

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**United States v. Dietrick Lewis Johnson, Sr.**

Johnson · No. 15-41085 and 15-41086 · Decided November 6, 2015

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OPINION

PER CURIAM.

,§;<A,~A,»£ G' " t 7>?€; wf-!3-5.3,;).10/» 5 €-pfec{/u¢ A'S\$/s lt aff gin €aunjez/;57§»?@€/ Ye" la §arz-a ' % §§<5,§32~@! NOS. 15-41085 AND 15-41086 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNITED STATES OF AMERICA Plaintiff - Appellee VS. DI\$TRICK Lé'wis JoHNSoN SE@URT§§CEIVED'N \_ Def`endant - Appella,nt CH!M|NAL APpEAl-S NOV 06 2035 APPEAL FROM cAUSE NUMBER'S a ia-cv-Aeo B\$YNY\$EIE\$IKZBHK UNITED sTATES DISTRICT coURT FoR THE EASTERN DISTRICT OF TEXAS, SHERMAN DivISIoN APPLICATION FOR CERTIFICATE OF APPEALABILITY,`W..',|&' ` AND BRIEF IN SUPPORT 9 sPEcIAl sTATEMENT To THE coURT Appellant is proceeding pro se in this action, without the assistance of professional counsel, has no formal training in law,gand has limited aptess to the prison law library forg the purpose of researehing relevant law dealing with the issues in this cause.

Therefore, petitioner moves this court to review this pleading under the standard established in HAINES v. KERNER, 404 U.S. 519, 30 L. Ed. 2d 652, 92 s.ct. 594 (1972). ` ' CERTIFICATE OF INTERESTED PERSONS Appellant hereby certify that the following persons have an interest in the outcome of the instant case. Appellant makes these representations to enable the judges' of this Court to evaluate their possible disqualification or recusal.

1. 'Dietrick Lewis Johnson, Sr..... x...Appellant 2. United States of America.....Appellee 3. Tracey M. Batson.....Attorney for Appellee John M. Bales » lietrick\_ Appellant '» = "i "l'@. 'r x (i) STATEMENT OF ORAL ARGUMENT Petitioner suggests that this Honorable Court would benefit from oral arguments, given the importance of the case and the uniqueness of some issues.

Otherwise, appellant will rely on his brief. (ii) 'TABLE OF CONTENTS cERTIFIcATE or INTERESTED PERSONS..... -.....i STATEMENT or ORAL ARGUMENT..... ii TABLE or AUTHoRITIEs..... vii STATEMENT or JURISDICTION.....f.....xv STATEMENT OF ISSUES PRESENTED FOR REVIEW.....xvi ISSUE NUMBER ONE: A Certificate of Appealability should issue because Mr. Johnsons' plea of guilty was not knowingly and voluntarily to the full consequences of his guilty plea.

Prosecutorial Misconduct, violations' of due process and equal protection of the law, conspiracy to convict, vindictive prosecution, fraud and a total miscarriage of justice. ISSUE NUMBER TWO: A Certificate of Appealability should issue because of ineffective assistance of counsel, trial and appellate counsel j failed to preserve error, and/or demonstrate harm of perjured testimony, rendering their performance ineffective, in violation of the Sixth Amendment.

ISSUE NUMBER THREE: A Certificate of Appealability should issue because of conflict of interest between the defendant and his attorney. ISSUE NUMBER FOUR: A Certificate of Appealability should issue because of a Rule (11) violation, which trial and appellate counsel failed to request for a Competency hearing. ISSUE NUMBER FIVE: A Certificate of Appealability should issue because in the matter of Case No. A:lh-CV-hol, the petitioner was prejudiced when he was convicted and sentenced on an indictment that was returned by a grand jury whose term had expired.

On 'June 22nd, 2015,' the case was dismissed without prejudice, when it was supposed to be dismissed with prejudice because prejudice ensued. ISSUE NUMBER SIX: This matter should be remanded to the district court for a discovery hearing. STATEMENT OF THE FACTS AND OF THE CASE..... I A. 'Procedural history..... v..... 1 B. 'Factual background..... n....>..... I n 1.

U.S. Marshals' warrantless no knock, search violation 14, 20 2. Illegal impound of vehicle.....;..... 13, 14 3. Phone records, parts' receipt and police reports.... I §, 17, 13 4. Failure to subpoena or interview witnesses'..... 20 SUMMARY OF THE ARGUMENT..... 3 GOVERNMENT STATUTE/STANDARD OF REVIEW.....

5 A. Statutory authority..... r..... 5 B. Standard of review for obtaining a COA..... 6 ISSUE NUMBER ONE RESTATED..... 8 A Certificate of Appealability should issue because Mr. Johnson's plea of guilty was not knowingly and voluntarily to the full consequences of his guilty plea. Prosecutorial misconduct, Due process and Equal protection of the law violation's, f Conspiracy to convict, Vindictive prosecution, Fraud and a Total Miscarriage of Justice.

A. Standard of Review..... ¶..... 13 B. Factual Background..... 13 C. Argument..... 13 4 1. Exhibit's A and B..... t..... 8 ISSUE NUMBER TWO RESTATED..... ¶..... 13 A Certificate of Appealability should issue because of ineffective assistance of counsel, trial and appellate counsel failed to preserve error, and/or demonstrate harm of perjured 3, ir 1 z testimony, rendering their performance ineffective, in violation of the Sixth Amendment.

A. 'Standard of Review'.....18 B. '-Argpment.....;.....q.....18 l.:Perjured testimony.....t.....l§ C. Issuance of the COA.....19 D. Relief is required.....;.....19 ISSUE NUMBER THREE RESTATED.....L..21 A Certificate of Appealability should issue because of the conflict of interest between the defendant and his attorney.

A. Standard of Review..... 21 B. Argument.....;.....21 l. It is unethical for defense counsel to advise her client to enter into a contract (to accept a plea offer) when the contract has a waiver preventing the defendant from later challenging his counsel's advice, C. Issuance of the COA..... 22 D. Relief is required.....r.....

22 ISSUE NUMBER FoUR RESTATED.....22 A Certificate of Appealability should issue because of a Rule (11) violation, which trial and appellate counsel's failed to request for a Competency Hearing. A. Standard of Review..... 23 B. Argumentg.....;.....24 1.

The trial judge must personally inquire whether the defendant understood the nature of the charges §that is against hmm. § 2.:'The Court never, not once asked the petitioner was he taking any prescription medication's by a license physician, for any medical reason's. C. Issuance of the COA.,..... 24 z D. Relief is required.....§.....25 ISSUE NUMBER FIVE RESTATED.....25 A Certificate of Appealability should issue because in this matter, Case No. A:IA-CV-éél, petitioner was prejudiced when he was convicted and sentenced on an indictment which was returned by a grand jury whose term had expired.

