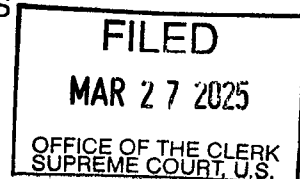


No. 24-6959

IN THE

SUPREME COURT OF THE UNITED STATES



Markus Odon McCormick — PETITIONER
(Your Name)

vs.

WARDEN Daniel Everett — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

Emergency PETITION FOR WRIT OF CERTIORARI "Actual Innocence"

Markus Odon McCormick
(Your Name)

P.O. Box 1109
(Address)

Clinton, N.C. 28329
(City, State, Zip Code)

(910) 592-2151
(Phone Number)

QUESTION(S) PRESENTED

- (1) Whether AEDPA's exhaustion requirement can be overcome by a showing of actual innocence?
- (2) Whether the court erred in finding that reasonable jurists would not find the court's treatment of Petitioner's claim debatable or wrong and the claims don't deserve to proceed further?
- (3) Whether AEDPA's exhaustion requirement can be overcome by applying the fundamental miscarriage of justice exception?
- (4) Whether the Fourteenth Amendment to the United States Constitution allows a state conviction to stand when it's based on fabricated evidence?
- (5) Whether the Fourth Circuit erred in concluding Petitioner has not made requisite showing that failure to review his petition would result in a fundamental miscarriage of justice and dismissing his petition as mixed was improper ~~and~~ constitutes prejudicial error.

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

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☒ is unpublished.

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

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☒ is unpublished.

☐ For cases from **state courts**:

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

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

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

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

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 1-22-2025.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 3-18-2025, and a copy of the order denying rehearing appears at Appendix C.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1) United States Constitution, Amendment V provides, in pertinent part: "No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law."
- (2) United States Constitution, Amendment VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to effective assistance of counsel for his defense, trial and appellate counsel"
- (3) United States Constitution, Amendment XIV provides, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"
- (4) North Carolina General Statute § 15A-612(b), provides "no finding made by a judge under this section precludes the state from instituting a subsequent prosecution for the same offense."
- (5) North Carolina General Statute § 7A-30; appeal involving substantial question"
- (6) North Carolina General Statute § 7A-31: petition for discretionary review"
- (7) Motion For Appropriate Relief In Appellate Division § 15A-1418

STATEMENT OF THE CASE PROCEDURAL HISTORY

On 2-4-2019 Petitioner along with Maranda Justice (M.J. hereinafter) was arrested in parking lot of buffalo wild wings and charged with 2 counts of promoting prostitution date of offense 11-25-2018. As a result from that arrest on 2-5-2019 Petitioner was charged with PWISD heroin, cocaine, marijuana and maintain/dwell motor vehicle. M.J. was only charged with one count of promoting prostitution on 2-4-2019.

On 4-4-2019 Petitioner had a probable cause hearing in front of District Court Judge Caitlyn Evans (C.E. hereinafter) and at the conclusion C.E. dismissed both promoting prostitution charges with a finding of no probable cause for arrest due to lack of evidence presented on date of arrest warrant. That same day using the same exact evidence the state ordered Detective Sasha Graham (S.G. hereinafter) to re-charge Petitioner again only changing date of offense to 12-20-2018 and case file No's to 19CR54261 and 19CR54262. On 4-16-2019 another probable cause hearing was held and C.E. found probable cause at the conclusion and the case still remained in district court until 12-9-2019 alleged Cumberland County grand jury indictment.

The grand jury returned additional indictments of 4 counts of human trafficking, 11 counts of promoting prostitution on new indictments submitted by assistant district attorney case file Nos 19CR52989; 19CR53012 and 19CR53011. On 2-10-2020 Petitioner was indicted again on same exact charges/indictments not being superseded by the first ones, nor were the witnesses whom testified before grand jury testimonies recorded by a court reporter in which the state admitted on the record during a pretrial hearing on 5-19-2021 and 5-24-2021.

The cases came on trial before Honorable Thomas Lock, Superior Court Judge on 6-21-2021 in Cumberland County after Petitioner declined to accept the state offer of two counts of promoting prostitution, free to argue on a Alford plea.

A. Evidence Presented at trial tended to show the following:

Jonathan Strange (J.S. hereinafter) was lead counsel and during state witness Det. Everett Hockenberry (E.H. hereinafter) direct testimony Petitioner made motion to have J.S. removed due to existing conflict of interest (that was brought to attention of trial judge) and not objecting or impeaching E.H. while he was giving perjured, prejudicial and inadmissible testimony which the Court granted, that led to Petitioner proceeding pro se.

