STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	2012-CP-16-814
	)	
Timothy Michael Farris,	)	
Applicant,	)	MOTION
	)	AND MEMORANDUM
v.	)	
	)	FOR SUMMARY JUDGMENT
State of South Carolina,	)	
	)	FOR THE APPLICANT
Respondent.	)	

Applicant moves for summary judgment on the grounds of ineffective representation and newly discovered evidence–material facts, not previously presented and heard, that require vacation of the conviction in the interest of justice.

Ineffective Representation

1. Applicant is the victim of a rogue police officer and defense counsel who made no effort to comply with the duty to advocate. The issues presented here will "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 688 (1984).

2. Plea counsel, Matthew Swilley, was appointed to represent the Applicant on February 24, 2011. [**Exh. A**] One week later he phoned the Applicant to notify him about a plea hearing scheduled for the following week. Swilley did not ask for a continuance.

When they met, Swilley did not review the evidence nor consult with the Applicant. Swilley told him he had no choice but to plead guilty. [**Applicant's affidavit**] With these words, Matthew Swilley assumed the role of judge.

South Carolina Did Not Have Jurisdiction

3. It is reasonable to presume defense counsel did not look at the file or do any research. Thus, he was not aware that South Carolina could not claim personal jurisdiction for the twenty-years-old, long-time resident of North Carolina. Defense counsel undoubtedly was ignorant of the fact that the Applicant, a musician with no criminal record, had no business contacts nor ever committed a tortious act within this state (*S.C. Code Ann*. § 36-2-803).[1] "The Fourth Circuit 'has made it clear that due process requires that a defendant's contacts with the forum state be tantamount to physical presence there.'[citation]" *Perficient Inc. v. Pickwick,* No. 11-cv-479 (W.D. N.C. 2012). Ignorant of these facts and relevant law, defense counsel failed to assert Applicant's due process rights. Also see, *World-wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

Invalid Arrest Warrant

4. The South Carolina arrest warrant was deficient on its face. Had defense counsel read it, he would have realized that the affidavit in support of the warrant did not meet the constitutional and statutory requirements for issuance of an arrest warrant.

5. Due to defense counsel's negligence, he was not aware the affiant, Mica

[1] "First, the nonresident defendant's conduct must meet the requirements of South Carolina's long-arm statute. [citation] Second, the exercise of jurisdiction must comport with the requirements of the due process clause. [citation] The defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. [citations]" *Moosally v. Norton*, Op. No. 3769 (S.C. Ct. App. filed April 5, 2004).

Griggs, was not an investigator, had no personal knowledge, and could swear to nothing other than what would be considered hearsay in court. Griggs wrote, "Sgt. John Specht, a Hartsville police investigator states to the affiant . . .."[2] Specht's *unsworn* oral statement to Griggs cannot support the warrant. [**Exh. B**]

6. The court reversed the conviction in *State v. Dunbar,* Op. No. 3866 (S.C. Ct. App. Sept. 27, 2004) when it found, "The person signing the affidavit had no knowledge of the facts alleged in the affidavit." The *Gist* court similarly ruled: "[A] warrant issued upon a statement of facts not sworn to is unconstitutional." *Gist v. Berkeley County Sheriff's Dept*., 151 S.E.2d 162 (S.C. Ct. App. 1999).

7. Here, as in *Gist, Id.*, the affidavit for the arrest warrant failed to describe how the Applicant was linked to the crime. Mere conclusory statements do not suffice. The observations of *State v. Jenkins*, Op. No. 4958 (S.C. Ct. App. dated June 20, 2012) similarly apply: "[W]e find the police did not provide the magistrate a substantial basis on which to find probable cause."

8. A challenge to the integrity of the affidavit would have revealed intentionally or recklessly omitted material facts:

- No facts establish jurisdiction of a non-resident;
- No facts show how emails were traced to Applicant's computer;
- No facts show how emails were traced to this particular computer user;
- No facts establish how it was determined that the Applicant's email

[2]Rule 602, SCRE requires a witness other than an expert to have personal knowledge of the matters testified to.

address was not used by another resident of his home, a guest, or an email hijacker;

- No facts identify the person accused to a moral certainty as the perpetrator of the criminal act;
- The investigating officer, Specht, did not swear to any facts.

9. The warrant's affidavit did not support a finding of probable cause. “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.” *Illinois v. Gates*, 462 US 213 (1083).

10. Hartsville Municipal Court Judge Rilla Thomas did not ask why a local police officer did not refer an out-of-state suspect to federal law enforcement. When there is evidence of a defendant who crosses, or intends to cross. state lines to meet a minor, jurisdiction belongs to federal investigators. But federal investigators require “a substantial step” (i.e., plans to meet with the minor) for probable cause.

> To prove an attempt to violate § 2422(b), the Government must establish beyond a reasonable doubt that defendant used a facility or means of interstate commerce to intentionally “persuade, induce, entice, or coerce a person whom he believed to be a minor into illegal sexual contact and took a substantial step toward that persuasion or enticement.” United States v.

Barlow, 568 F.3d 215, 219-20 (5th Cir. 2009) (internal quotation marks, brackets, and citation omitted).[3]

11. An alternative to referring the case to federal investigators was described in *State v. Gaines*, Op. No. 26549 (S.C. Sup. Ct. dated October 6, 2008). It began when a Pennsylvania detective, pretending to be a twelve-years-old girl with the screen name "LilAshleyPA," was contacted by William Gaines of South Carolina. Using the computer alias, "HMMRTHEGRT8" on their AOL internet chats, Gaines encouraged "LilAshleyPA" to travel to Greenville to see him; proposed renting a hotel room where she could stay with him; offered to buy her clothing and lingerie; requested nude photos of her; and cautioned "LilAshleyPA" to keep their plans secret because "guys my age aren't allowed to date girls your age."