On June 22, 2015, the case was dismissed without prejudice, when it should of been dismissed with prejudiced, because prejudice ensued. A. Standard of Review..... 25, 26 B. Argument..¢.....‘ .....25, 26 1. A Fourteen (14) point offense level increase..Zé 2. An Eight (8) point offense level increase..... 24 ISSUE NUMBER SIX RESTATED.....26 This matter should be remanded to the District Court for a Discovery Hearing.

A. Standard of Review.....26 B. Preservation of error.....26 C. Denial of the Discovery Hearing was an abuse of discretion.....,.....~27 PRAYER.....:.....f§..... '..... 29 CERTIFICATE OF SERVICE.....30 TABLE OF AUTHORITIES FEDERAL CASES United States v. Gaitan, 954 F.Zd 1001, 1011 (Sth Cir.

1992)..... 8 United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990)..... 8 Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).....14 Wood v. Collins, -. -. 898 F.2d 1027 (5th Cir. 1990).....11 Kennedy v. Maggio,,. 725 F.2d 269 (5th Cir. 1984).....11 founq v. Zant; 677 F.Zd 792 (1lth Cir.

1982).....14 Risher v. United States, 992 F.2d 982 (9th Cir.  
1993).....11 United States v. Henderson, v 72 F.3d 463, 465 (5th Cir.  
1995).....11 United States v. Pugliese, 805 F.2d 1117, 1123 (2d Cir.  
1986)....3.....`14 Miller v. Wainwright, 7 798 F.2d 426 (11th Cir. 1986).....16  
s United States vi Borders, § § 992 F.Zd 563 (Sth Cir.

1993).....;.....'.....14 Suggs v. United States, 513 F.3d 675, 679-680 (7th Cir.  
2008).....10 1~Hoots v. Allsbrook, 785 F.Zd 1214, 1221\_f4th Cir. 1986)..z.....:14  
Gaines v. Hopper) » 575F.2d1147(5thCiI-0 1978).Il.-.I...II‘,¢I.II°l...""l£+ William v. Washington,  
59 F.3d 673 (7th Cir.`1995).....1.....15 (vii) United States v. Ihsan Elashyl, \_ 554 F.3d  
480 (5th Cir.

2008).....11 United States v. Somner, 127 F.3d 405, 408 (5th Cir.  
1997).....11 United States v. Lewis, ‘ 476 F.3d 369 (5th Cir. 2007).....12  
Jackson v. United States, 1 Burdine v. Johnson, 292 F.Bd 336, 345 (5th Cir. 2001).....14  
Bond v. Dretke, \_384 F.3d 1661 167r68 (5th Cir.

2004).....16 United States v. Perez, 1 United States v, Garcia-Jasso, 472 F.3d 239, 243  
(5th Cir. 2006).....22 United States v. Vaquero, 997 F.2d 78, 89 (5th Cir.  
1993).....;.....22 Moore v. United States, \_ 950 F.2d 656, 660 (CAIO  
1991).....21 Ragland v. Shattuck National Bank, 36 F.3d 983, 990 (CAIO  
1994).....,.....

12 'Johnston v. Singletary, 162 F.3d 630 (11th Cir. 1998);.....20 Theriot v. Whitley, 18  
F.3d 311 §Sth Cir. 1994)....\_ '§4.....¢.....20 Velarde v. United States, v 927 F.Zd 826 (7th  
Cir. 1992)..... 20 Henry v. Scully, 778 F.3d 51 (2d Cir. 1996).....:..... 20 l  
§Strickland v. Washington, § f 466 U.S. 668, 104 S.Ct.

2052, 80 L. Ed. 2d 674 (1984)...15 Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 371, 88 L. Ed.  
2d 203 (1985).16 Glasser v. United States, 315 U.S. 60, 75-76, S.Ct. 457, 467, 86 L. Ed. 680  
(1942).....17 Wood v. Georgia, 450 U.S. 261, 271 (1981)..... 21 Cyler v. Sullivan,  
446 U.S. 335, 350 (1980).....21 McCarthy v. United States, 394 U.S. 459, 22 L.  
Ed.

2d 418, 89 S.Ct. 1166..... 23 Pate v. Robinson, 383 U.S. 375 (1996).....L.....23  
Drope v. Missouri, 420 U.S. 162 (1975).....23 Medellin V. Dretke, 544 U.S.  
660 666 (2005).....¢.....7 Drinkard v. Johnson, ' \_ . 97 F.3d 751, 755 (5th Cir.  
1996).....7 Fuller v. Johnson, 114 F.3d 491,'495 (5th Cir.

1997).....7 Miller-El v. Crockrell, 537 U.S. 322, 336 (2003).....7,  
Green v. United States, 445 F.2d 847, 848 (6th Cir. 1971).....6 Graziano v. United

States, 83 F.3d 587, 590 (2d Cir. 1996).....;6 Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010).....:5;...6 Feliz v. United States, § Nos. 01 Civ.

5544 (JFK) 00 Cr. 53 (JFK), 2002 WL 1964347, ar (S.D.N.Y. Aug; 22, 2002)..... 7  
United States v. Munoz, 408 F.3d 222 (5th Cir. 2005). 'Campbell v. Reardon, 2015 BL 63739 7th  
Cir: No. 13-2634, March 10, 2015.;...21 United States v. Pandilidis, `524 F.Zd 644, 647 (6th Cir.  
1975).....-.....25 United States v. Weintraub, at 871 FZZd 1257, 1259 (SEh Cir.

1989).....:.....28 ` Gibbs v. Johnson, 154 F.3d 253, 258 (5th Cir. 1998).....28  
Perillo v. Johnson, 79 F.Bd 441, 444S45 (5th Cir. 1996).....28 Blackledge v. Allison,  
431U¢S¢ 63' 82\_83 (1997)0¢-0¢¢ ¢¢¢¢¢ ¢~o~.~o~¢o¢¢~¢¢¢¢co~28 Kirkpatrick v. Blackburn, '  
777 F.Zd 272 (5th Cir. 1985).....14 United States v. Scott, 625 F.Zd 623 (5th Cir.

1981).....14 United States v. Henderson, 72 F.3d 463, 465 (5th Cir.  
1995).....17 Loyd v. Whitley, 977F02d149(5thcir¢1992)0'¢»¢~¢¢¢¢00¢¢0»0¢ccc¢¢..  
¢'¢~20 J FEDERAL STATUTES 28 U.S.C. 2253(€)(Z)..... 7 28 U.S.C.  
2255¢0t¢cnooñlooinloooocl¢nlctoo¢¢¢.non1¢0»6 28 U.S.C.` 2255(b).....l...l.....I.....I.I.....ZG  
28\_U.s.c.

