

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COREY JAWAN ROBINSON ——— PETITIONER

VS.

JOSEPH MCFADDEN, Warden ——— RESPONDENT(S)

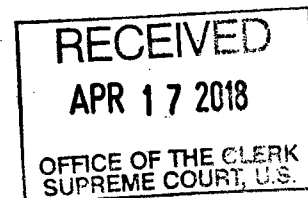
ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APR 17 2018 #294233

Corey Jawan Robinson #294233
BREC Waterce 166
4400 Broad River Road
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QUESTION(S) PRESENTED

1) Did the United States Court of Appeal err in not granting a certificate of appealability as to issue two District Court err in granting Summary Judgment to Respondent on ground two when petitioner has established cause and prejudice for the procedural default and that also failure to review the constitutional claim will result in a fundamental miscarriage of justice that proves actual innocence which prejudice is also shown under 2254(d)(1) and 2254(d)(2).

2) Did United States Court of Appeal err in not granting a certificate of appealability on issue #3, District Court err in granting Summary Judgment to Respondent on ground ten when petitioner has established a constitutional violation under 2254(d)(1) and petitioner was entitled to relief under 2254(d)(2).

3) Did United States Court of Appeals err in not granting a certificate of appealability on District Court err in denying Petitioner motion to compel production of evidence when evidence establish a constitutional violation and failure to produce evidence would result in a due process violation which proves a miscarriage of justice of actual innocence

4) Did United States Court of Appeals err in not granting a certificate of appealability on District Court err in granting Summary Judgment to Respondent on ground six when petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice that involves actual innocence. Petitioner is entitled to relief under § 2254(d)(1) and § 2254(d)(2).

5) Did the United States Court of Appeals err in not granting a certificate of appealability on District Court err in granting Summary Judgment to Respondent on ground seven when petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice that proves actual innocence, petitioner is entitled to relief under § 2254(d)(1) and § 2254(d)(2).

6) Did the United States Court of Appeals err in denying a certificate of appealability on District Court err in granting Summary Judgment to Respondent on ground nine when petitioner has established he did not have a opportunity to fully and fairly present his Fourth Amendment argument due to trial counsel ineffectiveness and Respondent should not be granted Summary Judgment based upon Buleman because petitioner is entitled to relief under 2254(d)(1) and 2254(d)(2).

7) Did the United States Court of Appeals err in denying a certificate of appealability as to District Court err in granting Summary Judgment to Respondent on ground eleven when petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of actual innocence and petitioner is entitled to relief under 2254(d)(1) and 2254(d)(2).

8) Did the United States Court of Appeals err in denying a certificate of appealability as to District Court err in granting Summary Judgment to Respondent on ground twelve when petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice of actual innocence with petitioner is entitled to relief under 2254(d)(1) and 2254(d)(2)

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LIST OF PARTIES

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:

Donald John Zelenka, Deputy Attorney General

William Edgar Salter, III, Assistant Attorney General

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

FOR cases from federal courts:

The opinion of the United States court of appeals appears at Appendix 405 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 408 to the petition and is unpublished.

JURISDICTION

FOR cases from federal court

The date on which the United States Court of Appeals decided my case was on February 1, 2018.

No petition for rehearing was timely filed in my case

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the Constitution: No person shall be deprived of life, liberty or property without due process of law.

The Fourteenth Amendment to the United States Constitution provides in relevant part: Nor shall any state deprive any person of life, liberty, or property without due process of law.

Amendment XIV, section 1, Constitution of the United States: All person 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 shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law.

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

The Fourth Amendment guarantees the right of the people to be secure from unreasonable searches and seizures. U.S. Const. Amend. IV. Both the Fourth Amendment of the United States Constitution and Article 2, §10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. Amend. IV.

STATEMENT OF THE CASE

On June 3, 2008, around 5:30 pm., the Georgetown County Sheriff's office received an anonymous telephone call to their 911 service indicating that the caller had witnessed a black male wearing a white jersey bearing the number 32 and an orange hat making a narcotics transaction in the caller's neighborhood App.p. 70, line 21-22. Upon his arrival, and without speaking to the caller, Deputy Seale began looking for someone who fit the announced description App.p. 70, line 22-p. 71, line 6. He came upon the petitioner several streets over from where the caller had reported... seeing the illegal conduct App.p. 70 line 22-p. 71, line 6. Deputy Seale got out of his car, approached the petitioner and asked him for identification App.p. 72, line 14-15. Deputy Seale then asked petitioner if he had any weapons and petitioner responded that he did not App.p. 72, line 23-p. 73, line 3. Deputy Seale asked petitioner if he could put him down for weapons and the petitioner agreed while raising his hands above his head App.p. 73 line 4-7. Deputy Seale then, rather than simply patting petitioner down, attempted to place petitioner in handcuffs so that he could do a proper search, he was not [executing] a legal writ, deputy testified I punched him two to three times App.p. 73 line 16-17, the Solicitor states petitioner only pull away and took a swing. App.p. 27, line 12-15. See DVD of police car tape shows no assault occur, only assault occur was when Deputy Seale grabbed me and tried to force me in handcuffs after I refused to be placed in handcuffs, which Deputy Seale testified I was not under arrest App.p. 91, line 3-4. Which Deputy testified I placed my hands behind my back to get handcuff App.p. 73, line 9-15. Which is perjury see Narrative report when Deputy said he grab me then told me he was going to handcuff me, detain me. Evidence was presented that Deputy had no injury or complains of injury even thou he claim his arms was bruised no hospital report or picture did not support his dispute against my evidence presented App.p. 141, line 7-p. 144, line 2. Which Deputy caused his own injury and struggle when jumped on me after I tripped and fell in a wooded area App.p. 73, line 20-25. Petitioner moved for a direct verdict motion twice and it was denied App.p. 145, line 9-p. 164, line 4. On March 17, 2009, I proceeded to trial, the State did not present any evidence or direct evidence of any witness actually witnessing me with drugs. They presented Ms. Fordham who was an anonymous caller, no drugs was sold to her and she claims I was all the way across the street when she saw what she assumes a drug transaction App.p. 57, line 10-p. 68, line 16. Next the state present Deputy John Seale, who never saw me dig in my pockets, drop or throw any drugs, he also gave... three (3) contradicted, inconsistency and false statements of where the drugs was found in woods, in middle of woods, edge of woods or like warrants stated in parking lot, but Deputy Seale stated it was not found in parking lot and he was not the one who obtain warrants. App.p. 69, line 9-p. 164, line 14. The last witness they presented was Agent Geno who actually discover the drugs testified I was away from the scene when he arrived (so he don't know if the drugs was 3 feet, 30 yards, or 3 miles from me, he cannot testify to seeing me possess any drugs) App.p. 109, line 1-5. I moved for a direct verdict twice and it was denied App.p. 145, line 9-p. 164, line 4. In the month of April 2013... per hearing, I amended my application adding Prosecutorial Misconduct and newly after discovery evidence see PCR transcript. The facts were the Solicitor allowing

testimony of I hit the Deputy Seale at trial. App.p. 73, line 16-17. Which see DVD tape of police car which prove no assault occurred and see App.p. 27, line 12-15 which Solicitor cleared the record up by saying Z only pull away and took a swing, which prove no assault occurred. The solicitor also allowed the testimony that Z placed my hands behind my back to be handwritten detain App.p. 73, line 9-14, which Solicitor was in possession of see Narrative report, Deputy Seale statement that indicated he placed my hands behind my back to detain me. My conviction was obtained by false statements. Solicitor allowing testimony that Z was in a drug known area, when see DVD tape of police car which prove that Z was not stopped at club and club was not present in video. Which the incident Report of Deputy Seale Narrative report is newly after discovery evidence, Solicitor never gave petitioner a complete copy until the ending part of trial see App.p. 157, line 4-9, App.p. 158, line 21. Even Deputy Seale testified it was actually missing page App.p. 143, line 4-9. So petitioner never had this information to cross examine Deputy Seale about testimony of petitioner placing hands behind back to be detain when evidence prove Deputy Seale placed petitioner hands behind back to be detain, which newly after discovery evidence proves perjury. March 14, 2009, I presented several motion to the pre-trial judge, which included two motion to suppress evidence for lack of probable cause, judge asked to hear the motions App.p. 23, line 10-17. Counsel failed to argue motion, but made his own motion to add. App.p. 23, line 8-p. 24, line 11. Court asked Counsel again to hear arguments on all motions. App.p. 24, line 8-15. Counsel failed to argue motions again. App.p. 24, line 16-17. Counsel never asked for a Franks v. Delaware hearing, counsel never argued the illegal search and seizure of the money. Counsel told me the next day, I could not take a plea after motion been denied, which Z could have enter a conditional guilty plea and still challenge preserved motions that was denied. His main reason was because Z was looking at 15-30 years as 3rd offense, never once did he tell me Z was indicted under 2nd offenses. Z did not learn this until sentencing see trial transcript. Counsel never presented the DVD car tape, or objected to the false testimony at pre-trial hearing of me putting my hands behind my back to be detain. App.p. 24, line 12-p. 25, line 24. When Deputy Seale Narrative report he stated he put my hands behind my back to detain me. Prior to trial, petitioner [apprized] the court of his desire to proceed pro se, counsel reiterated petitioner request and asked to be relieved as counsel for petitioner App.p. 39, line 18-21. The trial court proceeded to query petitioner regarding his age, education, and desire to proceed pro se. Also, trial judge advised petitioner of the danger and disadvantages of self-representation and of his right to appointment of counsel in the case App.p. 40, line 10-App.p. 49, line 13. Petitioner never stated he did not want an attorney or said he waived his right to counsel but to his appointed counsel because of the mistreatment and the trial judge stated you understand that we have started the case and we are going to go forward with this trial at the present time and trial judge stated you understand that if I accede to your request to represent yourself, that will not delay the trial in this matter? App.p. 43, line 13-19. Petitioner testified to counsel