At the conclusion of the states case in chief, the state elected to dismiss indictments 19CR52989, 19CR53011 with "his" (alleged human trafficking victim) and count 4 in (see attachment) (4)

(attachment)

indictment 19CR554261, The court dismissed PWISD heroin & marijuana counts from indictment 19CR551632.

Petitioner testified on his own during the presentation of his defense and stated during his testimony "he was released from Federal prison in October 2018, didn't meet "hiza" until November 2018 and the only dealings with her was to sell marijuana in Wilmington and it was stolen at Mike's house which prevented that from happening (just like "hiza" stated in interviews with detectives) and "hiza" left with Jason Godwin and didn't see her again until 12-20-2018 car accident where M.J. called Jason Godwin dad to pick them up and had "hiza" and Jason with him. They all went to hotel that night and Petitioner went to hospital with mom from complications of car accident. The next morning M.J. called saying "she gave hiza & hexi some money to get drugs, took a Xanax and fell asleep waiting on them and when she woke up all her money was gone", M.J. and "hiza" both stated while testifying "Petitioner was not in room when the one two girl date took place and "hiza" received her money from the date."

Petitioner was found guilty of PWISD cocaine, two counts of human trafficking against his date of offense 9-19-2018 through 12-19-2018 and the other 12-20-2018. For offenses against M.J., Petitioner was found guilty of two counts of promoting prostitution by solicitation offense dates 12-20-2018 and 1-27-2019 and by receiving profits on 12-20-2018. Petitioner was found not guilty of 2 counts of promoting prostitution by profiting against M.J. on 1-16 and 17 of 2019. Petitioner was sentenced to 96-176 months for the human trafficking convictions, 21-35 months for each conviction of promoting prostitution against hiza, and 10-21 months imprisonment for PWISD cocaine. The trial court consolidated 2 convictions of promoting prostitutions for offenses occurring on 12-20-2018. Petitioner gave written and oral notice of appeal in open court.

B. The Proceedings On Appeal In State Court

Petitioner gave timely notice of appeal in open court on 7-2-2021. Appellate counsel Joseph

(attachment)

Hattimare raised four issues in the North Carolina Court of Appeals none being constitutional issues, which resulted in the N.C. Court of Appeals finding no error, upholding convictions in its unpublished opinion filed on 7-5-2023.

Petitioner proceeded pro se and appealed the North Carolina Court of Appeals order to the North Carolina Supreme Court on 7-25-2023 pursuant to § N.C.G.S. 7A-30 (appeal involving substantial constitutional question), as well as on 7-27-2023 pursuant to § N.C.G.S. 7A-31 (petition for discretionary review), and § pursuant to § N.C.G.S. 15A-1448 (motion for appropriate relief in appellate division) plus motion for speedy appeal on 8-8-2023 also other filings in which all was either dismissed or denied without written opinion on 3-20-2024. While the direct appeal was pending in N.C. Supreme Court & Court of Appeals filed 2 petitions for writ of habeas corpus on 4-17-2023 and 9-22-2023 asserting "actual innocence" that were both denied without written opinion which led to Petitioner filing current § 2254 petition in eastern district of N.C.

C. The Proceedings In District Court in Eastern District of N.C.

On 9-27-2023 the court granted Petitioner's application to proceed in forma pauperis and on 10-27-2023 the court conducted its initial review and permitted the action to proceed, plus directed the clerk to serve respondent with the petition. Respondent sought dismissal of the petition as "a mixed petition" claiming the petition contain both unexhausted and exhausted claims. Petitioner responded back informing the district court "Respondent is committing fraud upon court, falsely claiming multiple grounds had not been exhausted and ground 7 is the only ground not exhausted and that's because that ground supports his actual innocence argument and will delete this one ground and proceed with the other claims that have all been exhausted if the court so finds", and requested evidentiary hearing. The district court on 8-12-2024 dismissed without prejudice Petitioner's petition as unexhausted, denied petitioner's motions as well as a certificate of Appealability, without a hearing.

(attachment)

2 Petitioner's Appeal To The Fourth Circuit

Rather than request leave to amend or go back to N.C. courts, petitioner appealed. In 9-30-24 Petitioner filed an informal brief in the fourth circuit court of appeals raising 3 issues also asking the circuit judges to delete ground 7 and adjudicate on the merits. On 1-22-2025 in an unpublished opinion 3 judge panel dismissed the appeal. Petitioner moved the court for rehearing en banc in the 4th circuit that was denied on 3-18-25 this petition follows.

