IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

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DUSTIN JAMAL WARREN,

Petitioner,

-against-

BARNEY OWENS, Warden of the
Pamlico Correctional Institution,

Respondent.

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Case # _____

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

COMES NOW the Petitioner, DUSTIN JAMAL WARREN, a person incarcerated in the State of North Carolina pursuant to a judgment of conviction and sentence thereon, by and through undersigned counsel, and hereby states the following facts in support of his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, and attaches the following exhibits:

Exhibit 1 - Record on Appeal in North Carolina Court of Appeals Docket # COA15-499

Exhibit 2 - Transcripts of Motion Hearing 9-2-2014

Exhibit 3 - Trial Transcripts

Exhibit 4 - Brief for the Appellant in North Carolina Court of Appeals Docket # COA15-499

Exhibit 5 - Brief for the State in North Carolina Court of Appeals Docket # COA15-499

Exhibit 6 - Decision in North Carolina Court of Appeals Docket # COA15-499 filed 11-7-2015

Exhibit 7 - Petition for Discretionary Review in Case # 417P15 filed 12-14-2015

Exhibit 8 - State's Response to Petition for Discretionary Review in Case # Case # 417P15 filed 12-22-2015

Exhibit 10 - Order Denying Petition for Discretionary Review in Case # 417P15 dated 1-28-2016

Exhibit 11 - Motion for Appropriate Relief filed 12-12-2016

Exhibit 12 - State's Response to Motion for Appropriate Relief filed 9-22-2017

Exhibit 13 - Transcripts of Evidentiary Hearing 6-6-2018

Exhibit 14 - Transcripts of Evidentiary Hearing 6-11-2020

Exhibit 15 - Order Denying Motion for Appropriate Relief dated 7-27-2020

Exhibit 16 - Petition for Writ of Certiorari in Case # P20-462 filed 8-24-2020

Exhibit 17 - State Response to Petition for Writ of Certiorari in Case # P20-462 filed 9-3-2020

Exhibit 18 - Order Denying Petition for Writ of Certiorari in Petition for Writ of Certiorari in Case # P20-462 filed 9-22-2020

JURISDICTION AND VENUE

1. Petitioner seeks relief from a judgment of conviction entered against him on September 10, 2014 in the Carteret County Superior Court, State of North Carolina, in Case # 14-CRS-050372, Case # 14-CRS-050376 and Case # 14-CRS-050377, for the offenses of Conspiracy to Manufacture Methamphetamine (N.C.G.S. § 14-2.4(A)), Possession of Precursor Chemicals with Intent to Manufacture Methamphetamine (N.C.G.S. § 90-95(D1)(2)), and Manufacturing Methamphetamine (N.C.G.S. § 90-95-(B)(1A)). Petitioner was convicted after trial by jury and sentenced to concurrent indeterminate terms of imprisonment of 127-165 months on each count.

2. Pursuant to the aforementioned judgment of conviction, Petitioner is currently in the custody of the North Carolina Department of Public Safety, Adult Corrections Division, Pamlico Correctional Institution.

3. This petition is brought pursuant to 28 U.S.C. § 2254, et seq., giving this Court jurisdiction over this matter.

4. Venue is proper herein because Carteret County is situated within the Eastern District of North Carolina, Eastern Division.

5. No prior petition seeking this relief has been filed in this Court, or any other Federal court of competent jurisdiction.

6. This petition is filed within one year of the date Petitioner's conviction became final, absent any tolling period.

INTRODUCTION AND PROCEDURAL HISTORY

7. Dustin Jamal Warren was arrested January 31, 2014 and charged with possession and distribution of methamphetamine precursor, in violation of N.C.G.S. § 90-95(d1)(2), manufacturing methamphetamine, in violation of N.C.G.S. § 90-95(b)(1a), and conspiracy to manufacture methamphetamine, in violation of N.C.G.S. § 14-2.4(a). Warren pleaded not guilty. On February 24, 2014, Warren was indicted on charges of possession of precursor chemicals with the intent to manufacture methamphetamine, manufacturing methamphetamine, and conspiracy to manufacture methamphetamine. The indictment also charged Warren as a habitual felon.

8. Warren proceeded to trial September 8, 2014 and he was convicted by a jury on all counts. At sentencing, the trial court consolidated 14-CRS-50372, possession and distribution of a methamphetamine precursor, with 14-CRS-50376, manufacture of methamphetamine, then sentenced the Warren for the Class C felony to a presumptive term of 127 months minimum to 165 months' maximum in the Department of Correction. In 14-CRS-50377, conspiracy, the Warren was sentenced to the presumptive range of 127 months minimum to 165 months' maximum to be served at the expiration of the previous sentence. (Exhibit 1).

9. Warren directly appealed his conviction to the North Carolina Court of Appeals in Case # COA15-499. The Court of Appeals affirmed the judgment of conviction in a written opinion dated November 17, 2015.

10. Warren timely sought discretionary review in the North Carolina Supreme Court, but his petition was denied on January 28, 2016.

11. Thereafter, Warren filed a Motion for Appropriate Relief, collaterally attacking his conviction in the trial court on December 12, 2016. (Exhibit 11). The State filed a response in opposition thereto on September 22, 2017. (Exhibit 12). The trial court initially held an

evidentiary hearing on the motion on June 6, 2018, presided over by the Honorable Benjamin G. Alford, Superior Court Judge (retired). (Exhibit 13). At the conclusion of the hearing, the court took the motion under advisement and promised a ruling at a future date. However, Judge Alford retired prior to issuing a ruling.

12. As a result, a second evidentiary hearing was held on June 11, 2020 before the Honorable Joshua W. Willey, Jr., Superior Court Judge. (Exhibit 14). The court issued a written order denying the Motion for Appropriate Relief, which was filed on July 22, 2020. (Exhibit 15).

13. Petitioner appealed the denial of post-conviction to the North Carolina Court of Appeals in Case # P20-462. (Exhibit 16, Exhibit 17). The Court of Appeals denied the petition in a written order dated September 22, 2020. (Exhibit 18)

14. This petition follows.

STATEMENT OF FACTS[1]

15. On January 29, 2014, there was approximately 1.5 inches of snow on the ground on an unusually cold day in Atlantic Beach, North Carolina. Dustin Warren ran into Heather Kennon, who was in some sort of distress, and gave her a ride to the Seashore Motel in Atlantic Beach, North Carolina. (Exhibit 3:74). Kennon checked into the room by herself. (Exhibit 3:87). After she checked in, she asked Warren for a ride to the store, and purchased what appeared to be groceries. (Exhibit 3:345). At the time, Warren was dating Anique Pittman.

16. When Warren decided to leave and go to Anique Pittman's condominium, Kennon asked him for a ride because Kennon did not want to stay in the motel room. (Exhibit 3:363). Motel staff saw Warren leave the motel, and to them it appeared that the room was empty from at least 12:30 a.m. until 7:30 a.m. the following morning. (Exhibit 3:105).

17. Anique Pittman had picked up Warren's friend, Mark Thomas, and invited him to spend the night at her condominium after Thomas had gotten into an argument with his wife. (Exhibit 3:310), Exhibit 13:54, Exhibit 14:39-40). Pittman testified that she lived in a condominium complex in a nice neighborhood with her 13-year old son, and no illegal activity occurred at her home. (Exhibit 3:311-312, 381).