mistreatment. For example petitioner testified because during my pre-trial hearing, when I had my pre-trial hearing, he had put argue my motion and he said he was going to say this and say that, but when we got into court, he didn't mention nothing and he didn't object to nothing that -- petitioner testified yes, sir, but then again he -- he told me to write -- he told me to write stuff on the paper what I have him to ask and cross examine the witnesses, but while I was writing on the paper, he just pushed my paper back. He didn't ask no questions I asked him during cross. Petitioner testified yes sir, but we had altercations in the past because he refuses to show me my D.V.D. tape App.p. 44, line 5-p. 45, line 21. Petitioner was arrested on June 3, 2008 for warrant number J-512017; 018; 019. Petitioner was original appointed counsel Richard F. Colvin who filed a motion to be relieved as counsel on September 16, 2008 see Exhibit of Motion to be relieved as counsel, the honorable Alison R. Lee gave an order relieving counsel on September 23, 2008 and Reuben Gowde was substituted for public defender in place of Mr. Colvin see Exhibit Order relieving Counsel, on this same day the solicitor disclosed discovery to new appointed counsel Reuben Gowde which only contained plea offer, indictment, warrants, incident report, Use of Force Report and NCZE, the solicitor Dixie C. Brancanti never disclosed as evidence the video from in-car camera see Exhibit Acknowledgement of receipt of discovery documents dated September 23, 2008 which no attorney for defendant did not sign acknowledge receipt. Petitioner was trying to seek the video through freedom of information Act from solicitor office which the supervisor III indicated that the file reflected that discovery given to Richard Colvin on August 25, 2008 which this offer discovery evidence see letter from solicitor office shows perjury that solicitor never disclosed video from the in-car camera to counsel because evidence reflect see Exhibit Acknowledgement of receipt of discovery documents it was disclosed on September 23, 2008 and it does not contain evidence of video which shows a Brady violation, per counsel did not review the record on this issue and he was ineffective of assistance. Petitioner also testified when relieving counsel at trial during trial of the failure to show D.V.D. tape see App.p. 45, line 17-21. Also at pre-trial hearing Mr. Gowde move that the prosecution produced any evidence that have not already been given. Court asked prosecutor is there anything, solicitor responded I don't believe so App.p. 29, line 25-p. 36, line 22. see Exhibit Acknowledgement of receipt of discovery documents dated September 23, 2008 which no solicitor on the case disclosed the in-car video. see ECF #1. In 2008, a Grand Jury indicted Petitioner for possession with intent to distribute while bote cocaine base, possession of marijuana with intent to distribute and assault while resisting arrest in Georgetown County, South Carolina ("the state"). ECF No. 46-3 at 78, 84, 90.) On March 16, 2009, Petitioner's trial for these charges commenced, and Attorney C. Reuben Gowde represented him (ECF No. 46-1 at 3). Petitioner was tried before the Honorable Steven H. John (Id.). After Judge John ruled on several motions raised at the beginning of trial, Petitioner made a Motion to Relieve his counsel and proceed pro se (Id. at 49-50.) After questioning Petitioner about his Motion and informing him of his

trial rights, Judge John granted Petitioner's Motion to represent himself, relieving Attorney Coude as Petitioner's counsel. (Id. at 44-50.) At the conclusion of Petitioner's trial, a jury found Petitioner guilty of possession of crack cocaine with intent to distribute possession with intent to distribute marijuana, and assault of an officer while resisting arrest (Id. at 194-95.) Petitioner was sentenced to concurrent sentences of fifteen years imprisonment for possession with intent to distribute cocaine base, ten years imprisonment for possession with intent to distribute marijuana, and ten years imprisonment for assault on a police officer while resisting arrest. (Id. at 201.) On March 20, 2009, Petitioner filed an appeal in the South Carolina Court of Appeals. (ECF No. 46-461.) Deputy Chief Appellate Defender Wanda H. Carter represented Petitioner on direct appeal, filing an Anders Brief and a Petition to be Relieved as counsel on December 29, 2009. (ECF No. 46-1 at 205-213.) On January 12, 2010, Petitioner filed a Pro Se Appellant Brief. (ECF Nos. 46-2 at 2-22, 46-13.) The South Carolina Court of Appeals dismissed Petitioner's case on April 28, 2011. (ECF 46-2 at 23.) On May 5, 2011, Petitioner filed a Petition for Rehearing (ECF No. 46-5) and it was denied on June 1, 2011. (ECF No. 46-6.) On December 12, 2014, Petitioner filed a pro se Petition for writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) On March 30, 2015, Joseph McFadden ("Respondent") filed a Return and Motion for Summary Judgment, but the Return was missing a portion of the Appendix (ECF Nos. 23, 24). Respondent filed a correct Return and Motion for Summary Judgment on November 25, 2015. (ECF Nos. 46, 47.) On March 2, 2016, the Magistrate Judge issued a Report and Recommendation ("First Report") recommending that the court grant Respondent's Motion for summary judgment and deny Petitioner's Petition. (ECF No. 58.) On March 14, 2016, Petitioner filed an objection to the Magistrate Judge's Report. (ECF No. 64.) On September 30, 2016, the court accepted in part and rejected in part the First Report. (ECF No. 71.) The court denied Petitioner's Habeas Corpus petition as to Ground One through Nine and Eleven through Thirteen. (Id. at 3.) The court disagreed with the First Report as to the procedural bar on Ground Ten based on its discovery that Petitioner presented Ground Ten in his pro se Brief on direct appeal, thus satisfying the exhaustion requirement for his claim. (Id. at 8.) The court instructed Respondent to refile his summary judgment motion as to Ground Ten so that the "court may have a more fully developed argument on the issue" and remand Petitioner's Petition to the Magistrate Judge for reconsideration. (Id. at 9.) The court did not grant a Certificate of Appealability (Id. at 10.) In response to the court's order (ECF No. 71) Respondent filed an Amended Answer and Amended Motion for Summary Judgment on December 2, 2016 (ECF Nos. 77, 78.) Petitioner filed an Amended Response on December 12, 2016. (ECF No. 82.) The Magistrate Judge filed her Report and Recommendation as to Ground Ten on March 30, 2017. (ECF No. 84.) Ground Ten of Petitioner's Petition states that the "trial judge erred in not granting his Motion for Directed Verdict and that the state failed to prove that he had actual or constructive possession of the crack and marijuana found at the scene." (ECF No. 1 at 20.) The Magistrate Judge recommended that Respondent's Motion for Summary Judgment as to Ground Ten (ECF No. 78) be granted. On April 4, 2017, Petitioner filed an

Objection to the second Report (ECF No. 86) and on April 11, 2017, he filed a supplement to his Objection (ECF No. 89). Respondent responded to Petitioner's Objections (ECF No. 90) and Petitioner replied (ECF No. 91). On August 7, 2017, the court accepted the Magistrate Judge's Second Report granting Respondent's Motion for Summary Judgment and denying Petitioner's Petition (ECF No. 95). Petitioner appealed this order to the United States Court of Appeals for the Fourth Circuit and it was remanded to this court for a certificate of Appealability as to Ground Ten, which district court subsequently denied it. (ECF Nos. 98, 103, 108.). On February 1, 2018 the United States Court of Appeal for the Fourth Circuit denied a certificate of appealability and appeal was dismissed. The United States Supreme Court has jurisdiction to hear this appeal under 28 U.S.C. § 1254(1a).

REASONS FOR GRANTING THE PETITION

ARGUMENT #1

The United States Court of Appeal erred in not granting a certificate of appealability to issue two District Courts erred in granting Summary Judgment to Respondent on ground two when petitioner has established cause and prejudice for the procedural default and that also failure to review the constitutional claim will result in a fundamental miscarriage of justice that proves actual innocent which prejudice is also shown under 2254(d)(1) and 2254(d)(2).

Ground two was presented at Post Conviction Relief hearing App.p. 300, line 24-App.p. 302, line 19, it also was preserved in order of dismissal see App. 382 see ECF No. 64 Appeal Counsel procedural default petitioner ground by not petition it to South Carolina Supreme Court which by appeal attorney not petition preserved ground shows cause for the procedural default. Prejudice is also established through the merits of ground two see ECF No. 30 and 64. and ECF No. 1. Counsel failure to raise particular claim or claims on appeal is to be scrutinized under cause and prejudice test when failure is treated as procedural default by state courts. Murray v. Carrier, 106 S.Ct. 2639 (1986). In extraordinary case, where constitutional violation has probably resulted in conviction of one who is actually innocent, federal habeas court may grant writ even in absence of showing of cause for procedural default. Murray v. Carrier, 106 S.Ct. 2639 (1986). Ineffective assistance of counsel can supply the cause that, together with prejudice would excuse a procedural default in a habeas proceeding. Etherton v. Rivard, 800 F.3d 737 (2015). Petitioner has established a fundamental miscarriage of justice that proves actual innocent by clear and convincing evidence and proof and that it was based on an unreasonable determination of the facts in light of the record before the state court 3 2254(d)(2) see ECF# No. 64. It is too much contradiction, inconsistencies, false and perjury testimony dealing with the consent issue or any verbal or physical assault on the Deputy that was not proved beyond a reasonable doubt. Petitioner can also excuse the procedural default of Ground two on actual innocence see Exhibit of Deputy John Seale Narrative Report, which Deputy testified petitioner placed his hands behind his back to be detain. The record proves petitioner was not under arrest App.p. 91, line 3-4. Evidence was presented that Deputy had no injury or complaints of injury even though he claimed his arms was bruised no hospital report or picture did not support his dispute against petitioner evidence presented App.p. 141, line 7-p. 144, line 2. Which evidence was presented Deputy Seale caused his own injury and struggle when jumped on petitioner after he tripped and fell in a wooded area App.p. 73, line 20-25. Further it is actual innocence Deputy John Seale testimony of Consent to be arrest was without merits when asked during trial what was you arresting me for, what was your reason for stopping me and arresting me App.p. 91, line 1-2. Deputy Seale answered as you