The Gaines matter was referred to SLED (South Carolina Law Enforcement Division). SLED agents set up an AOL internet account using the screen name "Allyinsc13," and posed as a thirteen-year-old girl living in Columbia. Gaines responded to the decoy with nearly the exact same enticements. The chats continued until SLED agents procured an order for HMMRTHEGRT8's records from AOL; confirmed the online chats originated from Gaines' South Carolina home; obtained a search warrant; and confiscated Gaines's computer.

Gaines appealed his jury conviction and lost. Unlike Specht's investigation of the Applicant, the suspect was referred to investigators in Gaines' home state; the second series of chats replicated the first, and there was evidence of intent (plans to meet).

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[3] *U.S. v. D'Andrea*, No. 10-60996 (5th Cir. 2011)

12. The Gaines conviction occurred prior to the arrest of the Applicant, and could have served as a model for Detective Specht. Instead, he acted without probable cause–which he undoubtedly knew since he enlisted a low level employee to substitute for him on a sworn affidavit. Judge Thomas could have stopped the runaway train, if she recalled that "The arrest warrant process should not be treated as a bureaucratic process in which the magistrate or municipal judge becomes merely a rubber stamp for the police."[4]

13. Defense counsel's failure to challenge the affidavit and arrest warrant as invalid and lacking probable cause contributed to the violations of the Applicant's Fourth Amendment rights. Citing United States v. Leon, 468 U.S. 897, 920, 104 S. Ct. 3405, 3419, 82 L. Ed.2d 677 (1984), the South Carolina Supreme Court noted,[5]

> three situations in which [] deference to a magistrate's finding of probable cause was not warranted: First, the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. . . . Second, the courts must also insist that the magistrate purport to 'perform his 'neutral and detached' function and not serve as a rubber stamp for the police." . . . Third, reviewing courts will not defer to a warrant based on an affidavit that does

[4]Judge's Bench Book, available at www.sccourts.org/summaryCourtBenchBook/HTML/CriminalC.htm

[5]*State v. Weston*, Op. No. 24724 (S.C. Sup. Ct. filed December 15, 1997).

not "provide the magistrate with a substantial basis for determining the existence of probable cause."

14. Although the investigating officer in *Giordenello v. United States*, 357 U.S. 480 (1958) was not as unscrupulous as Detective Specht, the Supreme Court concluded that violations of Fourth Amendment rights demanded the conviction be set aside.

Unlike Specht, the investigating officer in *Giordenello* appeared at court and submitted a sworn affidavit. His affidavit was defective "on any of several grounds," including that he "relied exclusively upon hearsay information rather than personal knowledge." The hearsay was from law enforcement officers and other persons, none of whom either appeared or submitted affidavits. *Giordenello* is directly applicable to this Applicant. The conviction of the Applicant must be set aside.

Illegal Seizure

15. The very next day Detective John Specht drove a red, unmarked car to North Carolina to meet with a Union County detective. Three days earlier he had convinced his North Carolina counterpart to acquire search and arrest warrants from a North Carolina court, and a Fugitive Arrest Warrant "to aid in extradition back to SC." (quoted from Specht's incident report). [**Exh. C-1 incident report**]

16. What defense counsel could have learned without great effort is that Specht could not get a Fugitive Arrest Warrant issued by South Carolina.[6] Additionally, the Applicant was not a fugitive. He had never been indicted anywhere.

[6]South Carolina did not enact the Uniform Criminal Extradition Act. South Carolina's extradition statute allows the state to respond to demands from other states, but there is no provision to demand return of a fugitive. (S.C. Code Ann. § 17-9-10)

17 . Specht and four North Carolina police officers entered the mobile home of the Applicant's grandparents, using the unlocked back door, found the Applicant alone and asleep in his bedroom, woke him, showed him the warrants, and proceeded to interrogate him–without Miranda warnings.[7] [**Exh. C-2 incident report**]

18. The North Carolina search warrant specifies digital devices and electronic storage devices. Officers went beyond the search warrant, confiscating a webcam (which does not store anything), handwritten letters, and proceeded to search a closet and dresser drawers. When Applicant's grandmother returned home she saw the officers confiscating not only the Applicant's computer but also her new Dell computer, the Dell monitor, mouse, and keyboard. She complained that she had just finished paying for these. They took them anyway, and turned all items over to Specht. [**Exh. D**]

19. Hartsville Detective Specht did not have authority to seize these items, nor to arrest the Applicant–beyond the borders of South Carolina. Yet defense counsel did not question Specht's confiscation of Applicant's possessions and his grandmother's possessions. Defense counsel did not question the confiscation of items not relevant to the alleged crime. Defense counsel did not question the illegal seizure of the Applicant. Was defense counsel not familiar with the Fourth and Fourteenth Amendments?[8]

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[7] *Missouri v. Seibert*, 542 US 600 (2004).

[8] Amendment XIV Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of 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." Also see, *U.S. v. Place*, 462 U.S. 696 (1983) (A seizure of personal property is *per se* unreasonable . . . unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.")

Illegal Extradition

20. In shackles, the twenty-years-old Applicant was brought to the court in Union County, North Carolina for extradition. Defense counsel should have known that Applicant was not a fugitive from justice within the meaning and intent of the Constitution and laws of the United States (Art. 4, Sec. 2, Constitution of the United States; R. S. § 5278, 18 U.S.C.A. § 662, relating to extradition).

