Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 20-6833

IN THE

SUPREME COURT OF THE UNITED STATES

CLOREY EUGENE FRANCE,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner: Clorey E. FRANCE
#0138059
633 Old Landfill Road
Taylorsville, NC 28681-8420
Pro Se

ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

Petitioner's appointed appellate counsel, Ann B. Petersen, filed the Defendant-Appellant's Brief without first allowing Petitioner to review said brief as Petitioner requested. Upon review of this brief Petitioner immediately moved to stay proceedings and to have counsel removed or replaced, also filing numerous motions to the appellate court expressing that counsel was failing to raise any non-frivolous issues which, if not raised upon his first appeal of right, would be deemed abandoned and procedurally barred if raised in any subsequent appeal, post-conviction motion, or federal collateral review proceedings. And those issues were. The appellate court denied all of Petitioner's motions, to replace or remove counsel without consideration or determination thereof based solely upon the appointment of counsel; hence:

I. WHETHER THE NORTH CAROLINA SUPREME COURT'S ORDER TO UPHOLD THE NORTH CAROLINA COURT OF APPEALS' RULES OR PRACTICES OF *PER SE* DENYING, WITHOUT INQUIRY OR DETERMINATION, ANY AND ALL TIMELY, GOOD-FAITH MOTIONS/NOTICES MADE BY INDIGENT APPELLANTS SEEKING TO HAVE APPOINTED APPELLATE COUNSEL REMOVED OR REPLACED DUE TO OBJECTIVELY UNREASONABLE REPRESENTATION, NOT ONLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS IN *BENITEZ V. UNITED STATES*, 521 F.3d 625

(6TH CIR. 2008) WHERE IT WAS HELD THAT THE "COURT HAS AN AFFIRMATIVE DUTY TO INQUIRE AS TO THE SOURCE AND NATURE OF THAT DISSATISFACTION," ID., AT 634, BUT ALSO THE HOLDINGS OF THE UNITED STATES SUPREME COURT IN ANDERS v. CALIFORNIA, 386 U.S. 738, 87 S.CT. 1396, 18 L.ED.2D 493 (1967); OR ROE v. FLORES-ORTEGA, 528 U.S. 470, 120 S.CT. 1029 (2000) WHERE, AFTER THE COURT HAD BEEN PUT ON NOTICE OF THE DEFENDANT'S DISSATISFACTION, THE COURT WAS AWARE THAT APPOINTED APPELLANT COUNSEL FAILED TO BRIEF OR ARGUE ANY ASSIGNMENTS OF ERROR IN THE DEFENDANT'S BRIEF WHILE ALSO FAILING TO WITHDRAW FROM DEFENANTS APPEAL, THE COURT FAILED TO REQUIRE APPOINTED APPELLATE COUNSEL TO FILE AN "ANDERS BRIEF" WITH THE COURT, AND DEFENDANT ALLOWING DEFENDANT TO RAISE ANY POINTS HE SO CHOSE?

North Carolina law, NORTH CAROLINA REVISED RULES OF PROFFESSIONAL CONDUCT, RULE 1.16 grants appellants who have privately retained counsel "the right to discharge a lawyer at any time, with or without cause," id., at Comment [4]; however "[W]hether a client can discharge appointed counsel may depend on applicable law." ID., at Comment [5] The current law, rules, practices, or customs of the North Carolina

Appellate Courts bars, per se, any and all considerations of pro se motions filed therein by indigent appellants wishing to inform the courts of objectively unreasonable, i.e., ineffective assistance of appointed appellate counsel during defendants' appeal by right proceedings; hence

II. WHETHER THE CURRENT, OR THEN LAWS AT THE TIME OF PETITIONER'S APPEAL AND DENIAL OF PETITIONER'S STATE PETITION FOR WRIT OF CERTIORARI WITH THE SUPREME COURT OF NORTH CAROLINA, VIOLATE THE PETITIONER'S FEDERAL CONSTITUTIONAL PROTECTIONS GRANTED BY THE FOURTEENTH AMENDMENT WHERE THE STATE OF NORTH CAROLINA HAS MADE OR IS ENFORCING LAWS, RULES, PRACTICES, OR CUSTOMS WHICH ABRIDGE INDIGENT APPELLANTS' PRIVILEGE TO THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL; AND, OR FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW; OR THE EQUAL PROTECTIONS OF THE LAWS?

Upon the face of the record before the appeals court there existed prima facie evidence that the State failed to prove every fact necessary to constitute the crimes for which Petitioner was charged. Although the appellate court was in possession of the record, aware that during trial proceedings a timely motion to dismiss for insufficiency of evidence was made and denied, the appellate court, in light of appellate counsel's failure to raise and/or argue this issue on appeal and Petitioner's June 24, 2012 pro se "UNTITLED MOTION," should have, sua sponte, raised this issue reversing and dismissing the related charges; hence:

III. WHETHER, WHEN PRESENTED WITH PRIMA FACIE EVIDENCE THAT THE GOVERNMENT FAILED TO PROVE "EVERY FACT NECESSARY TO CONSTITUTE THE CRIME CHARGED" BEYOND A REASONABLE DOUBT AS REQUIRED BY THE FIFTH AMENDMENT, IN RE WINSHIP, 397 U.S. 358, 364 (1970), THE REVIEWING COURT SHOULD SUA SPONTE RAISE THIS ISSUE "IN THE INTEREST OF JUSTICE," MESAROSH V. UNITED STATES, 352 U.S. 1, 10-14 (1956); "TO AVOID A "FUNDAMENTAL MISCARRIAGE OF JUSTICE," MC QUIGGINS, V. PERKINS, 133 S.CT. 1924, 1935 (2013); OR TO AVOID A "MANIFEST INJUSTICE" TO A DEFENDANT, N.C. RULES OF APPELLATE PROCEDURE, RULE 2, WHERE IF THE COURT DOES "NOT REVIEW THE ISSUE OF SUFFICIENCY OF THE EVIDENCE ... DEFENDANT WOULD REMAIN IMPRISONED FOR A CRIME THAT THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT" AND "SUCH A RESULT WOULD BE MANIFESTLY UNJUST"? NORTH CAROLINA V. BATCHELOR, 190 N.C. APP. 369, 377-78, 660 S.E.2d 158, 164 (2008)

V

List Of Parties: Rule 14.1(b)(i)

For Petitioner:

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  FILED: MARCH 13, 2013
  JUDGEMENT: JULY 6TH, 2015 - DENIED

- PETITION FOR REHEARING: NORTH CAROLINA MIDDLE DISTRICT COURT; NO. 1:13-CV-00250-JAB-LPA
  FILED: JULY, 23, 2015
  JUDGEMENT: STRICKEN - JULY 26, 2015