2119.....1 18 U.S.C. 1512(&)(2)(A) & (a)(3)(C).....3 18 U.s.c.  
924(c).....1 13 U.s.c. 922(g)(1)..... 1 18 U.S.C.  
3109.....20 WIWEWJWIWJWIWI€MWI 28 U.S.C. 1291  
(2015).....xv STATEMENT OF JURISDICTION The United States Court of  
Appeals for the Fifth Circuit has jurisdiction of this matter, pursuant to 28 U.S.C. § 1291 (2015);  
as an appeal from a final decision of the United States District Court For The Eastern District of  
Texas, Sherman Divi- sion.

Petitioner filed a Petition for Writ of Habeas Corpus; "July 23, 2014." The Writ of Habeas Corpus  
was denied; "July 29, 2015."4 Petitioner filed a timely Notice of Appeal on/or around; "August 5,  
2015." (Xv) STATEMENT OF ISSUES PRESENTED FOR REVIEW ISSUE NUMBER ONE: A  
Certificate of Appealability should issue because Mr. Johnsons' plea of guilty was not knowingly  
and voluntarily to the full consequences of his guilty plea.

Prosecutorial Misconduct, violations' of due process and equal protection of the law, conspiracy to  
convict, vindictive prosecution, fraud and a total miscarriage of justice. ' ISSUE NUMBER rwo=  
1 A certificate of Appealability should issue because of ineffective assistance of counsel, trial and  
appellate counsel failed to preserve error, and/or demonstrate harm of perjured testimony,  
rendering their performance ineffec- tive, in violation of the Sixth Amendment.

ISSUE NUMBER THREE: A Certificate of Appealability should issue because of Conflict of  
interest between the defendant and his attorney. ISSUE NUMBER FOUR: A Certificate of  
Appealability should issue because of a Rule (11) violation, which the trial and appellate counsel

failed to request for a Competency hearing. ISSUE NUMBER FIVE: A Certificate of Appealability should issue because in the matter of Case No. 4:14-CV-461, the Petitioner was prejudiced when he was convicted and sentenced on an indictment that was returned by a grand jury whose term had expired.

On 'June 22nd, 2015,' the case was dismissed without prejudice; when it was supposed to be dismissed with prejudice because prejudice ensued. (xvi) ISSUE NUMBER SIX: This matter should be remanded to the district court for a discovery hearing. STATEMENT OF THE FACTS AND OF THE CASE A. Procedural history.

On April 12, 2012, the grand jury returned a true bill in a Superseding Indictment with Count(1) of Car Jacking in violation of 28 U.S.C. § 2119, with Count(Z) of Possession of a firearm; during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and Count(3) of Felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

B, "Factual background. In August of 2012 petitioner entered into a plea agreement with the government to plead guilty to Count(1) in the Superseding Indictment, and the government agreed to dismiss Counts(2) n & (3). On November 28, 2012, pre trial hearing was scheduled in, petitioners' parallel state case's for 9: 30 A. M. The Assistant district attorney; "Cynthia A. Walker," postponed that hearing until 1330 P.M. that same afternoon.

She drove to retrieve a copy of the petitioners' federal guilty plea agreement, from the U.S. assistant district attorney; "Tracey M. Batson." This federal plea agreement that could have been easily faxed to her, was doctored to suit her alleged Kidnaping case.

(1) At the rescheduled, postponed 1:30 P.M. pre-trial hearing November 28, 2012, Assist. D.A. entered the federal plea agreement into the Courts record as a confession. The plea agreement was used to box Mr. Johnson into an unconditional Sixty (60) year plea agreement.

After the plea agreement was entered into the record, the prosecutions plea offers' went from Forty (40) years, to Fifty (50) years, and finally to Sixty (60) years. When Mr. Johnson realized that the State of Texas was using his federal plea against him as a confession, he entered a Motion in federal Court to withdraw his plea of guilty.

On January 30, 2013, at hearing for Mr. Johnson to withdraw his guilty plea, his defense counsel Mrs. Benson testified that she never advised Johnson, if he plead guilty in federal court, the State of Texas would use that plea against him.

On March 4, 2013, Hon. Amos L. Mazzant in his fact finding and conclusions of law, was to allow Mr. Johnson to withdraw his guilty plea. Further, since his defense counsel never advised him of the consequences of his guilty plea.

On April 10, 2013, seeing now that the State of Texas have 1, '1'; -, 1 certified that they would not use the plea agreement, the Hon. Judge denied Mr. Johnson a right to withdraw his guilty plea. UNDISPUTED OF FACTS: On November 28, 2012, which is Five (5) Months before the perjured, false declaration was entered into the Courts' record, it had already been used as a confession.

Mr. Johnsons' defense counsel; 'Terri Daniel,' was so upset, stating that Mr. Johnson (2) is admitting to everything in the federal guilty plea agreement, and she then requested to withdraw as counsel from Mr. Johnsons' case's.

On November 15, 2013, Mr. Johnson was sentenced to 240 Months imprisonment for Car Jacking, in violation of 28 U.S.C. § 2119, and 125 Months, to run concurrent, for Tampering with a witness, or an informant, in violation of 18 U.S.C. §§ 1512 (a)(Z)(A) & (a)(3)(C)- SUMMARY OF THE ARGUMENT Mr. Johnson brings Six issues before this Hon. Court, from his denial of a Certificate of Appealability below, by district judge Marcia A. Crone: (1) A (COA) Certificate of Appealability should issue because of prosecutorial misconduct, due process and equal protection of the law, conspiracy to convict, vindictive prosecution, fraud, and a total miscarriage of justice.

(2) A (COA) Certificate of Appealability should issue because a Six Amendment violation of ineffective assistance of counsel. 5 ~. ~ § which affected the validity of the waiver. (3) § (COA) Certificate of Appealability should issue because of a conflict of interest that affected the validity of the waiver.

(4) A (COA) Certificate of Appealability should issue because of a Rule (11) violation, failure to hold a Competency hearing, when Competency was an issue. (5) A (COA) Certificate of Appealability should issue because prejudice ensued when Mr. Johnson was convicted and Sentenced on an invalid indictment that was returned by a grand jury whose term had expired.

(6) A (COA) Certificate (3) of Appealability should issue for this matter, and should be remanded to the District Court for a Discovery Hearing. Returning to issue number one, a plea of guilty was not knowingly and voluntarily to the full consequences of Mr. Johnson's guilty plea. In a hearing January 30, 2013, for Mr. Johnson to withdraw his guilty plea. Mr. Johnson's defense testified, that she never advised counsel; "Denise S. Benson," him of the consequences his guilty plea would have on his parallel state case's.