18. Once Warren and Kennon arrived at Pittman's house, Kennon wanted to stay in Warren's car as she waited for someone to pick her up. (Exhibit 3:365). Pittman never saw Kennon on the evening of January 29, 2014. (Exhibit 3:313). Warren hung up his car keys on a key hanger near the front door and told Thomas he was going to sleep, and went into the bedroom

[1] The facts set forth herein are based upon the court file, the Motion for Appropriate Relief, the transcripts of the trial, the transcripts of the first Motion for Appropriate Relief hearing, and the transcripts of the second hearing. At the start of the second M.A.R. hearing, the State requested that the entirety of the court file, including the motion and its attachments, the trial transcripts, and the transcripts of the June 6, 2018 hearing be admitted into evidence and considered. (Exhibit 14:4-6). The defense stipulated to their admission, and post-conviction court expressly considered them. (Exhibit 14:7, 194). Thus, they are part of the State Court record

with Pittman where he remained for the night. (Exhibit 3:366). Later, he was awoken by Thomas, who showed that him Heather Kennon had come into Pittman's condominium, and Warren went back to bed. (Exhibit 3:369). Warren never left the house that night. (Exhibit 3:312). Even if he wanted to, he could not because the bridge connecting Atlantic Beach from Morehead City was closed as a result of the weather conditions, cutting off vehicular traffic. (Exhibit 13:41, 42, 45, 51-52, 62).

19. Cassie Flowers had dated Dustin Warren for several months in 2013, but their relationship had ended prior to January 2014, and they were not on speaking terms. (Exhibit 14:59). Cassie Flowers knew of Heather Kennon, but did not know her personally; she disapproved of the people Kennon associated with. (Exhibit 14:59-60). On January 29, 2014, she was living in her own residence by herself with her dog in Morehead City, North Carolina. (Exhibit 14:60). The dog, a Labrador Retriever, always barked loudly whenever someone approached the door to Flowers' residence. (Exhibit 14:61). At no time during that day, night, or the following morning did she ever see Dustin Warren or Heather Kennon, nor did anyone visit her at her home. (Exhibit 14:61).

20. Throughout the night, Kennon continuously went in and out of Pittman's condominium, giving Thomas the impression that she was waiting to get picked up by someone. (Exhibit 14:22-23). Each time she went in or out, the door was left ajar, allowing cold air to come in, despite his requests that she leave the door closed and annoying Thomas. (Exhibit 14:23-24). At one point, Thomas lost patience and locked the front door, locking Kennon out. Id. After that, Kennon disappeared. (Exhibit 3:24).

21. The following morning, Mark Thomas asked him to drive him to buy cigarettes and breakfast. (Exhibit 3:370, Exhibit 14:27-28). Kennon had since disappeared. (Exhibit 3:373).

When he and Thomas entered Warren's car, they noticed that the window was down, there was drug paraphernalia in the front seat, and a room key for a motel. (Exhibit 3:370-371, Exhibit 14:27-28). None of these items had been in the car when it was parked it the night before. (Exhibit 3:372).

22. At approximately 9:30 a.m. on the morning of January 30, 2014, a motel housekeeping staff member entered the empty room and saw a black bag and numerous suspicious items, including a can of kerosene. (Exhibit 3:108). She called 911 and police were dispatched. (Id.).

23. Police made entry into the room and found what appeared to be a clandestine methamphetamine laboratory, including a number of precursor chemicals, and significantly, cold packs. (Exhibit 3:136-146, 216). Eventually, all of the items inside the room were collected that morning pursuant to a search warrant. (Id.). The bag contained Kotex-brand items, either sanitary napkins or tampons. (Exhibit 3:189, Exhibit 14:115).

24. While law enforcement officers were at the motel processing the items, Dustin Warren and Mark Thomas drove up to a convenience store that was across the street from the motel and were immediately taken into custody. (Exhibit 3:194, 373-374, Exhibit 14:29). Two pills of Adderall, a prescription medication, were found inside the driver's side door handle. (Exhibit 3:188). Additionally, the key to the motel room was found near Warren's car. (Exhibit 3:191).

25. Later, an arrest warrant was issued, and served upon, Heather Kennon, and she was charged along with Warren for possessing the items inside the motel room. (Exhibit 3:227).

26. Who initially represented Heather Kennon is at issue; on the file jacket of her case file for this prosecution, Docket # 14-CRS-50380, the name "Fulcher" appears on the line for the attorney of record, is crossed out, and the name "Suggs" appears beside the crossed-out "Fulcher."

(Exhibit 13:125-126, Exhibit 14:186-187). Ultimately, Christopher Suggs, Esq., represented Kennon, though he knew that he was not the first lawyer on her case. (Exhibit 13:146).

27. After he was arrested, Warren was appointed counsel, James Wallace III, who employed a private detective, Ann Harris Scadden. (Exhibit 13:88). Ms. Scadden interviewed Mark Thomas during her investigation. Id. Approximately 1 month later, Warren retained Rodney Fulcher, Esq. with $2,500.00, which was his income tax refund. Id. When he retained Fulcher, he was told that Fulcher was already court-appointed to represent Heather Kennon, but Fulcher stated he might be able to "finagle" something to get relieved from her case and represent Warren. (Exhibit 13:88-89). Fulcher never discussed a conflict of interest, or asked Warren to waive a conflict of interest. (Exhibit 13:89).

28. Fulcher advised Warren that there was a 57-month plea offer that had been extended by the State, and repeatedly pressed Warren to accept the plea offer. (Exhibit 13:90).

29. From the first day of his representation, Warren was adamant about going to trial and repeatedly told Fulcher that he was innocent. (Exhibit 13:126). Warren gave his attorney Mark Thomas' contact information, and asked him to contact Cassie Flowers, who was incarcerated at the time, as Flowers would be able to contradict a key fact in Heather Kennon's anticipated testimony – whether Warren and Kennon went to Flowers' home and picked up chemicals commonly used to manufacture methamphetamine. (Exhibit 13:91-93). In addition, Warren told Fulcher that another person named Brandon Elps had been set up by Heather Kennon and was criminally prosecuted as a result of that set up, and was ready, willing and able to testify; Elps was also incarcerated in a local county jail at the time of trial. (Exhibit 13:94-95).

30. Rodney Fulcher was Brandon Elps's prior criminal defense attorney, and had represented Elps prior to Warren's trial. (Exhibit 13:131-132).[2]

31. Prior to trial, Heather Kennon entered into an agreement with the District Attorney to testify against Warren. (Exhibit 13:127-129, Exhibit 14:143). Fulcher admitted that there was never any question as to the chemical composition of the items found in the motel room; the issue in the case was whether Dustin Warren knowingly possessed any of those items, or whether they were exclusively possessed by Kennon. (Exhibit 13:128). Fulcher also admitted that after he and Warren learned that the prosecution was going to call Heather Kennon as a witness against Warren, attacking her credibility became of paramount importance. (Exhibit 13:130-131).

32. Despite this, Fulcher admittedly never spoke with any of those three witnesses. (Exhibit 13:131, Exhibit 14:157-159).

33. Approximately one week before the trial was scheduled to commence, on September 2, 2014, Rodney Fulcher appeared in court and asked to be relieved as counsel:

> Your Honor, this is a case that I was retained in. As we've kind of gone along with it, **I don't think Mr. Warren and I see eye-to-eye** on everything. **I don't think I can zealously represent him at a trial** based on the evidence, the conversations we've had. So it's going to be my motion to withdraw from the case. **Also, he's unable to continue to finish hiring me**.