- APPEAL / REQUEST FOR CERTIFICATE OF APPEALABILITY: FOURTH CIRCUIT COURT OF APPEALS, NO. USCA4 15-7346
  FILED: AUGUST 6TH, 2015
  JUDGEMENT: DENIED - FEBRUARY 3RD, 2016

- PETITION FOR WRIT OF CERTIORARI: UNITED STATES SUPREME COURT (NO FILING NUMBER)
  FILED: JUNE 26, 2016
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- Petition For Writ Of Certiorari - North Carolina Supreme Court; No. 349P20
  Filed: August 3rd, 2020
  Judgement: Denied - August 6th, 2020

Related State Proceedings: State v. Clorey France

- Trial By Jury - Cabarrus County (North Carolina) Superior Court; No.'s 09CRS 052770-01; 09CRS 9072
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- Post-Conviction - Motion For Appropriate Relief, Cabarrus County Superior Court, No.'s 09CRS 052770, 09CRS 9072
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- Petition For Certiorari: North Carolina Court Of Appeals
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  Judgement: Denied - February 27th, 2013

LIST OF PROCEEDINGS: RULE 14.1(b)(iii)

- PETITION FOR REHEARING: FOURTH CIRCUIT COURT OF APPEALS; NO. USCA4 15-7346
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  JUDGEMENT: DENIED - APRIL 4TH, 2016

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JURISDICTION, RULE 14.1(e)

On August 6, 2020, the North Carolina Supreme Court, the last court of resort with jurisdiction to review the opinions and orders of the North Carolina Court of Appeals, denied Petitioner's state court petition for writ of certiorari, as well as his petitions for temporary stay, supersedeas and immediate release.

Petitioner now comes before the United States Supreme Court seeking issuance of the Courts writ of certiorari under SUPREME COURT RULES 10(b) and 10(c) where the NORTH Carolina Supreme Court's decision(s) conflict(s) with an important federal question determination made by an United States court of appeals, conflicts with relevant decisions of the United States Supreme Courat, and/or has decided an important question, or questions, of federal law that has not been, but should be settled by this Court.

Constitutional Provisions

North Carolina Constitution, Article I, § 19

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privilages, or outlawed, or exiled, or in any manner deprived of his life, liberty or property but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or natural origin.

North Carolina Constitution, Article I, § 20

General Warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

North Carolina Constitution, Article I, § 23

In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not to be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees for defense, unless found guilty.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT IV

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.

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; 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; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI

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

UNITED STATES CONSTITUTION, AMENDMENT XIV

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 the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protections of the laws.

TABLE OF AUTHORITIES CITED

CASES: UNITED STATES SUPREME COURT

STATEMENT OF THE CASE AND FACTS

On August 20, 2009, Petitioner was arrested by the Cabarrus County (North Carolina) Sheriff's Office (CCSO) Deputy Kevin Klinglesmith and charged with breaking or entering a motor vehicle, attempted first degree burglary, and breaking and entering (a garage) - 09CRS 052770 -, as well as possession of implements of housebreaking and possession of stolen property - 09CRS 052771. APPENDIX IIII, pp. 92, 93. Due to Petitioner's past convictions he was additionally charged as being an habitual felon. APPENDIX (App:x) IIII, pp. 94.

Prior to trial Petitioner waived his right to counsel and filed motions to suppress evidence seized at the time of arrest: one set of keys (the allegedly stolen property), a home sales flyer, and flashlight, on the grounds that said arrest was unconstitutional due to lack of probable cause and knowingly false information being provided to the magistrate to establish probable cause to issue arrest warrants. (RECORD ON APPEAL (R.O.A.) pp. 34-39, 92-94, 87-91, 133-139)

Petitioner additionally moved to suppress all testimony and seized evidence relating to the search warrant executed upon his vehicle and GPS unit on the grounds the search warrant was a general warrant failing to particularly describe the evidence to be seized, the affiant failed to set forth information of facts establishing probable cause to believe the evidence being sought would be found in Petitioner's vehicle or GPS unit, and the affiant knowingly provided the issuing magistrate false information.

R.O.A. 77-86, 104-108, 124-132 and 147-157. On August 26, 2010 a hearing was held in these matters with the court denying Petitioner's suppression motions.

Prior to trial Petitioner moved the court to compel completion of discovery by the State. R.O.A. 166-67. This motion was summarily dismissed on, or about March 3, 2011. Also on this date, Petitioner moved the court to compel the CCSO to comply with defense's subpoenas, see R.O.A. pp. 30, 72, 99, 161, which the CCSO had failed, without adequate cause, to obey. The court summarily denied that motion as well.

On the first day of trial, March 28, 2011, Petitioner moved to either dismiss or continue proceedings on the grounds that the State had failed to complete discovery by failing, primarily, to provide the in-dash camera footage from Deputy Klingtesmith's and the complete radio transmissions Although state prosecutor's informed the court that they were unaware of whether the camera footage had been pulled, and that they had not reviewed the entire CCSO radio transmissions, the court denied the motions on the basis of prosecutions ignorance and lack of due diligence. (TT. pp. 19-22.)

On the first day of trial Petitioner once again moved to suppress the introduction of the allegedly stolen set of keys on the grounds that, at the time of seizure, officers lacked probable cause due to a lack of an incriminating nature of the keys, and that Deputy Klingtesmith, after seizure, went to test the keys on the victims' residence and to have the keys identified as stolen property. The court denied this motion during voire dire, ruling that officers may seize anything they find during an arrest. (TT. pp 23-25)

Petitioner's trial was conducted in the absence of the arresting officer, Deputy Kevin Klingensmith, who arrested Petitioner without warrant. (T. pp. 142, 169) who was reportedly on his honeymoon in Mexico. (T. pp. 168). The court advised Petitioner that he may subpoena Deputy Klingensmith regarding the in-dash camera footage, but then denied that subpoena (T. pp. 22 and 164)

During trial prosecution elicited testimony, over Petitioner's objection, relating to previous unsolved, unconnected burglaries of the victims' residence. (T. pp. 75, 85, 86, 124-25). Prosecution elicited testimony before, and published photographic to the jury relating to the execution of the search warrant and 47 items seized that were not connected to nor related to the cases being tried; as well as testimony citing "additional victims" and crimes that were not before the jury, all over Petitioner's numerous objections, all of which, save one, were overruled by the court. (T. pp. 193-207, 196, 197, 198, 204)

Petitioner sought to impeach the testimony, reliability and credibility of the State's primary witness and evidence-in-chief with the prior inconsistent statements, i.e., the vague description of the suspect witnessed, which contradicted the detailed, matching description of the suspect that witness/victim Darren Furr testified to having provided to law-enforcement officers immediately after Mr. Furr allegedly saw and chased the suspect. (T. pp. 127-28). The court, however, sustained the State's objection to defense's impeachment of the witnesses' testimony on the grounds that the prior inconsistent statements contained in law enforcement records and radio transmissions were hearsay. (T. pp. 127-30)

During trial prosecutors elicited testimonial evidence relating to an allegedly abandoned latex glove found along Petitioner's track; (T. pp. 140-41) however no abandoned latex glove is listed in evidence maintained in relation to these matters.

