

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

MARCUS DANIEL ALLISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001520

APPENDIX

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
APPLICANT'S EXHIBIT NO. 1 (30 PHOTOGRAPHS)**

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

- 90) Failure to investigate an alleged "Shovel" Mr. Kelly claims he saw the defendant with prior to entering the "woods", while no such "Shovel" has ever been found, or proven to ever have existed;
- 91) Failure to investigate possibility of Malicious Prosecution; Officer Misconduct; or Neglect of Duty;
- 92) Failure to investigate police Coercion/Provocation of states witness Donald Gentile;

POLICE AND LAB REPORTS

- 93) Failure to review Police Case Reports for any discrepancies or to compare the several different reports filed, which would have shown Officer's were withholding information and were not being truthful in their testimonies, and had mishandled evidence, as well as provoking the states Key Witness to say what they wanted him to say, in order to get out of felonious charges and no longer be a suspect in this case;
- 94) Failure to review Police Lab Reports, which would have provided potentially exculpatory evidence for the defense, as well as facts that would corroborate the defendant's statements, and have been adverse to the "evidence" the state introduced at trial;

SUBPOENA WITNESSES

- 95) Failure to subpoena Alibi witnesses, or other supporting witnesses which would have established the states key witness was committing perjury and had lied to the police, at the government's expense on behalf of his indigent client;

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HIRE PRIVATE INVESTIGATOR

- 96) Failure to employ an Investigator to locate, or interview witnesses, or to Motion the court to appoint an investigator;

FACTS RELATED

- 97) Failure to adequately represent client by failing to perform any independent investigations, and instead relying on the government's version of facts;

GRAND JURY RELATED

- 98) Failure to research and investigate possible fraudulent misrepresentation by the Prosecution, where the Indictments list both Grand Jury "True Bill", and "Direct" authorization for trial, when "Direct" indictments bypass presentment to the Grand Jury, and "True Bill" is presentment to the Grand Jury;
- 99) Failure to investigate the "Chain of Custody" regarding the evidence, where presentment to the Grand Jury involves retrieving it from the Sheriff's Department by signing it out, presenting it to the Grand Jury for review, and then returning it to the Sheriff's Department by signing it back in, and the evidence was never "signed out" until trial;
- 100) Failure to interview "Chris Oddis", Foreperson of the "Grand Jury" for determination of actual presentment of this case and evidence to the Grand Jury for "True Bill";
- 101) Failure to investigate whether any "witnesses" listed on the indictments, or other statements were presented to the Grand Jury for consideration;

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* Res Ipsa Loquitur *

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- 102) Failure to interview any Grand Jury members to determine if this case was presented to them for consideration, and to ensure it was done so justly and fairly;

CONSULTATION RELATED

- 103) Failure to consult with the defendant about the facts involving the Search and Seizure, and whether or not the Officer's actually had consent to search defendant's camper, as well as the property and his person, and to ensure they complied with all procedural safeguards;
- 104) Failure to consult with the defendant regarding his Alibi; Alibi witnesses; physical and technical Evidence; or his own personal knowledge of states witness, and acquaintance Donald Gentile; or any other suspects in the area;
- 105) Failure to consult with defendant regarding any pretrial investigations; pretrial research; or trial strategy;
- 106) Failure to allow defendant the opportunity to consult with co-counsel, that was brought on by original counsel two weeks before trial, after original counsel had to "hurry up" and prepare a case, due to his failure to prepare for almost two years, when defendant refused last of (4) four plea offers while continuing to maintain his Actual Innocence;

TO ADVISE DEFENDANT

- 107) Failure to advise defendant of his right to a Bench Trial as opposed to a Jury Trial, due to the Judge's legal obligation to rule on the facts, and not prejudicial theory;
- 108) Failure to advise the defendant of the Accomplice Corroboration Rule; or "Hand of One, Hand of All", under Accomplice Liability Theory;

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- 109) Failure to advise the defendant of the elements of the offense or potential defenses;
- 110) Failure to advise the defendant of desirability of the Plea Offers; discuss the strength of the governments case; or the chances of Acquittal;
- 111) Failure to advise defendant of the legal requirements necessary to establish "knowing and intelligent" Consent, to Search, to verify wether or not defendant's "Consent" was proper;
- 112) Failure to advise defendant that his pre-arrest statements to Police were inadmissable and should be excluded, due to being informed he was a suspect prior to making said statements but not read his Miranda Rights, and the Government intended to use those statements against him at trial;
- 113) Failure to advise the defendant of any Trial Strategy before proceeding with trial, when defendant wanted to assist defense counsel, tried to assist actively during trial, but counsel paid no attention to defendants aid;
- 114) Failed to advise defendant that counsel would not be providing a Defense at all; informed defendant's family and Alibi witnesses not to show up for trial; was not prepared; would not present any evidence or adverse litigation; and counsel did not follow up on any assistance the defendant provided;
- 115) Failed to advise defendant that counsel did not notify the State of any defense' Alibi Witnesses;
- 116) Failure to advise defendant that both he and his Alibi Witnesses, one of whom was present for trial despite defense counsel's poor judgment not to have them present to testify, would be able to speak on defendant's behalf;
- 117) Failure to advise defendant that counsel neglected to serve court ordered Subpoena on a defense witness;
- 118) Failed to advise defendant that counsel failed to depose or conduct any investigation or research into the states witnesses;

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- 119) Failure to advise defendant that states key witness "Donald Gentile", would testify that Mr. Gentile dropped the defendant off at his friend "Jason's" house;
- 120) Failure to advise the defendant of the context of the statements made to the Police by Mr. Gentile or Mr. Kelly, or advise of what the Police Reports stated, and not letting the defendant read any of the Discovery materials;
- 121) Failure to advise defendant of other potential suspects in the area whom had Burglary related charges;
- 122) Failure to advise defendant that "Photograph's" the Officer's took were allegedly "lost";
- 123) Failure to advise defendant that the Officer's were still in possession of defendant's Laptop;
- 124) Failure to advise defendant that he could request a "Change of Venue", or that it might be appropriate due to the circumstances;
- 125) Failure to advise defendant that Mr. Kelly alleged he was in possession of a "Shovel", which would have allowed defendant to establish evidence proving he never owned a shovel;
- 126) Failure to advise defendant of any issue's with states Evidence;
- 127) Failure to advise defendant of the change in Law regarding the Grand Larceny indictment;
- 128) Failure to advise defendant that the state had no Direct or Circumstantial Evidence establishing all of the Elements of the charges;
- 129) Failure to advise defendant that neither the Officer's nor the State could locate any "Stolen" property;
- 130) Failure to advise defendant of any Post-Trial opportunities he might have to obtain relief from Wrongful Conviction;

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TRIAL INEFFECTIVENESS

JURY SELECTION

- 131) Failure to strike juror # 26 (Kristy F. Busha), due to probability of bias, regardless of her denial of such, as her husband is a Law Enforcement Officer within the same county as alleged crime; the defendant resides in and has a criminal history within same county; and juror subject to outside influence of spouse;

VOIR DIRE

- 132) Failure to Object to Judge's refusal to ask Defense question regarding "Duke Energy" employee's, due to fact that Victim; Defendant; Officer Price; and other juror's had either worked for "Duke", were working for "Duke", or had friends or family who were; and "Duke Energy" is located in Oconee County and has major influence over "County Atmosphere";
- 133) Failure to Object to inadequacy of Voir Dire to identify Juror Prejudice, due to Juror's 2-12 not being questioned;
- 134) Failure to move the court Sequester the Jury, due to trial publicity within the county; and other possible outside influences that could taint the juries perspectives;
- 135) Failure to move the court restrain trial publicity until after the trial's conclusion, so as to ensure no outside influence upon the jury;
- 136) Failure to utilize any alternate juror's due to juror # 26 (Kristy F. Busha), being involved with a Law Enforcement Officer in Oconee County;

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OPENING ARGUMENTS

- 137) Failure to object to Prosecutor's prejudicial statement of: "There was a lot of stuff stolen. There was three pistols, there was a whole bunch of movies." [Transc. Pg.72 L.25 - Pg.73 L.2]

* This statement suggests that there were more movies involved in this case than would be presented, and therefore would only serve to further inflame the juries bias against the defendant.

- 138) Failure to object to Prosecutor's prejudicial statement of: "...some of the stuff that was stolen out of his camper was recovered from the Defendant's camper a short time later." [Transc. Pg.73 L.10-12]

* This statement is a prejudicial factual assertion that has no other purpose but to coerce the jury into believing that the items in evidence are stolen, and there is no debate about it. The prosecution is not the finder of fact but must leave that to the jury to decide.

- 139) Failure to object to Prosecutor's prejudicial statement of: "There were firearms stolen." [Transc. Pg.73 L.13]

* This statement is a factual assertion that is meant to coerce the jury into believing that there is no debate regarding any allegedly "stolen" firearms. This is for the fact finder to determine, not the prosecution. And no-one ever proved any firearms existed in the first place.

- 140) Failure to object to Prosecutor's prejudicial statements of: "I anticipate this will be a pretty quick trial." [Transc. Pg.74 L.7-8]; "We'll try to speed things up." [Transc. Pg.75 L.6], AND; "...we will try to speed things along the best we can." [Transc. Pg.75 L.10]

* These type of statements tend to provoke juries into rushing into rendering a verdict without much thought or consideration for the facts or the sufficiency of the evidence, and effectively deprive the defendant of a fair trial by an impartial jury.