* footnote

"hisa" is the pseudonym North Carolina court of appeals used to protect the identity of the victim.

REASONS FOR GRANTING THE PETITION

I. AEDPA's exhaustion requirement on a procedurally defaulted claim can be overcome by a strong showing of "actual innocence" or a "fundamental miscarriage of justice."

(1) Under the actual innocence exception to the procedural bar rule, a petitioner seeking to take advantage of the "actual innocence" gateway to federal habeas review of procedurally defaulted claims must present evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error. see "McDuggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed. 2d 1019, 92 A.L.R. Fed. 2d 663 (2013)"

(2) It has also been held to excuse this procedural default habeas corpus petitioner asserting actual innocence must demonstrate innocence; the burden is on him, not the state. see "United States ex rel. Navarro v. Atchinson, 69 F.Supp. 3d 810 (W.D. Ill. 2014)". And in this case the record will show:

(a) In indictment 19CR53012 the state alleges on 9-18-2018 Petitioner was human trafficking "hisa" in Fayetteville, N.C.

(b) Petitioner asks this court to take judicial notice that Petitioner was not released from federal prison until 10-14-2018

(c) On cross-examination "hisa" stated she came to Fayetteville, N.C. on 9-18-2018 with Aaron Torres and didn't meet Petitioner until two months later. see (Tp. 679-80)

(d) On cross-examination "hisa" stated "anytime she was with Petitioner she never did anything sexual at all." (Tp. 605)

(e) On cross-examination "hisa" stated on 12-20-2018 Petitioner was in a car accident and M.J. called Jason Godwin father to pick her and Petitioner up. (Tp. 614)

(f) On cross-examination "hisa" stated "she was doing two girl dates with M.J. to fix a tire on Jason vehicle." (Tp. 640)

(g) On cross-examination M.J. stated "after car accident Petitioner left with his mom to go to hospital, didn't know where he went but he stayed overnight and while Petitioner was gone she took a Xanax, fell asleep and hisa, Jason Godwin and heri never returned with the money she gave them to buy her drugs but also stole the money out of her purse." (Tp. 945-46)

(h) M.J. stated "she didn't know who took hilly "hisa" pizs and "hisa" did the date because her and Jason Godwin were in need of money." (Tp. 919)

(see attachment)

*(Tp: Trial page number of state trial transcript)

(attachment)

- (1) Petitioner stated "on 12-20-2018 he was in a car accident and from injuries sustained called his mother, whom took him to hospital, where he stayed overnight and came back to hotel next morning because "M.J." called and told him all her money had been stolen by "hisa" and others. (Tp. 1271-72)
- (3) Petitioner contends the facts raised in this subsection ~~from~~ the record supports his unexhausted ground 7 claim to where he asserting "actual innocence." Petitioner asks this court to make a de novo review of ground 7 in his § 2254 petition or in the alternative delete this one unexhausted ground and proceed on the merits of petition in the interest of justice ~~able to fact~~ it was raised in the trial court, brought to attention of appellate counsel, N.C. Supreme Court and federal courts, and a reasonable jurists would find this argument of constitutional magnitude stronger than the weaker issues appellate counsel raised in brief to North Carolina Court of Appeals, see "Edwards v. Carpenter, 529 U.S. 446, 451 (2000)" courts ruled "ineffective assistance of appellate counsel may serve as "cause" and "prejudice" to excuse a procedural default, as long as petitioner show that his claim of ineffective assistance of appellate counsel itself has merit, see "Lord v. Ishee, 384 F.3d 189, 194 (6th Cir 2004)"; "Edwards v. Carpenter, 529 U.S. at 450-451"
- (4) Petitioner asserts there is no better "alibi" than being incarcerated when accused of committing a crime and, 9-18-2018 offense date is a material element the state had to prove beyond a reasonable doubt, Petitioner was sex human trafficking "hisa" in Fayetteville, N.C. and the record shows in the trial court Petitioner was not released from federal prison until 10-19-2018 and didn't meet hisa until November 2018 and during those 3 days "hisa" was with petitioner at his friend Mike's house she was safe, comfortable and didn't engage in any prostitution, (defense exhibit 12) and the petitioner asks this court to review this evidence and order Petitioner to be immediately released from custody.

II. The decision of the 4th Circuit is in conflict with Supreme Court and other circuit courts governing habeas
Petitioners presenting mixed petitions with exhausted and unexhausted claims.