Therefore, on March 4, 2013, Magistrate Judge; "Amos L. Mazzant," granted Mr. Johnson to withdraw his guilty plea and to take the case before a jury. The prosecution entered a fraudulent declaration, and on April 10, 2013, the District Judge denied the Magistrate Judges fact findings and recommendation. Issue two deals with ineffective of counsel, that affected the validity of the

waiver. Counsel failed to preserve error, and/or demonstrate harm of perjured testimony, rendering their performance ineffective, violating the Sixth Amendment.

The third issue demonstrates a conflict of interest between Mr. Johnson and his attorney, that also affected the validity of the waiver. It was unethical for counsel to advise her client to accept a plea offer; when the plea has a waiver preventing Mr. Johnson from later challenging her advice.

The fourth issue deals with a Rule (11) violation. The trial judge asked Mr. Johnson; "was he on any illegal drugs?" And he replied by saying; "No." The trial judge never asked was he taking any prescription medications prescribed by a licensed physician, for any medical reasons.

(4) The fifth issue is that Mr. Johnson was prejudiced when his fifth Amendment was violated, by being convicted and sentenced on an invalid indictment. The indictment was returned by a grand jury whose term had expired, therefore, the case should have been dismissed with prejudice because prejudice did ensue.

The sixth issue is that this matter should be remanded to the district court for a Discovery Hearing. Mr. Johnson filed a Motion for discovery, but the trial judge abused his discretion by denying discovery, GOVERNING STATUTE/STANDARD OF REVIEW As an overview, Mr. Johnson will first set forth the applicable law governing his request for justice in this matter.

Secondly, since he was denied a Certificate of Appealability,(COA) below, all included matters will be governed by the standard of review set forth under this heading § A, Statutory authority. The law provides: A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence.

(5) To prevail under 28 U.S.C. § 2255, a defendant must show a fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process. Furthermore, 28 U.S.C. § 2255 requires a district court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and the records of the case conclusively show that the petitioner is entitled to no relief. Relief under § 2255 is available "only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in [a] complete miscarriage of justice."

"Because collateral challenges are in tension with society's strong interest in the finality of criminal convictions, the courts have established rules that make it more difficult for a defendant

to upset a conviction by collateral, as opposed to direct, attack." A petitioner in a § 2255 proceeding bears the burden of proof by a preponderance of the evidence...» § 2255(q)(1)- B. Standard of review for obtaining a COA: Being denied a COA at the district court level; Mr. Johnson now requires a COA in order to pursue the merits of his claim on appeal.

*Green v. United States*, 445 F.2d 847, 848-50 (6th Cir. 1971); *Graziano v. United States*, 83 F.3d 587, 590 (2d Cir. 1996) (per curiam); *Vickman v. United States*, 614 F.3d 50, 55 (2d Cir. 2010); *Reliz v. United States*, Nos. 01-cv-5544 (JFK) (6) 00 CR 53 (JFK), 2002 WL 1964347, at \*4 (S.D.N.Y. Aug. 22, 2002). 2253(c)(2); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005); *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir.

1996); *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997). *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); Low Threshold for Habeas COA's and Harsh Words for Race-Based Peremptory Challenges, 17 *Crim. Prac. & Report* 1 (Feb. March 2003). A COA may be granted only where there is "a substantial showing of the denial of a constitutional right." To make this showing, Mr. Johnson must demonstrate that to "demonstrate that the issues are debatable amongst jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further."

In other words, the question is the debatable nature of the underlying constitutional claim, not the resolution of that debate. If there is any doubt whether to grant a COA, the doubt is resolved in favor of the petitioner. A COA determination is a separate proceeding; one distinct from the underlying merits. A COA analysis is an "overview of the claims in the habeas corpus petition and a general assessment of their merits."

The COA assessment "does not require full consideration of the factual or legal bases adduced in support of the claims." In fact, the statute forbids it." Moreover, the majority in *Miller-El* suggested the likelihood that the appeal will ultimately be successful is almost irrelevant.

The "debatable amongst jurists of reason" inquiry has been interpreted as a very low barrier to the issuance of a (7) COA. However, a petitioner must, however, prove "something more than the absence of frivolity or the existence of mere good faith on his part." ISSUE NUMBER ONE RESTATED: A Certificate of Appealability should issue because Mr. Johnson's plea of guilty was not knowingly and voluntarily to the full consequences of his plea of guilty.

Prosecutorial misconduct, due process and equal protection of the law, Conspiracy to convict, Vindictive prosecution, Fraud, and a total miscarriage of justice. Petitioner has raised a substantial showing of denial of constitutional right on issue 'Ground Four, in 28 U.S.C. § 2255. Mr. Johnson was not advised of and did not understand the consequences of his [guilty] plea.

*United States v. Gaitan*, 954 F.2d 1001, 1011 (5th Cir. 1992) (quoting *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990)) See Exhibit's (A) & (B). I. The U.S. and State assistant district

attorney's both, knowingly and willingly submitted a fraudulent objection/perjured declaration, knowing it to be false March 18, 2013. 2.

On November 28, 2012, Mr. Johnson had a 9:30 A.M. Pre-trial hear, before Hon. Scott J. Becker, in District 219. The assistant district attorney "Cynthia A. Walker" postponed that hearing until 1:30 P.M. that same afternoon, while she drove to meet up with U.S. assistant district attorney "Tracey M. ~Batson." Furthermore, she drove to retrieve a copy of Mr. LJohnsons' federal plea agreement, which could of been easily faxed to her, The federal plea was tampered with, to suit her agg. kidnaping case with the state.

(8) 3. At the postponed 1:30 P.M. pretrial hearing, the federal plea agreement was entered into the court's record as a confes- sion. 4. The Hon. Scott J1 Becker, viewed the federal plea agree- ment, and then reset matters before him, to allow petitioner to be sentenced on his federal charges first. 5. Seeing that the federal plea agreement was entered into the State Court's record, the prosecutions plea offer's went from Forty (40) years, to Fifty (50) years, and finally to Sixty (60) years, now that the federal plea agreement was entered into the court's record as a confession.

6. The States prosecution used the federal guilty plea agreement as leverage, to force Mr. Johnson into an unconditional Sixty (60) year plea agreement. 7. When Mr. Johnson had realized, that the State was using the federal plea agreement against him, he entered a Motion to withdraw his guilty plea in federal court. 8. At the hearing January 30, 2013, for Mrrx£ohnson to withdraw his guilty plea, the U.S. Assist.