(Exhibit 2:2-3).

[2] At the 2018 MAR hearing, Fulcher testified definitively that he represented Elps in a prior criminal case before Warren's 2014 trial. At the 2020 MAR hearing, Fulcher claimed he could not remember if he had represented Elps before, and was impeached with his prior testimony. (Exhibit 14:157-158)

34. The trial court inquired of Warren, who stated:

> Thank you, Your Honor. I retained Mr. Fulcher right after I got indicted. Twenty-seven days after I got locked up I retained him for basically $2,500. I was never mentioned or told or anything there would be any other -- extra money for court or nothing. But my girlfriend got the money -- you know what I'm saying -- to him. We got him retained and everything.
> **None of my witnesses have been talked to**. None of the evidence, what I have asked to be received such as -- you have a -- we have this -- a main suspect person that these things were caught in her motel room, that it had been 19 hours prior to being in that motel room, is the main person that's saying that I'm the person doing these things. Okay?
> **He hasn't talked to none of my witnesses**. Hasn't got none of the evidence. I asked to pull her records -- medical records stuff, and there was evidence on the scene that was not even tested.
> ...
> I feel like I'm being railroaded. I feel like my lawyer didn't do a good job, you know what I'm saying.
> ...
> I feel like they're trying to railroad me here. And I'm just -- I'm ready to go to trial, because I can win this case. **And he don't want to go to trial, because he asked for more money**. So I just -- I mean, whatever. I'm not going to be railroaded. ...So I'm just asking for him to withdraw from my case, and we just proceed toward trial. But I need enough time to prepare for trial, and **I need a lawyer who's going to do the job that I asked him to do. That includes getting the evidence and talking to my witnesses and stuff like that**.

(Exhibit 2:2-5) (emphasis added).

35. Fulcher declined the court's invitation to respond to Warren's allegations. (Exhibit 13:6-7). The trial court then denied the motion to withdraw, and ordered the case to be tried the following week. Id.

36. After that hearing, the relationship between attorney and client further deteriorated. (Exhibit 14:107).

37. Fulcher attempted to secure the attendance at trial of Thomas, Flowers, and Elps, via court-ordered writs of habeas corpus ad testificandum. (Exhibit 13:134-135, Exhibit 14:160).

However, none of the three witnesses were brought to court. (Exhibit 13:135). On the first day of trial, Fulcher moved to continue the case because some witnesses had not yet been served with subpoenas, arguing

> The other one, Your Honor, is going to be my motion to continue the case. Since last Your Honor ruled last week in the case, concerning the -- my continued representation of my client, we had to send out immediately that afternoon an entire list of witnesses that he said he wanted. And we got -- those subpoenas went out that afternoon; many of those have not been served as of yet. **They're material witnesses**.
>
> **It prejudices his case if they're not here**. So I would certainly ask to continue it to have those here. I think the burden -- **the prejudice to him would be a lot worse than it would be any burden on the State**, to reschedule this case.

(Exhibit 3, p. 7) (emphasis added)

38. Trial commenced on September 8, 2014. (Exhibit 3). The State's theory of prosecution was that Dustin Warren constructively possessed the items found inside the motel room, along with Heather Kennon. (Exhibit 3:444). At trial, the State called a number of law enforcement officers and the motel staff who testified generally as to the contents of the motel room and the condition in which it was found. The central witness in the State's case was Heather Kennon, who had entered into a cooperation agreement with the District Attorney and agreed to testify against Warren.

39. Kennon testified that she was a heroin and pill addict; she met with Dustin Warren on January 29, 2014. (Exhibit 3:243). Kennon testified that everything found in the motel room belonged to Dustin Warren and that Warren was responsible for cooking methamphetamine that they both ingested; the only things that she had brought was a coat and a purse. (Exhibit 3:247). She further testified that they drove to Cassie Flowers' house in Morehead City in order to obtain chemicals to make methamphetamine on the night of January 29, 2014. (Exhibit 3:259-260).

Kennon testified that she and Warren went to Anique Pittman's home and spent the night there where she claimed methamphetamine was being used and manufactured. (Exhibit 3:351). On cross-examination, Kennon admitted that she had a previous romantic relationship with Brandon Elps. (Exhibit 3:356). She also testified that Mark Thomas was at Anique Pittman's house on the night in question. (Exhibit 3:256). Kennon claimed that she remained at Anique Pittman's home all night through the following morning when Warren was arrested, helped Pittman clean up her apartment, and left. (Exhibit 3:258).

40. Following Kennon's testimony, the State rested. After the State rested, the District Attorney inquired as to whether the defense was going to present evidence:

> MR. SPENCE: Going to call Mark Thomas?
> MR. FULCHER: **I do not know if Mark Thomas had been writted back or Cassie Flowers either**. But I plan to call Lisa -- Richard Willis, and Anique Pittman. All the other ones I am certain are here to testify.

(Exhibit 3:298) (emphasis added).

41. Anique Pittman testified as a defense witness consistently with the facts above. During Anique Pittman's testimony, the State cross-examined her by pointing out the absence of both Cassie Flowers and Mark Thomas:

> Q: Okay. Is Mark Thomas here today?
> A: No, sir. He's in – he's incarcerated.
> Q: Is Cassie Flowers here?
> A: I don't even know Cassie Flowers.

(Exhibit 3:390).

42. Following Anique Pittman's testimony, the following transpired:

> THE COURT: All right. Mr. Fulcher, you have some motion you want --
> MR. FULCHER: I do, Your Honor. We would -- **I would like to call one witness, a Brandon Elps, for the purposes of testifying to the truth of Ms. Kennon**. **He's over in custody in our jail**. It would be limited to the fact -- of testimony, that she had, in previous occasions, gotten him in trouble, went to the law on him and all that. So that would be my motion, to have him over here. **And the other two witnesses would be -- and the other two would be for Cassie Flowers in the Department of Corrections, and Mark Thomas. They, too, would be witnesses to show -- testify to the untruthfulness of Ms. Kennon** and things that she had said and done in the past. And I would make a motion to continue, to get those witnesses here.

(Exhibit 3:329-330) (emphasis added).

43. The trial court acknowledged that writs for Mark Thomas and Cassie Flowers were issued on September 4, 2014, and invited defense counsel to make an offer of proof as to Brandon Elps, because the court would "be happy to have the Sheriff bring him over." (Exhibit 3:330-331). Counsel never took the court up on its offer.

44. Dustin Warren testified in his own defense at trial and denied knowledge or possession of any of the items inside the motel room consistent with the statement of facts above. (Exhibit 3:353-363).

45. Following Warren's testimony, the defense rested. (Exhibit 3:464). No further discussion or inquiry was made regarding Mark Thomas, Cassie Flowers, or Brandon Elps.