(1) In the instant case the 4th Circuit erred dismissing petitioner's petition as a mixed petition because there is a great inconsistency within the Federal Circuits on the treatment of habeas petitioners presenting mixed petitions with unexhausted and exhausted claims, meaning that citizens rights vary greatly depending on where they find themselves.

(2) Circuit Courts in the following cases made these rulings "where a state prisoner, seeking federal habeas corpus relief, presents in his petition both claims which have been exhausted in the state courts and claims which have not:

(a) 1st Circuit - habeas petitioners with unexhausted as well as exhausted claims may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles. See "Gautier v. Wall, 620 F.3d 58 (1st Cir. 2010)"

(b) 2nd Circuit - ^{allowed} habeas petitioner who has a "mixed petition to abandon his unexhausted claims so that he may proceed with his exhausted claims," see "Zarvelau Artuz, 254 F.3d 374, 378 (2nd Cir. 2001)"

(c) 3rd Circuit - Unless the petitioner elects to withdraw the unexhausted claim, the entire petition should be dismissed without prejudice, see "Carpenter v. Naughton, 296 F.3d 138 (3rd Cir. 2002)"

(d) 5th Circuit - Those with exhausted and unexhausted claims "may proceed only with the exhausted claims," see "Strickland v. Thaler, F.3d 171 WL 5418369 (5th Cir. 2012)"

(e) 6th Circuit - Allowed the petitioner to delete unexhausted claims and proceed with exhausted claims, see "Van Armen v. Smith, F.3d WL 11070972 (6th Cir. 2014)"

(f) 7th Circuit - Procedural default will be excused if the habeas petitioner can show cause and prejudice for failure to exhaust claims, or if a failure to review them on these procedural grounds would result in a fundamental miscarriage of justice, see "Howard v. O'Sullivan, 185 F.3d 721 (7th Cir. 1999)"

(g) 8th Circuit - Procedural default may be excused and a habeas petition reviewed if a petitioner can prove cause and prejudice for the default or that a constitutional error led to his or her actual innocence, see "Holt v. Bowersox, 191 F.3d 970 (8th Cir. 1999)"

(h) 9th Circuit - When faced with a mixed petition, the district court must always give the petitioner the option of either withdrawing unexhausted claims and proceeding only on exhausted claims. see "Olvera v. Giurbino, 371 F.3d 569 (9th Cir. 2004)"

(i) 10th Circuit - At the Petitioners requests the court decided the Petitioners exhausted claim on the merits and dismissed without prejudice the Petitioners unexhausted claim, see "Tapia v. Hemster, 172 F.3d 1143 (10th Cir. 1999)"

(3) This court in the following cases made these rulings where a state prisoner seeking federal habeas corpus relief, presents a petition with claims which have been exhausted and claims unexhausted.

(a) "Burton v. Stewart, 549 U.S. at 154, 127 S.Ct. 793 (2007)" court held those with exhausted and unexhausted claims "may proceed only with the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles."

(b) "Rhines v. Weber, 544 U.S. at 277-78, 125 S.Ct. 1528 (2005)" court ruled when faced with a mixed petition, district court before dismissing mixed petition must give the Petitioner an opportunity to delete the unexhausted claims and proceed with only the exhausted claims, as well as deciding whether the Petitioner has good cause for his failure to exhaust all claims, and whether the unexhausted claims have some possible merit.

(4) Petitioner asserts all claims in petition are exhausted except ground 7 in which Petitioner agreed to delete the one unexhausted claim and proceed to have the rest decided on the merits in every last one of his filings and now again in this petition and states upon this court, the only reason ground 7 was included, because it supports the actual innocence argument, and that this is an extraordinary case to where the fundamental miscarriage of justice exception apply, and had the court applied these other opinions from other circuits and Supreme Court there is a strong possibility a different result would of outcome and the only remedy is to excuse the unexhausted ground or delete it and decide Petitioners, petition on the merits.