heard on the video tape, I asked you for your I.D. I was not getting out to arrest you. You gave me consent to pat you down for weapons because the way you were -- you were acting so nervous, it had me fearful for -- I didn't know if you had a knife or a gun. You gave me consent to pat you down for weapons. App.p. 91, line 3-8. This testimony is without merits of what the fourth Amendment requires for consent. How can a person give you consent by him acting so nervous, that's not consider giving consent, that something he wanted to do because he testified it had me fearful. App.p. 91, line 6. So the pat down would be considered illegal based on the illegal stop, if the Deputy never made the illegal stop he would of never been fearful and that doesn't justify him wanting to place petitioner in handcuffs to do a pat down, so it is also inconsistency because he said petitioner gave him consent, then he said petitioner gave him consent because he were acting so nervous, which therefore one of Deputy Seale or Trial Counsel Guede used perjury testimony because Mr. Guede testified at PCR hearing after question by Mr. Boan did you get to see a DVD from the police? Mr. Guede answer was on my notes I've got down that what the DVD said or -- and the way I -- and I don't remember the DVD but I've got in my notes there where I viewed it And the date on it and all that -- and I wrote that down it said it was 6:02 pm and it's -- basically, all I've got down is words App.p. 338, line 17-22. Mr. Guede note did not mention nothing about petitioner giving consent to a pat down, Mr. Guede testified that the video words was the policeman said mind if I check you for weapons, I will be putting cuffs on you to detain you, the Defendant ran. App.p. 339, line 1-7. Which if petitioner did gave consent to pat him down, Deputy Seale exceeded the pat down when he attempted to place petitioner in handcuffs which was illegal seizure, the record is clear beyond a reasonable doubt petitioner did not punch Deputy Seale several times two to three as he claims, the solicitor stated that petitioner only pull away and take a swing App.p. 27, line 12-15, according to the record it shows Mr. Guede and the solicitor Mr. Andrew that no assault occurred and the record reflect Deputy Seale is lying which proves actual innocence, see ECF #No. 30 Solicitor waited until he presented the DVD in-car police car tape to the jury was his first time disclosing the DVD car tape to defense counsel Mr. Robinson App.p. 79, line 7-8. His reasons for introducing it into evidence was to show the jury hear a struggle from the woods, but Deputy Seale used perjury testimony and said he made it clear we were not in woods but on edge of wood App.p. 101, line 11-21. Deputy Seale admitted he was around petitioner neck he wasn't restraining arms, just laying on top of him, the only struggle Deputy Seale described petitioner did was keep his hands underneath him both times and attempt to get on top of him. App.p. 77, line 10-p. 80, line 24. Which also in closing argument the solicitor knew petitioner did not hit Deputy Seale two to three times or at all because he stated he did commit an actual assault on this officer. You heard testimony from that. You can see part of it on the tape. I know it's not

crystal clear, but I think you can tell what went down. But even if you don't think it's there, once he gets inside the woods you can hear -- you can hear the struggle App. p. 173, line 25 - p. 174, line 6. To establish "actual innocence," which would permit collateral review of procedurally defaulted claim, petitioner was required demonstrate that, in light of all the evidence, it was more likely than not that no reasonable juror would have convicted him. Bousley v. U.S., 118 S.Ct. 1604 (1998). Where habeas petitioner shows by clear and convincing proof that he is actually innocent of conduct on which his sentence is based, incarceration is fundamentally unjust and miscarriage of justice exception to procedural default bar applies. Spence v. Superintendent, Great Mendon Correctional Facility, 219 F.3d 162 (2000). When a petitioner raises a Schlup gateway actual innocence claim to enable a district court to consider the merits of the petitioner's otherwise procedurally defaulted habeas claims, the district court, in light of all the evidence, both old and new, must determine whether it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt; if the district court finds that, more likely than not any reasonable juror would have reasonable doubt as to the petitioner's guilt, then the petitioner has satisfied the Schlup standard and the district court must review the petitioner's procedurally defaulted claims. Teague v. Pearson, 689 F.3d 322 (2012).

Petitioner has established cause and prejudice for the procedural default and actual innocence to get over the procedural default with clear and convincing evidence, proof. Now Petitioner would show the court he is entitled to relief under § 2254(d)(1) it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this court and that it involved an unreasonable application of such law. Appellate counsel was ineffective assistance for failing to file a merit brief. Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit. See State v. Williams, 305 S.C. 116, 117, 406 S.E.2d 357, 358 (1991) (Upon the receipt of an Anders brief and "the receipt of the prose brief or the expiration of the period to file a prose brief, this court will then proceed to review the record as required by Anders. If no issue of arguable merit is discovered, the appeal will be dismissed and counsel's petition to be relieved will be granted. In the event the court finds any issue(s) of arguable merit, the parties will be directed to submit new brief(s).); State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct. App. 2002) (stating "After a thorough review of the record in accordance with Anders v. California and State v. Williams, we find the only preserved issue at trial is whether the trial court erred in denying Lawrence's motion for a direct verdict on the charge of discharging a firearm into an occupied structure" (emphasis added) (footnotes omitted). Petitioner moved for a direct verdict motion twice and it was denied App. 145, line 9 - p. 164, line 4. The right to effective assistance of appellate counsel, and the Strickland standard for evaluating such a claim, was extended to appellate proceedings in Smith v. Murray, 477 U.S. 527 (1986). and Smith v. Robbins, 528 U.S. 254, 120 S.Ct. 746 (2000). And prejudice is established, they is "no rational

trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 324, 99 S.Ct. at 2791-92 see also Cervantes v. Smith, 132 S.Ct. 2, 4 (2011). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Deficient is shown and prejudice is also established because appellate counsel knew the issue she raised was not preserved for direct appeal and she knew the motion for direct verdict denial was preserved and had merits and if she had of filed a merit's brief on the denial of direct verdict motion and properly briefed ground the court of appeals and South Carolina Supreme Court could have acted accordingly and it is a reasonable probability the result of the proceeding would have been different and petitioner would have prevailed, thus, petitioner was prejudice by appellate counsel's failure to file a merit's brief.

ARGUMENT #2

United States Court of Appeal erred in not granting a certificate of appealability on issue #3, District Court erred in granting Summary Judgment to Respondent on ground ten when petitioner has established a constitutional violation under 2254(d)(1) and petitioner was entitled to relief under 2254(d)(2).

Petitioner has established by clear and convincing evidence and proof and that it was based on an unreasonable determination of the facts in light of the record before the state court § 2254(d)(2) see ECF No. 1 and ECF No. 64. It is too much contradiction, inconsistencies and false and perjury testimony of where the drugs was found, the element of possession was not proven beyond a reasonable doubt. The State is required to prove every element of a crime beyond a reasonable doubt. Jackson v. Virginia. There is no sufficient evidence on record of any witnesses actually witnessing petitioner with drugs, there are no sufficient evidence on record of where the drugs was found or where Deputy Seale was at when the drugs was found. When question by Mr. Corde on record and when--when Deputy Beno found it, were you in the grown up area, too, with him looking, or were you back at the ~~highway~~ ~~lot~~ the cleared land part? Deputy Seale testified I was back in the parking lot area with my supervisor and lieutenant were with me trying to help me from--recover from being fatigued App.p. 21, line 20-25. How is this true when Deputy Seale testified they were within sight of, you know, twenty-five yards of me the entire time. App.p. 26, line 9-17. Deputy Seale testified probably, I would guess about fifty yards from the parking lot to where the struggle took place. App.p. 77, line 2-3. Deputy Seale also testified and I remained within twenty-five yards of Agent Beno. I could see him. He was from me from here to the back wall where it took place, and he

located the crack cocaine and the marijuana in the immediate area where we were struggling App.p. 85, line 11-15. This can't be true because Deputy Seale testified to being in the parking lot area when Geno found it App.p. 21, line 20-25. so that means he was not twenty-five yards within sight of the discovery of drugs, if it was fifty yards from the parking lot to where the struggle took place App.p. 77, line 2-3. Deputy Seale did not know where the drugs was found Deputy Seale testified Right. There was a few people up at the parking area a couple cars. I don't remember exactly how many App.p. 75, line 25 - p. 76, line 1. Deputy Seale testified he was alone in the woods the whole time while struggle with Mr. Robinson App.p. 82, line 2-4. He testified Mayo club was open to the public at the time but we were in the middle of the woods. App.p. 91, line 25 - p. 92, line 1, then Deputy Seale testified to being in the woods again App.p. 92, line 3-4. He testified that the warrants says drugs located in the parking lot of Mayo Club App.p. 97, line 4-24. Then Deputy Seale testified again to the warrants says located in the parking lot of Mayo Club. App.p. 97, line 25 - p. 98, line 1. Deputy Seale testified not the parking lot App.p. 97, line 1-3. So the drugs was not found in the parking lot App.p. 97, 1-3. Deputy Seale testified they were not found in his possession but where we had be struggling in the briars and bush in the woods, he continue to testify after being question about the middle of woods, Deputy Seale testified Because once--once you were take into custody, I can't leave you in woods. App.p. 99, line 1-22. Deputy Seale testified using false testimony Deputy Seale testified to not being in the middle of woods but right on the edge of the woods. App.p. 101, line 8-17. Deputy Seale also testified before the discovery of drugs petitioner was handcuffed turned over to Corporal Barton who took petitioner to the detention center App.p. 75, line 1-9. Deputy Seale testified he was four to five feet behind the petitioner the entire time and did not notice defendant take anything out of his pockets App.p. 75, line 16-22. Deputy Seale testified he chased petitioner around back none of this time petitioner was not throwing anything out of his pockets. App.p. 76, line 9-13. Deputy Seale testified he never seen petitioner drop anything or throw anything App.p. 104, line 11-14. The record is rife with evidence to prove these drugs was not in petitioner actual or constructive possession and that anyone could have dropped these drugs. warrants states it was located in Mayo's parking lot App.p. 97, line 4-24. Deputy Seale testifies a few people up at the parking area a couple cars App.p. 75, line 23 - p. 76, line 1. He testified he don't remember exactly how many App.p. 76, line 1. Agent Geno who actually discovered the drugs testified petitioner was away from the scene when he arrived. App.p. 109, line 1-5,