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- 141) Failure of defense counsel to refrain from commenting:
 " I will do what we can to make this an expeditious effort for you." [Transc. Pg.77 L.25 - Pg.78 L.1]

* This statement is prejudicial to the defendant in that it reinforces the prosecution's previous prejudicial statements to the jury to which the intention was to coerce the jury into rushing into a verdict without much thought or consideration for the facts or the sufficiency of the evidence, and further inflames the defendant's deprivation for receiving a fair trial by an impartial jury.

- 142) Failure to reinforce or provide any supporting facts or litigation for counsel's statement of: "...it is our position that the State's evidence does not support a guilty verdict in this trial, and we believe that Mr. Allison is not guilty." [Transc. Pg.78 L.8-11]

* Defense counsel never provided the defendant with any defense at all, they simply rested the Defense' case in three minutes, without so much as an attempt to defend their client.

* In the least, counsel could have mentioned that the state failed to meet it's burden of proof in establishing all of the elements of the charges, or the element of the defendant's culpability, yet they failed to do so, but instead offered their client to the wolves with no defense.

DEFENSE/EVIDENCE

- 143) Failure to file the Alibi notice, which would have preserved defendant's right to assert Alibi defense;
- 144) Failure to investigate, prepare, and present Alibi defense, which would have shown that defendant was in different city all day, and during the time the state's key witness Donald Gentile claims to have arrived at defendant's camper, thus adversely affecting both the State's, and Mr. Gentile's implications that the defendant burglarized Mr. Kelly's camper before Mr. Gentile arrived;

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- 145) Failure to investigate several Alibi witnesses, that live in the neighborhood of defendant's mother, which is in different city than alleged crime, who could have placed defendant there all day and evening, and would have corroborated defendant's Alibi, and cast doubt on the prosecution's key witness' testimony;
 - 146) Failure to call defendant's Mother and Stepfather, as Alibi witnesses to corroborate defendant's assertion that he was with them all day and evening, and his Stepfather had to pick him up, and take him back due to the defendant being unable to drive under a suspended license;
 - 147) Failure to investigate or utilize any alternative defense for the best interest of his client, other than no defense at all;
 - 148) Failure to move the court dismiss the case in its entirety or exclude both relevant and irrelevant evidence due to both the Police' failure to preserve evidence (Photographs; Crowbar; Gloves; House on Haunted Hill, DVD; Ammo Box; and other DVD's), and the Governments failure to preserve evidence (Same);
 - 149) Failure to move the court exclude State's key witness Donald Gentile's testimony and pretrial statements, or dismiss the witness entirely due to evidence of witness coercion and/or provocation, where said witness admitted he was coerced and/or provoked to write a statement and testify against the defendant, by the "Sheriff", during his trial testimony;
 - 150) Failure to offer any Evidence, in defense of his client, after forcing defendant to investigate, gather his own evidence, and present it to defense counsel; or offer any evidence after the State rested it's case; or after defense' Motion for Directed Verdict was denied;
 - 151) Failing to prepare any evidence of 3rd Party culpability, other than Bare Suspicion, when counsel's only intended defense was for the "3rd Party Guilt" argument, and Judge's prejudicial introduction of "Hand of One, Hand of All" charge to Jury effectively removed the "Burden of Proof" from the State and left the defendant with the Burden to prove his innocence;

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- 152) Failure to properly and timely raise Corpus Delicti issue during trial based on a lack of corroborating evidence which would have placed doubt in the minds of the jury;
- 153) Failure to offer any Evidence that defendant previously owned two SKS Rifles, which used the caliber 7.62x39 HP; still had leftover rounds; purchased many "half case" box's from a business owner in town on occasion; and had proof of it all, thereby making it very likely the defendant would have an "Ammo Box", of his own, as described by Mr. Kelly;
- 154) Failure to offer any Evidence that the defendant drank Whiskey; had different types of left-over bottles at his residence; and visited the Liquor Store just up the road on many occasions; drank "Evan Williams" Whiskey regularly; and had friends that also drank the same, with defendant, before trial, and could testify to the same;
- 155) Failure to offer any Evidence that the defendant had more than (250) two-hundred and fifty, plus, DVD's at his residence before, during and after the alleged "break-in", and some were in fact scattered around his camper; and had exchanged DVD's with friends, family, and Mr. Kelly, making it likely that the defendant would legally be in possession of DVD's that were either not his personally, but borrowed, or were his, but just the same title;
- 156) Failure to offer Evidence that defendant had previously owned many different types of Firearms, Legally, that were similar in size, shape, and color, to what is alleged were "stolen", and Mr. Gentile has previously viewed them month's before this alleged "break-in", thereby placing the erroneous thought that it was at this time he saw them, into Mr. Gentile's liquor induced and highly intoxicated state of mind; coupled with him being charged with his felonious crimes, and considered a suspect in this case; while being offered bribes, and fraudulent assertions by the Sheriff's Department;
- 157) Failure to offer Evidence that the Police were currently investigating other people in the area that were suspects in connection with several other burglaries, and could be involved with this case;

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- 158) Failure to offer Evidence that defendant had his own Laptop, with Broadband service, and would have no need to steal one;
 - 159) Failure to offer Evidence that defendant had (3) three of his own TV's at his residence and would have no need for someone else's;
 - 160) Failure to offer any Evidence that because the defendant was between jobs, his family was paying his bills for him, and helping him to get back "onto his feet", until he could get a job and pay them back, therefore he had no need or desire to "steal" from anyone;
 - 161) Failure to offer into Evidence the Police Case Report that show's Cpl. Price' statement that he attempted to "Dust for Print's"; where at trial the Officer's testified that no-one "Dusted for Print's", and this would have given the Jury a reasonable Doubt that the Officer's were being truthful in their allegations;
 - 162) Failure to offer any Evidence that, if the prosecution's theory that "Black Gloves" were used were true, there would be no "Partial or Smugged" prints, because the gloves would not leave any "Partial or Smugged" prints;
 - 163) Failure to retain an independent Fingerprint Expert to compare the "Partial and Smugged" prints with that of the Defendant, Mr. Kelly, Officer's, and Mr. Gentile, or to run them for identification with S.L.E.D. or the F.B.I.;
 - 164) Failure to argue to the Jury that if the Defendant had been "in and out" of the woods "several times", as both the Officer's and Mr. Kelly testified to, then the defendant's shoes should have been muddy, and there should have been muddy shoe prints everywhere, due to the "heavy rainfall" all day; yet there were not;
 - 165) Failure to argue to the Jury that the defendant was heavily intoxicated and was in no way able to "Break-in" to anything or "steal" the items in question, without leaving some trace of him having been there, or have the ability to get rid of the alleged "stolen" items where they would never be found again;

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- 166) Failure to argue Lack of Intent; Lack of Motive; or any other argument to show the Prosecution's case lack's standing and merit due to their inability to prove any element of the offense's charged;
 - 167) Failure to move for instruction on Lesser Included Offense that might have been in clients best interest, where the Prosecution failed to provide the lesser instruction;
 - 168) Failure to confront Mr. Kelly with his previous testimony that, "I knew he was part Mexican.", when this is not only untrue, but Mr. Kelly had no way of determining this because the defendant is obviously Caucasian; never told Mr. Kelly about his heritage; and there was nothing to suggest it;
 - 169) Failure to present a defense of Police Fabrication, due to the obvious inconsistencies with their Reports; Testimony; and the issue's with mishandling the "Evidence", and Coercion/Provocation of Mr. Gentile;
 - 170) Failure to conduct Scientific testing of Gloves to determine if clients assertion that they were not his, but he believed they belonged to one of the Officer's, was true, because this information could have been used to impeach the Officer and have a Mistrial declared;

FAILURE TO OBJECT

- 171) Failure to object to Prejudicial remarks made by Prosecutor during Opening Arguments, where said statements inflamed the minds of the Jury to already consider the defendant guilty and a bad person, thus more likely to have committed the crime, due to the prosecution asserting facts about the "Evidence", that a Jury had yet to hear or consider;
- 172) Failure to object to the introduction of both relevant and irrelevant "Evidence", due to the Officer's failure to preserve and maintain the integrity of the same;

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- 173) Failure to object to Officer Testimony regarding their "Observations", due to the officer's alleged "Loss" of Photograph's they took of said evidence, where the Defense was left with no way to investigate their allegations, and thus the Jury was left with a "one-sided" story, to consider the defendant's fate with only the state's version of events;
 - 174) Failure to object to Officer Testimony regarding the Defendant allegedly giving "Consent to Search", due to the state failing to establish procedural safeguards (eg., Signed Consent to Search Form; or Defendant Testimony affirming the same), where defendant did not give consent to search his camper, thus the "Evidence" admitted at trial was illegally obtained and inadmissible;
 - 175) Failing to object to allowing Officer Testimony at trial, because the officer's never appeared at defendant's Preliminary Hearing, thus violating the "Confrontation Clause"; Defense Counsel failed to depose them before trial; and as a result, the defendant had no way to know what the officer's were going to testify to, and could not build a defense to the same;
 - 176) Failure to object to other Prejudicial statements made by the Officer's, as described in accompanying documents, "TRIAL TESTIMONY, JARRET PRICE "OFC."; and, CASEY BOWLING "OFC." ";
 - 177) Failure to object to, and/or correct, prejudicial statements by Mr. Kelly, as described in accompanying documents, "TRIAL TESTIMONY, BRUCE KELLY";
 - 178) Failure to object to, and/or correct, prejudicial statements by Mr. Gentile, as described in accompanying documents, "TRIAL TESTIMONY, DONALD GENTILE "RAGS" ";
 - 179) Failure to object to prejudicial statements by Prosecutor during trial, as described in accompanying documents, "PREJUDICIAL STATEMENTS, PROSECUTION";
 - 180) Failure to object to prejudicial statements by Prosecutor during Closing Arguments, where said statements served to paint the defendant in a negative light; vouch for states key witness; and utilize two separate and Conflicting Theories, while re-asserting theories regarding "evidence" as fact;