On, or about, March 30, 2011, Petitioner was found guilty by jury on all counts and sentenced to five consecutive terms of 116 months to 149 months. Petitioner appealed in open court and accepted court-appointed representation- Attorney Ann B. Petersen (Attorney Petersen). Attorney Petersen refused to file any issues or arguments in challenge to the convictions and judgements relating to case no. 09CRS 052770. (See App.'x II, pp. 53), raising issues solely in challenge to case no. 09CRS 052771.

During the pending appeal, Petitioner wrote numerous correspondences to Attorney Petersen requesting that she remove herself from his appeal, App.'x III, pp. 77-78, while also contacting the North Carolina Appellate Defender's Office requesting that Attorney Petersen be removed and/or replaced, App.'x III, pp. 74-76. Attorney Petersen refused to remove herself and the Appellate Defender's Office failed to request, ex parte, that counsel be removed and/or replaced by the court.

During the pending appeal, Petitioner also wrote numerous motions and correspondences to the North Carolina Court of Appeals informing the court the he and counsel were at an impass and counsel was refusing to raise any issues in challenge to the three remaining convictions under case no. 09CRS 052770. (App.'x III, pp. 79-80, 81-83, 88-91). Petitioner set forth in an "UNTITLED MOTION" to the Chief Justice of the North Carolina Court of Appeals 22 (twenty-two) possible issues (ID., pp. 88-91)

All of Petitioner's Motions were summarily dismissed without inquiry based upon appointment of counsel alone.

Petitioner went so far as to attempt to withdraw his appeal, and re-file without Attorney Ann Petersen for representation, as was his statutory right under North Carolina General Statute §15A-1450; however Attorney Petersen prevented Petitioner from doing so by refusing to simply sign and file said Motion on Petitioner's behalf

As a result of the appeal Petitioner's convictions and judgements under 09CRS 052771- possession of implements of housebreaking, and misdemeanor possession of stolen property- were reversed and vacated. However, "[b]ecause defendant ha[d] presented no issue regarding the judgements entered upon his remaining convictions [for attempted first degree burglary, breaking and entering, and breaking or entering a motor vehicle, i.e., 09CRS 052770], [the court failed to] find [ ] error as to those judgements," (App.'x I, pp. 50-51) on August 21, 2012.

On December 18, 2012, Petitioner filed a post-conviction "Motion For Appropriate Relief" with the Cabarrus County Superior Court that was dismissed without hearing.

On March 26, 2013, Petitioner filed a 28 U.S.C. §2254 habeas corpus application in the Federal District Court for the Middle District of North Carolina that was summarily denied without hearing on July 6, 2015. (Case No. 1:13-cv-00250-JAB-LPA)

On July 23, 2015, Petitioner filed a "Petition For Rehearing" in that matter that was stricken for lack of signature with said ruling being deferred until the lack of signature was corrected by August 21, 2015.

On August 11, 2015, Petitioner opted to forego pursuing the stricken petition for rehearing and filed his appeal in this matter directly to the Fourth Circuit Court of Appeals in a NOTICE OF APPEAL dated August 6, 2015, with appeal being entered as August 27, 2015. Said appeal was dismissed on February 17, 2016 with judgement entered on the grounds that Petitioner had failed to correct the lack of signature on his District Court Petition for Rehearing, although Petitioner had filed a timely NOTICE OF APPEAL. (DOCKET # 15-7346)

On June 26, 2016 Petitioner forwarded to the United States Supreme Court his PETITION FOR WRIT OF CERTIORARI that, for reasons beyond Petitioner's knowledge or control went unfiled by this Court. And, although for more than 3 (three) years Petitioner exercised due diligence starting as early as October 17, 2016, this Court refused or otherwise failed to inform Petitioner of the status of his petition.

On August 3, 2020 Petitioner filed a State court PETITION FOR WRIT OF CERTIORARI to review the North Carolina Court of Appeals denials and dismissals of Petitioner's motions to remove appointed appellate counsel, to stay his appeal, and to allow him to withdraw the appeal. In that petition Petitioner cited that said denials and dismissals violated his Sixth Amendment rights to effective Assistance of Counsel, as well as Petitioner's Fifth and Fourteenth Amendment rights to DUE PROCESS OF LAW and EQUAL PROTECTION OF THE LAWS. The Petition was denied and dismissed summarily on August 6, 2020. (App.'x I, pp. 42-43 (No. 349P20).

Reasons Why Writ Should Issue: I

I. The North Carolina Supreme Court's ORDER denying Petitioner's State PETITION FOR WRIT OF CERTIORARI, TEMPORARY STAY, WRIT OF SUPERSEDEAS and IMMEDIATE RELEASE, issued summarily and without explaination on August 6th, 2020 (See APPENDIX (APP'X) (1)) set forth simply that said petitions were denied, i.e., the "petition is without merit," N.C. R. App. P. 21(e). Said order upholding the North Carolina Court of Appeals orders denying Petitioner's pro se motions for removal of appointed appellate counsel while also denying Petitioner's claims that the actions of the Court of Appeals denied him the constitutional right to the effective assistance of counsel during an appeal of right is contrary to the United States Supreme Court holdings in ANDERS v. CALIFORNIA, 386 U.S. 738, 87 S.CT. 1396, 18 L.Ed.2d 493 (1967); PENSON v. OHIO, 48 U.S. 75, 109 S.CT. 346, 102 L.Ed.2d 300 (1988), and ROE v. FLORES-ORTEGA, 528 U.S. 470, 120 S.CT. 1029, as well as the Sixth Circuit Court of Appeals holding in BENITEZ v. UNITED STATES, 521 F.3d 625 (2008).

A. Standard of Review.

"[A] defendant wishing to substitute counsel must 'bring any serious dissatisfaction with counsel to the attention of the [dis] court.'" BENITEZ v. UNITED STATES, 521 F.3d 625, 632 (2008). "Once a defendant does so, the [ ] court is obliged to inquire into the defendant's complaint and determine whether there is good cause for the substitution. It is hornbook law that when an indigent defendant makes a timely and good-faith motion requesting that appointed counsel be discharged and new counsel be appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatifaction with his current counsel." BENITEZ, 521 F.3d., at 632 (internal alterations, citations and quotation marks omitted). "Thus, where a court is faced with a defendant's request to effect a change in his representation by way of a motion to substitute counsel, the court <u>must</u> determine whether there is good cause for the substitution by balancing the accused right[s] ... and the public interest in the prompt and efficient administration of justice." ID. (emphasis added) (internal citations omitted).