46. After all of the evidence, both Fulcher and the District Attorney gave their closing arguments to the jury. (Exhibit 3:408-444). Both characterized the central question for the jury to resolve as a credibility contest between Heather Kennon and Dustin Warren:

> The only thing we have testimony of anything that went in that room is Heather Kennon's testimony, that she and Dustin were making it. But nobody else confirms that they were doing it. Nobody else was in that room except for the two of them.
> ...
> Nobody has any confirmation of that. The only thing is Heather Kennon's testimony.
> ...
> Once again, all we have is the testimony of Heather Kennon. And it's only through her testimony that we can imply any involvement by Dustin. I'd submit that she is very inconsistent and very dishonest in who she says who she is.
> ...
> So in light of all this, and I'm asking that you examine the evidence that Judge Alford is going to ask you to examine, and ask you to judge the credibility of the witnesses. Certainly, I ask you to examine everything that you said -- heard Heather Kennon said, and if you believe her, and if you don't believe her, then I ask that you find Mr. Warren not guilty. I ask you to examine the evidence, the testimony of Dustin. If you don't believe him either, I still ask you to find him not guilty. Based upon the evidence, the testimony is the only thing that could actually put him in any kind of connection with it, and I dare say that I think she's very incredible.

(Exhibit 3:420, 421, 423, 425) (defense closing argument)

> You can convict Dustin Warren on his own statement. The things that he said. The things that don't make sense.
> ...
> You can convict him -- if you don't believe him, if you think he's up here telling you or cooking you up a story, you can convict him on that. On that basis. Because when somebody testifies, even though they don't have to, we don't put a halo over their head or believe their testimony. He becomes a witness.
> ...
> Heather Kennon was not really a witness; she's an exhibit. She's Exhibit A. Exhibit A. Addict. I want you to think about these two people. Heather Kennon, who was up for five nights straight. If her story wasn't straight, she did a heck of a job even remembering what she did.
> ...

> Your common sense is going to tell you, between those two people, if you had asked Heather Kennon to butter a piece of toast that day, I doubt she could do that. And she's not going to be able to construct some chemical operation to create a substance.
> ...
> But I guarantee you, between those two, they both were involved. It doesn't matter how much he was involved. But your common sense is going to tell you, between those two people, who was the leader and who was the follower? Like I said, Mr. Warren has got to explain everything, and he's got an explanation for everything, but he's got an explanation for every single thing in isolation.

(Exhibit 3:430, 431, 433, 436, 437) (State's closing argument).

47. Following closing arguments and the jury instructions, the jury returned verdicts of guilty as to all charges on September 10, 2014. (Exhibit 3:457-458). Warren was sentenced as indicated above.

48. Warren directly appealed his conviction to the North Carolina Court of Appeals in Case # COA15-499, raising the following points on appeal:

1. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW BASED ON THE REASONS EXPLAINED TO THE COURT AND THUS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS

2. THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO CONTINUE TO ALLOW HIM TO SECURE WITNESSES FOR HIS DEFENSE DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS DUE PROCESS RIGHTS AS GUARANTEED BY THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF NORTH CAROLINA

3. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL ATTORNEY FAILED TO REQUEST THE COURT BRING BRANDON ELPS FROM THE JAIL, AS THE COURT OFFERED, TO MAKE AN OFFER OF PROOF OF HIS TESTIMONY CONCERNING HEATHER KENNON GETTING HIM INTO TROUBLE AND THEN GOING TO LAW ENFORCEMENT AS THIS WAS THE THEORY OF DEFENDANT'S CASE ON TRIAL

4. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY NOT HAVING TWO WITNESSES BROUGHT BACK FROM THE DEPARTMENT OF CORRECTION TO TESTIFY TO HEATHER KENNON'S UNTRUTHFULNESS

5. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL BY NOT GRANTING A CONTINUANCE AND THUS EXCLUDING NEGATIVE CHARACTER WITNESSES AGAINST HEATHER. KENNON AS THEY WERE AVAILABLE WITHIN THE DEPARTMENT OF CORRECTION AND NEED ONLY BE BROUGHT BACK BY THE STATE ON A WRIT. THEIR NEGATIVE TESTIMONY AS TO THE TRUTHFULNESS AND CHARACTER OF HEATHER KENNON WOULD HAVE SIGNIFICANTLY IMPEACHED THE STATE'S CASE AND LIKELY RESULTED IN ACQUITTALS OF THE DEFENDANT

6. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A CLASS C FOR CONSPIRACY TO MANUFACTURE METHAMPHETAMINE WHEN THE FELONY IS A CLASS D

(Exhibit 4).

49. The North Carolina Court of Appeals affirmed the convictions in a written opinion on November 17, 2015. (Exhibit 6)

50. Warren next timely petitioned the North Carolina Supreme Court for discretionary review on December 14, 2015. (Exhibit 7). In that petition, Warren condensed the first five issues into two main points, and abandoned the sixth claim on appeal. The North Carolina Supreme Court denied discretionary review on January 28, 2016. (Exhibit 10).

51. Following the affirmance of his conviction on direct appeal, Dustin Warren filed a Motion for Appropriate Relief on December 8, 2016. (Exhibit 11). The motion raised a claim of ineffective assistance of counsel based upon Fulcher's failure to interview or call Mark Thomas, Cassie Flowers, or Brandon Elps as defense witnesses.

52. At the two evidentiary hearings, Cassie Flowers, Mark Thomas, and Dustin Warren testified on behalf of the defense. Rodney Fulcher and Chris Suggs testified as prosecution witnesses. [3]

53. In his testimony, Fulcher admitted he never spoke with any of the three missing witnesses. (Exhibit 13:131, Exhibit 14:157-159). He further admitted that after the writs of habeas corpus were not satisfied, he made no further efforts to secure the attendance of those witnesses. (Exhibit 13:135-136). Fulcher further testified that he did not make the decision not to call them as witness simply because they had criminal records; he "just wanted to see what they had to say, if it was anything credible" first. (Exhibit 13:133).

54. When confronted with the Heather Kennon court file jacket, Rodney Fulcher could not explain why his name was on the file jacket and crossed out. (Exhibit 14:136). Rodney Fulcher

[3] Suggs only testified at the 2018 evidentiary hearing.

admitted at the evidentiary hearing that he subsequently represented Heather Kennon on this same case after she violated probation, and obtained a favorable resolution for her. (Exhibit 13:126, Exhibit 14:136). When asked whether he had ever represented Heather Kennon prior, Fulcher gave vague responses:

> **Q. Had you ever represented Heather Kennon, prior?**
> **A. It's -- not to my -- I don't believe I have**. I know in this case I did not. I never spoke to her about this case before.
> Q. About a prior case?
> A. I don't remember if I have. Nothing that would have been involved with Mr. Warren.
> Q. Well, whether it was involving Mr. Warren or not?
> **A. I don't -- I don't recall if I ever represented her before.**

(Exhibit 13:126) (emphasis added).

55. At the second evidentiary hearing, Fulcher gave the same vague responses when asked the same question about Brandon Elps:

> Q. Had you ever represented Brandon Elps prior to Mr. Warren's trial in September of 2014?
> A. I don't remember if I did. I know that I've done some things for him after this. But nothing that... Mr. Elps' reputation preceded him before this, and that was the main reason why I did not want to call Mr. Elps, because he was always in custody for some type of problem.
> Q. You hadn't represented Mr. Elps in the past, correct?
> A. I said I don't remember if I have. It's been -- I have represented him since this particular event.

(Exhibit 14:157).

56. This was at odds with his prior testimony at the first evidentiary hearing in 2018:

> Q: And it's safe to say you never spoke with Cassie Flowers either?
> A: That's correct.
> **Q: And never spoke to Mr. Elps?**
> **A: That's correct. I would say that I had represented Mr. Elps in the past before.**
> **Q: You had been -- represented Mr. Elps?**
> A: Yeah. But nothing -- not in this case.
> **Q: In what kind of case?**
> **A: A criminal case. So I was familiar with his criminal history.**

(Exhibit 13:131-132) (emphasis added).