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

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- 181) Failure to object to admission of state's key witness' statements into evidence, which was not harmless error, due to said testimony providing necessary elements of offense, and being coerced/provoked under fraudulent misrepresentation by the Officer's, as well as opportunity to remove himself as a suspect;
 - 182) Failure to object to the Prosecution's failure to produce Investigator Sgt. David B. Smith as a witness, due to Sgt. Smith being the Lead Investigator; acquiring the Search Warrants; supervising the Search; signing the Affidavitt for Search Warrant; and confirming/signing the Inventory of Property Taken pursuant to the Warrant; and filing his own Report;
 - 183) Failure to object to the Prosecution's failure to produce Justin Ward as a witness, due to Mr. Ward being listed on the Indictments as a Grand Jury Witness for the State;
 - 184) Failure to make specific objections that were requested by the defendant, as written notes by the defendant and located in the Defense File;
 - 185) Failure to object to Prosecution's and Officer's use of defendant's statements at scene of alleged crime, which violates defendant's Constitutional Right against self incrimination;
 - 186) Failure to object to Judge's prejudicial remark during Charge to Jury of, "The Defendant's failure to testify ..." [Transc. Pg.240 L.12-14], and his continuous remarks that "...the Defendant did not testify..." [Transc. Pg. 240 L. 8-21], which seeded the minds of the Jury to consider that the defendant must have something to hide;
 - 187) Failure to object to Judge's erroneous ruling that he would only allow the defense argument of "3rd Party Guilt" if the Jury was charged with "Hand of One" theory of Accomplice Liability;
 - 188) Failure to object to Judge's ruling that he would allow the Officer's to discuss the Crowbar being an "exact match" due to the prejudice nature of the officer's; that there was never an expert witness to testify to this assertion; there was never an expert that tested this theory; and the defense was unable to investigate this assertion/theory due to mishandling the evidence, and loosing Photographs;

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

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- 189) Failure to object to Judge allowing Sgt. Casey Bowling to sit-in for the entire trial, and have the ability to hear other witness testimony before he testified, which circumvented the Defense' Motion for Sequestration of the Witnesses, and allowed Sgt. Bowling to alter his own version of the facts, for a more effective and unfair prosecution;
 - 190) Failure to object and move for Mistrial when state's witness Donald Gentile committed Perjury, and/or after admitting he was coerced/provoked into writing statements and testifying by the Sheriff;
 - 191) Failure to object to Prosecution failing to include J. Zamberlin as a witness, where Mr. Zamberlin filed a Report; served defendant with Indictments; and works for the Prosecutor's Office as an Investigator;
 - 192) Failure to object and move for Mistrial due to the Prosecution's failure to establish, or even discuss, all of the Elements of the Offenses Charged, or to meet it's Burden of Proof of "Beyond a Reasonable Doubt";
 - 193) Failure to object to Prosecutor's allusion in Closing Argument that "The guy had no means to acquire new pistols and new laptops and new TVs without stealing them.", where said prejudicial remarks inflamed the minds of the Jury and was unfair;[Transc. Pg.208 L.18-20];

MOVE FOR A MISTRIAL

- 194) Failure to move for a Mistrial based on Prosecutor's improper comment's regarding Defendant's financial and employment status, and then commenting that, "The guy had no means to acquire new pistols and new laptops and new TVs without stealing them." [Transc. Pg. 208 L.18-20];
- 195) Failure to move for a Mistrial over Mr. Gentile's prejudicial testimony, that deprived Defendant of a fair trial;

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

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- 196) Failure to move for a Mistrial due to highly prejudicial Evidence being introduced at trial;
 - 197) Failure to move for a Mistrial due to the Defense being denied the right to a Fair Trial when the Judge included the Jury charge of "Hand of One", where said charge relieved the state of it's "Burden of Proof", and placed the Burden on the Defendant to prove his innocence;
 - 198) Failure to move for a Mistrial after the state rests it's case, and after the denial of a Directed Verdict, because the state failed to establish all the elements of the offense's charged;
 - 199) Failure to move for a Mistrial when Officer's were allowed to discuss their "Observation's" regarding the "Evidence" where, without the photograph's, the defense was left without an opportunity to present any mitigating and adverse evidence, and without the opportunity to mount a successful defense;
 - 200) Failure to move for a Mistrial due to both Officer and Prosecutorial Misconduct, where the officer's mishandled, tampered with, and lost evidence; and the prosecution withheld and misrepresented evidence, as well as allowing a dishonest and unreliable witness to testify on the state's behalf;
 - 201) Failure to move for a Mistrial after both the State and Defense rest their case's, where jury was left to consider defendant's fate with only the State's version of events; the State was relieved of their "Burden of Proof"; the "Burden of Proof" was redirected to the Defendant; the state failed to establish all of the Elements of the charge's, or the element alleging defendant committed the crimes; there is no evidence that either Mr. Gentile or the Defendant committed the crimes; and there is no evidence establishing a common plan, scheme, or design between the two for the commission of some illegal and/or overt act;

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

TO PRESERVE ERROR

- 202) Failure to preserve error of Judge's denial of Motion for Directed Verdict, where said error could have been ruled upon, by the Court of Appeals, under Direct Appeal;
- 203) Failure to preserve error of Judge allowing the Officer's to discuss prejudicial "evidence", after the establishment of their "loss" of Photograph's, that would have been the only way the Defense could have at an opportunity for any meaningful defense, or adverse litigation of the same;
- 204) Failure to file Suppression Motions and preserve issue's for Direct Appeal;
- 205) Failure to argue and preserve for appeal, any violation of the Defendant's Federal and State Constitutional Rights, and/or Federal and State Law;

TO CONSULT WITH DEFENDANT

- 206) Failure to consult with defendant before trial, regarding Trial Strategy, where defendant had knowledge of "Evidence", States Witness, facts of case, and was willing and desired to help;
- 207) Failure to consult with defendant during trial, due to the complexity of the case and defendant's knowledge of the documentary and physical Evidence, as well as the witnesses; and defendant took notes and made suggestions to counsel during trial, and counsel disregarded defendant's notes and suggestions without question;

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

JURY MISCONDUCT

- 208) Although I believe that the Jury had been tampered with, I have no way to prove this theory without being able to question all the Juror's. And for that to happen, I need an outside source, that has my best interest in mind, and whom is determined to find out the truth.

* The fact that Juror Busha's husband is Law Enforcement within the County, to where almost everyone knows me, and where I have a Criminal Record, seem's to scream Juror Bias. I believe it may be in part to the outside influence of her husband, or from other Juror's influenced by the Prosecution in some way.

WITNESS RELATED

- 209) Failure to investigate and call (2) two Alibi witnesses, (4) four evidentiary witnesses, and serve a court authorized Subpoena, which could have provided beneficial testimony to defendant that would have effectively defeated the essential elements of the state's Burglary and Grand Larceny charges;
- 210) Failure to question Investigator, whom had previously obtained a conflicting and very different story from the State's Key Witness, that testified at defendant's trial;
- 211) Failure to give Alibi Notice and disclose Alibi Witnesses and Locations, which would have corroborated defendant's version of events, and cast doubt on the prosecution's key witness Testimony, and the Elements of the charges;
- 212) Failure to investigate or attempt to locate potential Alibi witnesses, when defendant provided counsel with their names and locations, which would have supported counsel's defense of misidentification;

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- 213) Failure to use state's witness' inconsistent identification testimony, written statements, and verbal statement's to police, or his failure to recall an event;
 - 214) Failure to interview Police Officer's involved in the questioning of defendant and his search, arrest and prosecution;
 - 215) Failure to interview, prepare and produce witnesses at trial that would testify to defendant's character, which would have placed reasonable doubt in the minds of the Jury as to his Intent, Motive and capabilities;

EXPERT WITNESSES

- 216) Failure to use government funds available to hire an Expert Witness for his Indigent Defendant, which could have tested and/or reviewed state's Evidence to show prejudice and multiple error's, where such expert testimony would have placed a reasonable doubt in the minds of the jury;
- 217) Failure to hire Expert to DNA test the "Black Gloves", which were entered by the state to imply the reason for finding no usable prints; where defendant has never owned said gloves, and his DNA would not be found on them;
- 218) Failure to consult with a Fingerprint Expert to rebut the state's assertion that no usable prints were found, where defendant has always claimed the "Evidence" in question was his and only his, and Mr. Kelly's prints would not have been found; unfortunately however, the "evidence" was allowed to be handled by every state witness at trial, as well as the jury, without gloves, and outside of evidence bags, destroying any opportunity defendant had at proving this;
- 219) Failure to consult with any Forensic Experts to rebut the state's allegations regarding the defendant's residence or the "evidence";

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IMPEACHMENT RELATED

- 220) Failure to impeach state's witness Jarret Price, where the opportunity was available and doing so would have placed doubt in the minds of the Jury as to the believability of his allegations;
- 221) Failure to impeach state's witness Sgt. Casey Bowling, where opportunities were available, and doing so would have placed doubt in the Officer's truthfulness;
- 222) Failure to adequately proffer impeaching material from state's key witness Donald Gentile, where the witness was clearly being deceitful and perjurious on multiple points of his testimony;
- 223) Failure to impeach Mr. Kelly "victim", regarding his assertion that he knew defendant was part Mexican, and other erroneous facts, where said impeachment would have shown the Jury that the "victim" himself was unclear about facts concerning the defendant, and would likely have placed doubt in the minds of the Jury as to Mr. Kelly's assertions;
- 224) Failure to object to prosecutor using defendant's Post-Arrest statement's to impeach him, during Direct Examination of Officer's; and Closing Arguments to Jury;