"Where a [ ] court is on notice of a criminal defendant's dissatifaction with counsel, the court has an affirmative duty to inquire as to the source of and nature of that disatisfaction - regardless of whether the attorney is court-appointed or privately retained." ID., at 634.

"We review a district court's denial of a motion to substitute counsel for an abuse of discretion, considering 'the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense.'" ID., at 635 (quoting ILES 906 F.2d at 1130 n. 8).

"[Counsellor's] role as an advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not the counsel - then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceede to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." ANDERS v. CALIFORNIA, 386 U.S. 738, 744, 87 S.CT. 1396, 1400, 18 L.Ed.2d 493 (1967).

"To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First it must satisfy to itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claims that might support the client's appeal. Second, it must determine whether counsel correctly concluded that the appeal was frivolous." PENSON v. OHIO, 48 U.S. 75, 109 S.CT. 346, 351, 102 L.Ed.2d 300 (1988) (ID., at 48 U.S. at 83) (internal quotations and citations omitted)

"[O]nce a court determines that the trial record supports arguable claims, the criminal appellant is entitled to representation." ID., 48 U.S. at 84, 109 S.CT. at 352.

"As we stated in STRICKLAND, the 'actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice.' 466 U.S., at 692, 104 S.CT., at 2067."

"[W]e have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." ROE v. FLORES-ORTEGA, 528 U.S. 470, 479, 120 S.CT. 1029, 1034 (2000).

"If counsel has consulted with the defendant, the question of deficient performance is easily answered; Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." ID., 528 U.S. at 478, 120 S.CT., at 1035.

"According to [Defendant-Appellant (Defendant)], counsel's deficient performance deprived him of a notice of appeal and hence, an appeal altogether. Assuming those allegations are true, counsel's deficient performance has deprived [Defendant] of more than a fair judicial proceeding: that deficiency deprived [Defendant] of the appellate proceeding altogether. In CRONIC, PENSON and ROBBINS, we held that complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.' CRONIC [UNITED STATES V., 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984)], supra at 659. The even more serious denial of the entire proceeding itself, which the defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any 'presumption of reliability,' ROBBINS [SMITH. v., 528 U.S. 259, 286, 120 S.CT. 746, 145 L.Ed. 2d 756 (2000)], to a judicial proceeding that never took place." FLORES-ORTEGA, at 484, 120 S.Ct., at 1038-39 n. 15.

"[W]e follow the pattern established in STRICKLAND [v. WASHINGTON, 466 U.S. 668, 104 S.CT. 2052, 80 L.Ed. 2d 674 (1984)] and CRONIC, and reaffirmed in ROBBINS requiring a showing of prejudice ... but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See STRICKLAND, supra, at 493-496; CRONIC, 466 U.S., at

658-59, 104 S.Ct. 2039; Robbins, at 286-287, 120 S.Ct. 746 ... we hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." Flores-Ortega, id.

"To establish objectively unreasonable appellate performance under Strickland, [Defendant-Appellant] must show that his counsel 'unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them.'" Delgado v. Lewis, 223 F.3d 976 (2000) (9th Cir. (2000)) (quoting Smith v. Robbins, 120 S.Ct., at 746), 223 F.3d at 780.

"Of course, prejudice is presumed in cases where a defendant goes unrepresented by counsel. See United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland, 466 U.S., at 685, 104 S.Ct. 2052. This is true whether the denial was actual or constructive. See id., at 692, 104 S.Ct. 2052." Delgado, 223 F.3d at 981.

B. Argument.

Petitioner, on March 26, 2012, or about, received a copy of the "Defendant-Appellant's Brief" (See App.'x II) filed on his behalf by appointed appellate counsel Ann B. Petersen (Counsellor Petersen). In this brief Counsellor Petersen raised only two (2) arguments that were so narrowly worded as to specifically challenge only the convictions and judgements against Petitioner for possession of an implement of housebreaking - burglary tools - and misdemeanor possession of stolen goods, i.e., those charges contained in the indictment for case no. 09CRS 052771, while failing to present, discuss, or argue any issues in challenge to the convictions and judgements against Petitioner in relation to the charges of breaking and/or entering, breaking and entering a motor vehicle, and attempted first degree burglary, i.e., those charges contained in the indictment for case no. 09CRS 052770.

Immediately upon receipt and review of the appellate brief the Petitioner contacted the North Carolina Appellate Defender's Office requesting that Counsellor Petersen remove herself from Petitioner's cases for "failing to provide effective assistance" and "failure to include and raise critical grounds for appeal which may be (and, in fact, was) subsequently procedurally barred." (App'x III (E)). Although under North Carolina law: INDIGENT DEFENSE SERVICES, RULE 3.5 Substitution of Counsel, the Appellate Defender or Indigent Services Director had the authority to request the court that Counsellor Petersen be removed where RULE 3.5 states:

For good cause, the Appellate Defender or IDS Director may request ex parte that a judge of a court of competent jurisdiction replace appellate counsel previously appointed with new counsel selected by the Appellate Defender or IDS Director, the Appellate Defender or IDS Director failed to do so.

Petitioner received a reply from the Appellate Defender dated April 2, 2012 informing him that the Appellate Defender was without the power to withdraw appointments of counsel. (App.'x III (F)

Petitioner also immediately, on March 26, 2012, contacted Counsellor Petersen by correspondence and requested that she be removed from his representation where Counsellor Petersen's services had "fallen below an objective standard;" "Counsel had failed to raise key grounds for appeal which may be barred in any successive post-conviction motions;" and that "Counsel has ... misrepresented the facts of the case." (App.'x III (H))

Petitioner, on March 26, 2012, moved the North Carolina Court of Appeals (NC COA) for a STAY OF RULING in relation to his appeal on the grounds that Petitioner and Counsellor Petersen had "come to an impasse for which Appellant has requested that said counsel - Ann B. Petersen - remove herself as appellant's counsel." This MOTION was denied summarily by the NC COA.

Petitioner, on or about, April 30, 2012, filed a pro se motion with the NC COA requesting that the court remove Counsellor Petersen for counsellor's performance falling "below an objectively adequate standard," and that "Attorney Ann B. Petersen's representation has been ineffective to the prejudice of the defendant-appellant," while citing at least eight (8) non-frivolous issues that Counsellor Petersen could have raised, but failed to do so. (App.'x III (I)

On the 4th of May, 2012 the NC COA issued an ORDER denying Petitioner's "APPELLANT'S MOTION FOR REMOVAL OF COUNSEL." Said MOTION and ORDER were bothed mailed to Appellate Defender Staples Hughes who still failed to may a request to remove and replace Counsellor Petersen. (App.'x III (J)). (See App.'x I, pp 44)

On June 21, 2012, Petitioner filed a pro se motion pursuant to N.C. GEN. STAT. §15A-1450 seeking to withdraw his appeal in order to have Counsellor Petersen removed, so that he could re-file said appeal without Counsellor Petersen's representation. (App.'x III (K)). this motion was denied because Counsellor Petersen refused to sign and file said motion on Petitioner's behalf; i.e., because Counsellor Petitioner refused to allow Petitioner to exercise his statutory rights to withdraw his appeal.