57. The trial court below issued a written decision and order denying the motion on July 22, 2020. (Exhibit 15). In the order, the court below made the factual finding that Fulcher never contacted Mark Thomas, Cassie Flowers, or Brandon Elps. (Exhibit 15, ¶¶ 37, 42, 48, 51). The court further found that Fulcher failed to make an offer of proof or take any action to secure their attendance in court when Flowers and Thomas were not transported to testify in court. (Exhibit 15, ¶ 48). Additionally, the court made the following findings that are at issue herein:

> 56. Had Thomas testified at trial his testimony would have partially corroborated that of Kennon and directly contradicted Pittman's. Pittman denied that there was any drug activity at her condo whereas both Thomas and Kennon described an all night drug party. Hence it is likely that his testimony would have strengthened the State's case and weaken that of the defense. There is not a reasonable probability that his testimony at trial would have resulted in a different outcome.
>
> 57. As noted above, because of her feigned inability to remember a single person who supplied her drugs, the Court finds that Thomas' testimony is not credible. However had she testified she would have directly contradicted Pittman and Thomas who testified to crossing the Atlantic Beach Bridge in coming from Newport to the Pittman condo; according to Flowers the bridge was closed at all relevant times. There is not a reasonable probability that her testimony at trial would have resulted in a different result.
> …

> 59. Even if Kennon's testimony were totally discredited the State still had a very strong circumstantial case.
>
> 60. At the evidentiary hearing, Defendant did not produce testimony of other attorneys in order to prove that his counsel's performance was deficient; and, nor did Defendant introduce standards of professional conduct established by the North Carolina Indigent Defense Services, American Bar Association or any other entity to prove that trial counsel's performance was deficient.
>
> 61. Defendant failed to allege or establish that his counsel's performance was so deficient that it prejudiced his defense such-that but for his counsel's errors, the result of the trial would have been different.
>
> …
>
> A. Defendant has not established the necessary facts by a preponderance of the evidence.
>
> B. Defendant has not shown the existence of the asserted ground for relief.
>
> C. Defendant has not shown that counsel's performance was deficient; and that the deficient performance prejudiced the defense.

(Exhibit 15).

58. Following the denial of the Motion for Appropriate Relief, Petitioner timely appealed to the North Carolina Court of Appeals on August 24, 2020. (Exhibit 16). The North Carolina Court of Appeals denied his appeal on September 22, 2020.[4]

59. This petition now follows.

[4] That decision effectively terminated post-conviction litigation in the North Carolina courts. No petition is permitted to the North Carolina Supreme Court for discretionary review of the order denying post-conviction relief pursuant to N.C.G.S. §§ 7A28-(a), 7A-31(a), 15A-1422(f) and Rule 15(a) of the North Carolina Rules of Appellate Procedure. Petitioner has fully exhausted every remedy available in the North Carolina state court system

GROUNDS OF UNCONSTITUTIONALITY OF PETITIONER'S CONVICTION AND SENTENCE

60. To prevail under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner seeking federal review of his or her conviction must demonstrate that the state court's adjudication of his or her federal constitutional claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, or resulted in a decision that was based on an unreasonable factual determination in light of the evidence presented in state court. See 28 U.S.C. § 2254(d)(1), (2); Williams v. Taylor, 529 U.S. 362, 375-76 (2000).

GROUND I – THE STATE COURT DECISIONS DENYING PETITIONER'S DIRECT APPEAL AND POST-CONVICTION RELIEF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE CONTRARY TO, AND BASED UPON AN UNREASONABLE APPLICATION OF, CLEARLY-ESTABLISHED SUPREME COURT PRECEDENT; IN ADDITION, THEY WERE BASED UPON UNREASONABLE FACTUAL DETERMINATIONS IN LIGHT OF THE EVIDENCE IN THE STATE COURT RECORD

A. Legal Standard

61. The "contrary to" clause of section 2254(d)(1) is violated if the state court reaches a result opposite to the one reached by the Supreme Court on the same question of law or arrives at a result opposite to the one reached by the Supreme Court on a "materially indistinguishable" set of facts. Williams v. Taylor, 529 U.S. 362, 405-06, (2000).

62. A state court's decision is an "unreasonable application" of clearly established federal law when the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Barnes v. Joyner, 751 F.3d 229, 238 (4th Cir. 2014).

63. 28 U.S.C. § 2254(d)(2) permits a Federal District Court to grant habeas corpus relief to a state prisoner if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

64. An unreasonable determination of the facts is one "sufficiently against the weight of the evidence that it is objectively unreasonable." Gray v. Zook, 806 F.3d 783, 790 (4th Cir. 2015), quoting Winston v. Kelly, 592 F.3d 535, 554 (4th Cir. 2010), see also Williams v. Stirling, 914 F.3d 302, 312 (4th Cir. 2019).

65. The Second Circuit has assumed that an "unreasonable determination of the facts" occurs where a state court's conclusion cannot be supported by the transcript of the official proceedings. Jones v. Murphy, 694 F.3d 225, 259 n. 4 (2d. Cir. 2012). The Second Circuit has also assumed that an official transcript constitutes "clear and convincing evidence" required to rebut the presumption of correctness by 28 U.S.C. § 2254(e)(1). Id., see also Cotto v. Herbert, 331 F.3d 217, 233 (2d Cir. 2003).

66. At least two courts have described an "unreasonable determination of the facts" as follows: "[A] factual finding (or assumption) which lacks any record support, which is contradicted by evidence in the record, and which is shown to be factually wrong by information which is readily accessible and unquestionably accurate is an objectively unreasonable determination of the facts under 2254(d)(2)." Waldron v. Voorhies, 626 F.Supp.22 739 (N.D. Ohio 2009), quoting Fargo v. Phillips, 129 F.Supp.2d 1075 (E.D. Mich. 2001), overturned on other grounds, 58 Fed.Appx. 603 (6th Cir. 2003).

67. The Fourth Circuit has held

> **When a state court apparently ignores a petitioner's properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)**. Moore v. Hardee, 723 F.3d 488, 499 (4th Cir. 2013), citing Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (concern that a state court "had before it, and apparently ignored" petitioner's probative evidence of a constitutional violation). In Taylor, for example, the Ninth Circuit found factual determinations unreasonable when the state court ignored a "highly probative" affidavit corroborating the petitioner's claim that his confession had been coerced and he had been denied an attorney. 366 F.3d at 1006 (noting that "[a] rational fact-finder might discount [the affidavit] or, conceivably, find it incredible, but no rational fact-finder would simply ignore it").

Gray v. Zook, 806 F.3d 783, 791 (4th Cir. 2015) (emphasis added)

B. Argument on the Merits

1. The State Courts' Determination that Petitioner Received Effective Assistance of Counsel Was Contrary To and Based Upon an Unreasonable Application of Clearly Established Supreme Court Precedent

68. The Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is established when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

69. Here, the main thrust of Petitioner's ineffective assistance of counsel claims, raised on direct appeal and in his post-conviction relief motion, was that trial counsel was ineffective in failing to secure favorable defense witnesses to testify on his behalf.