21. Applicant was told to sign a Waiver of Extradition. Defense counsel's neglect to review and discuss the file with the Applicant is the reason he never knew what transpired when the Applicant asked for an attorney. [**Applicant's affidavit**]. Applicant signed the Waiver without reading it.

22 Had defense counsel looked at the Waiver, he would have seen nothing in the huge blank space designated, "Crime(s) in Demanding State." He would have seen no date in the blank space for "Date of Crime(s)." [**Exh. E**] Although South Carolina is entered in the box for "Demanding State," the demand was from Hartsville Detective John Specht, acting without authority. It was Specht who was demanding.

23. These blank boxes indicate awareness by a North Carolina judge, Detective Specht, and other officials that the Applicant was not a fleeing fugitive. Despite this, whomever prepared the Waiver chose to check the box that reads, "*I understand that I have been arrested in this State under criminal process alleging that I committed the crime(s) shown above on the date and in the demanding state and county named above*." The twenty-years-old, a captive of law enforcement, signed without reading. **[Applicant's affidavit**] Although defense counsel knew (or should have known) the Applicant had never

been arrested prior to the extradition, he did not challenge this.

24. Within two days the Applicant's Constitutional rights were violated four times. His Fourth Amendment rights are applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Not one of the three appointed defense attorneys (2008-2011) raised this issue.

Unlawful Custodial Arrest

25. Detective Specht brought the Applicant to Darlington Detention Center, eighty miles from Applicant's home. Applicant again asked about a lawyer, and was told to get in the holding cell. This was another violation of Applicant's Fourth and Fourteenth Amendment rights. Fifteen hours later–the next day–the prisoner was brought to a room where he sat in handcuffs to view Judge Rilla Thomas on closed circuit television. This was the bail hearing. The Applicant was not represented.

26. Applicant does not recall Judge Rilla telling him he had the right to request a preliminary hearing. It was his first arrest and Applicant had no idea what it was, nor that by not requesting a preliminary hearing he missed an opportunity to challenge Detective Specht and, possibly, end his ordeal quickly.[9]

27. Two weeks later, on August 18, 2008, assistant attorney general Susanna Ringler brought State v. Farris to the grand jury. Three days later Applicant was indicted. [**Exh. F**] It is likely Ringler need only read aloud "sexually explicit" phrases from Specht's alleged transcripts and the grand jury, ever ready to indict a ham sandwich, indicted

[9]"A preliminary examination is a critical state in a criminal proceeding. Thus the defendant should have the opportunity to obtain counsel or have such appointed before the examination. State v. Taylor, 255 S.C. 268, 178 S.E.2d 244 (1970)." *South Carolina Court Bench Book*, section F(7). Available at http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalF.htm.

Timothy Michael Farris for criminal solicitation of a minor.[10]

Discovery Oddities

28. Applicant did not apply for a public defender and did not pay the forty dollar screening fee but, unknown to him, an attorney was assigned. Two days after the indictment, Robert Kilgo, Jr. sent discovery requests to the prosecutors. [**Exh. G**] Several months later Kilgo departed employ as a public defender–without ever speaking with the Applicant. The two public defenders who succeeded Kilgo never questioned the Applicant about his claim of innocence, nor followed up on the discovery (evidenced by the file the Applicant did not see until June 2012).

29. Assistant A.G. Ringler responded to Kilgo's discovery request on October 14, 2008, with 114 pages of discovery and one disc.[11] Her cover letter noted that she was enclosing the prosecution's discovery requests. **[Exh. H**] According to the file delivered to the Applicant on June 4, 2012, no response was made to her requests.

30. Ringler's letter added, "Additional evidence and results from [the] computer examination will be disclosed as they become available."[12]

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[10]S.C. Code Ann. §16-15-342(A): The elements of criminal solicitation of a minor include: (1) a defendant who is at least eighteen years old; (2) who must knowingly contact, communicate, or attempt to communicate with; (3) a person who is actually, who reasonably believed to be, under the age of eighteen; (4) for the purpose of or with the intent of persuading, inducing, enticing, or coercing to engage in a sexual activity or a violent crime; or (5) with the intent to perform a sexual activity in the presence of the person under, or reasonably believed to be under, the age of eighteen.

[11]Ringler appears to be unaware of the lack of a search warrant for the confiscated items. And she made no mention of examination of the 20 unlabeled CD-R discs, nor the videotape confiscated from Applicant's residence.

[12]The reference to one computer implies no examination was made of the Dell, which belonged to Applicant's grandmother. Yet her Dell computer was kept in evidence.

31. On December 12, 2008, Ringler sent Kilgo a disc with discovery material she described as, “the forensic report on the equipment seized from the defendant.” **[Exh. I]** Apparently none of the public defenders examined the file since they were not aware that the forensic exam disc was missing.[13]

32. When Tonya Copeland-Little phoned to introduce herself, Applicant believed she was his first defense counsel. Neither she nor Swilley, her successor, was aware of the blank spaces on the Extradition Waiver, and neither appear to have read numerous other items that might have been used in Applicant’s defense.