Petitioner, on or about June 24th, 2012, forwarded a correspondence to the Chief Justice of the North Carolina Court of Appeals stating that Counsellor Petersen was forcibly making Petitioner waive his rights to appeal, and that Petitioner was "not voluntarily WAIV[ING] [his] right to raise grounds or issues to be listed [t]herein." (App.'x III (L)). In this correspondence Petitioner set forth 22 (twenty-two) non-frivolous grounds for appeal that Counsellor Petersen refused to raise, and that a possible "miscarriage of justice" would occur unless counsel were removed. (App.'x III (L))

Petitioner additionally, on April 15, 2012, or about, contacted

Counsellor Petersen with an attatched list of non-frivolous issues. (App.'x III (M))

Petitioner clearly, as the record reflects, brought his serious dissatisfaction to the attention of the appellate court, making "a timely and good-faith motion requesting that appointed counsel be discharged and new counsel be appointed, [therefore] the [ ] court ha[d] a responsibility to determine the reasons for defendant's dissatisfaction with his current counsel." BENITEZ, 521 F.3d at 632 (internal quotations and citations omitted).

Where the North Carolina Court of Appeals had been repeatedly put on notice of Petitioner's dissatisfaction with his appointed appellate counsel, the appellate court failed to meet the "affirmative duty to inquire as to the source of and nature of that dissatisfaction", ID., at 634, by summarily dismissing and denying Petitioner's pro se motions to the appellate court and in doing so denied Petitioner's Sixth Amendment right to the effective assistance of counsel during his first appeal by right.

The appellate court abused its discretion in this regard where the Petitioner's motion to remove or replace counsel were timely, the appellate court failed to make any inquiry whatsoever into the Petitioner's Complaint, and the conflict between [Counsellor Petersen and Petitioner] was so great that it resulted in a total lack of communication preventing an adequate [appeal]." ILES, 906 F.3d at 1130 n.8.

Counsellor Petersen's failure to present and discuss any issues in challenge to case no. 09CRS 052770, the charges of breaking or entering, breaking and entering a motor vehicle, and attempted first degree burglary contained therein, or the convictions and judgements thereunder against the petitioner gives rise to only one plausible, rational inference: Counsellor Petersen found Petitioner's case on appeal to be wholly frivolous. Accordingly, as determined by this Court in ANDERS v. CALIFORNIA, Counsellor Petersen should so have advised the court that she found Petitioner's appeal in relation to case no. 09CRS 052770 to be wholly frivolous and made a request for permission to withdraw therefrom.

As also held by this Court in ANDERS, Counsellor Petersen was also required to accompany such a request with a brief citing to any issues "in the record that might arguably support the appeal" with a copy thereof "furnished the [Petitioner] and time allowed him to raise any points that he cho[se]." ANDERS, 384 U.S., at 744, 87 S.Ct. 1400.

It was objectively unreasonable representation, i.e., constitutionally ineffective Assistance of Counsel for Counsellor Petersen to fail to provide the appellate court with an ANDERS BRIEF, thus depriving the Petitioner of his Sixth Amendment protections.

Once Petitioner made a timely, good-faith motion to the appellate court making the court aware of his serious dissatisfaction with

Counsellor Petersen's performance was also apprised in a timely and good-faith manner that Petitioner's dissatisfaction stemmed from counsellor's failure to raise certain. Being in possession of the DEFENDANT-APPELLANT'S BRIEF, the appellate would have been well aware that in relation to case no 09CRS 09CRS 052770 counsel failed to present or argue any issues in challenge thereto. This awareness is unequivocally reflected in the appellate court's OPINION issued in these matters where the appellate court determined:

> Because defendant has presented no issue regarding the judgements upon his remaining convictions, we find no error to those judgements.

On the basis of Petitioner's pro se motions and Counsellor Petersen's failure to present any "issue regarding the judgements upon [Petitioner's] remaining convictions," the appellate court was required to satisfy itself that federal constitutional concerns had been met where Counsellor Petersen had constructively withdrawn. The court was required "to satisfy itself that [Counsellor Petersen] ha[d] provided [Petitioner] with a diligent and thorough search of the record for any arguable claims" and the court was, itself, required to "determine whether counsel correctly concluded that the appeal was frivolous." PENSON, 48 U.S., at 83.

The appellate court's failure to require Counsellor Petersen to furnish an ANDERS BRIEF was in error leading to a "constructive denial of assistance of counsel altogether [ ] legally presumed to result in prejudice." PERSON, Id. (quoting STRICKLAND, 466 U.S., at 692, 104 S.CT., at 2067.)

Counsellor Petersen's decision that Petitioner's case on appeal in relation to case no. 09CRS 052770, and failure to present and discuss any issues in challenge thereto was not an objectively reasonable choice. (emphasis added)

Counsellor Petersen's failure to present and discuss any issues in the Petitioner's appellate brief effectively deprived [Petitioner] of more than a fair proceeding: that deficient performance deprived [Petitioner] of the appellate proceeding altogether," FLORES-ORTEGA, 120 S.CT., at 1038-39 n.15, where under the NORTH CAROLINA RULES OF APPELLATE PROCEDURE, RULE 28(a): Issues not presented and discussed in the parties briefs are deemed abandoned. See also NORTH CAROLINA v. MAYNARD, 195 N.C. APP. 757, 673 S.E.2d 877 (2009) (Defendant made no argument in her brief concerning her conviction and any assignment of error pertaining to that conviction was deemed abandoned.)

Because Counsellor Petersen constructively withdrew from case no. 09CRS 052770, without the appellate [redacted] court following the holdings of ANDERS v. CALIFORNIA, prejudice may be presumed in this matter with no further showing from the Petitioner of the merits of his appeal because the violations of Petitioner's Sixth Amendment rights to the effective Assistance of Counsel" rendered the appeal proceedings presumptively unreliable or entirely nonexistent." See STRICKLAND, supra, at 493-96, CRONIC, 466 U.S., at 658-59, 104 S.CT. 2039; ROBBINS, at 286-87, 120 S.CT. 746 ..." where the United States Supreme Court has held "that when counsel's constitution deficient performance deprives a defendant of an appeal he would otherwise have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." FLORES-ORTEGA, at 484, 120 S.CT., at 1038-39.