so the state did not know if the drugs was 3 feet, 3 yards or 3 miles from petitioner. Trial Counsel Gurde testified at Post-Conviction Relief hearing there's no question that it was a motion made to suppress the drugs, he testified we went over to the club where he was at and photographed it, it's a junky run down dope addict, wino infested area, got old tires all around the back of the building and the clubs, so, my point and arguments, the note that I made to ask the policemen in all this stuff was witness-by, God, anybody could've throw the drugs down there. The drug addicts and users hand out down there. It is a filthy place. There are probably dead cats or dead skunks and stuff laying all around, empty beer bottles that anybody could've thrown those drugs down at anytime App.p. 336, line 24-p. 337, line 19, which the drugs probably was throw away as trash because it was only Item 1.1 was 0.16 grams, and Item 1.2, 0.11 grams App.p. 130, line 13. Deputy Seale even testified club Mayo's is known for narcotics App.p. 19, line 3-4. Petitioner was not stopped at Mayo's club but on breentown road and ran to Mayo's club after he resisted Deputy Seale unlawful arrest. App.p. 15, line 5-p. 17, line 7. See ECF Nos. 86, and ECF No. 91. Karen Fordham can not be used to establish actual or constructive possession, Karen Fordham testified not really reason petitioner getting fired. App.p. 64, line 14-17. She used perjury of what type of drugs was found App.p. 65, line 9-16. How was it a drugs transaction Karen Fordham never mention seeing any money or additional drugs App.p. 57, line 1-p. 69, line 11. She does not know how big the bag she saw was App.p. 65, line 25-p. 67, line 6. She added a she a third person when in the 911 report it said a him then when question why female wasn't given in the 911 statement she answered. I don't know what to tell you about that one App.p. 67, line 13-p. 68, line 14. Karen Fordham can't be used as a witness Deputy Seale testified her house is roughly five hundred, six hundred yards just estimating from the incident where drugs was found App.p. 71, line 1-21. Deputy Seale never mention anything about a door rag in his testimony of what happened App.p. 72, line 14-p. 75, line 12. He never mention a door rag or petitioner shirt came off at pretrial hearing App.p. 13, line 5-p. 26, line 25. the door rag came up in leading question from solicitor which show it's a lie which no where in record is facts that petitioner shirt came off so that's perjury his clothing was collect from woods when question by petitioner you said you took me out of the woods and walked way down here, fifteen, but you marked the spot Deputy John Seale answered Yeah, from where your shirt-remember when you were running and your shirt ripped and I dropped it, and then I jumped right back on top of you App.p. 100, line 5-9 this is perjury Deputy Seale first stated and he tried to run, and I grabbed him by his under shirt he was

wearing. It ripped two or three times before I was able to get him back on the ground App.p. 74, line 14-17, first he said I tried to run then he changed it and said when you were running, also first he said my shirt ripped two or three times before he was able to get me back on the ground then he changed it said my shirt ripped and he dropped it and then he jumped right back on top of me, but App.p. 84, line 13-15 Deputy Seale stated and you see where I was grabbing him and it was ripped several times while I was grabbing and trying to pull him back on the ground, and that's it so right there proves he lied about my shirt ripped and he dropped it and then he jumped right back on top of me when he first said before that he was grabbing and trying to pull me back on the ground and that's it, right there Deputy Seale stated that's it but later during cross examine he added more when he saw it did not make sense. Karen Fordham do not remember clothing never said anything about a doo rag. That a prisoner has failed to make the ultimate showing, at certificate of appealability (COA) stage of a habeas proceeding, that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable, as required for a COA; thus when a reviewing court inverts the statutory order of operations and ~~first~~ decides the merits of an appeal then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner at the COA stage. Buck v. Davis, 137 S.Ct. 759 (2017).

Now Petitioner would show the court he is entitled to relief under § 2254 (d)(1). It is shown that the earlier state court's decision 'was contrary to federal law then clearly established in the holdings of this court and that it involved an unreasonable application of such law. Petitioner moved for a direct verdict twice and it was denied App.p. 145, line 9-p. 164, line 4. A defendant is entitled to review only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781 (1979). In Coleman v. Johnson, 566 U.S. —, 132 S.Ct. 2060, 2062 (2012) (per curiam), the Supreme Court emphasized that: We have made clear that Jackson claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury not the court — to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1, — (2011) (per curiam) (slip op., at 1). And second on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The Federal court instead may do so only if the state court decision was 'objectively unreasonable.'" Ibid. (quoting Reynolds v. Left, 599 U.S. —, — (2010) (slip op., at 6). Under South Carolina law, mere presence of person in area containing drugs ~~obscure~~ evidence of his dominion and control over

them is insufficient to prove his possession of drugs. Goldsmith v. Witkowski, 981 F.2d 697. Under South Carolina law, even presence of defendant in area containing drugs coupled with knowledge of drugs is insufficient to sustain possession conviction, state must also prove dominion and control. Goldsmith v. Witkowski, 981 F.2d 697. Under South Carolina law, proof of dominion and control as required to sustain drug possession conviction may include evidence that accused controlled premises where drugs were found or that he had special relationship with owner or lessor of premises. Goldsmith v. Witkowski, 981 F.2d 697. see U.S. v. Moya, 422 F.3d 207 (2005) even though involves possession of a gun it still reflects to Appellant case Judge abused its discretion in allowing prosecutor to comment on defendant's flight from police evidence from record proves that Appellant fled because officer tried to force him in handcuffs due to an illegal arrest involving the assault while resisting arrest charge not because he had drugs. like Moya the evidence here taken in Appellant case most favorable to the government is insufficient to establish that Appellant constructively possessed any of the drugs. The only evidence the government presented to support constructive possession was that Appellant was present in the same location from which the drugs was found but that is not facts according to the false testimony and even so mere presence is insufficient to establish possession. No fingerprints or other physical evidence link Appellant to drugs. The Government did not present testimony that Appellant had been seen with the **Drugs** found Karen Fordham report by anonymous call so therefore it's insufficient evidence existed for the jury to find beyond a reasonable doubt that Appellant was a felon in possession of drugs. The sixth Amendment right to jury trial, in conjunction with the due process clause requires that each element of a crime be proved to a jury beyond a reasonable doubt. Hurst v. Florida, 136 S.Ct. 616 (2016). Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(1) only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court. In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determination made by state courts, the United States Supreme Court held as follows: A federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to clearly established Federal law as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 404-05 (2000) Petitioner has established both requirements of § 2254(d)(1).

ARGUMENT #3

United States Court of Appeals erred in not granting a certificate of appealability on District Court erred in denying Petitioner motion to compel production of evidence when evidence establish a constitutional violation and failure to produce evidence would result in a due process violation which proves a miscarriage of justice of actual innocence.

see ECF No. 64, petitioner has established good cause for discovery. Petitioner was arrested on June 3, 2008 for warrant number J-512017; 018; 019. Petitioner was original appointed counsel Richard F. Colvin who filed a motion to be relieved as counsel on September 16, 2008 see Exhibit 6 of Motion to be relieved as counsel, the honorable Alison R. Lee gave an order relieving counsel on September 23, 2008 and Rueben Goude was substituted for public defender in place of Mr. Colvin see Exhibit Order relieving counsel, on this same day the solicitor disclosed discovery to new appointed counsel Rueben Goude which only contained plea offer, indictment, warrants, incident report, use of force report and NCIC, the solicitor never disclosed as evidence the video from the in-car camera see Exhibit Acknowledgement of receipt of discovery documents dated September 23, 2008 which no attorney for defendant did not sign acknowledge receipt, Petitioner was trying to seek the video through Freedom of Information Act from solicitor office which the supervisor III indicated that the file reflected the discovery given to Richard Colvin on August 25, 2008 which this after discovery evidence see letter from solicitor officer shows perjury that solicitor never disclosed video from the in-car camera to counsel because evidence reflect see Exhibit Acknowledgement of receipt of discovery documents it was disclosed on September 23, 2008 and it does not contain evidence of video which shows a Brady violation see ECF No. 1 and attached Exhibits. see ECF No. 64, Deputy Seale testified petitioner punched him two to three times App.p. 173, lines 16-17, the solicitor states petitioner only pulled away and took a swing. App.p. 27, line 12-15. The video is needed because that testimony solicitor failed to correct during trial and it was given to establish probable cause and reasonable suspicion for the arrest. Counsel Goude never had possession of video because solicitor Mr. Andrew stated at pre-trial hearing the day before trial, Your honor, the only additional thing is I do have all the evidence relating to this case and I'm going to sit down with Mr. Goude, if he's willing to do that, and we also have some video potentially, and some audio, and I'll get with him and see what we can work out as far as consenting App.p. 35, line 2-7. which petitioner counsel Goude testified and I don't remember the DVD App.p. 338, line 17-22.

District court failure to consider whether petitioner had demonstrated good cause for discovery was abuse of discretion. Good cause sufficient to warrant grant of discovery in a habeas action is demonstrated where specific allegations show reason to believe that the petitioner may if the facts are fully developed be able to demonstrate that he is entitled to relief. Bowers v. U.S. Parole

Com'n Warden, 745 F.3d 1127 (2014); see also Bracy v. Gramley, 117 S.Ct. 1793 (1997).

ARGUMENT #4

United States Court of Appeals erred in not granting a certificate of appealability on District Court erred in granting Summary Judgment to Respondent on ground six when Petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice that involves actual innocence. Petitioner is entitled to relief under § 2254(d)(1) and § 2254(d)(2).

SEE ECF No. 1, 30 and 64. Ground six was raised at PCR hearing App.p. 298, line 1-10; App.p. 308, line 13-p. 312, 11. PCR counsel failed to file a Rule 59(c) motion to preserve issue in PCR Judge order of dismissal. Which is cause and prejudice for the procedural default because had counsel file rule 59(c) motion, it would of been preserved for Federal review. Marlar v. Warden, Tyger River Correctional Inst., 432 Fed. Appx. 182 (C.A. 4 (S.C.) 2011); Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009), which failure of this court to review issue that was raised at PCR hearing would result in a fundamental miscarriage of justice that involves actual innocence. When a petitioner raises a Schrup gateway actual innocence claim to enable a district court to consider the merits of the petitioner's otherwise procedurally defaulted habeas claims, the district court, in light of all the evidence, both old and new, must determine whether it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt; if the district court finds that, more likely than not any reasonable juror would have reasonable doubt as to the petitioner's guilt, then the petitioner has satisfied the Schrup standard and the district court must review the petitioner's procedurally defaulted claims. Teague v. Pearson, 689 F.3d 322 (8-2-2012) see Brown v. Singleton, 229 F.Supp. 2d 1345.

Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court. SEE ECF No. 1, 30 and 64. The testimonies by Deputy Seale that Solicitor failed to correct was material and did affected the judgment of the jury, allowing testimony of petitioner hit the police was material because Deputy Seale used it to establish probable cause for the arrest App.p. 91, line 8-10. Prosecutor had knowledge of the falsity because he stated on record petitioner only pull away and took a swing, which prove no assault occurred App.p. 27, line 12-15. Also evidence of DVD police car tape prove no assault occurred. The testimony that Solicitor failed to correct that Deputy Seale used that petitioner placed his hands behind his back to be

handcuffed detain was material to the current issue at trial App.p. 73, line 9-14. And evidence presented to PCR court and District court see Exhibit attached to ECF No. 1 Narrative report by Deputy Seale indicated Deputy Seale placed petitioner hands behind his back to detain him. This affected the judgment of the jury to establish petitioner consent to arrest when he was never under arrest. Allowing the testimony of Deputy Seale stating that petitioner was in a drug known area prejudice petitioner also when evidence proves he was walking toward Mayo's club App.p. 71, line 1-3. And evidence of DVD tape would prove Petitioner was not stopped at club and club was not present in video. To invoke miscarriage of justice exception to Antiterrorism and Effective Death Penalty Act's (AEDPA) Statute of limitations, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence 28 U.S.C. § 2254(d)(1)(D). See also McBrynn v. Perkins, 133 S.Ct. 1924 (2013).

In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determination made by state courts, the United States Supreme Court held as follows: A federal court may grant a writ of habeas corpus if the relevant state court decision was either (1) "contrary to clearly established Federal law as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting from § 2254(d)(1)). Petitioner has established both parts to § 2254(d)(1). Conviction acquired through knowing use of perjured testimony by government violates due process, regardless of whether government solicited testimony that it knew or should have known to be false, or simply allowed such testimony to pass uncorrected. V.S. v. Kelly, 35 F.3d 929; Williams v. Taylor 120 S.Ct. 1979 (2000) also see Riddle v. Gilmint, 369 S.C. 39, 631 S.E.2d 70 (2006).

ARGUMENT #5

The United States Court of Appeals erred in not granting a certificate of appealability on District Court erred in granting summary judgment to Respondent on ground seven when petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice that proves actual innocence, petitioner is entitled to relief under § 2254(d)(1) and § 2254(d)(2).

see ECF #No. 30 and 64, Ground seven was presented in PCR court during Post-Conviction Relief hearing App.p. 292, line 20-23, it was preserved in order of dismissal see App.p. 381, Appeal Counsel procedural default claim by not petitioning to South Carolina Supreme Court when it was raised at Post-Conviction Relief hearing and ruled upon in order of dismissal which shows cause for the procedural default and prejudice because had appeal counsel petition preserved claim to South Carolina Supreme Court it would be exhausted for federal court review.

Ineffective assistance of counsel is cause for procedure default by exhaustion doctrine generally requires that such claim be presented to state courts as independent claim before it may be used to establish cause for procedural default. Murray v. Carrier, 106 S.Ct. 2639 (1986). Counsel failure to raise particular claim or claims on appeal is to be scrutinized under cause and prejudice test when failure is treated as procedural default by state courts. Murray v. Carrier, 106 S.Ct. 2639 (1986).

Failure to review the constitutional claim will result in a fundamental miscarriage of justice that proves actual innocence. In extraordinary case, where constitutional violation has probably resulted in conviction of one who is actually innocent, federal habeas court may grant writ even in absence of showing of cause for procedural default. Murray v. Carrier, 106 S.Ct. 2639 (1986). Ineffective assistance of counsel may constitute cause for a procedural default of a federal claim in state court, allowing federal habeas review of the defaulted claim; however, in order to establish cause based on this argument, the ineffective assistance of counsel claim itself must not be procedurally defaulted. Ben nett v. Warden Lebanon Correctional Inst., 782 F.Supp.2d. 466 (2011).

Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court. See ECF Nos. 1, 30 and 64. Which prove petitioner didn't have a fair and full hearing on the merits in the state court on the Fourth Amendment violation due to trial counsel ineffective assistance of not being prepared to argue petitioner motion to suppress evidence, not arguing petitioner motion at all or requesting a Franks v. Delaware hearing an evidentiary hearing in Franks v. Delaware hearing was required based on the facts that warrants said that drugs was found in parking lot and Deputy Seale testifying not in parking lot. App.p. 97, line 1-3 and warrants state petitioner punched Deputy John Seale several times in the face while being pat down for weapons, when testimony given by solicitor prove no assault occurred App.p. 27, line 12-15, in-car camera proves no assault verbal or physical occurred per Mr. Goude testimony at Post-Conviction Relief hearing App.p. 338, line 17 p. 339, line 10, which petitioner has made a substantial preliminary showing that a false statement knowingly and intentionally with reckless disregard for the truth was included by the affiant in the warrant affidavit. see App.p. 349, App.p. 393; and App.p. 387, prejudice is established trial counsel Goude did not argue his motion or petitioner motion, nor referring to Deputy Seale was lying about consent or the lack of additional information in the warrants about anonymous tip and consent of petitioner placing his own hands behind his back to be detained App.p. 16, line 10-p. 25, line 20. Which see Exhibit of Narrative Report when Deputy Seale stated he was the one who placed

petitioner hands behind his back to be detain.

To invoke miscarriage of justice exception to Antiterrorism and Effective Death Penalty Act's (AEDPA) statute of limitation, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence 28 U.S.C.A. § 2254(d)(1)(D). See also McQuiggin v. Perkins, 133 S.Ct. 1924 (2013).

In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determinations made by state courts, the United States Supreme Court held as follows: A federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "Contrary to clearly established Federal law as determined by the Supreme Court of the United States," or (2) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting from § 2254(d)(1)). Petitioner has established both requirements.

Ground seven the pivotal question is whether the state court's application of the Strickland standard was unreasonable, it was petitioner has established deficient, see ECF No. 64, Counsel failed to argue petitioner motions App.p. 23, line 10-p. 28, line 15, lied about letting petitioner testified at pre-trial hearing App.p. 349, line 11-18, when petitioner never testified App.p. 28, line 12-15. Counsel Gowde never cross examination John Seale as to the false testimony used to show consent and assault App.p. 21, line 3-p. 22, line 3. Counsel Gowde never obtained or had possession of the Narrative statement Report of John Seale, it was given to petitioner at the ending of trial App.p. 157, line 9-p. 158, line 21. Never had DVD from police car to request a Franks v. Delaware hearing. App.p. 35, line 2-7. Prejudice is established it is a reasonable probability if counsel had of requested a Franks v. Delaware evidentiary hearing, argue petitioner and his motions, made objection to false testimony and consent issues, presented DVD police car tape, the motion would have got granted the evidence suppressed, petitioner would have been afforded the opportunity to raise his fourth Amendment claims involving the facts, Respondents could not rely on Stone v. Powell as an affirmative defense and the court could not use Doleman to not review merits of the fourth Amendment and have petitioner litigate how Stone nor Doleman does not apply to him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). No pretrial discovery motions filed p. 434 Clark v. Blackburn, 619 F.2d 431-434 (CA9 1980) ineffective assistance, Wade v. Armontrout, 798 F.2d 304 (CA8 1986). p. 307. In Kimmelman v. Morrison, 477 U.S. 365, the Supreme Court held that counsel's failure to conduct discovery based on a mistaken belief that the state had an obligation to turn over inculpatory evidence resulted in deficient performance. Hyman v. Aiken, 824 F.2d 1405 (CA4 1987) p. 1416. The failure of Hyman's counsel to examine and to appreciate what the solicitor made readily available to them was equally prejudicial. These incidents, coupled with counsel's failure to read other statements in the solicitor's file and their failure to adequately prepare for sentencing with respect to both facts and law, clearly establish prejudice within

the meaning of Strickland, 466 U.S. at 687, writ granted. Stano v. Dugger, 889 F.2d 962 (CA 11 1989) p. 967 "In the present case, the circumstances surrounding Mr. Pearl's representation of Stano--the state's failure to release discovery materials--prevented him from assisting the accused during a critical stage of the proceeding." see Cronic, 466 U.S. at 659 n. 25. Under those circumstances... Although counsel was available to assist the accused the likelihood that any lawyer, even a fully competent one as Mr. Pearl was here, could provide effective assistance was so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id at 659-60, 104 S.Ct. at 2047. Under Cronic, therefore we must presume that Stano was prejudiced by Mr. Pearl's inability to give advice and grant him relief on grounds of ineffective assistance of counsel.

The defendants ask us to suppress the search evidence. Instead, we remand for an evidentiary hearing. This hearing shall include the issues of the officer's good faith and the existence or lack of additional sworn testimony before the magistrate. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). We must determine whether the officer's action stopping petitioner was justified at its inception and whether the detention was reasonably related in scope of the circumstances which justified the interference in the first place. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1967). The person approached however need not answer any question put to him; indeed he may decline to listen to the question at all and may go on his way. Terry v. Ohio, 392 U.S. 32-33, 88 S.Ct. 1885-1886. see also Florida v. Bostick, — U.S. —, 115 S.Ct. 2386, 115 L.Ed.2d 389 (1995).

ARGUMENT #6

The United States Court of Appeals erred in denying a certificate of appealability or District Court erred in granting summary judgment to Respondent on ground nine when petitioner has established he did not have a opportunity to fully and fairly present his Fourth Amendment argument due to trial counsel ineffectiveness and Respondent should not be granted summary judgment based upon Dolan because petitioner is entitled to relief under 2254(d)(1) and 2254(d)(2).