D.A. had the same State Assist. D.A. actively participating in this federal hear- ing, sitting at the prosecutions table, on video and audio. 9. On March 4, 2013, after defense counsel testified that she never advised Mr. Johnson that if he plead guilty in federal court, the state would use that guulty plea against him. Then, in Hon. Mazzants fact finding and recommendation, was to grant Mr.`Johnson an opporthnity to withdraw`his guilty plea, and to take the case to trial before a jury.

(9) 10. On March 18, 2013, the government entered an objection, and submitted a perjured declaration from the state of Teaxs, stating that they would not use Mr. Johnsons' federal guilty plea. The government and the state of Texas violated Mr. John- sons' due process and equal protection of the law, when they knew the declaration was false. 7 ll. On April 10, 2013, the district judge denied Mr. Johnsons' Docket (#36) Motion, seeing that the state of Texas certified that they would not use the federal guilty plea.

12. On November 15, 2013, based on this miscarriage of justice, Mr. Johnson was sentenced to 365 Months of imprisonment. Petitioner must have notice of the true nature of the actual charges that is against him. (U.S. Assist. D.A. contends now, that Mr. Johnson was never charged with weapon violations). Suggs v. United States, 513 F.3d 675, 679-680 (7th Cir.

2008). §QI§: See the governments response to Mr. Johnson's 2255 Motion, pg. lly"line's 2 & 3, which clearly states that in Count-1, that Mr. Johnson was not charged with the use of a firearm, However, in the superseding indictment; in Count-Z & 3, Mr. Johnson was charged with possession of a firearm, during and in relation to a crime of violence and felon in possession of a firearm.

These charges were dismissed during the plea negotiations, after Mr. Johnson plead guilty to Count~1 of the indictment. Therefore, it is safe to say that the government presented an illegally obtained firearm as evidence, before the grand jury, during their independent role of investigation (10) April 12, 2012, Petitioner must understand the consequences of his plea, and must understand the nature of the constitutional protections he is waiving.

Matthew. 201. F.3d at 365. These undisputed of facts affected the validity of the waiver itself. United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995). Risher v. United States, 992 F.2d 982 (9th Cir. 1993). Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990). Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984). In the governments response to petitioners' 2255 Motion, Document 21, Filed 01/28/2015, pg.

11 of 27, pg. ID. #207, first paragraph states: "The government never charged Mr. Johnson with a firearm, and he never admitted to using a firearm." However, Mr. Johnson's (PSR) pre~sentence report, he was given a six (6) point offense level for use of a firearm. He was also given a four (4) point offense level for bodily injury. In Document 21, Filed 01/28/2015, pg.

3 of 27, pg. ID #199, -on PSR-15, there was no where in the alleged victims statement, where Mr. Johnson assaulted or raped the victim to be charged with bodily injury. He was not charged with assault or rape in the plea agreement, but the PSR clearly states that he raped the victim. United States v. Munoz, 408 F.3d 222 (5th Cir. 2005). See Exhibit's E & F. The government is obligated to live up to the bargain it strikes in the plea agreement.

United States v. Ihsan Elashyl, 554 F.3d 480 (5th Cirr 2008). Thus a plea agreement is construed strickly against the government as the drafter. United States v. Somner, 127 F.3d 405, 408 (5th Cir. 1997). 'To assess whether (11) a plea agreement has been violated, this court considers whether the governments conduct is consistent with the defendants reason- able understanding of the plea agreement.'

United States v. Lewis, 476 F.3d 369 (5th Cir. 2007). In Mr. Johnsons' PSR, they recommended a six (6) point offense level for use of a firearm, and a four (4) point offense level for bodily injury based on the application of an abuse of trust enhancement not included in the plea agreement. What is fraud? "Fraud is a generic term." Ragland v. Shattuck National Bank, 36 F.3d 983, 990 (CA10 1994). It encom- passes a broad range of ways 'by which another is cheated.' Id.

There are actually two (2) types of fraud: 'Intentional and constructive.' Id1 Intentional is when, obviously, a party intends to deceive the other party. Constructive, though, is broader and covers even intentional deception.

For example, when the government placed a collateral attack 'waiver in Mr. Johnsons' plea agreement, it created a conflict of interest. And because the government knew this, and fail§d to say anything, it was fraud because Mr. Johnson had an underly- ing right to be correctly informed of the facts. Id. Fraud occurs when a party in the contract, has the obligation to say that the waiver could cause a conflict of interest. It is construc~ \_tive fraud when the government knowingly remained silent on this issue.

However, any fraud in a contract voids the contract as if it never existed. On October 14; 2014, Attorney General "Eric H. Holder Jr.," directed his prosecutor's not to enforce collateral attack (12) waivers in existing plea agreement's. And when the government enforces a waiver provision in a plea agreement, the court abuses its discretion if it raises the issue.

Wood v. Milyard, 132 S.Ct. 1826, 1833 fn. 5 (2012). A. Standard review. Mr. Johnson adopts the standard or review for obtaining a COA and obtaining relief as set forth supra. l. The government committed a constitutional error, when they deprived Mr. Johnson of his due process and equal protection of the law, which is a guaranteed right. This type of miscon- duct, just to win a conviction by any means is a miscarriage of justice.

The government submitted the declaration, knowing it to be false, just to deprive Mr. Johnson of his right to a jury trial. ISSUE NUMBER TWO RESTATED: A Certificate of Appealability should issue because of ineffective assistance of counsel, trial and appellate counsel failed to preserve error, and/or demonstrate harm of perjured testimony, rendering their performance ineffec- tive, in violation of the Sixth Amendment.

Defense counsel; "Denise S. Benson," allowed Mr. Johnson to plead guilty in open court, to charges that she knew he did not commit. On July 9, 2012, defense counsel files a Motion to suppress illegally obtained firearm (a clear violation of the forth Amendment). Counsel then comes back to Collin County jail eleven (11) days later, on July 23, 2012, with a plea agree- ment and a consent form from the government, stating that Mr. Johnson gave U.S. Marshal's verbal consent to search a parked, (13) locked vehicle on private property, Herring v. Estelle, 491 F.Zd 125 (5th Cir.

1974); U.S. v. Pugliese, 805 F. 2d 1117, 1123 (2d Cir. 1986); U.S. v. Borders, 992 F.Zd 563 (5th Cir. 1993); Young v. Zant, 677 F.2d 792, 798 (llth Cir. 1982). This type of ineffective assistance of counsel invalidated the waiver. Jackson v. United States; 2007 U.s. Dist. Lexis 13362 (E.D. Pa., Feb. 26, 2007). Kirkpatrick v. Elackburn, 777 F.Zd 272 (5th l. Defense counsel encouraged Mr. Johnson to plead guilty on the fact that the U.S. Marshal's stated that Mr. Johnson gave them

verbal consent to search a parked, locked vehicle on private property, without a signed warrant by any court, and no signed consent form, no where in the record was signed by Mr. Johnson.