And, assuming arguendo that it did not constitute prejudicial error, per se, for Petitioner's appellate counsel to constructively withdraw without filing an ANDERS BRIEF and the appellate court allowing appellate counsel to do so, Counsellor Petersen's appellate performance was objectively unreasonable under STRICKLAND where Counsellor Petersen failed to discover the follow non-frivolous issues, present them in Petitioner's brief and, therefore, argue them on appeal in challenge to case no. 09CRS 052770:

1.) N.C. GEN. STAT. §15A-1442(4)(b): There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.

At the close of the State's evidence Petitioner moved to dismiss the charges. (Tp. 221); (DEFENDANT-APPELLANT'S (DEF.'S) BRIEF, p.9); (NC COA OPINION (NC-COA12-50) at p. 3), (SEE APP:X I).

In relation to OFFENSE II of case no. 09CRS 052770 - BREAKING AND OR ENTERING A MOTOR VEHICLE (N.C.G.S. §14-56) - the State failed to establish "'substantial evidence of each essential element of the offense charged, or of a lesser offense included therein;'" NC-COA12-50 at 3 (quoting STATE v. FRITSCH, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000)). (SEE APP.'x IV); IN RE WINSHIP, 397 U.S. 358, 364 (1970).

"N.C.G.S. §14-56 (1983) provides, in pertinent part: If any person with intent to commit any felony or larceny therein, breaks or enters any ... motor vehicle ... containing any goods, wares, freight, or other thing of value ... that person is guilty of a Class I felony. (Emphasis added in the original). The statute requires, as an element of the offense, that the vehicle broken or entered must contain 'goods, wares, freight, or other thing of value.' Our Court of Appeals has held that even items of trivial value satisfy this element of the offense." STATE v. MCLAUGHLIN, 321 N.C. 267, 282 (1987)

The record in the present matter and MCLAUGHLIN are materially similar in that in both matters the record "is devoid even of evidence that the victim's vehicle contained items of trivial value that belonged to the victim or to anyone else." ID. "Because there was no evidence here of the essential element of the offense established by N.C.G.S. §14-56, the trial court should not have submitted the issue of defendant's guilt of the offense to the jury. Accordingly, defendant's conviction on the charge of breaking and entering a motor vehicle is reversed." ID., at 270-71; see also IN RE WINSHIP, 397 U.S. at 363.

More importantly, where the State failed to present sufficient evidence to legally support Petitioner's conviction, the DOUBLE JEOPARDY CLAUSE of the Fifth Amendment bars retrial in this matter. SEE SMALIS v. PENNSYLVANIA, 476 U.S. 140, 142-44 (1986) (The Double Jeopardy Clause bars retrial when a judge dismissed charges against defendants because evidence legally insufficient to support conviction.); see also HUDSON v. LOUISIANNA, 450 U.S. 40, 44-45 (1981) (double jeopardy bars retrial when judge set aside jury's guilty verdict and granted motion for new trial because evidence insufficient.)

2.) In relation to Offense III of 09CRS 052770 - FIRST DEGREE BURGLARY - N.C. G.S. §14-51, the State failed to establish substantial evidence of each essential element of the offense charged, or of the lesser-included offense of attempted first degree burglary for which Petitioner was found guilty and sentenced where the State failed to allege and prove any felonious intent. (emphasis added)

"Felonious intent is an essential element of the crime[s] defined in [N.C.G.S. §14-51]. It must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged," STATE v. FRIDDLE, 223 N.C. 258, 260 (1943). (SEE App.'x IV)

In the present matter at bar, at no point during proceedings does the State make any allegations of what the felonious intent may have been. Although the felonious intent of larceny may be inferred from the evidence once the allegation of such felonious intent has been made by the State, that allegation must be made.

"Thus, when even construed in the light most favorable to the government, the evidence is insufficient to permit a reasonable factfinder to conclude beyond a reasonable doubt that [Petitioner] had the intent to [commit larceny]. For these reasons set forth, the judgement [should be] vacated, and [ ] remand[ed] ... for entry of a judgement of acquittal." UNITED STATES v. BAILEY, 819 F.3d 92, 95 (4th Cir. 2016).

3.) In relation to OFFENSE I of 09CRS 052770 BREAKING AND OR ENTERING - N.C.G.S. §14-54(a), as set out above in (2), felonious intent is an essential element of this offense - element four - which the State failed to produce sufficient evidence to support a guilty verdict against the Petitioner.

In regard to both OFFENSE II and OFFENSE III, the trial court committed prejudicial and plain error by submitting these matters to the jury, but more importantly, by alleging the felonious intent for the State after the close of all the evidence. Petitioner would ask that this Court make a holding as to the constitutionality of such an error on behalf of the trial court where Petitioner can find no case precedent.

4. N.C.G.S. §15A-1442(4)(c): there has been error in the admission or exclusion of evidence, to the prejudice of the defendant, and N.C.G.S. §15A-1442(5)(a): The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.

There was a violation of Petitioner's Confrontation Clause rights where Petitioner "was prohibited from engaging in otherwise appropriate cross-examination ... to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." OLDEN v. KENTUCKY, 488 U.S. 227, 231, 109 S.Ct. 480, 483, 102 L.Ed.2d 573 (1988)

During trial, Petitioner attempted to cross-exam State's witness Darren Furr regarding the statements contained in the Investigative File Report and Sheriff's Office radio transmissions provided to the defense through discovery by the State. In this report and transmissions are alleged statements made by Darren Furr to law investigators "describing or explaining an event or condition [his alleged witnessing and chase of the perpetrator] made while declarant [Darren Furr] was perceiving the event or condition, or immediately thereafter;" N.C. R. EVID., RULE 803 (1); See also FED. R. EVID. R. 803(1); and, or "statement[s] relating to a startling event or condition [Darren Furr's witnessing and chase of the perpetrator] made while the declarant [Darren Furr] was under the stress of excitement caused by the event or condition;" N.C. R. EVID., RULE 803(2); see also FED. R. EVID. RULE 803(2). (T. pp. 128-129).

The statements contained in the Investigative File REPORT / INVESTIGATIVE REPORTING OFFICER'S REPORT NARRATIVE — also being the same information presented to the magistrate to establish probable cause for Petitioner's arrest and warrants therefore — were contradicted by, and proven to be false by the trial testimony of the reporting officer himself as well as by State's witnesses and victims Michelle Furr and Darren Furr (Mrs Furr and Mr. Furr). (App.'x V); (See also Tr. pp. 128-130)

Upon the State's objection a voire dire was conducted by the court. During this voire dire Mr. Furr denied all the material statements of fact contained in law enforcement records that would have established "the essential facts constituting the offense[s] charged;" Fed. R. Crim. P., Rule 3; see also N.C.G.S. §15-304(d). More importantly, the Reporting Officer's Narrative fails to cite any description of any suspect Mr. or Mrs. Furr may have witnessed, and the radio transmissions establish that law enforcement officers were provided with a vague description of a suspect that matched only that of the Petitioner's race:

> I spoke with the [ ] victim to get more information. Suspect from what he said was a black man wearing some heavy clothing.