Specht’s Affidavit

33. Among the items defense counsel did not read is the only affidavit signed by Detective Specht. [**Exh. J**] Dated June 6, 2008, two months before Specht drove to North Carolina to seize the Applicant, the single paragraph states,[14]

> Beginning on May 17,2008, this officer was posing undercover on the internet as a thirteen (13) year old female, utilizing Yahoo! Instant Messenger. The defendant in this case, **positive identity yet unknown** but referred to from this point as "Michael24339" (his screen name) engaged the undercover in a chat conversation on Yahoo Messenger. Throughout the course of May 17 chat, and again on June 4,2008, the defendant chatted over periods of several hours with the officer. During the first chat, "Michael24339" asked the undercover about her sexual experiences and masturbation habits. On the second chat, "Michael24339" again asked about those topics, but additionally asked about anal sex with the undercover. He has also mentioned making a roadtrip [sic] to Hartsville SC, to meet the undercover.

[13]The forensic disc was not in the file at the public defender’s office on June 4, 2012.

[14]Bold added; otherwise, copied exactly including misplaced commas and other mistakes.

> During the course of the chats, and during a third chat on 6-6-2008, in which sex was not the preferred topic of conversation, "Michael24339" messaged a link to a MySpace page which he claims belongs to his "record label", of which he claims to be the proprietor. The FRIEND ID# for that page is 305952311. Through investigation, the officer also located another MySpace page for "Michael24339", which is identified as FRIEND ID# 14362323. It is believed that the requested MySpace records will help to corroborate the identification of "Michael24339." "Michael24339" also seems repeatedly directly **related to the name "Michael Farris", which is information obtained not only through Yahoo! chat (after being added as a friend) but also through publicly available web searches.** This information is requested in order to facilitate the prosecution of a Criminal Solicitation of a Minor offense which has already occurred.

34. Within the short time it took to write that paragraph, Specht progressed from "positive identity yet unknown" [line four] to "the name 'Michael Farris" [counting up from the bottom, lines 8-12]. Not one word describes Specht's experience or training, nor whether he had specialized training as a member of the Internet Crimes Against Children (ICAC) task force. He admits he identified the Applicant using nothing more sophisticated than publicly available web sites. He provides no facts to describe how the chats were traced to the Applicant or to his computer, nor how the Applicant was identified as the person behind the keyboard. Apparently it did not occur to Specht (nor to defense counsel) to wonder if the Applicant's screen name had been hijacked and used by someone else.

35. Specht's affidavit was the basis for a search warrant requested on August 1, 2008, the date of the Applicant's arrest, by assistant attorney general Megan B. Wines. The search warrant ordered Yahoo, Inc. to provide information related to the screen name or user name "Michael24339." [**Exh. K**] Although Wines refers to a "Yahoo! South Carolina

chat room," the source of this information is a mystery. It is not mentioned elsewhere–not in the affidavit nor the incident reports. There are a few other oddities, among them the search warrant reference to a Yahoo profile for the Applicant. That profile lists the wrong birth year for the Applicant, making him five years older. [**Exh. L**] None of these oddities was questioned by defense counsel.

Yahoo Search and Seizure

36. Wines' search warrant request repeats Specht's assertion–that the decoy stated "she" was thirteen years-old. But there is no supporting evidence. Similarly, in paragraph two, Wines states that Applicant "sent Alliekat0416 several pictures." But the only pictures in the file are a head shot from Applicant's driver license and numerous photos of his home taken by the police on the day of the raid..

37. Wines states: "Based on his training and experience Detective Sergeant Specht believes that the individual associated with the screen name 'Michael24339' is a threat to children." Training and experience? Defense counsel did not ask, nor did defense counsel question the basis for Specht's "belief" that Applicant posed a threat.

38. Apparently Wines did not read the actual documents since she failed to notice that Specht, as "Alliekat0416," never mentioned age. She was not aware that the emailer never took the "substantial step" to initiate a meeting. She was not aware of the absence of pictures Specht claimed were sent by the Applicant. That may be excusable. It is not excusable for defense counsel, who neglected the duty to challenge the absence

of this essential information, without which there is no crime.[15]

39. The Yahoo search warrant requested addresses, connection logs with times and dates, etc. Most odd is the footnote on page three. The State specifically did ***not*** want the contents of any electronic messages, whether or not in electronic storage.[16] Why was this not challenged by defense counsel?

40. Yahoo's eleven-page reply listed more than two dozen IP addresses. If defense counsel had checked, it would be apparent that not one of the IP addresses matched the IP address on the Yahoo profile for "Michael24339," and none could be traced directly to Applicant's computer. [**Exh. M**]

41. Then there is the incongruity of time. If defense counsel compared the time on Specht's chat logs with the times on the Yahoo list, and applied a conversion table for Yahoo's Greenwich Mean Time (GMT) to Eastern Daylight Savings Time (EDST), it would be obvious they do not match.[17] This surely would have raised questions about the possibility of email hijacking, had defense counsel troubled to look at the file.

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[15]S.C. Code Ann. §16-15-342(A). Also see, *State v. Nesbitt*, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001): In "the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." Also see, *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101 (1942). The Supreme Court explained that preparation to commit a crime and overt acts are different, and that "preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made."

[16]From the Department of Justice: "While it may be possible to obtain non-content log records through a subpoena or § 2703(d) order, the use of a § 2703(a) search warrant, as a matter of prudence, provides the broadest legal basis to obtain log records, particularly if content is involved. CCIPS is available to assist in answering these legal questions. For more information, call 202-514-1026." *Obtaining and Admitting Electronic Evidence*, Vol. 59, No.8, Nov. 2011. Available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5906.pdf

[17]Conversion tables are readily available on the internet.

42. A similar request was sent to MySpace, but the evidence file received by the Applicant in June 2012 did not include the replies. [**Exh. N**] Why did defense counsel not ask for these items?