U.S. V. Scott, 625 F.2d 623 (5th Cir. 1981). 2. On March 26, 2012, the Collin County Sheriff's Department called the U.S. Marshal's, to assist them in serving just an arrest warrant, for an alleged kidnaping charge.

However, they violated 18 U.S.C. § 3109, and the forth Amendment, by kicking down the front door to 11511 Ferguson Rd., Unit 16441 Dallas, Texas 75228, without knocking or announcing themselves before breaking open the door. Defense counsel was told about this incident, how the Collin County Sheriff Dept. and the U.S. Marshal's did not have a no knock warrant or a search warrant signed by any court., Counsel failed to investigate, and present~ ed no defense regarding this forth Amendment violation.

Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986); Gaines v. Hopper, 575 F.2d 1147 (5th Cir, 1978); Bhredine v. Johnsonf 292 F.3d 336, 345 (5th Cir, 2001). Counsel had a duty to familiarize (14) herself with discovery materials provided by the government, William v. Washington, 59 F.3d 673 (7th Cir. 1995). §Q;§: Mr. Johnson never discussed wanting to enter a guilty plea on his state charges, with his defense counsel.

The state prosecutions upward departures demonstrates that fact. Mr. Johnson entered into an unconditional sixty (60) year plea agree~ ment, after his federal plea agreement was used as a confession, not for any rebuttal or impeachment purposes. 2. Counsel was told to subpoena the complainants-and his phone records, and compare them to the complainants signed state- ment of facts, which was presented to the grand jury.

Then you'll see that this woman gave perjured signed statement of L L. »11"1 ~',-!>-` ,~l 11 thaiL independent role important facts to the grand jury durin (JU of investigation. Counsel failed in this regard, and her behav- ior was not objectively reasonable under Strickland v. Washing- ton, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's main objective as an appointed counsel, was to secure a fair and impartial process, which Mr. Johnson's constitutional rights would be properly vindicated.

However, to ensure an attorney's performance lived up to the expectation initiated in the two (2) stage analysis in Strickland. Furthermore, that must be utilized in the evaluation of all claims of constitution- al deficient performance rendered by court appointed counsel. Traditionally, under Strickland, the standard review, relief must be granted where (1) the records disclose that counsel's performance was deficient under the pfevailing norms and (2) the deficiency in counsel's elected trial strategy had an appre- ciable prejudicial affect on Mr. Johnson's ability to defend (15) the case.

However, when the plea was a negotiated guilty plea, the determination turns to whether, (1) counsel's advice to plead guilty was within the range of competency demanded of an attorney in a criminal case, and if not, (2) whether there is a reasonable probability that but for counsel's error's, Mr. Johnson would of never pleaded guilty and would of insisted on going to trial.

Bond v. Dretke, 384 F.3d 166, 167-68 (5th Cir. 2004) (citing Hill v. Lockhart, 474 U.S. 52, 59 106 S.Ct. 366, 371, 88 L. Ed. 2d 203 (1985) (Internal quotation marks omitted). Mr. Johnson does not have to prove without absolute certainty that he would not have pleaded guilty, only that there was a "reasonable probability" such would have occurred. Miller v. wainwright, 789 F.zd 426 (11th Cir.

1936). 3. The Strickland analysis commences with the presumption that defense counsel's advice to accept the governments' plea offer, was the result of sound judicial reasoning. However, that presumption vanishes completely when, as in the instant case, the records show that counsel's over all representation of the law in relation to the facts of the case, was inaccurate.

Quite naturally, a lawyer must have a firm command on the facts of the case, or at least a working familiarity of the law govern- ing the offense, before it can be said that she was competent to advise Mr. Johnson in regards to a guilty plea.

Therefore, where counsel negotiated and encouraged a guilty plea during Mr. Johnsons' trial court proceedings, without a legitimate reason'for doing so. This court must find that counsel's course of action to be an unacceptable trial, that prejudiced Mr. John- (16) son's defense. Glasser v. United States, 315 U.S. 60, 75-76, S.Ct. 457, 467, 86 L. Ed. 680 (1942).

United States v. Perez, l. Mrr Johnson had a constitutional right to be heard through counsel, to make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unim- peached, and conclusive the evidence may seem, unless he has waived his right to argument, or unless the argument is not within the issues of the case. But they were the issues at hand, and Mr. Johnson had not waived his right to argue these issues.

"There are no 'cost savings' in insisting on this kind of courtroom efficiency." U,S. v. Henderson, 72 F.3d 463, 465 5th 111111 t- 1 1 1111 1 1 t ulS alaimo m Mr. Johnson had a right for his couns 0 D »- 01 c n of innocence, which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Summation is a basic element of a criminal defense that offers the defendant both his last chance to persuade the court on the issue of rear sonable doubt as well as his first chance, to present his version of the case as a whole, to "sharpen and clarify the issues for resolution," and to point out the deficiencies" of the governments positions.

Here, a certificate of appealability should issue to review this matter, Secondly, Mr, Johnson was deprived of a direct appeal, which would of demonstrated that both trial and appellate counsel were ineffective as a matter of law, Trial counsel should be found to be ineffective due to failing to

request a sufficient time to fully develop arguments regarding illegally thained evidence, subpoena phone records, part's receipt, (17) Liberty Mutual Insurance Claim, Chase Bank statement for the complainant, for the month of December of 2011, police report's for the complainant and the ones Mr. Johnson filed in Dallas, Texas.

Counsel failed to obtain any of this evidence to preserve a more favorable standard of review; appellate counsel for fail- ing to adequately present the issue to this Court. Either or both require a new trial. A. Standard of Review. Mr. Johnson adopts the standard of review for obtaining a COA and obtaining relief as set forth supra. B. Factual Background.

The record demonstrates that alleged harassment and stalking charges that lead to the alleged Car Jacking and Kidnaping charges. C. Argument. The record demonstrates that trial counsel encouraged Mr. Johnson to plead guilty, and that she failed to investigate or defend her client..1 l. To establish a constitutionally deficient performance, Mr. Johnson must "identify the acts or omissions...that are alleged not to have been the result of reasonable professional judgment" to "show that counsel's representation fell below an objective standard of reasonableness" and outside the wide range of professionally competent assistance."

Addressing the ineffective claims, plain error review was required because of trial counsel's failure to follow through with Motion to suppress illegally obtained evidence that was presented to the (18) grand jury, or to subpoena any evidence to impeach the complain- ant's signed statement of important facts that was presented to the grand jury. In addition, trial counsel's error resulted in a failure to obtain a standard of review on appeal.

The appellate counsel failed to set forth any argument for prejudice, when trial counsel's error's was so serious that they rendered the proceedings fundamentally unfair or the result unreliable. The right to present a motion for illegally obtained evidence is an important one, and abridgment of this should not be toler- ated.