70. As established at both direct appeal from the trial record and at the post-conviction evidentiary hearings, there are several key facts are beyond dispute: (a) Rodney Fulcher never spoke with any of the three witnesses identified; (b) the witnesses were ready, willing and able to testify; (c) the witnesses were more accessible and easily produced in court because they were incarcerated; (d) the witnesses would have offered evidence that would have corroborated the defense and cast significant doubt on Heather Kennon's testimony.

71. As the trial transcript makes abundantly clear, the trial was a credibility contest between Petitioner and cooperating witness Heather Kennon. As Fulcher testified at the MAR hearing, the only issue litigated in the case at trial was whether Petitioner possessed the drugs, chemicals and paraphernalia in the hotel room, or other they were exclusively possessed by Kennon. As Fulcher admitted during his testimony, attacking Kennon's credibility was indispensable; to that end, the witnesses were necessary to complete the defense.

72. To find that the witnesses were material, this Court need only to consult the trial transcript and in Fulcher's repeated representations to the trial court that the three witnesses at issue here were "material" and explained exactly why they were material to the defense – "to testify to the untruthfulness of Ms. Kennon."

73. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690. Strickland cautions courts to refrain

from second-guessing counsel's strategic decisions from the superior vantage point of hindsight. Id. at 689. "Strategic choices made **after a thorough investigation of law and facts relevant to plausible options** are virtually unchallengeable." Id. at 690-691 (emphasis added).

74. The United States Supreme Court has repeatedly stressed that the Sixth Amendment's guarantee of effective assistance of counsel requires assistance by an attorney who has conducted a reasonable investigation into the relevant facts of the case and the applicable law. See Porter v. McCollum, 558 U.S. 30, 39 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000).

75. The United States Court of Appeals for the Fourth Circuit, following the Supreme Court's guidance, has held that "Strickland's objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies." Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998).

76. More to the point, the Fourth Circuit has clearly held "[t]rial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel." Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003), see also Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986).

77. The record is abundantly clear that trial counsel failed to interview, much less secure the attendance of, any of the defense witnesses; he admitted as much, and the MAR court made that finding.

78. While the state courts identified the correct standard under Strickland, it was unreasonably applied. On direct appeal, the state court declined to review the ineffectiveness claim, deferring to a subsequent Motion for Appropriate Relief. (Exhibit 6, pp 18-19).

79. The MAR court, though not citing Stickland, nonetheless identified the two prongs thereof, and made a finding (in conclusory fashion) that Petitioner failed to satisfy either prong. Sidestepping the issue of trial counsel's failure to interview, much less secure the attendance of the witnesses, the MAR court appeared to rely on the following finding in denying post-conviction relief:

> 60. At the evidentiary hearing, Defendant did not produce testimony of other attorneys in order to prove that his counsel's performance was deficient; and, nor did Defendant introduce standards of professional conduct established by the North Carolina Indigent Defense Services, American Bar Association or any other entity to prove that trial counsel's performance was deficient.

(Exhibit 15, p. 8)

80. The Supreme Court has **never** required expert witness testimony from other attorneys or evidence that an attorney's conduct fell short of standards by organizations whose membership is strictly voluntary, such as the American Bar Association or the North Carolina Indigent Defense Services. Rather, the Supreme Court has consistently held that it is the courts who decide what is or is not ineffective assistance as a matter of law.

81. This portion of the MAR court's order is an unreasonable application of Strickland and its progeny for this reason alone.

82. Putting aside the above, the state court misapplied the Strickland standard governing ineffective assistance of counsel. The state court identified the correct governing legal standard in this case as set forth in Strickland v. Washington, 466 U.S. 668 (1984). However, the state court then reached a result opposite to the one reached by the Supreme Court on the same question of law, and unreasonably applies that principle to the facts of the instant case.

83. It is clearly deficient performance to fail to interview a potential defense witness, or secure their testimony through compulsory means to present the evidence to a trial court. This is

especially so in this situation – where the case turns on the credibility of a single witness versus the defendant's testimony.

84. The state court's determination that Petitioner failed to establish prejudice is also legally infirm. The underpinning of the MAR court's determination was that because the court did not find the witnesses credible, then the jury would not have credited their testimony, in whole or in part.

85. This was unreasonable. Strickland's prejudice prong does not permit a court to usurp the role of a jury. The question is not whether the court would have found the witnesses credible, the test is whether the jury would have given the witnesses weight.

86. The record is clear that this case that the lack of defense witnesses to corroborate Petitioner's testimony, and therefore, his entire defense that Heather Kennon was solely responsible for possession of the drugs and chemicals. The District Attorney used the lack of witnesses to great effect in his summation:

> **You can convict Dustin Warren on his own statement. The things that he said**. The things that don't make sense.
> ...
> **You can convict him -- if you don't believe him, if you think he's up here telling you or cooking you up a story, you can convict him on that. On that basis**. Because when somebody testifies, even though they don't have to, we don't put a halo over their head or believe their testimony. He becomes a witness.
> ...
> Your common sense is going to tell you, **between those two people**, if you had asked Heather Kennon to butter a piece of toast that day, I doubt she could do that. And she's not going to be able to construct some chemical operation to create a substance.
> ...

> But I guarantee you, **between those two**, they both were involved. It doesn't matter how much he was involved. But your common sense is going to tell you, **between those two people**, who was the leader and who was the follower? **Like I said, Mr. Warren has got to explain everything**, and he's got an explanation for everything, but he's got an explanation for every single thing in isolation.

(Exhibit 3:430, 431, 433, 436, 437) (State's closing argument) (emphasis added).

87. Accordingly, Petitioner has satisfied both prongs of Strickland and the state courts' decision to the contrary was contrary to and an unreasonable application of clearly-established Federal Constitutional law.

2. The State Court Decision Denying Post-Conviction Relief Was Based Upon an Unreasonable Determination of the Facts in Light of the Record Evidence

88. Although set forth above, the Fourth Circuit's decision in Gray v. Zook, 806 F.3d 783, 791 (4th Cir. 2015) is particularly relevant to the instant case. There, the Fourth Circuit ruled

> **When a state court apparently ignores a petitioner's properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)**. Moore v. Hardee, 723 F.3d 488, 499 (4th Cir. 2013), citing Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (concern that a state court "had before it, and apparently ignored" petitioner's probative evidence of a constitutional violation). In Taylor, for example, the Ninth Circuit found factual determinations unreasonable when the state court ignored a "highly probative" affidavit corroborating the petitioner's claim that his confession had been coerced and he had been denied an attorney. 366 F.3d at 1006 (noting that "[a] rational fact-finder might discount [the affidavit] or, conceivably, find it incredible, but no rational fact-finder would simply ignore it").

Gray v. Zook, 806 F.3d 783, 791 (4th Cir. 2015) (emphasis added).

89. This is precisely what the state court did with Petitioner's claim of ineffective assistance of counsel. The "findings of fact" were not actually determinations of fact, but conclusory statements. Those conclusory statements failed to evaluate the evidence, weigh

Petitioner's properly presented evidence against trial counsel's contradictory testimony, examine or discuss in any meaningful fashion the trial transcript, or make any real determinations of fact.

90. For example, the state court made the following finding:

> 59. Even if Kennon's testimony were totally discredited the State still had a very strong circumstantial case.