(Tr. pp. 130-131).

The court sustained the State's objection on the grounds of hearsay. (Tr pp. 131). Also ruling that:

> And the fact that the officers may have mistaken what he [Mr. Furr] said, that's neither here nor there.

The court's ruling in this regard was erroneous for several reasons:

i) "[T]his statement was not [being] admitted for the truth of of the matter asserted, and it is settled that the Confrontation Clause does not bar the admission of such statements." WILLIAMS v. ILLINOIS, 567 U.S. 50, 57, 132 S.CT. 2221, 2228, 183 L.Ed.2d 89 (2012);

ii) "In this case... the [Petitioner] did not introduce [Mr. Furr's] out-of-court [statement] to prove the truth of [Mr. Furr's] assertions. Thus, ... [Mr. Furr's] [statement] was not hearsay under traditional rules of evidence." TENNESSEE v. STREET, 471 U.S. 409, 413-414, 105 S.CT. 2078, 2081, 85 L.Ed.2d 425 (1985); see also UNITED STATES v. WILLIAMS, 445 F.3d 724, 736 (4TH Cir. 2006) ("The question was thus not offered to prove the truth of the matter asserted and was not hearsay. See FED. R. EVID. 801(C)).; N.C. R. EVID. RULE 801(c): "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; see STATE v. REID, 335 N.C. 647, 440 S.E.2d 776 (1994) (When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay.)

iii.) Petitioner was denied his constitutional right to "meaningful" or adequate confrontation with an adverse witness in Mr. Furr. The Petitioner's "nonhearsay use of [Mr. Furr's statement to law enforcement officers] was critical to rebut [Mr. Furr's] testimony" that he provided investigators on the scene a description of the suspect matching that of the Petitioner prior to Petitioner's arrest. STREET, ID.

"Before the details of [Mr. Furr's statement] [should have been] admitted, the jury could evaluate the reliability of [Mr. Furr's statements and testimony] only by weighing and comparing the testimony of [Mr. Furr]" alone. ID. "the State's most important piece of substantive evidence was [Mr. Furr's testimony]." Because Petitioner was "denied the opportunity to present [Mr. Furr's] [statement] in [cross-examination] so as to enable the jury to make the relevant comparison, the jury [was] impeded in evaluating the truth of [Mr. Furr's] testimony and handicapped in weighing the reliability of [Mr. Furr's testimony]." ID. The trial court's exclusion of Mr. Furr's prior statements to law enforcement officers is "at odds with the Confrontation Clause's very mission - to advance 'the accuracy of the truth-determining process in criminal trials.' DUTTON v. EVANS [400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970)]." ID.; and

iv.) "On cross-examination, a party is not limited to asking questions about matters in evidence. N.C.G.S. § 8C-1, Rule 611(b) provides that a witness may be cross-examined on any matter relevant to the issue in the case, including credibility." STATE v. LOVIN, 339 N.C. 695, 713, 454 S.E. 2d 229, 239 (1995).

5.) N.C.G.S. §15A-1442(4)(c): There has been error in the admission or exclusion of evidence, to the prejudice of the defendant, to his prejudice.

Pr

Prior to trial and during the trial Petitioner sought to exclude evidence obtained through the execution of a search warrant upon Petitioner's vehicle and GPS unit therein, as well as all other evidence seized during and after Petitioner's arrest because said arrest- without warrant- was made without probable cause. (See App.'x VI); (DEFENDANT'S RECORD ON APPEAL, pp. 76-94, 145-156)

The search warrant in this matter was:

i) issued in violation of the Fourth Amendment where it failed to particularly describe the items to be seized, and was thus facially invalid;

ii) issued in violation ~~whose~~ of the Fourth Amendment where it failed set forth probable cause to believe that the items sought for seizure would have been found in Petitioner's vehicle; and

iii) was "rubber stamped" by the magistrate where upon its face the warrant was issued to search for "previously stolen items from the victims of this incident as well as other unidentified victims," "potential location(s) of additional victim(s);" "Any and all potential weapons;" "Any and all personal items of potential victims;" "items of personal property other than the vehicle's owner;" "any and all evidence that may [be] related to the known victims;" thus constituting an unconstitutional "General Warrant."

In regard to Petitioner's arrest, under North Carolina, and the United States Fourth Amendment, a law enforcement officer "may arrest without warrant when the person to be arrested has committed a misdemeanor in the presence of the officer," STATE v. FENNER, 263 N.C. 694, 698, 140 S.E.2d 349, 352 (1963); or "any person who the officer has probable cause to believe has committed a felony;" N.C. G.S. §15A-401(b)(2); "the question of whether ... the officer had reasonable grounds [i.e., probable cause] to believe he did, is for the jury." FENNER, ID.

As established by this Court in ORNELAS v. UNITED STATES, 517 U.S. 690, 116 S.Ct. 1657 (1996) it was held "that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." ORNELAS, 517 U.S. at 699, 116 S.CT. at 1663. This review consists of a two-step process. "First, a court must identify all of the relevant historical facts known to the officer at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search. ORNELAS, 517 U.S. at 700, 116 S.CT. at 1664.

In the present matter it is impossible from the trial record to review the "historical facts known to the officer at the time of the stop or search," ID., because the arresting officer was absent from Petitioner's trial supposedly on his honeymoon in Mexico. (Tr.p. 168). Accordingly, it would have also been impossible to offer any evidence to the jury establishing whether the arresting officer- Deputy Kevin Klingelsmith who, at gun-point gave Petitioner "directions to produce his hands, lay down, turn over" and "t[ook] the defendant into custody-had probable cause to do so. (Tpp. 142); (See also Tpp. 169 ("Deputy Klingtesmith had the suspect down on the ground at gun point. The suspect was face down on the ground with his arms and legs out.").

The arresting officer's absence at trial represents two questions on federal law that this Court has yet to rule upon:

1. Whether, where a defendant was arrested without warrant, or identification as being a suspect, the arresting officer's absence - per se - would constitute a Confrontation Clause violation; or

2. Whether said officer's absence - per se - would constitute a Fourth Amendment violation where probable cause for a defendant's arrest, without warrant, has not been established before the jury, or court.

It must also be noted that the State failed to present any historical facts that the arresting officer would have been aware and although Mr. Furr testified to having provided law enforcement officers a description matching that of the Petitioner, that testimony went uncorroborated by the six law enforcement officers who offered testimony at trial, but more importantly was contradicted by law enforcement records - radio transmissions - which Petitioner introduced, or attempted to introduce.