See ECF Nos. 1, 30 and 64. Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court. On March 16, 2004, petitioner presented several motion to the pre trial judge App.p. 23, line 10-17, the judge asked to hear the motions that he see at the present time before the court. App.p. 23, line 10-17, Counsel Mr. Goude failed to argue motion but made his own motion to add App.p. 23, line 8-p. 24, line 11. The court asked Counsel Goude to hear argument on all motion including Mr. Goude motion App.p. 26, line 9-15. Counsel failed to argue the facts of the motions. App.p. 26, line 16-17, Counsel never presented the facts about the consent issue, the court stated all right, and regarding that point, officer, so that I -- Deputy, I understand, at some point in time during your investigative stop of the

Defendant, you asked the defendant if you could pat him down and he consented, correct? App.p. 24, line 12-16. Deputy Seale said yes sir. App.p. 24, line 17. The court and he put his hands over his head and you asked him to put his hands behind his back App.p. 24, line 18-19. Deputy Seale stated yes sir I've had past experience where -- a similar situation, and I was elbowed in -- when his hands were over his head, he -- I was elbowed in the side of my head, so to try and prevent that from happening again, I asked him to put his hands down behind his back and was going to grab him and hold him to keep him. App.p. 24, line 20-25. The court all right and so when you did that, when you -- when you then -- to pat him down, you grabbed a hold of him, then at that point in time you told him that you were going to put him in investigative detention App.p. 25, line 1-4. Deputy Seale testified well, I explained to him before -- whenever -- I explained it to him all at once when I said, "You know," -- I was like, "You know if you'll put your hands behind your back, I'm going to put you in handcuffs just for safety while I pat you down, and then you'll be free to go." I didn't -- it's not like I asked him to put his hands behind his back and then grabbed him and then said, "I want to put you in -- in the handcuffs." I said it all at once before -- App.p. 25, line 5-12. The Court: Okay, and so then when you attempted to do that, what occurred? App.p. 25, line 13-14. Deputy Seale answered as soon as I reached around to grab my handcuffs, he twisted away from me towards me and then -- well, I guess out away from me, and then punched me several times in the left side of my face, and I attempted to grab him by his shirt and it came off the top of his head and then that's when the foot chase began. App.p. 25, line 15-20, Petitioner did not have a fair and full hearing on these facts Deputy John Seale used perjury and false testimony about the consent issue see Exhibit of Narrative filed by John Seale when Deputy Seale stated he grab petitioner than told him he was going to handcuff him, detain him which Deputy Seale lied to the court and said he said it all at once App.p. 25, line 5-12. which Deputy Seale testified petitioner placed his hands behind his back to get handcuff App.p. 73, line 9-15. which is perjury and false testimony because see Exhibit of Narrative report filed by John Seale, Deputy Seale stated he was the one who placed petitioner hands behind his back to be detain. See App.p. 16, line 10-19. Deputy used perjury and false testimony about petitioner placing his hands behind back to be detain. It nowhere petitioner had a fair and full opportunity to lift -- gate his fourth Amendment claim or opportunity to raise fourth Amendment claim when petitioner did not have a complete copy of Exhibit of Narrative Report filed by John Seale until ending part of trial App.p. 157, line 9-p. 159, line 21. Even Deputy Seale testified it was missing a page App.p. 143, line 4-9, Petitioner Counsel Goude couldn't know about evidence because he did not set the record

by objecting because the court needed that information in order to rule on the suppression motion, petitioner can further show no consent. Deputy Seale testimony of consent to be arrested was without merits, when asked during trial what was you arresting me for? What was your reason for stopping me and arresting me App.p. 91, line 1-2. Deputy Seale answered as you heard on the video tape, I asked you for your I.D. I was not getting out to arrest you. You gave me consent to pat you down for weapons because the way you were -- you were acting so nervous, it had me fearful for -- I didn't know if you had a knife or a gun. You gave me consent to pat you down for weapons App.p. 91, line 3-8. This testimony is without merit of what the law requires for consent in a fourth Amendment issue, how can a person give you consent by him acting so nervous, that not consider giving consent, that something he wanted to do because he said it had me fearful App.p. 91, line 6. So the pat down involving restraint would be considered illegal based on the illegal stop, if the Deputy never made the illegal stop he would never been fearful and that don't justify him wanting to place petitioner in handcuffs or pat down, so it is false testimony because Deputy Seale testified petitioner gave him consent, then he said petitioner gave him consent because he were acting so nervous, this is not considered consent and petitioner did not have a fair and full hearing of this fact because petitioner counsel did not question Deputy Seale about the illegal arrest of consent but only about where the drugs was found at. App.p. 21, line 3-p. 22, line 2, had counsel Goude question it would of come out that Deputy Seale reason to place petitioner in detention was for his own safety not by petitioner giving him consent. Petitioner never had a fair and full opportunity to litigate his fourth Amendment claim, the court asked counsel Goude to present any testimony from the defendant. App.p. 28, line 5-14. Counsel Goude did not. App.p. 28, line 15. Then at Post-Conviction Relief hearing Counsel Goude used perjury and false testimony saying he made the motion when Mr. Robinson was testifying which Mr. Robinson the petitioner never testified. App.p. 349, line 11-18 and App.p. 28, line 12-15. Mr. Robinson never testified. Deputy Seale or Trial Counsel Goude used perjury testimony, Mr. Goude testified at Post-Conviction Relief hearing after question by Mr. Buan did you get to see a DVD from the police? Mr. Goude answered was in my notes, I've got down that what the DVD said or -- and the way I -- and I don't remember the DVD but I've got in my notes there where I viewed it and the date on it and all that -- and I wrote that down -- it said it was 6:02 pm and it's -- basically, all I've got down is that it's words App.p. 338, line 17-22. Mr. Goude note did not mention nothing about petitioner giving consent to pat down, Mr. Goude testified that the video words was the police man said mind if I check you for weapons, I will be putting cuffs on you to detain you, the Defendant ran, and you ran on the highway and got to

the club and it was day light, and the rest is just Deputy saying I'm in woods, I need help and stuff like that App.p. 338, line 17-p. 339, line 10. So it was no consent or assault on Deputy Seale, but Deputy Seale testified that the tape said Do you mind if I pat you down for weapons? and you said said, Yeah, that's straight App.p. 91, line 11-17. Which if the petitioner did gave consent to pat him down Deputy Seale exceeded permission when he attempted to force petitioner in handcuffs which was illegal seizure. Counsel Gowde was not even prepared to argue his motions and petitioner motions to suppress the evidence, which the record is rife to prove Counsel Gowde was not even in possession of the in-car camera DVD from police car before or during pre-trial suppression motions because Solicitor Mr. Andrew stated at pre-trial hearing the day before trial, Your honor, the only additional thing is I do have all the evidence relating to this case and I'm going to sit down with Mr. Gowde, if he's willing to do that, and we also have some video potentially, and some audio, and I'll get with him and see what we can work out as far as consenting. App.p. 35, line 2-7, that statement alone prove petitioner could not have a fair and full opportunity when Solicitor withheld material evidence that Counsel Gowde could not fully the fourth Amendment claim at pre-trial hearing and Counsel Gowde nowhere in the transcript brought it to the court attention App.p. 5, line 1-p. 35, line 25. It would be a miscarriage of justice that proves actual innocence for Federal Habeas Corpus could not to review preserved ground. During the suppression motion hearing no facts was brought to the court attention involving the consent or assault dealing with the very real Fourth Amendment claim, which the law state petitioner can use necessary force to resist an unlawful arrest, even the Solicitor clear the record of no assault on Deputy Seale but just petitioner pulling away and taking a swing App.p. 27, line 12-15. So it's contradiction involving Mr. Andrew and Mr. Gowde testimony and Deputy Seale testimony involving the assault, so the record is rife with evidence that Deputy Seale used many false and perjury testimonies, it's nowhere in the record that show petitioner had a full and fair hearing on the facts involving the real fourth Amendment claim, petitioner can further show the court, Petitioner would clear the misleading facts of him being stopped in a well known area for drugs up first, this is actual prejudice and objectively unreasonable dealing with the facts petitioner was not stopped at club Mayo's but instead on the road way walking toward that direction, after Deputy Seale tried to create an arrest by attempting to place petitioner unwillingly in handcuffs petitioner ran to that area but the anonymous tip came from a call on Meadow Street. App.p. 14, line 6-p. 15, line 6 and App.p. 70, line 20-p. 71, line 3. Therefore arguments that Respondent had as to petitioner was stopped in a area known for narcotic illegal activity and guns is false statements. Next petitioner would address the fact that this call was anonymous see Exhibit of Deputy John Seale Narrative Report which no name was given

see App.p. 90, line 10-17 which Deputy Seale changed his answer and said he don't know if she did or not give her name. he didn't understand that, so the facts proves the call was anonymous. Next petitioner would address the fact that he was not under arrest App.p. 91, line 3-4 and under Federal law he had the right to walk away Terry v. Ohio, 392 U.S. 1 (1967); Florida v. Bostick, 111 S.Ct. 2386. Which also under the Federal Law the fourth and fourteenth Amendment requires that a consent to a search not be coerced, by explicit or implicit means by implied threat or covert force, Schneckloth v. Bustamonte, 93 S.Ct. 2041-2042 (1973). When see App.p. 16, line 10-22, when Deputy Seale answered the solicitor question saying I was the one who put my hands behind my back and at App.p. 24, line 12-p. 25, he said all at once when question by the court which see Exhibit of Narrative Report filed by Deputy Seale which show covert force, he asked petitioner first to put him down, then he put petitioner hands behind his back and told petitioner he was going to detain him while he patted him down. Next petitioner would clear up the facts Respondent's argument Deputy Seale testifying to petitioner nervous behavior App.p. 15, line 22-24 and App.p. 72, line 23-25 which this must fail also under Federal law nervous behavior in the presence of police officers, standing alone, does not provide a basis for reasonable articulable suspicion required by Terry. Terry v. Ohio, 392 U.S. 1, 20, 22 (1967). Respondent's only argument large sum of money, this argument must fail because the court ruled the money to be not some conclusion that would then automatically have him dealing in drugs App.p. 33, line 6-15. see Respondent re-filed Return and Motion for Summary Judgment ECF Nos. 46, 47 at page 32, these same false statement was used in state court against petitioner and based upon petitioner counsel they failed to clear the misleading facts up.

In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determinations made by state courts, the United States Supreme Court held as follows: A federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "Contrary to clearly established Federal law as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting from § 2254(d)(1)). Petitioner has established both requirements.

"Reasonable suspicion based solely on a call made from an unknown location by an unknown caller lacks sufficient indicia of reliability to make an investigatory stop." U.S. v. Byrum, 293 F.3d 192 (4th Cir. 2002). "Anonymous tips... are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability for example the correct forecast of a subject's not easily predicted movements." Florida v. J.L., 529 U.S. 266, 264 (2000). quoting Alabama v. White, 496 U.S. 325, 332 (1990) The detailed

description of the clothing of Petitioner might lead one to conclude that this means that the anonymous tip was reliable. After all, Deputy Seale was able to find someone in the area that perfectly matched the description given by the anonymous caller. However, the United States Supreme Court has said that, "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse, such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Florida v. J.L., 529 U.S. 246, 272, (2000). The initial question, then, is did the state have reasonable suspicion sufficient to stop Petitioner on the roadway on the day of his arrest? In Petitioner's case, the Georgetown County Sheriff's received an anonymous telephone call which led them to stop Petitioner as he was walking down the street. App. p. 70, line 1-p. 72, line 1. Deputy Seale offered no testimony that he observed Petitioner doing anything suspicious when he originally saw him, so unless the anonymous tip is enough to give the state reasonable suspicion, they did not have it initially. In determining whether the trial court erred in denying Petitioner motion to suppress the crack cocaine and marijuana, we must determine "whether the officer's action stopping Petitioner was justified at its inception and whether the detention was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1368, 1879, 20 L.Ed. 2d 889 (1967).