(Exhibit 15, p. 8)

91. The trial record and the post-conviction record establish that this was not a case involving strong circumstantial evidence. As trial counsel conceded in his testimony, this was a "he said, she said" case – literally. On the one hand, Dustin Jamal Warren denied any knowledge of what was in the motel room that Heather Kennon rented in her own name. On the other hand, Heather Kennon signed a cooperation agreement and agreed to testify as a State witness in exchange for a lesser sentence that allowed her to avoid prison time.

92. But that was not all. As the evidence came out at trial, it became apparent that female sanitary products were found in close proximity to the chemicals and paraphernalia – supporting an inference that the items were not possessed by Petitioner, but exclusively by a female – namely, Heather Kennon.

93. Without Heather Kennon's testimony, the only evidence that existed was mere presence. That is not "a very strong circumstantial case," it is not even legally sufficient evidence to convict.

94. Also critical to the MAR court's determination were the following findings:

> 56. Had Thomas testified at trial his testimony would have partially corroborated that of Kennon and directly contradicted Pittman's. Pittman denied that there was any drug activity at her condo whereas both Thomas and Kennon described an all night drug party. Hence it is likely that his testimony would have strengthened the State's case and weaken that of the defense. There is not a reasonable probability that his testimony at trial would have resulted in a different outcome.
>
> 57. As noted above, because of her feigned inability to remember a single person who supplied her drugs, the Court finds that Thomas' [sic] testimony is not credible. However had she testified she would have directly contradicted Pittman and Thomas who testified to crossing the Atlantic Beach Bridge in coming from Newport to the Pittman condo; according to Flowers the bridge was closed at all relevant times. There is not a reasonable probability that her testimony at trial would have resulted in a different result.

(Exhibit 15, p. 7).

95. These "findings" of fact distort the testimony of Mark Thomas and Cassie Flowers. First, Mark Thomas clearly and unequivocally did not describe "an all night drug party." Thomas testified clearly that he consumed drugs by himself, discretely. (Exhibit 14, pp 14-15). At trial, Anique Pittman testified she did not see Mark Thomas doing drugs the night he stayed over her house. (Exhibit 3, p. 310, 311).

96. Second, Cassie Flowers' testimony did not directly contradict Anique Pittman's trial testimony, nor did it contradict Mark Thomas' testimony at the MAR hearing. Regarding the bridge closure, Thomas testified:

> Q. Was the bridge closed that night because of snow?
> A. Yes, it was. That night. But it was not closed that day when I crossed it. I --
> Q. So if Dustin Warren and Heather Kennon had to go to Cassie Flowers' house in Morehead City before 5:30 that night the bridge would have been open, correct?
> A. I think the bridge was closed from six to six, if I'm not mistaken.

(Exhibit 14, p. 41).

A. I came over it between four and five o'clock, and it was open.
Q. Okay. Do you know when it closed?
A. I think the bridge was closed between six p.m. and six a.m.
Q. Do you know when it was closed?
A. No, I don't know when it was closed.
Q. Okay.
A. Not specifically. I do know that the bridge was closed that night, possibly the night before, because I mean you talking below freezing weather.
Q. I got it. My question is if Dustin Warren and Heather Kennon had gone to Cassie Flowers' house at any time before they came over to Anique Pittman's house, the bridge would have been open, right?
A. If they would have come over there before they came to her house, possibly yes.
Q. So if Cassie Flowers says the bridge was closed that's incorrect.
A. Depend on what time she's saying the bridge was closed.

(Exhibit 14, p. 42).

97. Cassie Flowers testified that that evening, the bridge was closed due to weather:

Q. As a matter of fact, that highrise bridge from Atlantic Beach to Morehead was closed, wasn't it?
A. Yes, sir.
Q. It was. You couldn't get over it, could you?
A. No, sir.

(Exhibit 13, pp 27-28).

Q. Okay. And the bridge going from Morehead City in to Atlantic Beach, what was the status of that bridge?
A. The bridge was closed.

(Exhibit 14, p. 62)

98. At trial, Heather Kennon testified that the bridge was closed:

Q Okay. And when you left the DoubleTree, why did you go to the Seashore Motel?
A Because -- I don't even know why he pulled up in there -- because we really didn't have nowhere else to go.
Q Okay.
A So -- because I think there was snow on the bridge, or ice on the bridge or something. We couldn't get back over the bridge to Morehead.

(Exhibit 3, p. 267)

99. Anique Pittman's testimony at trial regarding the time she crossed the bridge (before 6:00 p.m.) mirrored Dustin Warren's trial testimony and Mark Thomas' testimony. (Exhibit 3, p. 311).

100. Thus, the transcripts clearly contradict the MAR court's factual findings. The "facts" as found by the MAR court were clearly unreasonable determinations as they have no basis in the state court record.

101. Two other critical findings of fact made by the MAR court were unreasonable determinations:

> 53. He [Rodney Fulcher] was familiar with the criminal backgrounds of Thomas and Flowers as well as the fact that both were then in prison; he did not consider either to be credible witnesses; he had interviewed Pittman and knew that she would testify to many of the same matters as Thomas and did not believe it to be in Defendant's best interest to call these witnesses. He believed that Pittman would be a stronger witness due to her lack of an extensive criminal record.
>
> 54. Although he did not interview Thomas or Flowers he made a strategic decision not to call these witnesses largely because of their criminal history and the effect it would have on their credibility.

(Exhibit 15, p. 7)

102. Again, these findings are belied by the record.

103. It goes without saying that an attorney has a duty to be candid with a court. When an attorney represents to a court that a witness, who is incarcerated, is material and necessary for the defense, and requests the court to expend governmental resources to transport that prisoner from a jail or prison to court, then the court can assume that the attorney has a good faith basis for making such a request:

> The other one, Your Honor, is going to be my motion to continue the case. Since last Your Honor ruled last week in the case, concerning the -- my continued representation of my client, we had to send out immediately that afternoon an entire list of witnesses that he said he wanted. And we got -- those subpoenas went out that afternoon; many of those have not been served as of yet. **They're material witnesses**.
>
> **It prejudices his case if they're not here**. So I would certainly ask to continue it to have those here. I think the burden -- **the prejudice to him would be a lot worse than it would be any burden on the State**, to reschedule this case.

(Exhibit 3, p. 7) (emphasis added)

104. It would be logically impossible for this Court to accept this on the one hand, and simultaneously accept the contradictory explanation that despite these repeated representations, counsel essentially misrepresented to the trial court that the witnesses were material, and never had any intention of calling them as witnesses to begin with.

105. Either Fulcher believed the witnesses were material and necessary to the defense, or he did not. Either his representations to the trial court were accurate and truthful, or they were not.

106. If his representations were accurate and truthful, then his later explanation that he never had any intention of calling the witnesses cannot be credited. If his representations were inaccurate and untruthful, and he was merely posturing or engaging in dilatory tactics, his testimony cannot be credited.

107. Further, it is clear that his failure to speak with the witnesses, much less call them, was not strategic. As Fulcher conceded, all of the witnesses in this case, except the police officers and motel staff, had criminal records. He did not make the determination not to speak with the witnesses based on their criminal records:

> Q. And is it fair to say that you'd made the decision, after you knew these people, these folks' criminal history, not to call them as a witness? You made that decision prior to trial?
> A. I had it in the back of my mind. I called those people -- we had those people subpoenaed, and I was going to speak with those when they came. **I just wanted to see what they had to say, if it was anything credible. I didn't know what they were going to say**.