Here, requiring that Mr. Johnson be given a new trial, is presumed when the right erroneously denied, and the presump- tion of harm, although not absolute, is not readily overcome. 1111 Here, trial counsel failed to inve ti 111,,1 1. ate 01 defend her ciient 00 to the best of her ability, and appellate counsel did not present any arguments mentioned. A certificate of appeal should issue, and Mr. Johnson should be given a new trial. q D. Issuance of the COA.

Claims that have been rejected on their merits require petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable and wrong." The question is the debatability of the underlying constitutional claim, not the resolution of that debate. A COA should issue. E. Relief should be granted.

As stated earlier, relief under § 2255 is available "only for...constitutional error... No question exists of constitu- tional necessity of proper representation to the fullest of (19) their ability,

including preserving and presenting error, Here, having not demonstrated that, counsel deprived him of his Sixth Amendment Constitutional guaranteed right to counsel, and that appellate counsel failed in proper presentation of the issues before this court.

Defense counsel; "Rafael De La Garza," was ineffective for not raising Competency Claims. *Johnston v. Singletary*, 162 F.3d 630 (11th Cir. 1998). *Theriot v. Whitley*, 18 F.3d 311 (5th Cir. 1994). When counsel knew there was some form of mental confusion going on with his client, who tried to withdraw from his guilty plea twice, during his trial court proceedings.

And where Mr. Johnson caught three (3) additional charges while still awaiting trial. Counsel was ine raising a "Dead Bang Winner," on direct appeal. Then counsel files and "Anders Brief," stating that Mr. Johnson had no ground for appeal. When the Supreme Court has stated that attorney who seek to file an Anders Brief should consult with his client, to ascertain if he has any issues to pursue on appeal.

Counsel failed in this regard, seeing that he was told repeatedly, to subpoena phone records, part's receipt and witnesses, to impeach the complainants testimony. *Velarde v. United States*, 927 F.2d 826 (7th Cir. 1992). See also *Henry v. Scully*, 778 F.3d 51 (2d Cir. 1996); *Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992). Counsel was fully aware of how the U.S. Marshal's kicked down the front door to where Mr. Johnson was a guest at, and had no signed lease or rental agreement; without knocking or announcing themselves before breaking down the door.

They violated 18 U.S.C. § 3109 and the Fourth Amendment to the United (20) States Constitution. Counsel failed to investigate, or subpoena any witnesses, *Campbell v. Reardon*, 2015 BL 63739 Ych Cir. No. 13-2634, March 10, 2015. Counsel's representation fell within the wide latitude of afforded by *Strickland v. Washington*, 466 U.S. 668 (1984); relief should be granted.

ISSUE NUMBER THREE RESTATED: A Certificate of Appealability should issue because of the conflict of interest between the defendant and his defense counsel. A. Standard of Review. Mr. Johnson adopts the standard of review for obtaining a COA and obtaining relief as set forth supra. B. Argument.

Here demonstrating how a conflict of interest affected the validity of the waiver. 1. The Kentucky State Supreme Court just said that collateral attack waivers "create a non-waivable conflict of interest between the defendant and his attorney." *United States v. Kentucky, State Bar Association*, No. 20013\*\$0-000270-KB (ky. 2004).

The court also said that it's an 'ethical breach' by counsel. *Id.* When viewed through the lens of conflict of interest, the problem of collateral attack waiver's become quite clear, "Counsel owes her client a duty of loyalty, and a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The Sixth Amendment right to counsel includes the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981), and this "conflict free" representation extends to plea negotiations.

(21) *Moore v. United States*, 950 F.2d 656, 660 (CA10 1991). The Supreme Court even said that if a defendant can show that his counsel operated under a conflict of interest, he does not have to show that he was prejudiced (that counsel error's changed the outcome of the proceedings). *Cyler v. Sullivan*, 466 U.S. 335, 350 (1980). Conflicts of interest are of great interest to the court's.

2. A collateral attack waiver created a conflict of interest between Mr. Johnson and his defense counsel, because it is unethical for counsel to advise Mr. Johnson to enter into a contract (to accept a plea offer) when the contract has a waiver preventing him from later challenging his counsel's advice. *United States v. Garcia-Jasso*, 472 F.3d 239, 243 (5th Cir.

2006) (quoting *United States v. Vaquero*, 997 F.2d 78, 79 (5th Cir. 1993). C. Issuance of the COA. Mr. Johnson has raised undisputed facts, and has made an adequate showing to proceed further, D. A conviction obtained through a conflict of interest between the defendant and his attorney, a new trial should be warranted.

As the same occurs here, Mr. Johnson likewise requests a new trial. **ISSUE NUMBER FOUR RESTATED:** A Certificate of Appealability should issue because of a Rule (11) violation, where trial and appellate counsel failed to request for a competency hearing.

(22) A. Standard of Review. Mr. Johnson adopts the standard of review for obtaining a COA and obtaining relief as set forth supra. B. Argument. A Rule (11) proceeding, it is mandated that the trial judge comply with Rule (11).

The trial judge must personally inquire whether Mr. Johnson understood the true nature of the charges he was being faced with, 1. The grand jury returned a true bill in a Superseding indictment April 12, 2012, charging Mr. Johnson with the following charges: "Count (1), Car Jacking, in violation of 28 U.S.C. § 2119; Count (2), Possession of a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and Count (3), Felon in Possession of a firearm, in violation of 18 U.S.C. § 922(g)(1)."

This firearm was used as evidence, presented to the grand jury under false pretenses. The firearm was obtained by an illegal search and illegal impound of a parked, locked vehicle that was on private property. The U.S. Marshal's had no signed search warrant from any court, nor was § 13 they ever given any verbal consent to conduct a search of any kind without a signed warrant by the court.

Now, the prosecution response to this violation is that they never charged Mr. Johnson with weapon violations. 2. Furthermore, on the court's record, Mr. Johnson was asked; "are you

on any illegal drugs?" And he replied by saying; 4 " " -no.

The court not once, asked Mr. Johnson was he taking any prescribed medications by a licensed physician, for any medical reason's. Mr. Johnson was taking 'Zoloft' which was prescribed (23) by "Dr. Stephen Ash," (Urologist), for premature ejaculation, due to complications, suffering from "Bladder Cancer," since 2004. This drug is known to treat individuals who are suffering from depression, or some other form of mental deficiency.

Mr. Johnson was taking this drug for three (3) to four (4) times a day, since January of 2010, up until his arrest March 26, 2012, Therefore, it is safe to say that it was impossible for Mr. Johnson to fully understand the nature of the charges against him,'or the full consequences of his guilty plea.