REASONS WHY WRIT SHOULD ISSUE: II

II. The current, or then laws at the time of Petitioner's appeal and the denials of Petitioner's State Petition For Writ Of Certiorari with the Supreme Court of North Carolina violate the Petitioner's federal constitutional protections under the Fourteenth, and/or Fifth Amendment where the State of North Carolina has either enacted or is enforcing laws, rules, practices, or customs which abridge indigent appellants' Sixth Amendment right to the effective Assistance of Counsel, and/or the right to Due Process of law and Equal Protection of the laws.

A. Standard of Review.

"No person shall be ... deprived of life, liberty, or property, without due process of law ..." AMENDMENT V (in pertinent part)

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

Amendment VI (in pertinent part).

"All persons born or naturalized in the United States ... are citizens of the United States .... No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deprive any person within its jurisdiction the equal protections of the laws." Amendment XIV (in pertinent part).

B. Arguement.

On first appeal by right, citizens have the right to the Assistance of Counsel. whether than afford counsel privately, or are required to have counsel appointed by the State.

Once counsel has been appointed to represent an indigent on appeal, counsel must file an Anders brief with the appellate court, and the indigent, allowing the indigent to raise any arguable points, and the appellate to decide whether the appeal is wholly frivolous or not before appointed counsel may be allowed to withdrawn based upon counsel's belief that the appeal is frivolous.

When an indigent has serious dissatisfaction with his appointed counsel, the law allows for the indigent to make a timely and good-faith request to the court for a change of counsel, and the court then has the affirmative duty to determine the reasons of that dissatisfaction.

However, under the rules, laws, practices and, or customs of the North Carolina appellate courts indigents have no rights to make a timely, good-faith request for a change of counsel for any reason short of death of counsel. If they make a motion to the appellate courts establishing constitutionally deficient performance and violation of the Sixth Amendment right to the effective Assistance of Counsel, the rules, laws, practices and, or customs of the appellate courts calls for any and all such motions or notices to be dismissed and denied indiscriminately, per se, without consideration.

These same laws, rules, practices and, or customs allow appointed appellate counsels to withdraw from indigent appellants' appeals without having filed an ANDERS brief and following all other federal safeguards established by this Court in ANDERS v. CALIFORNIA. It is an untenable assumption to make that an appointed appeal counsel who has already constructively withdrawn from an indigent's appeal would, on his or her own volition, file an ANDERS brief when the indigent has no legal avenue within the

North Carolina appellate courts to bring this issue before the appellate courts while the appeal is still pending and the indigent still has a constitutional right to the appointment of counsel.

Under North Carolina law an appointed appellate attorney may withdraw at any time he so chooses, and indigent appellates have no legal recourse to have appointed counsel file an Anders. brief, thus are indigent appellants in North Carolina being denied due process of law, as well as the equal protection of the law as established by this Court.

Reasons Why Writ Should Issue III

III The reviewing court, when presented with prima facie evidence upon the face of the record that the State, or Federal government has failed to prove every fact necessary to constitute the offense(s) charged beyond a reasonable doubt as required by the Fifth Amendment, the reviewing court has the obligation to, sua sponte, raise the issue in the interest of justice; to avoid a fundamental miscarriage of justice; or to avoid a manifest injustice to a defendant.

A. Standard of Review.

"On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed. R. Crim. P., Rule 33; see also Mesarosh v. United States, 352 U.S. 1, 10-14 (1956); United States v. Lopez, 818 F.3d 125, 132 (3rd Cir. 2016) (interest of justice requires granting of a new trial where government violated the defendant's due process rights undermining fairness, integrity, and reputation of judicial proceedings.).

A petitioner can overcome a procedural bar and a court may review a claim where the failure to review that claim will "result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also McQuiggins v. Perkins, 133 S.Ct. 1924, 1935 (2013).

"'To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.'" State v. Batchelor, 190 N.C. App. 369, 377-78, 660 S.E. 2d 158, 164 (2008) (citing N.C. R. App., Rule 2)

"Our [North Carolina] Supreme Court recently reiterated that aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party.'" ID.

B. Arguement.

The DUE PROCESS CLAUSE of the Fifth Amendment requires that the prosecution must prove "every fact necessary to constitute the crime" charged beyond a reasonable doubt, IN RE WINSHIP, 397 U.S. 358, 364. This applies to both State and Federal criminal proceedings, JACKSON v. VIRGINIA, 443 U.S. 307 (1979); SULLIVAN v. LOUISIANNA, 508 U.S. 275, 278 (1993)

"[W]hen even construed in the light most favorable to the government, the evidence is insufficient to permit a reasonable fact finder to conclude beyond a reasonable doubt that Petitioner committed the crimes of breaking and or entering a motor vehicle, breaking and entering, or attempted first degree burglary where the State failed to present sufficient evidence of each element of those offenses, and for that reason, "the judgement[s] [must] [be] vacated, and [ ] remand[ed] ... for entry of a judgement of acquittal." BAILEY, supra.

In viewing the actions of any court, the presumption must be afforded that the court is aware of all applicable laws relating to the particular case(s) before it. In this matter the appellate court was aware that Petitioner had made a timely motion to dismiss for insufficiency of evidence, (APP.'X I, NC COA12-50, pp. 3), and in order to make any ruling upon the denial of such a motion, the court was tasked with reviewing the record in its entirety. The result of said review would have been the appellate' court's awareness that the State prosecutors had failed to present sufficient evidence of any of Petitioner's remaining convictions. With that Knowledge the appellate court should have-"in the interest of justice" and, or to avoid a "manifest injustice" to the Petitioner-sua sponte, reviewed the failure to present sufficient evidence; in STATE v. BATCHELOR, the court established:

> In the present case, we hold that the State failed to meet its burden of proving that Defendant was perpetrator of the crime charged, which failure warranted the dismissal of the charge.... If we do not review the issue of sufficiency of the evidence in the present case, Defendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke RULE 2 under the exceptional circumstances.

ID., at 377-78; 660 S.E.2d at 164.

If, as stated by this Court in HERRERA v. COLLINS, 506 U.S. 390, 113 S.CT. 853, 122 L.Ed. 2d 203 (1993), "the central purpose of any system of criminal justice is to convict the guilty and free the innocent," then an appellate, nor any court, may be allowed to turn a blind eye towards evidence that conclusively establishes that a defendant should, or should have been acquitted but none the less has been imprisoned.

To allow a court to do so would be to also allow a court to ignore the United States Constitution that "prohibits the imprisonment of one who is innocent of the crime for which he was convicted;" HERRERA, as well as the holdings of the United States Supreme Court which has consistently held that a person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. SEE IN RE WINSHIP, 397 U.S. 358 (1970).

CONCLUSION

Based upon the above and evidence attatched hereto, Petitioner prays that the Court grant his petition for issuance of writ of certiorari.

This is the 2nd day of November, 2020

Signed,
Clery E. [signature]