III The 14th Amendment will not allow a state conviction to stand when its based on fabricated evidence by investigating officers

(1) More than 40 yrs. ago this court held that the 14th Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. see "Miller v. Pate, 386 U.S. 1 87 S.Ct. 785, 17 L. Ed. 2d 640 (1967)"; and further extended in "Massey v. Ojaniit, 759 F.3d 343 (4th Cir. 2014)". There has been no deviation from that established principle; see "Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217; see "Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177 87 L. Ed. 214; cf. "Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L. Ed. 9. There can be no retreat from that principle here. The 4th Circuit as well as other circuit courts have recognized a due process right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity. see "Washington v. Wilmore, 407 F.3d 274, 282 (4th Cir. 2005)" see "Zahrey v. Coffey, 221 F.3d 342, 349 (2nd Cir. 2000); also "Halsey v. Pfeiffer, 750 F.3d 273, 295-96 (3rd Cir. 2014)" finding by fabricating evidence for use in a criminal prosecution a state actor would violate a defendant's 14th Amendment due process rights regardless of whether or not the state actor violated other constitutional rights of the defendant." This is such case:

(a) E.H. was 1st detective to interview "hisa", see "Washington, 407 F.3d at 282-83"; and from that initial interview came the fabricated police report. see "Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988)", alleging Petitioner was committing crimes on alleged offense date at issue in ground 2 of petition that eventually led to Petitioner loss of liberty; i.e., conviction and subsequent incarceration. Id at 283" (Defense exhibit 3: 4 at trial)

(2) Petitioner asserts there is a strong possibility had Gilt, not maliciously, intentionally fabricated his police report Petitioner would not have been unlawfully charged, wrongfully convicted and sentenced with an offense bearing the date of 12-20-2018 and the only remedy is to grant this Petition and order Petitioner immediate release.

IV. The 4th Circuit erred in finding Petitioner's claims don't deserve encouragement to proceed further

(1) N.C. General Statute §15A-612(b) simply states existing law that "neither the district attorney nor anyone else would attempt to start the case again in district court through issuance of a warrant or other process unless there was new evidence and if the opposing party disagreed with the decision of the district court judge, would also have the option of submitting a bill to the grand jury despite the finding in district court." see "State v. Isobertlein, 1983, 308 S.E. 2d 442, 309 N.C. 601." And shows upon this court:

(a) On 2-4-2019 Petitioner was arrested and charged with 2 counts of promoting prostitution case Nos 19CR051565; 19CR051566, offense date 11-25-2018.

(b) On 4-4-2019 Petitioner had a probable cause hearing in front of "C.E." and at conclusion of hearing C.E. dismissed both counts with a finding of "no probable cause for arrest due to lack of evidence presented on date of arrest warrant." see "Evans v. Michigan, 568 U.S. 313, 318-319, 133 S.Ct. 1069, 185 L.Ed. 2d 124 (2013)"

(c) That same day using the same exact evidence the state re-charged Petitioner with exact same offense only changing case file Nos to 19CR54261; 19CR54262 and date of offense to 12-20-2018. see "5th Amendment to United States Constitution," see "Witte v. United States, 515 U.S. 89, 398 (1995)" "double jeopardy clause prohibition applies only where a subsequent prosecution involves the same offense in the same jurisdiction." quoting "McElrath v. Georgia, 601 U.S. 87, 94, 144 S.Ct. 651, 217 L.Ed. 2d 419 (2024)"

(d) Petitioner asserts this constitutional error was raised in trial court as well as ground one in petition and had the petition been adjudicated on the merits there is a strong possibility that this claim alone warrants the state sentence to be reversed and Petitioner released immediately.

(a) Ineffective assistance of appellate counsel constitutes "cause" and "prejudice" excusing a procedurally defaulted claim and shows upon this court.

(a) In "Martinez v. Ryan, 566 U.S. 1, 16-17, 132 S.Ct. 1309, 182 L.Ed 2d 272 (2012)", this court ruled "an individual has a constitutional right to the effective assistance of counsel on direct appeal."

and in the instant case petitioner has demonstrated a substantial showing of a constitutional violation in ground 8 of petition arguing "Appellate counsel's failure to brief the issues raised in petition met the "Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)" requirement."

(b) Indeed in the instant case there is no record of any strategic reason for appellate counsel's failure to raise the constitutional claims contained in petition, see "Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996)". The brief appellate counsel filed only contained 4 issues with none being constitutional errors. These arguments were obviously fatally flawed as the N.C. Court of Appeals found no error in its opinion. To purposely sacrifice the constitutional issues in favor of a poorly brief issue cannot be deemed strategic or reasonable. On the contrary, it demonstrates that appellate counsel omitted a significant and obvious issue in favor of a clearly and significantly weaker issue. see "Clark v. Stinson, 214 F.3d 315, 322 (2nd Cir. 2000)" also extended in "Davila v. Davis, U.S., -, 137 S.Ct. 2058, 2067, 198 L.Ed.2d 603 (2017)"; "Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)" courts found "winnowing out weaker arguments on appeal and focusing on stronger arguments is the hallmark of appellate advocacy and appellate counsel failure to raise a claim on appeal that was plainly stronger than those presented to the appellate court is deficient performance."