Hijacked Email (Identity Theft)

43 When the Applicant saw the file in June 2012–more than one year after the plea hearing–he said the chat logs were "fabricated." If Detective Specht is not responsible for creating them, it is likely the Applicant's email address was hijacked. In a similar way, Arizona state representative Michelle Ugenti became a victim of identity theft through email hijacking. Strangers using Twitter accounts posed as Ugenti. They used names such as "Michelle@RubbingUGently" and "MichelleUgenti @RepMUgenti." Each account described her factually–her location, that she is a mother, and one used an actual photograph of her.[18]

44. A far more serious cyber attack occurred to the South Carolina Department of Revenue. Hackers gained personal information and social security numbers of 3.8 million taxpayers and 1.9 million dependents plus "particulars of 699,900 businesses in the state."[19] There were reported cyber attacks on *The New York Times* and the *Wall Street Journal*, banks, and even the Federal Reserve. Hackers acquire personal information about targets from *Facebook* (e.g., the target's friends and interests), and "visit *Twitter* to

[18] Source: Digital Media Law, January 5, 2013, article by attorney Marie-Andree Weiss. Available at: www.dmlp.org/blog/2013/parody-or-drime-az-bill-may-blur-line

[19] *South Carolina Department of Revenue Public Incident Response Report* November 20, 2012. Available at http://governor.sc.gov/Documents/MANDIANT Public IR Report Department of Revenue - 11 20 2012.pdf, and http://www.jdjournal.com/2012/11/21/south-carolina-revenue-director-resigns-over-4-million-taxpayer-accounts-hacked/

get a sense of how someone writes."[20] In a *Wall Street Journal* report on cyber attacks an expert described one attack where a hacker learned that a systems administrator had five children. "The hacker crafted an email with a malicious file attachment that appeared to come from the company's human-resources department and contain information about a new benefit program for families with four or more kids."

45. "The Internal Revenue Service has issued several consumer warnings on the fraudulent use of the IRS name or logo by scamsters trying to gain access to consumers' financial information in order to steal their identity and assets."[21] Why, in response to Applicant's insistence that he was innocent, did defense counsel not consider the possibility of email hijacking (i.e., email identity theft)?

46. Raphael Golb of New York was prosecuted for falsifying email addresses. Golb set up email accounts in which he pretended to be scholars who disagreed with his scholar-father's opinion on the origin of the Dead Sea Scrolls.[22] Among other things, defendant sent emails in which one of his father's rivals purportedly admitted to acts of plagiarism. As the court stated, Golb was prosecuted "for giving the false impression that his victims were the actual authors of the emails. The First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false

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[20]"Watching and Waiting," Ben Worthen, *Wall Street Journal*, April 1, 2012. Available at: online.wsj.com/article/SB10001424052970204603004577269544215115670.html

[21]Available at http://www.irs.gov/uac/Suspicious-e-Mails-and-Identity-Theft

[22]*People v. Golb*, 2013 NY Slip Op 00436, Jan. 29,2013, affirming the conviction for identity theft, criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer. "The People were required to prove that defendant had the specific fraudulent intent to deceive email recipients about his identity, and to obtain benefits or cause injuries as a result of the recipients' reliance on that deception. The statutes criminalized the act of impersonation . . .."

impression that the source of the message ***is*** that other person." [italics in original][23] This Applicant believes he was similar to Golb's victims and, in particular, the scholar who seemed to admit to plagiarism.

47. Detective Specht identified the Applicant through his frequently used Yahoo email address, and that makes this case unique. Research into numerous ICAC prosecutions reveals a consistent pattern of defendants who solicited minors for sex hiding behind pseudonyms. They use an anonymous and sometimes quirky email address. All were indicted after arranging a meeting with the person they believed was a minor. These cases will be presented at an evidentiary hearing (some from ICAC prosecutions in South Carolina, some from other states).

Defense Counsel's Investigation

48. Defense counsel did not question Detective Specht's failure to authenticate the message logs. Nor did defense counsel challenge the content of these pages, which do not contain any statement by Specht, as decoy, of being age thirteen. Nor did defense counsel challenge the lack of evidence of intent (typically by attempting to arrange a meeting). Without these two elements, there was no crime, no probable cause.[24]

49. If defense counsel did any research, he would have learned from cases such as *State v. Reid.*[25] In *Reid* the ICAC detective testified about software incorporated into his

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[23] *Id*.

[24] "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson*, 397 US 759 (1971).

[25] *State v. Reid,* Op. No. 27004 (S.C. Sup. Ct. dated July 11, 2011).

computer, which recorded the chats in real time. There is no evidence Specht used ICAC-approved software to record the chats he had with "Michael24339."

50. In *State v. Odom* [26] the court summarized how the email was traced to a user–evidence lacking in regard to the Applicant. Additionally, at Odom's pre-trial suppression hearing the court learned about ICAC "Program and Investigative Standards." Did Specht have ICAC training? Did he follow ICAC protocol? Did he use ICAC-approved software? No one asked these questions.

51. The *Odom* appeals court reversed the suppression (on the basis of weight versus admissibility of evidence), but a footnote in the ruling is significant–the explanation of the importance of the IP address.

> Each computer connected to the internet is assigned a unique numerical address, otherwise known as an Internet protocol or IP address, to identify itself and facilitate the orderly flow of electronic traffic. An IP address is a string of up to twelve digits, such as '202.134.34.9.'" Peterson v. National Telecommunications and Information Admin., 478 F.3d 626, 629 (4th Cir. 2007).