CROSS-EXAMINATION

- 225) Failure to properly and adequately Cross-Examine state witness's, or re-cross as necessary;
- 226) Failure to object to Judge improperly restricting counsel's examination of a state witness, by telling counsel he "could have went into that on Re-Cross", yet never allowed him to do so; and counsel never requested a re-cross;

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- 227) Failure to elicit more impeaching testimony from states witness Donald Gentile regarding any "deal" or "understanding" between the two, and more testimony regarding the "Sheriff's" misrepresentation of alleged statements from the defendant, which coerced/provoked Mr. Gentile into writing one, and testifying;
- 228) Failure to refrain from accidentally or intentionally "Coaching" Mr. Gentile's testimony to conform with that of his written statements to police, where his verbal statements to police were different from both written and trial testimony;
- 229) Failure to object to any and/or all instance's of the Prosecutor's illegal Coaching of state's witnesses to conform with or supplement the testimony of other witnesses;

TESTIFYING RELATED

- 230) Failure to object to Judge's prejudicial statement during Charge to Jury, of "...the defendant's failure to testify...";
- 231) Failure to refrain from coercing/provoking defendant not to testify, by telling him "If you testify, they'll use your criminal history to make you look bad to the jury, and they'll convict you.", which is why the defendant did not testify, but wanted to before;
- 232) Failure to object and request a Mistrial, when state's witness Donald Gentile committed Perjury during his testimony, and the prosecution allowed it and tried to conform it or supplement it with other witness testimony, where said testimony differed from that of his verbal statements to police, and his sworn voluntary written statement;

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CORROBORATING EVIDENCE

- 233) Failure to employ an Investigator to locate and interview witnesses to corroborate defendant's assertion's;
- 234) Failure to subpoena any witnesses that would have substantially corroborated defendant's assertions;
- 235) Failure to object to state's lack of credible corroborating evidence relied upon to show any of the elements of the charges;
- 236) Failure to utilize any of the physical, technical, or witness related evidence, that defendant provided, which would have corroborated defendant's assertions;
- 237) Failure to object to any of the prejudicial evidence the state relied upon to corroborate it's own witnesses testimonies, or it's own theories;

SEQUESTRATION OF WITNESS RULE

- 238) Failure to object to the prosecution's violation of the sequestration rule during trial, where the state asserted before the court that Sgt. Casey Bowling was the Lead Investigator, and the state requested Sgt. Bowling to stay in the courtroom while all witnesses testified and for the entirety of trial, and Sgt. Bowling was a state "identification witness", while, in fact, Inv. Sgt. David B. Smith was actually the Lead Investigator over this case; as indicated on the "Affidavit for Search Warrant", "Search Warrant", "Inventory for Search Warrant", and his own "Case Report";

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TO CORRECT FALSE OR MISLEADING TESTIMONY

- 239) Failure to move to correct testimony, which he knew, or reasonably should have known, was false or misleading, where said testimony was prejudice against the defendant and provided a fundamentally unfair trial;

PROVOKED ERRORS

- 240) Failure to "speak-up" or object at certain times when errors were made by the Judge and Prosecutor, instead of remaining silent, thereby provoking errors which caused or contributed to defendant's unfair and highly prejudiced trial;

TO DEVELOP FACTS

- 241) Failure to develop evidence of defendant's innocence, through any evidence that defendant provided, or counsel's own evidence, that would have cast a reasonable doubt about defendant's guilt;
- 242) Failure to develop facts or other evidence of Misconduct on the parts of the Officer's or the Prosecution, that would have established the disregard for proper criminal procedures and the defendant's constitutional rights; where the development of such would have established a fundamentally unfair trial, and would have been grounds for a mistrial;
- 243) Failure to develop evidence of "3rd Party Guilt", that would be sufficient enough to prove 3rd parties culpability and remove the state's allegations of culpability from the defendant;

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**TO SUBJECT PROSECUTION'S CASE TO
MEANINGFUL ADVERSE TESTING PROCESS**

- 244) Failure to subject prosecution's case to adversarial testing process by failing to prepare for trial, having no focused defense strategy, failing to call any witnesses, and failing to oppose government's motion for "Hand of One" charge to jury;
- 245) Failure to hold the government to the "Burden of Proof", of establishing all the elements of the charges, and such performance undermined the the proper functioning of the adversarial process, which cannot be relied upon as having produced a just result;
- 246) Failure to provide effective performance due to counsel abandoning the required duty of loyalty to his client by not simply making poor strategic or tactical choices, but acting with reckless disregard for his client's best interest, and apparently with the intention to weaken his client's case;

INSUFFICIENCY OF THE EVIDENCE

- 247) Failure to challenge the sufficiency of the evidence, at the end of trial, and move for dismissal based upon insufficient evidence, due to the absence of proof of essential elements of the charges, thereby violating Due Process, providing an unfair trial, and undermining confidence in the verdict;
- 248) Appellate counsel's failure to raise insufficiency of the evidence violate's Due Process where any strategy not to do so undermines confidence in counsel's performance;

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CLOSING ARGUMENTS

- 249) Failure to object to prosecutor's prejudicial statements about people "doing burglaries", the defendant having "...no means to acquire new pistols ... without stealing them.", the Photo's being "...damaging to the defendant..." "...the only ones found in his hidden cubbyhole...", "...he got ride of it..", "...he changed his story...", as well as other's while vouching for and placing Mr. Genitle's credibility above the defendant's;
- 250) Failure to address the only aspects of trial that mattered while focusing on things that did not, and mentioning details that might have hurt his client, while there was no overwhelming evidence of culpability;
- 251) Failure to argue the "Hand of One" charge, that would provide the jury with knowledge of the requirement of a common plan, scheme or design, and that there was none;
- 252) Failure to present a coherent argument to the Judge and Jury based on Police Fabrication, where defense is entitled to present evidence, without having reserved the right to do so, after denied Directed Verdict; or object to prosecution trying to prove guilt by association;

JURY INSTRUCTIONS

- 253) Failure to object to the instruction of "Hand of One", or in the least, request an additional "limiting" instruction, or an instruction on the prosecution's key witnesses testimony to be scrutinized with caution and suspicion, or that a conviction cannot be had upon the testimony of an "accomplice" unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense;

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- 254) Failure to request Jury Charge informing the Jury that the Indictments require the defendant to be the Principal Offender, while the "Hand of One" instruction only requires him to be an "Agent/Accomplice";
 - 255) Failure to request a jury instruction that defined all predicate elements of the charges, so it could not convict unless it first found defendant guilty of all elements, and "Hand of One" was not an element of the charges;
 - 256) Failure to object to "Hand of One" instruction due to the instruction's Constructive Amendment of the Indictments that created Fatal Variance and rendered "3rd Party" defense meaningless;
 - 257) Failure to object to unconstitutional jury instruction of "Hand of One" that shifted the "Burden of Proof" onto the defendant, which could not be deemed strategic, and prejudiced the outcome of trial;
 - 258) Failure to request Cautionary Instruction about Law Enforcement Agent's dual roles in testifying both as Fact and Expert witnesses;
 - 259) Failure to request instruction for a Lesser Included Offense due to the inability to prove the Elements and due to the serious nature of the offense, and the amount of time involved;
 - 260) Failure to request a Limiting Instruction where the prosecution presented highly prejudicial untrue testimony that the defendant "changed his story several times", which produced the defendant as dishonest;
 - 261) Failure to request instruction that a state's witness' credibility may be attacked by the use of prior inconsistent statements;
 - 262) Failure to request instruction that defendant is presumed to be innocent and the Burden of Proof "Beyond a Reasonable Doubt" is on the state to prove;

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- 263) Failure to request an expanded instruction on "Beyond a Reasonable Doubt", that would describe "beyond a reasonable doubt of every fact and element necessary to constitute the crime's with which he is charged";
- 264) Failure to object and raise issue that the instruction on reasonable doubt is deficient;

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SENTENCING INEFFECTIVENESS

TO INVESTIGATE, PRESENT EVIDENCE
OR CALL WITNESSES IN SUPPORT

- 265) Failure to investigate defendant's Work Ethic, Job Experience, Educational Background, Military Background, History for Volunteer Work, Donation's (Blood; Plasma; and Monetary), defendant's Character and Moral Values, or other positive Traits or Contributions;
- 266) Failure to present Mitigating Evidence of No Prior Arrest's or Conviction's, or of defendant's Cooperation, and several attempts to Help, or that defendant himself was burglarized in the past and his own firearms were taken, hence, the reason he diligently tried to help;
- 267) Failure to contact any of defendant's Family or Friends that were more than willing to speak on his behalf and support him;

TO OBJECT

- 268) Failure to object to prosecutor erroneously informing court that defendant had a prior conviction for Burglary in Anderson County, where defendant did not, or pending burglary charges in Anderson, and "conviction's" for shoplifting;
- 269) Failure to object to Judge denying disclosure of Presentence Report to defense as requested, and within (10) ten day minimum, as mandated by statute;

