant to be present during criminal proceedings stems from both the confrontation clause of the sixth amendment and the due process clause of the 14th amendment to the U.S. constitution. See *Hurtado v. California*, 110 U.S. 516 (1884).

The confrontation clause guarantees the criminal defendant the right to be present at every stage of the criminal proceeding that would contribute to the opportunity for effective cross-examination. See *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987). The due process clause of the 14th amendment grants the defendant the additional right to be present at any stage of the criminal proceeding that is critical to its outcome if the defendant's presence would have contributed to the fairness of the criminal

procedure. See *Id.* at 745.

The cumulative effect of these two guaranteed rights pursuant to Maryland rule 4-231 entitled the defendant to be present at all important stages of the criminal proceedings including pretrial motion to suppress illegally obtained evidence. See *Id.* at 744. The right of the criminal defendant to be present in court is violated when critical stages of the criminal proceeding conducted while the defendant was involuntarily absent. See Md. rule 4-231 (citing *U.S. v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001) (quoting *U.S. v. Novaton*, 271 F.3d 968, 998 (11th Cir. 2001)). The defendant waives his or her right to be present in court if he or she is voluntarily absent from the courtroom, or is continuously disruptive of the proceedings after warnings from the court, or personally, or through counsel, agrees to or acquiesces in being absent in court. See *Taylor v. U.S.*, 414 U.S. 17, 19 (1973) (quoting *ILL. v. Allen*, 397 U.S. 337, 345-46 (1970)).

Pretrial hearing on motion to suppress physical evidence and to suppress an in-court identification was held to be a critical stage of trial. See *Moore v. ILL.*, 434 U.S. 220, 228-29 (1977) (quoting *Gilbert v. Cal.*, 388 U.S. 263, 272 (1967)). In *United States v. Wade*, the U.S. Supreme Court held that the Sixth Amendment/right to counsel attaches to critical stages of pretrial proceedings. See *Wade*, 388 U.S. 218, 224 (1967). Since the right to be present at every

Stage of the criminal proceeding is absolute, a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right. See *U.S. v. Novaton*, 271 F.3d at 305.

As in this case at bar, the petitioner argues that on December 05, 2014, defense counsel, Philip H. Armstrong, ESQ., withdrew the defendant's pretrial motion filed under circuit court docket entry #12 without the defendant's consent, nor present in court during the pretrial hearing on motion to suppress the illegally obtain wiretapped evidence and status hearing in violation of the sixth amendment to effective assistance of counsel and Maryland rule 4-231 requiring the defendant to be present at all times when required by the court. See (Appx-F- circuit court docket entry #22-29 and circuit court scheduling order dated: 07/31/2014).

However, the Supreme court's statement that the right to counsel is to protect the accused from a conviction resulting from his own ignorance of the law and constitutional rights was articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is the petitioner's argument that his defense counsels failed to ensure that his guilty plea was entered in compliance with Maryland rule 4-242(c) and the constitutional standard of pleading guilty as determined by the U.S. Supreme Court, See Hill,

474 U.S. at 59 (quoting Strickland, 466 U.S. at 687
(citing Boykin v. Alabama, 395 U.S. at 242),

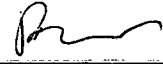
D.

Conclusion

Under these legal principles as discussed above, the petitioner believe that his petition for writ of certiorari to the U.S. Court of Appeals for the fourth Circuit need not be dismissed because the petitioner has demonstrated that reasonable jurists would find that the U.S. District court's assessment of his constitutional claims under his petition for federal writ of Habeas Corpus relief pursuant to Title 28 U.S.C. §§ 2253 and 2254 is debatable. See Slack v. McDaniels, supra, 529 U.S. at 484-85.

Wherefore, the petitioner prays that his petition for a writ of certiorari should be granted.

Pursuant to Title 28 U.S.C. § 1746, I declare and affirm under the penalty of perjury that the foregoing is true and correct.

Respectfully Submitted;  8/18/2019

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 _____

Date: 08/18/2019