The cited *Peterson* ruling was one year prior to the arrest of the Applicant. Defense counsel have no excuse for not using it in his defense. Did they look at the list of more than two dozen IP addresses provided by Yahoo? Not one IP, and none that can be directly

[26] *State v. Odom*, Op. No. 26624 (S.C. Sup. Ct. filed March 30, 2009).

traced to Applicant's computer. Why did defense counsel not question this?

52. Equally relevant is the *Odom* court's explanation of ICAC software: "The ICAC computers are equipped with software capable of recording various information concerning all communications sent and received in the course of undercover investigation." *Id.* This directly applies to the pages Specht claimed were transcripts of his chats with "Michael24339." The pages have a suspiciously strong resemblance to ordinary word processing pages. [**Exh. O**] Defense counsel did not challenge anything. If Specht were questioned on a witness stand, he may be forced to reveal a wealth of exculpatory evidence.[27]

53. Due to failure to review the file and do basic research, not one of the public defenders was aware of flaws in the state's case. Neither Copeland-Little nor Swilley was prepared to provide effective representation for a client accused of a felony that carried a lifetime sentence as a Registered Sex Offender.[28]

The First Plea Hearing

54. Copeland-Little ignored the Applicant's refusal to plead guilty and ordered him to be at court at two p.m. on November 9, 2009. [**Exh. P**][29] Outside court, Applicant again told Copeland-Little he would not plead guilty because he was innocent. In court,

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[27] "The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, supra.

[28] "The vast number of attorneys in SC who get appointed to these cases do not have the proper experience in these areas of practice." Commission on Indigent Defense Accountability Report FY 11-12, p.3. Available at www.scstatehouse.gov/reports/aar2012/e23.pdf.

[29] Exh. O reveals Copeland-Little's unfamiliarity with the Applicant. She addressed him as "Timothy," although he told her repeatedly that throughout his life he has been called Michael.

with an attorney as effective as the diploma she hung on her wall, the Applicant told the judge he was not guilty.[30] [**Applicant's affidavit**]

55. Applicant expected that now his public defender would do the work to take his case to trial. It was not to be with Tonya Copeland-Little. Some time later she left the employ of the public defender's office–without notifying Applicant. No one notified him. In 2010, approximately six months after the plea hearing, having heard nothing, Applicant phoned. He was told no attorney was assigned to him. Applicant was elated, thinking this meant the prosecutor was dropping the case. The year ended and another began.

Swilley and the Plea

56. On February 24, 2011 Matthew Swilley, admitted to the South Carolina bar in November 2009, was appointed to represent the Applicant. One week later he phoned to introduce himself and to announce a hearing date the following week. Aware that his client faced a felony conviction, Swilley said, "We have to set up a plea."

57. Applicant repeated that he was innocent. He was instructed to plead guilty. When he asked, "Can't we fight it?" Swilley said, "No, the AG would not take it if it wasn't a slam-dunk case." Nearly thirty years ago–before Swilley was born; before the Applicant was born–law professor Stephen J. Schulhofer wrote, "[I]nvestigation of the facts and the law is necessary to decide whether a trial is desirable and, if not, to negotiate the best

[30]For unknown reasons, there is no evidence of the first plea hearing in the court clerk's docket but Attorney Copeland-Little's mother must recall since she attended. The judge welcomed her and invited her to sit in the jury box, where she would have a better view of proceedings.

possible bargain."[31] But there was no plea bargaining.

58. Applicant told Swilley he would be at his office Friday morning to prepare for the hearing. At the meeting, he asked about filing a Clayton motion.[32] Swilley said South Carolina did not have anything like that. Applicant asked about pleading "no contest." Swilley said it was not possible. Applicant asked if there was any motion that could be filed. Swilley said, "No." Applicant did not know he had a right to see the entire file. He did not know that defense counsel was obligated to consult with him about the state's case before deciding whether to plead or go to trial. [**Applicant's affidavit**]

59. When he asked about his file, Swilley handed him a slim manila file folder. [**Exh. Q**] Within the folder were pages from Specht's incident reports, backdated from the date of the arrest. Other than describing the arrest, the content consisted of statements copied from the pages he claimed were instant messaging chats. [**Exh. R**][33]

60. The Applicant did not know there were more than eighty pages he had not seen. He had learned there needed to be an explicit statement of age by the detective, and he searched for this. It did not exist. These few pages confirmed there was no evidence of a crime. But what could he do? The hearing was one week away. Swilley did not believe he was innocent. The Applicant could insist on going to trial, but what kind of assistance

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[31]"Effective Assistance on the Assembly Line," Stephen J. Shulhofer, *NYU Rev. of Law & Soc. Change*, Vol. XIV:137 (1986).

[32]Clayton Motion refers to the provisions of N.Y. Crim. Proc. Law §§ 210.40 and 210.45 that require a hearing when either the prosecution or the defendant moves to dismiss the indictment in the furtherance of justice. Source: *Wikipedia.org.*

[33]The entire file, received in June 2012, was more than one hundred pages.

would Swilley give?[34]

To Plead or Not to Plead

61. As South Carolina courts know, "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.' [citations] When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary. [citations]" *Gibson v. South Carolina*, 334 S.C. 515 (1999), 514 S.E.2d 320.

62. Applicant finally saw a few pages, but he was not aware there were more than one hundred pages, many that would at least raise reasonable doubt as to his guilt. When the *Gibson* court affirmed setting aside the guilty plea and granting a new trial, its reasoning was based on prosecutors' failure to "share with defendants information favorable to the defense and material to guilt or punishment." Here, unlike *Gibson*, the failure to share information rests on the shoulders of defense counsel, a failure compounded by the failure to investigate anything. As the court recognized in *Hill v. Lockhart*, 474 U.S. 52 (1985), "failure to investigate or discover potentially exculpatory evidence" is an example of ineffective assistance of counsel that could result in an invalid plea.