(Exhibit 13:132-133).

108. Because the state courts' determinations in denying Petitioner relief based upon his claims of ineffective assistance of counsel were based upon unreasonable determinations of fact, this Court should grant this petition in its entirety.

GROUND II – THE STATE COURT'S DETERMINATION THAT PETITIONER'S RIGHT TO PRESENT A DEFENSE WAS NOT VIOLATION WAS CONTRARY TO CLEARLY-ESTABLISHED SUPREME COURT PRECEDENT AND WAS BASED ON AN UNREASONABLE FACTUAL DETERMINATION IN LIGHT OF THE STATE COURT RECORD

109. In the interest of brevity, Petitioner respectfully incorporates by reference the legal standard of this Court's review set forth in Ground I(A).

110. The Fifth and Fourteenth Amendments to the United States Constitution guarantee each criminal defendant the right to Due Process of Law. Due Process "guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.'" United States v. Valenzuela–Bernal, 458 U.S. 858, 872 (1982).

111. The right to present a defense arises under the Fifth and Fourteenth Amendment right to Due Process and the Sixth Amendment right to compulsory process. Richmond v. Embry, 122 F.3d 866, 871 (10th Cir.1997). It is one of the "minimum

essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294 (1973), citing In re Oliver, 333 U.S. 257, 273 (1948).

112. The United States Supreme Court has repeatedly held that criminal defendants have the right to put before a jury evidence that might influence the determination of guilt, and "to contradict or explain the opponent's case." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); see also United States v. Nixon, 418 U.S. 683, 709 (1974); Chambers at 302, Taylor v. Illinois, 484 U.S. 400 (1988) (stating that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive").

> The concept of "fundamental fairness" is sometimes an elusive one. Where an erroneous evidentiary ruling is made, and relevant evidence is thereby excluded, the reviewing court's duty is to determine whether the excluded evidence was material to the presentation of the defense:
> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97 (1976) (footnotes omitted).

113 The Court has recognized that "[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948). The fundamental right of a defendant to be heard, to have "his day in court," is worth little if the defendant has no

meaningful ability to call witnesses to testify on his behalf. As the Supreme Court has emphasized time and again:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.… This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). The Court has explained, "[t]he right of an accused in a criminal trial to due process is, in essence," "the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Thus, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986).

114. On the first day of trial, Petitioner requested a continuance because material witnesses, all three of whom were incarcerated, had not been produced in court by the state Department of Adult Corrections and the county jail - despite the fact that the trial court had previously executed writs of habeas corpus ad testificandum directing their production for trial. (Exhibit 3, p. 7). The trial court denied that request. (Exhibit 3, pp 7-8). The motion was made again when it came time to present defense evidence at trial, as the witness had still not been produced in court by the State authorities. (Exhibit 3, pp 329-330). Again, the court denied the request as to Mark Thomas and Cassie Flowers. (Exhibit 3, p. 330). The trial court requested an offer of proof as to Brandon Elps, who was in the county jail, and counsel started to make an offer of proof before the court cut him off. (Exhibit 3, p. 331).

115. Petitioner raised a claim of a deprivation of the Constitutional right to present a defense on direct appeal, complaining specifically of the trial court's refusal to allow him time to

present Mark Thomas and Cassie Flowers as defense witnesses. (Exhibit 4). The North Carolina Court of Appeals couched the issue as whether the trial court abused its discretion in denying the motions to continue, not as a Constitutional deprivation of the fundamental right to present a defense. (Exhibit 6, pp 21-22). The Court of Appeals held that the "court did not make a ruling on Defendant's motion to continue to allow for Flowers' and Thomas' testimony. Defendant failed to ask the court for a ruling on the issue." (Exhibit 6, p. 24). Accordingly, the Court of Appeals held that this issue was not preserved, and refused to consider it.

116. This was both legally and factually unreasonable. In ruling on the first application to continue, the trial court stated clearly and unequivocally:

> THE COURT: Most respectfully, the Motion to Continue is denied.

(Exhibit 3, pp 7-80)

117. In ruling on the second application to continue, the trial court stated:

> THE COURT: It would appear to the Court that any writ for -- says it's -- that was issued by this Court was done last Thursday, September the 4th, and the trial was scheduled -- was due to start the 8th, and the person, **Ms. Flowers**, is not currently in the Carteret County jail and neither is **Mark Thomas**, is my understanding. As to the other one, testifying about some alleged bad act of Heather Kennon at some earlier time without any connection to this case, would -- this Court does not believe would have relevance to the charges for which the defendant stands trial in this case, and **would not grant a continuance for that**.

(Exhibit 3, p. 330) (emphasis added).

118. Thus, it is crystal clear from the record that Petitioner moved to continue, set forth his reasons why the motion should be granted, and the court specifically denied the motion on both occasions, giving him a ruling upon which to appeal. Thus, the North Carolina Court of Appeals determination to the contrary is factually unreasonable.

119. Additionally, the North Carolina Court of Appeals conducted no analysis under either plain error review or any other review of the central Constitutional claim – whether the denials of the motions to continue and to secure defense witnesses by compulsory means deprived Petitioner of his fundamental Due Process right to present a defense.

120. What the North Carolina Court of Appeals essentially did was apply binding Supreme Court precedent on the right to present a defense in a manner for which it was never intended – to determine whether an abuse of discretion in denying the motions to continue was warranted. Then, it sidestepped the issue entirely by finding that the issue was not properly presented, and dismissed the claim.[5]

121. This was both an unreasonable determination of the facts and contrary to clearly established Federal Constitutional law as determined by the Supreme Court. Accordingly, this Court should grant the instant petition in its entirety.

[5] The dismissal of the claim effectively precluded review by the North Carolina Supreme Court. The North Carolina Rules of Appellate Procedure and the statutes require a "determination" by the North Carolina Court of Appeals as a prerequisite for discretionary review.

CONCLUSION AND RELIEF REQUESTED

129. The North Carolina state courts' determinations on direct appeal and on post-conviction relief were contrary to clearly-established Federal Constitutional law. Alternatively, those determinations were based upon unreasonable factual determinations in light of the evidence contained in the trial record and the post-conviction relief record. This warrants Federal habeas relief.

130. In the alternative, this Court has the power to order an evidentiary hearing pursuant to 28 U.S.C. § 2254(d)(1), (e)(2), and Cullen v. Pinholster, 563 U.S. 170 (2011). This hearing would resolve any outstanding disputed issues of fact, which are few in number.

131. For the reasons set forth above, this Court should grant the petition herein in its entirety.

WHEREFORE, Petitioner prays that this Court:

(A) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement upon a personal recognizance bond; or in the alternative,

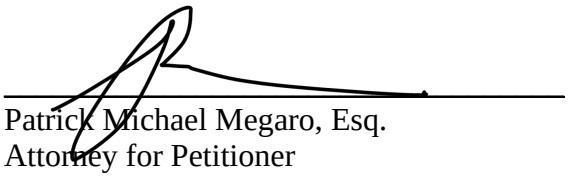
(B) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated, and he be restored to pre-trial status if he is not retried within sixty days; or in the alternative,

(C) Order an evidentiary hearing prior to making any final determination; and

(D) Grant such other and further relief as this Court may deem just, proper and equitable.

Dated: October 27, 2020

Respectfully Submitted,



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