The court, prosecution and the defense counsel's were aware of Mr. Johnson taking this medication<sup>1</sup> l 3. In Rule (11j, United States v. Dayton, supra, held that Rule (11) has three (3) core concerns; "1. A guilty plea must be free from coercion; 2.

The accused must know the'direct consequences of the plea of guilty; and 3. The accused must understand the nature of the charges against him, McCarty v. United States, 394 U.S. 459 22 L. Ed. 2d 418, 89 S.Ct. 1166. 4.

The Supreme Court has\_also held that a defendant is entitled to a competency hearing, and that his conviction may a,,,. 51 1 be overturned if the court knew, or should have known that the defendant was incompetent, and failed to hold a competency hear- ing, Pate v. Robinson, 383 U.S. 375 (1996). Drope v. Missouri; '420 Q.S. 162 (1975). Bouchillon v; Collins, 907 F.2d 589 (5th Cir.

1992). C. Issuance of the COA. Mr. Johnson has raised questions that are debatable among jurists of reason, and he has made an adequate showing to proceed further. (24) D. Relief is required. A conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. Where violation of Rule (11), the case should be reversed, and/or a request for a new trial should be warranted.

ISSUE NUMBER FIVE RESTATED: A Certificate of Appealability should issue because in the matter of Case No.'4:14-CV-461, defendant was prejudiced when he was convicted and sentenced on an indictment that was returned by`a grand jury whose term had expired.

On June 22,\_2015“ the case was dismissed without prejudice, when it should of been dismissed with prejudice, because prejudiced ensued. A. Standard of Review. A denial to dismiss the case with prejudice was an abuse of discretion. v B. Argument. 1. A fourteen point offense ievel was and still is being used against Mr? Johnson, after %he charge has bee% dismissed.

2. An eight (8) point offense level was and still is being used against Mr. Johnson, after the charge has been dismissed. Mr. Johnson was convicted and sentenced on an indictment which was returned by a grand jury whose term had expired.

Therefore, the indictment was void as a matter of law, and prejudice ensued when the indictment was used to convict and sentence Mr. Johnson. *United States v. Pandilidis*, 524 F.2d 644, 647 (6th Cir. 1975). Reversal is required. Mr. Johnson's Fifth (25) Amendment to the United States Constitution was violated, where he was protected by the indictment procedure, *Id.* at 648.4. §QI§: After the grand jury's investigation, the information obtained during the trial court proceedings could of been used against Mr. Johnson.

But the government decided to proceed by indictment, instead of information, and if they would of proceeded by information, no prejudice would of occurred. C. Standard of Review. Mr. Johnson adopts the standard of review for obtaining a COA and obtaining relief as set forth *supra*. D. Argument.

The case should of been dismissed with prejudice, because the prosecution violated Mr. Johnson's Fifth Amendment when he was convicted and sentenced on an indictment that did not belong to him. ISSUE\_NUMBER SIX RESTATED: 7 This matter should be remanded to the district court for a discovery hearing, Petitioner's discovery request should of been granted.

Because of the failure of the District Court to do so, petitioner is entitled to remand back to the District Court to satisfy this request. h. Standard of Review. A denial of Mr. Johnson's request for discovery for an abuse of discretion. B. Preservation of error. Section 2255(b) requires an evidentiary hearing "[u]nless (26) the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

When the allegations in the § 2255 motion is not negated by the record, the district court must hold an evidentiary hearing. Johnson's discovery request was filed in March of 2015, and was denied April 9, 2015. C. Denial of the discovery hearing was an abuse of discretion.

The Rules Governing § 2255 Cases in the United States District Court's provide that if a party obtains Leave of Court, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Habeas Corpus petitioner's may use discovery to develop facts sufficient either to require an evidentiary hearing or following "expansion of the record" to include discovered materials that may justify relief without a hearing. The ability to conduct the limited discovery that Johnson sought is especially important in order to expand the record and may yield exculpatory evidence. v In summary, where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is...entitled to relief, it is the duty of the court's to provide the necessary facilities and procedures for an adequate inquiry."

And where specific allegations before fha court show reason to believe that a petitioner may, if the facts are fully developed, be (27) able to demonstrate that he is confined illegally and is therefore entitled to relief, the discretion to grant discovery may rise to the level of a "duty." "Ordinarily, the decision to allow discovery...is left to the discretion of the district court."

However, denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim, However, where allegations of including use of false testimony and ineffective assistance are not conclusively negated by the record, "at a minimum" a should give serious consideration to holding an evidentiary hearing, Mr. Johnson made specific allegations of missing phone entries (call logs) that were not turned over to the United States Attorney's office in both the Writ and the Motion.

As seen in the merits claim above, the true order of the phone records, part's receipt, Liberty Mutual Insurance claim, police reports filed by both, the complainant and the petitioner is a lynchpin in Mr. Johnson's claim of falsified evidence. Deniedf the right to pursue this at trial, Mr. Johnson presented suffi- cient facts to pursue discovery on this issue.

As a petitioner is "entitled to careful consideration and plenary processing of his claim, including full opportunity for presentation of the rslevant facts," Mr: Johnson is entitled to a remand on this matter to further develop the record, See United States v. Weintraub, 871 F.2d 1257, 1259 (5th Cir. 1989). Gibbs v. Johnsony 154 F.3d 253, 258 (sth cir. 1998)1 Perillo v. Johnsb, 79 F.3d 441, 444S45 (5th Cir.

1996). Blackledge v. Allison, 431 U.S. 63, 82-83 (1997). (28) PRAYER Appellant request that a Certificate of Appealability be issued in all matters set forth above, the convictions be ordered to be reversed and a new trial or sentencing hearing held, or any other relief that he may be so entitled. Respectfully submitted, //j 1 (S \,;;T. 1 /r \$1, '»(. C',`~ 12 ~L»',' ':J'.L~lyhb@'V\l»'.¢'l /J:'a":`.f/Al \ Dietrick Lewis John§on, Sr. 19831-078 Beaumont FCI Complex (Med) P.O.

Box 26040 Beaumont, Texas 77720 (29) CERTIFICATE OF SERVICE I, Dietrick Lewis Johnson, Sr., hereby certify that a true and correct copy of the foregoing was sent to the Clerk of said Court, at the Fifth Circuit Court of Appeals, 600 S. Maestri Place, New Orleans, LA 70130-3408; from Beaumont FCI Complex (Med), P.O. Box 26040, Beaumont, Texas 77720, by placing the same in the institutional U.S. Postal mailing system on October 12, 2015.

Respectfully submitted, [v' ». x!. § 19831~078 Beaumont FCI Complex (Med) P.O. Box 26040 Beaumont, Texas 77720 (30)