(c) Petitioner exhausted his ineffective assistance of appellate counsel ground, when he raised it in his appeal involving substantial constitutional question (pursuant to N.C.G.S. § 7A-30) in front of N.C. Supreme Court on 7-23-23 in which the court denied without written order, and Petitioner asks this court to make a de novo review and adjudicate the petition on the merits.

(3) Appellate counsel deficient performance did prejudice Petitioner on direct appeal, and shows:

(a) Petitioner wrote numerous letters to appellate counsel as the direct appeal was pending on 10-28-2021, 2-16-2022, 9-20-2022, 10-12-2022, 10-17-2022, 10-24-2022 and 11-7-2022 asking him to brief the constitutional issues that Petitioner listed as grounds in his § 2254 petition.

(b) Petitioner kept a carbon copy of the letters as well as sent them certified mail and have the certified receipt plus letters to include as exhibits for the court.

(c) On 9-29-2022 appellate counsel wrote to Petitioner claiming he filed a motion to withdraw as counsel (in which Petitioner has copies of this as well to include as exhibit).

(d) On 12-20-2022 appellate counsel wrote again to Petitioner telling him why he is not going to argue the constitutional errors Petitioner requested. id. Strickland, 446 U.S. 668

(e) Petitioner asserts, just like the effective assistance of trial counsel, the effective assistance of appellate counsel is "a bedrock principle in our justice system. The right to effective assistance of counsel on appeal arises from both the 14th Amendment and Sixth Amendment. The 14th Amendment "guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective," see Fuitts v. Lucey, 469 U.S. 387, 392 (1985)". This country's Sixth Amendment jurisprudence confirms that a right to counsel "comprehends the right to effective assistance of counsel," see Guyler v. Sullivan, 446 U.S. 335, 344 (1980)" and in the instant case Appellate counsel deficient performance caused irreparable harm to Petitioner and the only remedy is to vacate sentence and order immediate release.

(f) Petitioner states upon this court on 10-28-2022 he wrote a certified 5 page letter to appellate counsel asking him to include specific constitutional/prejudicial errors in the body of his appellate brief, giving counsel the trial page number where the specific error occurred, the case law that supports the argument and everything included in the letter to counsel was raised in the N.C. Supreme Court, plus included as claims in current §2254 petition, therefore there is absolutely no reason for appellate counsel failure to raise these constitutional claims, see "Strickland v. Washington, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)".

V. The 4th Circuit erred finding that reasonable jurists would not find the courts treatment of Petitioners claim debatable or wrong

(1) In the instant case the 4th Circuit did err finding that reasonable jurists would not find the courts treatment of Petitioners claim debatable or wrong and shows upon this court:

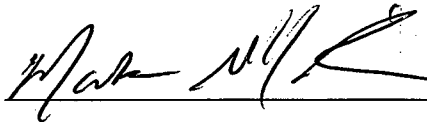
- (a) Petitioner asserts that after receiving the 3-20-24 order from N.C. Supreme Court, he immediately made and sent a motion for "Request For Writing Opinion By Justices And Findings of Facts and Conclusions of Law" dated 4-1-2023.
- (b) N.C. Supreme Court never responded to Petitioner's Request which led to Petitioner writing a letter to Chief N.C. Supreme Court Justice Newby on 10-11-2023
- (c) The N.C. Supreme Court responded back to Petitioner only telling him that "the N.C. Supreme Court does not have to give reason or written opinion on their rulings."
- (d) Petitioner states upon this court every ground raised in petition was presented to N.C. Supreme Court in his Filings and the N.C. Justices had it from 7-25-23 until 3-20-24 and still failed to tell Petitioner why this wrongfully, unlawful conviction is okay, and still till this day Petitioner has not had a judge in this country to give him a written opinion stating its findings of fact and conclusions of law on the grounds raised in §2254 petition, and prays this court does so now

CONCLUSION

Petitioner asserts he is actually innocent of the charges he is currently imprisoned on in N.C. State prison and it can be shown easily if this court allow briefing on oral argument. Petitioner will delete ground 7 in the interest of justice and proceed with the rest of petition on the merits and failure to do so will result in a fundamental miscarriage of justice and for the reasons contained in this petition, the petition for a writ of certiorari should be granted.

emergency

Respectfully submitted,



Date: 3-28-25