Petitioner very real fourth Amendment claim involve actual innocence. How could the courts Petitioner been in make an unreasonable determination of the facts that Petitioner had an opportunity to raise his fourth Amendment claim in state court, when the record reflect Petitioner counsel Goude was ineffective, the solicitor created a Brady violation and withheld important information evidence that counsel Goude needed, to, to ensure the court was aware of the misleading facts in the warrants App. 387; App. 393; and App. 394 and the false testimony given by Deputy Seale to establish probable cause, Counsel Goude did not argue his motions nor Petitioner motions.

The defendants ask us to suppress the search evidence. Instead, we remand for an evidentiary hearing. This hearing shall include the issues of the officer's good faith and the existence or lack of additional sworn testimony before the magistrate. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978).

ARGUMENT #7

The United States Court of Appeals erred in denying a certificate of appealability as to District Court erred in granting Summary Judgment to Respondent on ground eleven when Petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice of actual innocence and petitioner is entitled to relief under 2254(d)(1) and 2254(d)(2).

see ECF No 64, petitioner ground was exhausted twice and petitioner raised this issue twice at PCR one by it's self showing he did not have a fair trial and one under appellate counsel error so if the court can not review it under appellate counsel error at direct appeal because petitioner failed to present the issue to trial court, the court can review the ground of not having a fair trial under trial court error. App.p. 300, line 7-23 also the ground was dealt with out side the ground of Appellate Counsel failure to file a merit brief App.p. 365, line 1-p. 372, line 21 see also App.p. 373, line 16-25 it was addressed again separately also see order of dismissal App. 382 this issue is preserved separately from appellate counsel claims and petitioner did not have a fair trial under the fourteenth Amendment and fifth never waived his rights to counsel under the sixth and fourteenth Amendment. Petitioner has established cause and prejudice for the procedural default and failure to address merits would result in a fundamental miscarriage of justice.

Ineffective assistance of counsel is cause for procedural default but exhaustion doctrine generally requires that such claim be presented to state court as independent claim before it may be used to establish cause for procedural default. Murray v. Carrier, 106 S.Ct. 2639 (1986). Counsel failure to raise particular claim or claims on appeal is to be scrutinized under cause and prejudice test when failure is treated as procedural default by state court. Murray v. Carrier, 106 S.Ct. 2639 (1986). In extraordinary case, where constitutional violation has probably resulted in conviction of one who is actually innocent, federal habeas court may grant writ even in absence of showing of cause for procedural default. Murray v. Carrier, 106 S.Ct. 2639 (1986). Actual innocence gateway should open to reach merits of procedurally barred claim only when petition presents evidence of innocence so strong that court cannot have confidence in outcome of trial unless court is also satisfied that trial was free of non harmless constitutional error. McQuiggin v. Perkins, 133 S.Ct. 1924 (2013).

Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court, see ECF Nos. 1, 30 and 64. Never once did the trial judge question petitioner if he waived his right to counsel but only to represent himself. App.p. 39, line 18-p. 47, line 25. In State v. Bryant, 383 S.C. 410, 680 S.E.2d 11 (2004) the trial judge question him and asked him do he waive his right to counsel. If there is no question on record of petitioner waiving his right to counsel than it's no valid waiver. Petitioner even stated the mistreatment of counsel Goude representation see App. 39-47. Petitioner presented several motion to the pre-trial judge App.p. 23, line 10-17, the judge asked to hear the motions. App.p. 23, line 10-17. Counsel Goude failed to argue motion but made his own motion to add. App.p. 23, line 8-p. 24, line 11. The court asked Counsel Goude to hear arguments on all motion including counsel Goude motion App.p. 26, line 9-15, counsel failed to argue the facts of the motions, present evidence or cite case laws App.p. 26, line

16-17. The court asked Counsel Goude to present any testimony from the defendant App.p. 28, line 5-14. Counsel Goude did not. App.p. 28, line 15. At Post-Conviction Relief hearing Counsel Goude used perjury and false testimony saying he made the motion when Mr. Robinson was testifying. App.p. 349, line 11-18. Mr. Robinson the petitioner never testified App.p. 28, line 12-15. Counsel Goude used false testimony at Post-Conviction Relief hearing nowhere in the trial transcript did he make arguments at pre-trial like he testified to he was on petitioner side so we made the motion and I argued it, we said on page 23, I think it was, that there was no probable cause, that it was the woman's tip to the man or the woman there that dispatches the policeman and the policeman stopped a black man with a white football Jersey and the orange cap that the woman had described in the 911 tip and the dispatcher told the officer. App.p. 343, line 25-p. 344, line 6, this is false nowhere on record did counsel Goude argue this see App.p. 5, line 1-p. 35, line 25. Counsel Goude used more false testimony at PCR hearing when question by Mr. Boan when presented motions that you identified as being the jail house motions, did you attempt to argue those motions on his behalf App.p. 346, line 9-11. Counsel Goude answered I did, that was all part of the same argument. They were all saying the same thing, just saying it in a different way. App.p. 346, line 12-13, this is false testimony when the court said so those are the motions that are before the court that I see at the present time, is that correct, Mr. Goude App.p. 23, line 15-17. Mr. Goude stated Your Honor, those are the one Mr. Robinson hand wrote. I will make a -- my motion. App.p. 23, line 18-19. Which prove it was different stuff in each motion. Mr. Goude further used perjury testimony that was false saying I'm still trying to suppress the drugs and the stop and the tip from the woman App.p. 347, line 9-10, nowhere in the trial transcript did Mr. Goude try to suppress the tip from the woman App.p. 5, line 1-p. 35, line 25. The court tried to clarify one thing that petitioner motion was addressed on page 11 through page 12 App.p. 348, line 21-p. 349, line 13, Mr. Goude testified that's the way he understood it, I could be wrong App.p. 349, line 14. The court so there's about twelve pages there or longer or more dealing with those motions. App.p. 350, line 3-4 Mr. Goude testified that's the way I understand it. App.p. 350, line 5, this is wrong page 11 through 12 does not go + nothing to do with Mr. Goude argument on suppression motion. App.p. 11, line 1-p. 12, line 25, it was only address the title of the motions in front of the court, the court agreed to hear all argument after the arresting officer testify. App.p. 12, line 1-8. So it twelve page or longer the arresting officer testified not twelve or longer arguments was given on suppression motions, Petitioner can show further mistreatment pre-trial counsel Goude testified at post-conviction relief hearing that the charge he was representing petitioner for was third offense dealing with the drugs App.p. 329, line 7-25. Counsel Goude also testified on November the 10th of 08 he was informed by solicitor petitioner has two prior drug convictions. He was indicted for second offense on the drug charges. I believe the prior convictions -- during the sentencing will ask the judge to sentence him as a third-time offender in the event of conviction App.p. 331, line 14-17. Mr. Boan question Mr. Goude at the time your client went to trial, was

he, in your opinion, facing trial for third offenses or facing trial for second offenses App.p. 332, line 1-3. Mr. Goude testified, well, on the transcript, when the prosecutors called the case, now this -- I was just looking while y'all were talking a while ago -- on page 5, the solicitor says -- the court says, what's the docket number? call your case, And the solicitor says, Your Honor, he has five counts -- and this is on page 5 -- that have been to the Grand Jury, true billed, possession of cocaine base with intent to distribute, He has two priors therefore making that a third App.p. 332, line 4-11. Mr. Goude testified well, in December, we came to court on a motion hearing, December the 15th, '88 and we were here in court with Mr. Robinson, who represented himself and the prosecutor and the Judge in court on a motion and the Judge -- I've got down here on my time sheet -- motion at side bar -- the Judge says, let him plead to possession with intent to distribute cocaine second offense App.p. 333, line 23-p. 334, line 4, we'll give him the minimum sentence for five years App.p. 334, line 4-5. Mr. Goude testified I told the defendant and repeated the possible maximum penalty he was facing. He said, which I wrote down then, knowing that this would come up one of these days, he said on December the 15th -- I wrote down, I told the defendant again -- and this time wrote it down knowing that ignorance is gonna have a penalty for it and one of these days I was gonna be up here on the PCR witness stand -- so I wrote down that I told the client again that he according to the prosecutor, facing fifteen to thirty years on PW10 cocaine, eight-five percent App.p. 334, line 5-14. Therefore petitioner motion to relieve counsel resulted in mistreatment because Counsel Goude never informed petitioner of the nature and offenses of the charges he was facing for the PW10 cocaine base, Counsel Goude told petitioner he was facing fifteen to thirty for PW10 cocaine not PW10 cocaine base App.p. 334, line 13-14 but petitioner was found guilty for a higher offense PW10 crack cocaine see App. 391 verdict form, Counsel Goude told petitioner about five (5) year sentence motion at side bar the Judge recommended App.p. 334, line 19-22 see App. 390 PW10 cocaine base indictment petitioner was indicted under statute 44-53-0375 (B)(2) under section 44-53-110 which PCR code read 3015 which is possession, manufacturing, distribution cocaine base and second offense can not receive no more than five years so it was wrongfully for Counsel Goude to state minimum is five years when according to indictment that was the max for less than one gram of cocaine base. See Mr. Goude testimony regarding the five to thirty years, Judge give the five year minimum sentence App.p. 334, line 1-22. Which petitioner made a motion to quash the indictment and Counsel Goude failed to argue petitioner motion App.p. 23, line 10-p. 24, line 11. Petitioner can show further prejudice dealing with mistreatment of presenting himself, Counsel Goude never informed him the DVD car video was audio, never let him see the DVD from police car, in fact the record is rife that Counsel could not seen the in-car police video DVD before pre-trial hearing to argue petitioner or even his motion on the facts. Even though Counsel testified at Post-conviction Relief hearing after Mr. Doan question him did you get to see a DVD from the police. App.p. 338, line 17, Mr. Goude testified on my notes, I've got down that what the DVD said or -- and the way I -- and I don't remember