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- 270) Failure to object to penal sanction of Restitution that was never charged in the Indictment, nor proven "Beyond a Reasonable Doubt" by the government as required by Booker.
- 271) Failure to object to sentence of (25) twenty-five years where minimum was (15) fifteen, and the Evidence was insufficient to enhance base offense level where no weapons or other alleged "stolen" items were ever located, nor proven to ever exist;
- 272) Failure to object to states introduction of Misdemeanor DUI, as an opportunity to gain sentence enhancement, under the guise of informing the court of defendant's Probation;
- 273) Failure to object to the introduction and use of, defendant's prior conviction for "Shoplifting", to increase the sentence, where the Jury had not had the opportunity to hear evidence regarding said conviction;
- 274) Failure to make any effort to contradict the prosecution's case, or to present mitigating factors, thus, leaving defendant without a defense at sentencing or an opportunity to argue for a lessor sentence;
- 275) Failure to file Notice of Appeal and request Bond until final determination of Appeal;

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POST-TRIAL INEFFECTIVENESS

POST-TRIAL MOTIONS

- 276) Failure to file Motion For New Trial, where there was actual prejudice to the defendant;
- 278) Failure to file Motion for Dismissal based upon Insufficient Evidence;
- 279) Failure to file Motion for Post-Verdict Judgment of Acquittal or a Modification of the Verdict for a conviction on a Lesser charge;

FAILED TO ADVISE

- 280) Failure to advise defendant of Appellate time limitation's, or of Appellate Procedures;
- 281) Failure to advise defendant of Post-Trial options regarding Motions for Sentence Reduction; Rehearing; New Trial; etc...
- 282) Failure to advise defendant on ways to attack his conviction and sentence, after defendant's Mother requested to know several times, at defendant's request, pursuant to South Carolina Rules governing "Continuous Representation";
- 283) Failure to advise defendant of option of filing Writ Of Error Coram Nobis, or other available Writ's;

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MISCELLANEOUS INEFFECTIVENESS

CONFLICT OF INTEREST

- 284) Failure to recuse himself, or notify the court, or his client, that he was simultaneously representing both the Defendant and the States Key Witness, in two separate case's that involved the same subject matter of "dishonesty" and "theft"; and has continuously represented said witness several times after defendant's conviction; and states witness was a suspect in defendant's case;

CAUSE FOR PROCEDURAL DEFAULT

Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 297 (1986)

The Supreme Court observed that "cause" would be established by a showing that: (1) the factual or legal basis for a claim was not reasonably available to counsel; (2) that some interference by officials made compliance impracticable; or (3) the procedural default was the result of constitutionally ineffective assistance.

- 285) Failure to object to expert testimony by Sgt. Bowling when describing his "observation" that the crowbar was "...an exact match.";
- 286) Failure to object to erroneous jury instruction that expanded elements of crime;

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- 287) Failure to object to constructive amendment of Indictment establishing defendant as both Accessory and Principal, where indictments did not charge defendant as an accessory;
- 288) Failure to object to change in law of Grand Larceny, which would have changed the outcome of trial;
- 289) Failure to move to correct testimony, which he knew, or reasonably should have known, was false or misleading;

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LEGAL STANDARDS/REVIEWS FOR INEFFECTIVENESS CLAIMS

INEFFECTIVENESS V. STRATEGY DECISIONS

- * Berryman v. Morton, 100 F.3d 1089 at 1096 (3rd Cir. 1996)

For counsel to rest on "Strategy", necessitates the existence of one. This case lacked strategy. Instead, it was a "useless charade." (citing United States v. Cronin, 466 U.S. 648, n.19, 104 S.Ct. 2039, n.19, 80 L.Ed.2d 657 (1984)).

The question of whether counsel's strategy was reasonable goes directly to the performance prong of Strickland test, thus requiring the application of legal principles, and de novo review.

- * Freeman v. Class, 95 F.3d 639 (8th Cir. 1996)

There is no reasonable trial strategy for counsel's failure to request the cautionary accomplice testimony instruction and corroboration instruction.

- * De Luca v. Lord, 77 F.3d 578 (3d Cir. 1996)

Trial counsel's ineffective assistance of counsel claim will stand, even if a well intentioned lawyer earnestly pursues a strategy that is objectively unreasonable under professional norm and results in prejudice to defendant.

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- * Jones v. Scotts, 59 F.3d 143 (10th Cir. 1995)

A criminal defendant can overcome trial counsel's strategy and prevail on an ineffective assistance of counsel claim when he prove's trial counsel's strategy would not be considered sound.

- * Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994)

Failure to investigate potential Alibi witnesses was not a "strategic choice" that precludes claims of ineffective assistance.

- * Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993)

Trial counsel's failure to pursue speedy trial claim may constitute ineffective assistance of counsel and has no strategic value.

- * Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988)

Defense counsel's performance was not only ineffective, but counsel abandoned the required duty of loyalty to his client; counsel did not simply make poor strategic or tactical choices; he acted with reckless disregard for his client's best interest and apparently with the intention to weaken his client's case.

- * U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989)

The Gray court found where the deficiencies in counsel's performance are severe and cannot be characterized as a strategic judgment, the first prong of Strickland is met.

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- * Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987)

Trial counsel's lack of preparation and research cannot be considered the result of deliberate, informed trial strategy.

- * Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985)

Trial counsel's failure to object to highly inflammatory inadmissible evidence has no strategic value, and failure to request a limiting instruction constitutes ineffective assistance of counsel.

- * Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984)

Trial counsel's tactics can constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance or the prevailing professional norms.

- * Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984)

Trial counsel cannot stand behind the shield of trial strategy after failing to interview readily available witnesses whose testimony would have been noncumulative and potentially aided the defense.

- * U.S. v. Cronin, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984)

Trial counsel's failure to subject the prosecution's case to a meaningful adversary testing process may constitute a denial of due process and establish a per se violation of defendant's right to effective assistance of counsel.

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COUNSEL'S CUMULATIVE ERRORS

- * Taylor v. Kentucky, 436 U.S. 478, n.15, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)

Cumulative errors, while individually harmless, when considered together, can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law.

- * Washington v. Smith, 48 F.Supp.2d 1149 (E.D. Wis. 1999)

Counsel's cumulative error's and omissions by failing to investigate exculpatory information in police report, interview alibi witnesses, and subpoena alibi witnesses deprived the defendant to his due process right to a fair trial and constitutes ineffective assistance of counsel.

- * U.S. v. Tory, 52 F.3d 207 (9th Cir. 1995)

The Ninth Circuit found the cumulative effect of the errors deprived the defendant of a fair trial. This case was not an ineffective assistance of counsel claim; rather, the trial court's action hindered the defendant's defense.

- * Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994)

Defense counsel's cumulative errors and omissions during penalty phase constituted ineffective assistance of counsel.

- * Demarest v. Price, 905 F.Supp. 1432 (D.Col. 1995)

Trial counsel's cumulative errors and omissions constituted ineffective assistance of counsel and warranted a new trial.

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DENIAL OF COUNSEL

- * Williams v. Taylor, 529 U.S. 362, 375, 20, S.Ct. 1495,
146 L.Ed.2d 389 (2000)

The deprivation of the right to effective assistance of counsel is a structural error, which harmless error review does not apply.

- * Penson v. Ohio, 488 U.S. 75, 102 L.Ed.2d 300, 109 S.Ct. 346 (1988)

The Supreme Court found that the lower court of appeals erred allowing counsel to withdraw as appellate counsel after it determined that there were several arguable claims of error and, that such a complete denial of counsel on appeal can never be harmless error and prejudice is automatically presumed.

COURT PROVOKED COUNSEL'S ERRORS

- * Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985)

Where trial counsel provoked into acts inconsistent with his duties of loyalty to his client, by the trial court, such interference affects the fairness of the trial and prejudice is presumed. The Strickland standards have no applicability.

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FUNDAMENTAL UNFAIRNESS

- * Strickland v. Washington, 466 U.S. 668, 695-96, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

The ultimate focus of inquiry in challenging ineffective assistance of counsel claims goes to the fundamental fairness of the proceedings being challenged and whether counsel's errors are the type that caused a breakdown in the adversarial proceeding which seriously undermines the validity of the verdict, making the adversarial process itself presumptively unreliable.

- * Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985)

A criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

- * Estelle v. Williams, 425 U.S. 501, 505-06, 96 S.Ct. 1691, 1693-94, 48 L.Ed.2d 126 (1976)

Some courtroom practices may deprive a defendant of his Sixth Amendment Right to a fair trial, which implicates the due process clause.

- * Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980)

A criminal defendant is guaranteed, through the due process clause, a trial free from fundamental unfairness, including any unfairness which stems from blatantly incompetent counsel.

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AMERICAN BAR ASSOCIATION STANDARDS

- * U.S. V. Boigerain, 155 F.3d 1183 (10th Cir. 1998)

The American Bar Association Standards is a guide in determining reasonable professional behavior. See Strickland, 466 U.S. at 668, 104 S.Ct. 2052.

Strickland PREJUDICE PRONG STANDARD REQUIRES PROOF
BY PREPONDERANCE OF EVIDENCE

- * Weekly v. Jones, 56 F.3d 889 (8th Cir. 1995)

The court found a "defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland and that the reasonable probability standard is not a sufficiency of evidence test." (citing) Kyles v. Whitley, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995). Id. at 56 F.3d at 897.

- * James v. Cain, 56 F.3d 662 (5th Cir. 1995)

Proof of ineffective assistance of counsel is by the preponderance of evidence. See also Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983)

- * Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990)

The Bouchillon Court found the standard prejudice prong of ineffective assistance of counsel was a "reasonable probability" that he was incompetent "sufficient to undermine confidence in outcome." Strickland at 694, 104 S.Ct. at 2068. This is a lower burden of proof than the preponderance standard.