63. Swilley was insistent about the plea. The Applicant knew his defense counsel

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[34]"[T]he core purpose of the counsel guarantee was to assure `Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." [citation] If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment. [citation]" *Cronic v. United States,* 466 U.S. 648 (1948).

had abandoned his duty to advocate. He felt abandoned but he did not know that Swilley was violating his Sixth and Seventh Amendment rights. Lacking help or advice from anyone and, again faced with an incompetent attorney, the Applicant caved.[35]

64. On March 9, 2011, the Applicant went to court with Matthew Swilley as plea counsel. The Applicant was instructed to "plead as indicted." Swilley also instructed him to answer, "Yes," to every question the judge asked, or his guilty plea would be denied and he would face trial, with prison–and the possibility of a ten year sentence–a certainty. Swilley instructed him to commit perjury.

Perjury

65. As in *Lynumon v. Illinois*, 372 U.S. 528 (1963), "a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was

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[35] South Carolina's Supreme Court affirmed the trial court in *Kolle v. State*, No. 26771 (S.C. 2010), which vacated a conviction based on a guilty plea due to numerous instances of ineffective assistance.

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 .E.2d 471, 474 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

overborne at the time he confessed." This Applicant knowingly perjured himself. It was not an easy choice, nor a voluntary confession.

66. It was a quick hearing. Applicant plead as indicted, the judge never learned the facts of the case, and the plea was accepted. Then his grandfather got up to beg the judge not to send his grandson to prison. The fear of prison was realistic. Another innocent young man, Richard Danziger of Texas, was finally exonerated through DNA evidence but it was too late. In prison he was severely beaten, leaving him disabled due to brain damage.

67. Applicant was granted a suspended sentence and probation by Judge Paul M. Burch, who also informed Applicant of the ten-day window for filing a direct appeal, and fined him $500.00 to be paid to the Office of Indigent Defense. This was added to other fees designated as Law Enforcement Funding Surcharge, SC Criminal Justice Training Academy, Victim Conviction Surcharge, and a Collection Fee.

68. Applicant's perjury was the first time he ever did anything illegal. "Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process. *Missouri v. Frye*, 132 U.S. 1399 (2012).

69. The false confession and guilty plea instantly branded the Applicant as a convicted felon and Registered Sex Offender–for life.

> [A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be

> a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. [citation] Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. [citation] Second, is the right to trial by jury. [citation] Third, is the right to confront one's accusers. [citation] *Boykin v. Alabama*, 395 U.S. 238 (1969).

70. Despite exonerations of more than two thousand wrongly convicted people, at least twenty-five percent of whom falsely confessed, judges as well as juries find it difficult to believe anyone who is innocent would falsely confess to a heinous crime.[36] For this reason, Applicant asks the Court to take notice of an unique legal treatise in which the researchers, a lawyer and a psychologist, placed college students in a situation where they had to choose between a false confession for cheating with a minor punishment, or possibly lose their argument for innocence, in which case the penalty was severe. "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem," *103 Journal of Criminal Law & Criminology, No. 1* (2013), Lucian E.

[36]See, www.innocenceproject.org and the National Registry of Exonerations at http://www.law.umich.edu/special/exoneration/Pages/about.aspx

Dervan, J.D., and Vanessa A. Edkins, PhD. [**Exh. S**] Also, please see attorney Dervan's treatise, "Bargained Justice," Utah Law Review (2012). [**Exh. T**]

71. Immediately after sentencing, Applicant was instructed to go directly to the probation office, two blocks away. Now he learned that probation placed him under the supervision of three offices: South Carolina, North Carolina, and the Interstate Compact. South Carolina restricted him from places where children congregated, including church services. North Carolina turned his life into a virtual prison: curfew at 6 p.m.; no computer in the home, no use of computer or digital device anywhere; weekly attendance at a sex offender therapy group for which he was required to pay $35.00; monthly payment of $40.00 to the probation office (probably to pay for the gas to drive to his rural home for surprise raids); no liquor at any time; drug and alcohol testing. Any violation, including non-payment of fees, could result in revocation of probation and prison.

72. After registering, when he asked if he could go home now, one of the officers shouted at him, "You're a sex offender!" The officer assigned to Applicant told him to provide DNA; he would be billed $250.00 for the test and another $20.00 for a drug test. When he again asked about going home, the same woman said, "Didn't your lawyer tell you anything?" Obviously not. It was an unpleasant surprise to learn he could not return home with his grandparents. Applicant had to wait four days while paperwork between the states was processed and North Carolina allowed him to return home.

73. Unknown to the Applicant, the day after the plea hearing Matthew Swilley signed a forfeiture agreement for Applicant's possessions and his grandmother's monitor,

keyboard and mouse.[37] The space for Applicant's signature is *blank*. [**Exh. U**]

74. Although the form refers to S.C. Code Ann. § 16-15-445, the requisite hearing does not appear on the docket, nor was notice of a hearing given to "all interested parties." His grandmother's monitor, mouse and keyboard were forfeited without notice. Everything confiscated from the Applicant was forfeited. He did not know about the forfeiture until June 2012, when he acquired the complete file. Swilley, obviously, was not familiar with the Fifth Amendment.