the DVD but I've got in my notes there where I viewed it App. p. 338, line 18-20. Counsel had to view DVD after pretrial hearing because at pretrial hearing Solicitor Mr. Andrew stated Your honor, the only additional thing is I do have all the evidence relating to this case and I'm going to sit down with Mr. Goude, if he's willing to do that, and we also have some video potentially, and some audio, and I'll get with him and see what we can work out as far as consenting App. p. 35, line 2-7. Which mean Mr. Goude was never in possession of the video from police car, so Mr. Goude never was prepared for pretrial suppression motions and never showed petitioner the evidence of DVD for trial which prove more mistreatment of his representation and the record is rife that the solicitor disclosed the evidence of DVD to Richard Colvin see ECF Vol ground twelve and attached exhibits. Counsel Goude could not have been in possession of the police car DVD tape because he did not bothering to present it during suppression motion hearing to cross examination the witness John Seale about the false testimony involving assault and consent. App. p. 21, line 3 - p. 22, line 3, however Mr. Goude did not cross examination John Seale about nothing dealing with the arrest of illegality, he only question him about the drugs nothing dealing with the illegality arrest that was unlawful. App. p. 21, line 3 - p. 22, line 3. Which shows mistreatment because it denied petitioner an opportunity for full and fair litigation of his fourth Amendment claim dealing with the facts Counsel Goude could not been in possession of the see Exhibit of Narrative Report by John Seale attached as Exhibit to ECF No. 1, because Counsel Goude did not cross examination John Seale of the false testimony about consent to the court of petitioner placing his own hands behind his back. App. p. 16, line 13-22, direct examination by Mr. Andrew and used perjury and false testimony he said it all at once to show consent. App. p. 24, line 12 - p. 25, line 12, when see Exhibit of Narrative Report by John Seale that petitioner has submitted as evidence to the court that proves Deputy John Seale stated he was the one who placed petitioner hands behind his back to be detain and show Deputy John Seale stated he grab petitioner than told petitioner he was going to handcuff him, detain him so Deputy Seale lied to the court that he said it all at once and it shows further mistreatment that Counsel Goude failed to get this material evidence from Solicitor to cross examination the officer about him using false testimony dealing with Consent. App. p. 21, line 3 - p. 22, line 3. Petitioner never waived his right to Counsel. The court stated on record but you could have filed, as you have now so filed a motion to relieve him. App. p. 46, line 4-8 which prove petitioner only wanted to relieve Counsel not waive Counsel, Petitioner was coercion that resulted from mistreatment to relieve Counsel and represent himself. The court stated All right sir. You understand that we have started the case and we are going to go forward with this trial at the time, you understand that. App. p. 43, line 13-16. The court also stated for the record you understand if I accede to your request to represent yourself, that will not delay the trial in this matter. App. p. 43, line 17-19. The judge made petitioner feel as take Mr. Goude as Counsel or proceed on your own see Mr. Boan commit. App. p. 360, line 13 - p. 367, line 3. The judge never inquire about the

question do petitioner waive his right to counsel App.p. 367, line 4-p. 368, line 25. Mr. Johnson gave wrongfully information to the court saying it was clear from Judge John that Mr. Robinson was not going to have an attorney there, referring to petitioner trial transcript when Mr. Johnson stated it says you can waive that right if the court finds that this is a knowing and intelligent decision, you can waive that right to have an attorney present. App.p. 371, line 7-23. Prejudice is shown it is a reasonable probability had PCR counsel Dunn objected or brought to the court attention that Mr. Johnson left out the part do you understand that. App.p. 40, line 25-p. 41, line 2 and that the court was just asking petitioner a question of do he understand you can waive that right if the court finds that that is a knowing and intelligent decision App.p. 46, line 25-p. 41, line 2. It is a reasonable probability the court would of understood Mr. Johnson incorrect statement and no valid waiver was on the record to counsel and relief would of been granted. Which that wrongfully statement made by Mr. Johnson prejudice petitioner PCR hearing and had an effect on the rest of the court decision to deny relief. see App.p. 371, line 7-p. 374, line 19. Prejudice is further established it is a reasonable probability had the judge ask petitioner do he waive his right to counsel petitioner would of answered based on the record no he just wanted to relieve counsel because of the mistreatment dealing with the DVD video, not arguing motion to suppress evidence, not explaining nature of offense and sentence and not allowing him to take a conditional plea after motion was denied or not advising him that he could take a conditional plea and still appeal preserved motions that was denied. Cause and prejudice is shown for the procedure default, if the court consider they cannot review claim under Anders brief or Appellate counsel error because it was not preserved, they can review it under denial of a fair trial it was raised at Post-Conviction Relief hearing and preserved in order of dismissal separately from Appellate Counsel error, petitioner presented the procedural default to the undersigned in his see ECF No. 30 and 64 so the court was on notice under section dealing with exhaustion in petitioner response, see App.p. 240-250 PCR application the ground was raised separately than petitioner amended application adding appellate counsel error App. 268-287.

In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determinations made by state courts, the United States Supreme Court held as follows: A Federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to clearly established Federal law as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting from § 2254(d)(1)). "Clearly established Federal law in § 2254(d)(1). Petitioner has established both requirement of § 2254(d)(1).

The sixth Amendment expressly guarantees a criminal defendant only "the Assistance of counsel for his defense." U.S. Const. Amend. VI. Forett v. California, 422 U.S. 381, 819, 45 S.Ct. 2525 (1975).

ARGUMENT #8

The United States Court of Appeals erred in denying a certificate of appealability as to District Court error in granting summary judgment to Respondent on ground twelve when Petitioner has established cause and prejudice for the procedural default and that failure to review the constitutional claim will result in a fundamental miscarriage of justice of actual innocence which Petitioner is entitled to relief under 2254(d)(1) and 22

54(d)(2)

See ECF Nos. 30 and 64, ground twelve has not been presented in no state court because of PCR counsel failure to raise claim which show cause and prejudice for the procedural default and cause is also established by not disclosing the evidence to petitioner which shows prejudice also. Which failure to review would result in a fundamental miscarriage of justice of actual innocence.

Petitioner clearly established both "cause" for not raising his Brady claim in the state courts and prejudice from the constitutional violation. Because Brady already requires a showing of materiality, Petitioner's meritorious Brady claim established that he has suffered the requisite "prejudice". And given the Commonwealth's repeated assertions that it had an "open file" discovery system--i.e., a system where in all discoverable material is placed in the prosecutor's "file" and made available for inspection by (*14) the accused--Petitioner had every right to expect that Brady material would be made available in that "open file". Those "open file" assertions by the Commonwealth effectively concealed the existence of Petitioner's Brady claim, and thus are precisely the type of "external impediments" to the defense that clearly establish "cause" under this Court's cases. See Amadeo v. Zant, 486 U.S. 214, 222 (1988); Strickler v. Greene, 1998 WL 880835.

A procedural default will not bar a Federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. Trevino v. Thaler, 133 S.Ct. 1911 (2013). For procedurally defaulted claims, to which the Martinez exception to the normally applicable cause and prejudice rule for excusing state-court procedural default on Federal habeas is applicable, the District Court should allow discovery and hold evidentiary hearing where appropriate to determine whether there was cause under Martinez for the state-court procedural default and to determine, if the default is excused, whether there been trial counsel ineffective assistance of counsel. Detrich v. Ryan, 740 F.3d 1237 (2013). In federal habeas proceedings, attorney error is an objective external factor providing cause for excusing a procedural default in state proceedings only if that error amounted to a deprivation of the constitutional right to counsel; an error amounting to constitutionally ineffective assistance is imputed to the state and is therefore external to the prisoner. Davila v. Davis, 137 S.Ct. 2058 (2017). See also Martinez v. Ryan, 132 S.Ct. 1309 (2012).

Actual innocence gateway should open to reach merits of procedurally barred claim only when petition present evidence of innocence so strong that court cannot have confidence in outcome of trial unless court is also satisfied that trial was free of non harmless constitutional error. McQuiggin v. Perkins, 135 Ct. 1924 (2013). To invoke miscarriage of justice exception to Antiterrorism and Effective Death Penalty Act's (AEDPA) statute of limitations, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence 28 U.S.C.A. § 2254(d)(1)(D).

Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court. See ECF No. 1 and 64. Petitioner was arrested on June 3, 2008 for warrant number J-512017, 018; 019. Petitioner was original appointed counsel Richard F. Colvin who filed a motion to be relieved as counsel on September 16, 2008 see Exhibit of Motion to be relieved as counsel, the honorable Alison R. Lee gave an order relieving counsel on September 23, 2008 and Reuben Gowde was substituted for public defender in place of Mr. Colvin see Exhibit Order relieving Counsel, on this same day the solicitor disclosed discovery to new appointed counsel Reuben Gowde which only contained plea offer, indictments, warrants, incident report, Use of force Report, and NCJC, the Solicitor Dorie C. Brannanti never disclosed as evidence the video from the in-car camera see Exhibit Acknowledgement of receipt of discovery documents dated September 23, 2008 which no attorney for defendant did not sign acknowledge receipt. Petitioner was trying to seek the video through freedom of Information Act from Solicitor office which the supervisor III indicated that the file reflected that discovery given to Richard Colvin on August 25, 2008 which this after discovery evidence see letter from Solicitor office shows perjury that solicitor never disclosed video from the in-car camera to counsel because evidence reflect see Exhibit Acknowledgement of receipt of discovery documents it was disclosed in September 23, 2008 and it does not contain evidence of video which shows a brady violation, PCR counsel did not review the record on this issue and he was ineffective of assistance. Petitioner also testified when relieving counsel at trial during trial of the failure to show D.V.D. tape see App.p. 45, line 17-line 21. Also at pretrial hearing Mr. Gowde move that the prosecution produced any evidence that have not already been given. Court asked prosecutor is there anything, solicitor responded I don't believe so. App.p. 29, line 25-p. 30, line 22 which is perjury because solicitor Mr. Andrew stated at pretrial hearing the day before trial, Your honor, the only additional thing is I do have all the evidence relating to this case and I'm going to sit down with Mr. Gowde, if he's willing to do that, and we also have some video potentially and some audio, and I'll get with him and see what we can work out as far as consenting App.p. 35, line 2-7.

In interpreting § 2254(d)(1) and discussing the federal courts' rule in reviewing legal determinations made by state courts, the United States Supreme Court held as follows:

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CONCLUSION

The petition for a writ of certiorari should be granted.

February 20, 2018
Columbia, South Carolina

Respectfully Submitted,

B. J. R. #294233

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