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* Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990)

This case stands for the proposition once ineffective assistance of counsel is established, then the decision to overturn the conviction goes to the prejudiced prong of Strickland. If the defendant was actually or constructively denied assistance of counsel, the prejudice prong of Strickland is not required to be shown and the conviction must be set-aside.

RULES OF LAW AND PROCEDURE* Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983)

An attorney's performance is judged on the basis of the facts known to him, and the rule's of law and procedure, he is held to know, as an attorney representing defendant's in criminal proceedings. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself.

STANDARDS FOR CLAIMS RELATED TO SENTENCING* U.S. v. Acklen, 47 F.3d 739 (5th Cir. 1995)

A criminal defendant can meet the prejudice prong of Strickland in non-capital sentencing cases, by showing he would have received a less harsh sentence absent counsel's unprofessional errors or omissions.

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SINGLE ERROR OF COUNSEL

- * Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 391, 106 S.Ct. 2639 (1986)

A single error of counsel may constitute ineffective assistance of counsel.

- * Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979)

Trial counsel's single error, failure to move for a mistrial, constitutes ineffective assistance where that error allowed prejudicial evidence in that would not have been admissible.

MOTION FOR NEW TRIAL OR MOTION TO VACATE

- * Duarte v. U.S., 81 F.3d 75 (7th Cir. 1996)

Ineffectiveness of counsel is properly brought under motion to vacate sentence.

- * Bond v. U.S., 1 F.3d 631 (7th Cir. 1993)

Trial counsel's failure to file motion to suppress evidence is properly raised on petition for habeas relief instead of direct appeal.

- * U.S. v. Aquilla, 976 F.2d 1044 (7th Cir. 1992)

Ineffective assistance of counsel claims are generally best raised in motion for new trial or motion to vacate.

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TOTALITY OF COUNSEL'S ERRORS

- * Arrowood v. Clusen, 732 F.2d 1364 (7th Cir. 1984)

Trial counsel's unprofessional errors and omissions must be considered in light of totality of the circumstances. In other words, the prejudicial effect must be considered together.

- * Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)

The totality of trial counsel's unprofessional errors and omissions constitute ineffective assistance of counsel.

CONFLICT OF INTEREST

- * Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)

In order to find a Sixth Amendment violation based on a conflict of interest, the reviewing court must find: (1) that counsel actively represented conflicting interests; and (2) that an actual conflict of interest adversely affected the attorney's performance. Id. at 348, 100 S.Ct. at 1718. Under Cuyler, the court must presume prejudice if the conflict of interest adversely affected the attorney's performance. Id. Although Cuyler involved a conflict of interest between clients, the presumption of prejudice extends to a "conflict between a client and his lawyer's personal interest." See, Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.), cert. denied, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (1988).

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

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- * Rosenwald v. U.S., 898 F.2d 585 (7th Cir. 1990)

Where attorney represents conflicting interests, prejudice is presumed for showing of ineffective assistance of counsel.

INVESTIGATION BY COUNSEL

- * Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993)

Trial counsel's failure to investigate may constitute ineffectiveness of counsel, but defendant must allege with specificity what the investigation would have led to and how the outcome of trial would have been different.

INEFFECTIVENESS CLAIMS RESOLVED ON APPEAL

- * Riascos-Prado v. U.S., 66 F.3d 30 (2d Cir. 1995)

Ineffective assistance of counsel claim must be brought on direct appeal when defendant is represented by a new appellate counsel on direct appeal and claim is based solely on the record.

- * Guinan v. U.S., 6 F.3d 468 (7th Cir. 1993)

Ineffective assistance of counsel claims may be resolved on direct appeal where defendant relies on the record to support ineffectiveness claim.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

EVIDENTIARY HEARINGS

SECOND CIRCUIT

- * Holmes v. Bartlett, 810 F.Supp. 550 (S.D. N.Y. 1993)

The court found that Mr. Holmes was entitled to review on merits of his claim that trial court improperly restricted his counsel's ability to cross-examine detective.

- * U.S. v. Matos, 905 F.2d 30 (2nd Cir. 1990)

Trial counsel's failure to file suppression motion and preserve issue for review on appeal may constitute ineffective assistance of counsel and requires a remand. See also Nell v. James, 811 F.2d 100 (2nd Cir. 1987).

- * Allah v. LeFevere, 623 F.Supp. 987 (D.C. N.Y. 1985)

Trial counsel's failure to make motion for suppression of evidence of stolen property required an evidentiary hearing to resolve ineffective assistance of counsel claim, where stolen property constituted the only evidence linking defendant to robbery.

THIRD CIRCUIT

- * U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989)

Trial counsel's failure to conduct pretrial investigation by failing to go to the scene of the crime and locate potential witnesses amounted to ineffective assistance of counsel and required an evidentiary hearing.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

FIFTH CIRCUIT

* Nelson v. Hargett, 989 F.2d 847 (5th Cir. 1993)

Trial counsel's failure to pursue defendant's request for speedy trial may constitute ineffective assistance and requires an evidentiary hearing to determine whether defendant was prejudiced by counsel's unprofessional errors and omissions.

* Kirkpatrick v. Blackburn, 777 F.2d 272 (5th Cir. 1985)

Trial counsel's failure to move to suppress evidence obtained during illegal search of petitioner's residence may constitute ineffective assistance and requires an evidentiary hearing to develop the record on claim.

* Friedman v. United States, 588 F.2d 1010 (5th Cir. 1979)

Trial counsel's failure to subpoena certain witnesses at government's expense on behalf of his indigent client, required an evidentiary hearing to resolve the ineffectiveness of counsel claim.

SIXTH CIRCUIT

* Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001)

Appellate counsel's failure to raise trial counsel's ineffectiveness on direct appeal for failure to investigate and present mitigating evidence during penalty phase required an evidentiary hearing.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

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- * Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987)

Counsel's erroneous legal advice concerning possible use of prior convictions if defendant testified, failure to obtain transcripts of earlier trial to impeach key eyewitnesses, and failure to investigate potential alibi defense constituted ineffective assistance of counsel.

SEVENTH CIRCUIT

- * Rosenwald v. U.S., 898 F.2d 585 (7th Cir. 1990)

An evidentiary hearing is required to resolve claim that attorney represented conflicting interests, where same attorney represented government's key witness in an unrelated civil matter.

- * U.S. v. Myers, 892 F.2d 642 (7th Cir. 1990)

Trial counsel's failure to submit a limiting jury instruction and read and review documents released by government during discovery required an evidentiary hearing.

- * Nevarez-Diaz v. U.S., 870 F.2d 417 (7th Cir. 1989)

Trial counsel's ineffectiveness constituted "cause" and the Court's failure, along with the prosecutor's failure to adequately inform defendant that mere presence at time crimes were committed did not constitute the elements of the offense amounted to a fundamental miscarriage of justice and required evidentiary hearing.

- * U.S. Ex. Rel. Patterson v. Neal, 678 F.Supp. 749 (N.D.Ill.1988)

Trial counsel's failure to call alibi witnesses and present an alibi defense. Defendant stated a sufficient claim of ineffective assistance of counsel and required an evidentiary hearing to resolve the claim.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

EIGHTH CIRCUIT

- * Koskela v. United States, 235 F.3d 1148, 1150 (8th Cir.2001)

Counsel's failure to present alibi defense or call alibi witnesses required an evidentiary hearing to resolve claim of ineffectiveness of counsel.

- * Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986)

Trial counsel's failure to conduct a pretrial investigation and to interview alibi witnesses, warranted an evidentiary hearing to resolve the ineffective assistance of counsel claim.

NINTH CIRCUIT

- * Albern v. McDaniel, 458 F.3d 860, 873 (9th Cir. 2006)

Evidentiary hearing required to resolve claim that counsel was burdened with a conflict of interest because he failed to impeach his previous client, with his prior conviction, probation status, and cross-examine him on multiple points of his testimony.

- * Schell v. Witek, 181 F.3d 1094 (9th Cir. 1999)

Counsel's failure to consult fingerprint expert warranted an evidentiary hearing to resolve ineffective assistance of counsel claim.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

- * Baumann v. United States, 692 F.2d 565 (9th Cir. 1982)

Trial counsel failed to interview prosecution witnesses and prevented the defendant from doing so. He also failed to effectively cross-examine two witnesses that provided the evidence of defendant's involvement in the crime. Defendant was entitled to an evidentiary hearing to resolve his ineffective assistance of counsel claim.

TENTH CIRCUIT

- * Mayes v. Gibson, 210 F.3d 1284 (10th Cir. 2000)

Defense counsel's failure to investigate and present mitigating evidence during penalty phase warranted an evidentiary hearing to resolve claim of ineffective assistance of counsel.

- * Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991)

Trial counsel was burdened with a conflict of interest where counsel was required to present defense theory which inculpated his former client and was intertwined with petitioner's case. These allegations stated a significant claim warranting an evidentiary hearing.

- * Robison v. Maynard, Appellate counsel's failure to raise issue of prosecutorial misconduct in state appeal required an evidentiary hearing where Oklahoma court granted other defendants relief from same kind of conduct by same prosecutor to resolve ineffective assistance of counsel claim.

INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

* Res Ipsa Loquitur *

ELEVENTH CIRCUIT

- * Glock v. Singletary, 84 F.3d 385 (11th Cir. 1994)

Defense counsel's failure to investigate and discover mitigating evidence for sentencing required an evidentiary hearing to resolve ineffectiveness of counsel claim.

- * Tower v. Phillips, 979 F.2d 807 (11th Cir. 1992)

An evidentiary hearing may be required to resolve attorney-client communication when record does not resolve disputed facts supporting ineffective assistance of counsel claim.

- * Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992)

Trial counsel's failure to call character witnesses who were prepared to testify at sentencing may constitute ineffective assistance and required an evidentiary hearing to develop the facts.

- * Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986)

Trial counsel representing the defendant and had previously represented a prosecution's key witness, stated a sufficient claim of conflict of interest and warranted an evidentiary hearing.

A P P E N D I X - A

T R I A L T E S T I M O N Y

T R I A L T E S T I M O N Y

BRUCE KELLY (Victim).....	1
DONALD GENTILE (State's Witness).....	6
JARRET PRICE "OFC." (State's Witness).....	19
CASEY BOWLING "OFC." (State's Witness).....	32

TRIAL TESTIMONYBRUCE KELLY
(VICTIM)

- 1) Mr. Kelly first told Officer Price that he was missing "assorted DVD's" and "various other DVD's". [Case Report Detail]
- 2) At Trial, he testifies that he had a stack of DVD's missing. [Kelly/Direct, Pg.86 L.15 and Pg.87 L.4-8].
- 3) On Cross, he sated there was no stack missing, just the three that he alleges were taken from his camper. [Kelly/Cross, Pg.104 L.25-Pg.106 L.5]
- 4) Mr. Kelly never mentions any other DVD's, in his written statement, besides "House of a Thousand Corpses", in a black bag that Gentile had. [Kelly/Written Statement]
 - * Mr. Kelly also mentions this at Trial. [Kelly/Direct, Pg.89 L.13-16], and then again on cross, when he states that he never saw anything in my possession. [Kelly/Cross, Pg.107 L.10-20]
- 5) Mr. Kelly testified that he had owned approx. (50) fifty DVD's. [Kelly/Cross, Pg.105 L.10-13]
 - * Officer Price admits that I had "...a couple hundred." DVD's. [Price/Cross, Pg.132 L.22-Pg.133 L.11]
 - * DVD's are made and sold by the million's and it would not be unusual for two people to have a copy of the same DVD, Wal-Mart stocks thousands of the same titles.
- 6) Mr. Kelly testified that "It almost looked like they had picked through and chosen the ones they wanted,..." when referring to his DVD's. [Kelly/Direct, Pg.86 L.19-21]
 - * It seems very strange indeed that a burglar, with plenty of time to spare, would only take a few DVD's from a stack of (50) fifty or more.
- 7) In the Case Report, Mr. Kelly stated that he was missing a 4-pack DVD set of "South Park", a tripple feature of "Hills Have Eyes", "Asylum", "Hit and Run" and "House of 1000 Corpses". [Case Report Detail]
 - * However, he makes no mention of these DVD's in his written statement. [Kelly/Written Statement]
 - * Also, in the "lost" photograph's, you'll notice there is a "Hannibal Lector" DVD on the floor with a crowbar, gloves and other misc. items. At no time does Mr. Kelly ever mention this DVD.

TRIAL TESTIMONY

BRUCE KELLY
(VICTIM)

- 8) At Trial, the state produce's the DVD "House on Haunted Hill". [Evidence #4624/1]
- * Mr. Kelly never mentioned this DVD in his Written Statement.[Kelly/Written Statement]
 - * This DVD is not listed on the Inventory Log of items seized from my residence. [Search Warrant/Inventory Log]
 - * Officer Philpott testified that it was in the sealed evidence bag, to which he never opened, prior to testing for fingerprints. [Philpott/Direct, Pg.177 L.9-Pg.179 L.8]
 - * Yet Officer Price mentions it in his Report. [Case Report]
- 9) Mr. Kelly testified that he gave officer price a list of the DVD's that were missing. [Kelly/Cross, Pg.104 L.25-Pg.105 L.4]
- * "House on Haunted Hill" was not on any list or written statement from Mr. Kelly. Nor was it listed on the Inventory Log of items seized from my residence. [Search Warrant/Inventory Log]; [Kelly/Written Statement]
- 10) Mr. Kelly testified that he knew "...for a fact..." these DVD's were his because "...I watched them recently.". [Kelly/Cross, Pg.105 L.15-17 and L.22-Pg.106 L.5]
- * However, when asked by the State "What else did you have stolen?" on Direct, he never mentions "House on Haunted Hill". [Kelly/Direct, Pg.86 L.9-16]
 - * And when asked, by the State on Direct, "But there were only certain titles that were missing and you were able to determine what those were?" He states that the missing DVD's were in a separate stack from the ones he recently watched. This is contrary to his later testimony on cross (above). [Kelly/Direct, Pg.87 L.4-8]
 - * The DVD "House on Haunted Hill", was and is, unopened and still sealed with plastic packaging wrap from the store. [Clerk of Court Evidence Photo]; [Defense Closing Argument, Pg.220 L.5-11]
- 11) Mr. Kelly testified that "...I cannot a hundred percent identify this as mine,..." when discussing two of the DVD's. [Kelly/Direct, Pg.96 L.7-8]
- * Mr. Kelly also testifies that he identified the "empty" Ammo Box; the "empty" Liquor Bottle; and "a"(singular)

TRIAL TESTIMONY

BRUCE KELLY
(VICTIM)

DVD, when Cpl. Price "...asked me to go over to the camper...", "...asking me if I could recognize it, and I was able to recognize the stuff as my items.". [Kelly/Direct, Pg.93 L.21-Pg.94 L.3]

- * Mr. Kelly also testified on cross that when the officer called him over to the camper to look at the items, he "...sent me in there..." and "I saw the bottle, the box, and I believe one of the DVD's.". [Kelly/Cross, Pg.108 L.1-3]
- * However, the Officer notes in his report that he found (2) two DVD's in the same "opening" - 4 South Park DVD's, and "...a double feather set of House on Haunted Hill.". [Case Report Detail/Supp. by J.Price]
- * This is very odd because Mr. Kelly describes seeing only one DVD, when he identified the items as his. And this was before the officer's obtained a search warrant.
- * Also, the "Lost" photographs clearly show (3) three DVD's together in a separate drawer, after the drawer was removed, and after the heater in front of the drawer was removed and put back before the photo was taken. [Lost Photograph's]
- * And the DVD's were clearly moved from the right side of the drawer, in one photo, to the middle, in the other. [Lost Photographs]

12) Mr. Kelly testified that the last time he saw me was approx. 7:00am the morning he alleges he was broken into. [Kelly/Direct, Pg.91 L.15-18]

- * However, moments before he made this statement, he said that both myself and Gentile left with the bags at approx. "...9:00, 9:05 before the police officers got there.". [Kelly/Direct, Pg.90 L.10-12]

13) Mr. Kelly testified that both myself and Gentile left before the officers arrived. [Kelly/Direct, Pg.90 L.10-12]

- * However, Mr. Gentile stated that when he dropped me off, there was an officer at "...that mans house.". [Gentile/Written Statement]

14) Mr. Kelly testified that I came back and talked with him and the Officer after both myself and Gentile left,

TRIAL TESTIMONYBRUCE KELLY
(VICTIM)

"Approximately 15 minutes." later. [Kelly/Direct, Pg.91 L.23-Pg.92 L.3 and L.13-21]

- 15) Mr. Kelly then testified that "After the officer had left.." he saw me "...walking out with what appeared to be some kind of a shovel, a black instrument going back in the wooded area behind the camper. And I thought that was very suspicious because it was raining fairly heavily at the time and he was in regular street clothes and you normally don't go for a walk in the woods on a rainy day." [Kelly/Direct, Pg.92 L.24-Pg.93 L.9]
- 16) Mr. Kelly then testified that "...I had saw him come and go approximately four times in and out of his camper, off in the woods. He'd be gone for about five, ten minutes, and then come back." [Kelly/Direct, Pg.93 L.11-14]
- * Mr. Kelly never mentioned any of this in his Written Statement. [Kelly/Written Statement]
 - * It would seem obvious, and to be "common sence" that if I had taken a (15) fifteen minute walk from Jason's house, then went in and out of the woods approx. four times for (5) five to (10) ten minutes at a time, during a pretty heavy rainfall,... I should be soaking wet and dripping with water. Yet I was dry as a bone. Even when arrested.
 - * Not one article of my clothing on my person or in my camper was wet. Nor were any of my shoes or boots the slightest bit muddy.
 - * And not one shovel or black instrument was ever found to exist. At that time, I did not own one.
- 17) Mr. Kelly testified that "...I knew he was part mexican." [Kelly/Direct, Pg.91 L.11-12]
- * This statement is obviously untrue. I am not mexican, I have never been mexican, and I have never claimed to be mexican.
- 18) Mr Kelly testifies that while waiting for the Officer's to acquire a Search Warrant, "He said, "Don't let your stuff wet," and pulled it back in the camper because the DVD's in the box was getting rained on." [Kelly/Direct, Pg.94 L.8-14]
- * First, Mr. Kelly either misunderstood what I had said, or he intentionally substituted the word "my" stuff, for "your" stuff, for his own satisfaction in an attempt to place more suspicion on myself.