Direct Appeal

75. The Applicant had misgivings about his guilty plea. The slim packet of evidence Swilley had given him on Friday did not seem sufficient for a conviction, if he went to trial. He needed a new attorney. He expected the appellate defenders to be far more experienced, competent, and diligent than any of the public defenders assigned to

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[37] If the computer, digital camera, and CDs were destroyed or compromised in any way, that is yet another violation of Applicant's Constitutional rights. *California v. Trombetta* et al., 467 U.S. 479 at 480 (1984), "The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment."

The Court further stated that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."
The above is quoted from a letter dated Nov. 9, 2010, by Senior Assistant Attorney General Charles H. Richardson to Representative G. Murrell Smith. Available at http:www.scag.gov/wp-content/uploads/2011/03/smith-g-m-jr-os-9162-11-9-10-preservation-of-evidence-act.pdf.
Also see, *OZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004) (trial court did not abuse its discretion in striking the defendant's answer and entering judgment for the plaintiff on the issue of liability where the defendant reformatted a computer's hard drive, effectively erasing any information the computer may have contained, a day before surrendering it for court ordered inspection).

him. The file he never saw would be available to an appellate attorney. Once he or she perused the file, there would be grounds to appeal the involuntary plea.[38]

76. He began phoning Swilley. Leaving messages with the receptionist and not hearing back, Applicant kept phoning. Fifteen days after the plea hearing he reached Swilley. [**Applicant's affidavit**] It was too late to withdraw his plea, too late to file a direct appeal. Once again, Applicant had been denied his Sixth Amendment rights.[39] "[C]ounsel's conduct was objectively unreasonable and demonstrated the requisite prejudice resulting from the constitutionally deficient representation." *Frazer v. South Carolina,* 430 F.3d 696, 712 (4th Cir. 2005).

77. When Applicant asked if there was anything else in the file, Swilley said he would mail him the Yahoo search warrant and Yahoo IP logs. Applicant asked why he was not given these when he came to the office. Swilley said, "I gave you all that was relevant."[40]

78. The package that was mailed was, again, slim, and once again did not look like a slam-dunk. Applicant suspected Swilley was holding back other files, but had no idea how to get what was missing. He began phoning attorneys for advice. Thirteen months after the plea hearing, in June 2012, an attorney who had no criminal law nor constitutional law experience took sympathy. He traveled to North Carolina and, after Applicant received

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[38]Although the direct appeal could not have raised the issue of ineffective representation, other issues could have been raised (e.g., jurisdiction, illegal seizure, illegal arrest, numerous violations of Constitutional rights).

[39]Applicant did not waive his right to appeal; defense counsel was obligated to file an appeal on his behalf. *U.S. v. Poindexter*, 429 F.3d 263 (4th Cir. 2007).

[40]Swilley withheld approximately 80 pages the Applicant never saw prior to June 4, 2012.

permission from the probation office to travel to South Carolina, they went directly to the public defender director's office in Dillon. The attorney had told the Applicant he had a right to see the entire file and probably a right to have a copy of every page. And that is what he told A.C. Michael Stevens, the director of the Fourth Circuit Public Defender office.

The Complete File–Finally

79. Attorney Stevens initially refused to give Applicant anything from his file. Finally, he agreed to make copies. The sympathetic attorney insisted that Stevens sign the list of items, attesting that this was everything in their files. Stevens did so, but refused to allow them to view the disc that was in the file, claiming he had printed what was on the disk–the Detective's incident reports–and they would find these printed, in the batch he had copied. [**Applicant's affidavit**]

80. From the time of his arrest in 2008 and until June 2012, the Applicant was denied the right to view the file, thereby denying him the opportunity to consider any defense. As the *Holmes* court ruled, "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. [citation]" *Holmes v. South Carolina*, 547 U.S. 319 (2006).

81. The numerous violations of the Applicant's constitutional rights that were ignored by defense counsel, plus repeated and consistent failures of defense counsel more than suffice for the criteria enunciated by *Strickland v. Washington*: errors so serious that defense counsel's performance fell below an objective standard of reasonableness and

outside a wide range of competence.

Newly Discovered Evidence

82. The hundred-plus pages received on June 4, 2012 are the source material for this motion. Without that information, it would have been impossible to support a petition for Post-Conviction Relief. The starred Appendix Items are among the newly discovered evidence acquired in June 2012.

Conclusion

Summary judgment is appropriate in a case when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; see also, e.g., *Brandt v. Goodling*, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006).

The one hundred-plus pages of evidence were in the possession of the Office of Indigent Defense but inaccessible to the Applicant prior to June 2012. *State v. Harris*, 706 S.E.2d 526, 529 (S.C. Ct. App. 2011). These items support the following key issues:

- South Carolina did not have personal jurisdiction over this Applicant.
- Numerous violations of the Applicant's constitutional rights, primarily the extradition, arrest warrant, detention, seizure of property, wrongful conviction.
- Ineffective representation.

South Carolina Code of Laws, Title 17, chapter 27, section 70(c) empowers this court "to grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law."

In *Martinez v. Ryan*, 131 S.Ct. 1309 (2012) the Supreme Court reminded us that "the right to effective trial counsel is a bedrock principle in this Nation's justice system." The responsibility for this Applicant's conviction rests directly on the shoulders of his trial counsel.

For these reasons the Applicant prays this Court will grant summary judgment as a matter of law and, in the interest of justice, vacate the conviction with prejudice.

I swear under penalty of perjury that every statement in this pleading is true.

Dated:_____

_____

Timothy Michael Farris, Applicant Pro Se
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Waxhaw, North Carolina 28173
[redacted]