TRIAL TESTIMONYBRUCE KELLY
(VICTIM)

- * Second, if it was his stuff, it would be ill conceived to get it out of the rain and preserve possibly incriminating evidence against myself, than it would to just let it sit there and let the rain wash it away.
 - * Third, if there was suspicion by the Officer's concerning possible stolen property items in my possession, it would not be very professional to place these items out in the pouring down rain where possible incriminating evidence would most likely get washed away, even when the Officer handled the items without wearing gloves himself.
- 19) Mr. Kelly told the Officer's that he was missing numerous specific items of property that are not very easy to take and carry away.
- * Not one of these items were found in my possession, nor were any ever found to have existed in the first place.
 - * Mr. Kelly never mentions specific items in his Written Statement. [Kelly/Written Statement]
 - * When Mr. Kelly gave the Officer's the monetary evaluation of the items he alleges were stolen, his total is \$1,550.00. Yet during Trial, his evaluation totals \$1,606.00, and he adds \$800.00 for the alleged "damaged" camper door. [Case Report]; [Kelly/Direct, Pg.89 L.6-9]
 - * However, the Judge estimates my restitution at only \$1,084.80. [Sentence Sheets/Restitution]
- 20) Mr. Kelly testifies that his .38 Derringer and a surplus Russian Tokarev pistol were allegedly stolen. [Kelly/Direct, Pg.85 L.20-22 and Pg.88 L.24]
- * However, on cross he isn't sure what kind of surplus pistol it is, "...it was either a Czech or one of those western European countries that manufactured." [Kelly/Cross, Pg.103 L.18-20]
 - * And he isn't sure if he had a .38 Derringer or not. "...I believe I had a .38 caliber Derringer pistol." [Kelly/Cross, Pg.103 L. 22]
 - * Mr. Kelly makes no mention of a Military Surplus Pistol in his Written Statement. [Kelly/Written Statement]

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- 1) Mr. Gentile is asked where he is from, and if he has lived in Seneca since at least 2010. He testified that he is from Seneca, and yes, he has. [Gentile/Direct, Pg.141 L.23-Pg.142 L.5]
 - * Mr. Gentile is from Maine, and also has a Criminal Record in Florida, as a registered sex offender, to which he failed to register for several years in South Carolina until his arrest for it between 2013-2014. [SLED/Crim. Hist. Report]
 - * It is believed that Mr. Gentile also has a Criminal Record in NC.; GA.; and other states as well. [FBI/NCIC Report]
 - * Mr. Wilson Burr, my Public Defender, informed me before Trial that court had to be pushed back twice because Mr. Gentile could not be located. And that eventually, the Sheriff found him in Georgia, drove there, recovered him, and brought him back for trial.
- 2) Gentile testified that he has been working in Atlanta, and is getting ready to go to North Carolina. [Gentile/Direct Pg.142 L.8-15]
 - * I have twice attempted to contact "Walker Mechanical"(who Gentile testified he was working for in Atlanta), and have received no response. [Letter to W/M]
 - * The few years I had known Mr. Gentile, he never worked. When he walked into the Court Room to testify, he walked with a severe limp on his left side, causing him to "hobble" noticeably in front of the jury.
- 3) When Mr. Gentile is asked what time he arrived at my residence, he testified, "It was dark. I'd say around 9:00 maybe." [Gentile/Direct, Pg.143 L.2-6]
 - * First, Mr. Gentile doesn't seem sure as to what time it was when he arrived.
 - * Second, both my Mother and Stepfather know that my Stepfather picked me up earlier that day, and brought me back after 9:30pm. [A.Allison/S.Holcombe Affidavit]
- 4) Mr. Gentile is asked "...Why did you go to his house?" And he testified "...he said why don't you come over and we'll have a cook-out and have a couple drinks." [Gentile/Direct, Pg.143 L.7-9]

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- * First, I had asked him to come over to get me drunk because my Mom just got out of the Hospital after Neurosurgery. I was depressed and scared because I almost lost my Mom.
- * And earlier that day I had cut mom's hair around the Staples and Stitches in her head, where the doctor's cut open her skull to remove the Cancerous Brain Material. I needed to drink that memory away...
- * Second, I had already eaten dinner with my mom and step-dad, earlier in the day.
- * Third, Why would anyone cook-out after 9:00pm in the pouring down rain? I know I didn't.

5) During Mr. Gentile's testimony, he seems to have trouble remembering his story about cooking-out.

- * He is asked by the Prosecutor "So what did you do all night?" His response is, "We sat around, shot the breeze, and drank." The Prosecutor then ask's, "Did you all do any cooking-out?" And Mr. Gentile responds, "Yeah, we did cook out. Yeah, we cooked out." [Gentile/Direct, Pg.145 L.8-11]

- * And then when he is asked about what happened after he saw the "guns", he neglects to mention cooking-out, again.

"He just put them up on the counter and then we listened to the radio and had a few drinks, watched the movies, and that was about the size of the night." [Gentile/Direct Pg.146 L.13-19]

- * Mr. Gentile never mentions cooking-out in his Written Statement, nor is it logged into the Officer's Case Report when they made contact with Mr. Gentile. [Gentile/Written Statement]; [Case Report Detail]

6) Mr. Gentile is asked if he brought his own drinks with him when he arrived at my residence, and what kind was it.

- * Mr. Gentile testified, "I brought my own." And that it was, "Whiskey." And, "At that time it was Wild Turkey." [Gentile/Direct, Pg.143 L.12-19]
- * There was never any "Wild Turkey", and Mr. Gentile's drink of choice is "R+R". This is evidenced by the liter sized bottle of it sitting behing the "Pabst Blue Ribbon" beer can, on the counter beside the sink, in the "lost" photographs. ["Lost" Photo's]

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- * Mr. Gentile is asked, on Cross, "...Did you bring anything with you,... the night you came over to visit?" And he testified twice, "Nope. Just me.", and "Nope, nothing."
- * He is then asked, "No Wild Turkey?" And then he says, "Well, yeah, I brought Wild Turkey."
- * It is interesting that he only seems to remember the Wild Turkey when he is proffered about it.
- * Also, Mr. Gentile never mentions Wild Turkey in his Written Statement, nor is it mentioned in the Case Report. [Gentile/Written Statement]; [Case Report Detail]

7) Mr. Gentile is asked what did he see, and what happened when he got to my residence. He testified, "He opened up and I came in side and he was, he was on his laptop there and he was showing it to me and listening to the stereo." [Gentile/Direct, Pg.143 L.24-Pg.144 L.3]

- * In his Written Statement, Mr. Gentile never says that I had a laptop other than my own. [Gentile/Written Statement]
- * However, after being arrested for an outstanding Warrant, the Officer claims Mr. Gentile told him that I had a "... large laptop computer other than the one Gentile advised was allisons." [Case Report Detail]
- * Mr. Gentile never mentions a laptop "other than my own" during trial.[Transc./Gentile]
- * Also, it seems very odd that Mr. Gentile would tell the Officer's that I had laptop "other than my own" when being arrested for his Warrant and after the Officer's explained to him what was missing before questioning, and after he already had asked Mr. Kelly what was missing. [Case Report Detail]; [Gentile/Written Statement]; [Kelly/Written Statement]; [Gentile/Direct, Pg.150 L.8-Pg.151 L.8]; [Kelly/Direct, Pg.84 L.21-Pg.85 L.8]
- * Furthermore, the Officer's confiscated MY laptop when they searched me, and did not give it back until after my wrongful conviction. [Search Warrant/Inventory Log]; [Property Receipt/Release Form, signed by: Officer Casey Bowling - Dated: 8/2/12]

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- 8) Mr. Gentile testified that when he got to my camper, I showed him some pistol's. He then goes on to describe them, in great detail. [Gentile/Direct, Pg.144 L.7-19]
- * First, Mr. Gentile describes one as "...black in a case." Then the prosecutor asks if the black one had "...a holster with it or anything?" And Mr. Gentile states, "I can't remember if it was a holster or a case, but it was in something." [Gentile/Direct, Pg.144 L.11-19]
 - * In their Case Report, Officer's report that Mr. Gentile informed them that the "black pistol", "...was in a brown leather holster." [Case Report Detail]
 - * In his Written Statement, Mr. Gentile describes the "black" one as, "...black with a case." [Gentile/Written Statement]
 - * In describing these pistol's, Mr. Gentile never mentions a " 1911 45 Cal. ", which Mr. Kelly claims he is also missing. And Mr. Gentile never mentions it in his Written Statement; the Case Report; or his testimony at trial. [Gentile/Written Statement]; [Transc./Gentile]; [Case Report Detail]
- 9) Mr. Gentile is asked, "...Did you handle the guns?" And his response is, "I don't remember. I don't think I did. I might have. I can't -- I don't remember to tell you the truth." [Gentile/Direct, Pg.145 L.1-4]
- * It seems to me, that if Mr. Gentile did do this, he is having trouble remembering if his prints are on the guns.
 - * Also, this seems like an odd question to ask your star witness, because of his reliance on a pair of black gloves that the Officer's claim were with the other items in question. And how they seem to have had trouble with finding any prints.
- 10) Mr. Gentile is asked if he saw "...anything else in there unusual?" And his response is, "No. Oh, he had a flat screen TV, but I didn't, you know, he had a pretty good stereo system." [Gentile/Direct, Pg.145 L.5-7]
- * First, I had a small flat screen TV that my mom had bought for me for Christmas, years before. But at this campsite, I only had (2) two "bubble" TV's.

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- * Second, no one ever mentions a Stereo System missing. Mr. Kelly never mentions a Stereo in his Written Statement, there is no mention of one in the Officer's Case Report, nor in Mr. Gentile's Written Statement. [Kelly/Written Statement]; [Case Report Detail]; [Gentile/Written Statement]
 - * Also, it might seem "unusual" for an unemployed man to have (3) three Pistols; (2) two Flat Screen TV's; (2) two Laptop's; (500) Five Hundred Rounds of Assault Rifle Ammo; 3/4 of a Liter Bottle of Whiskey; and a bunch of DVD's.
 - * Mr. Gentile testified that he didn't see anything "unusual" in my camper, because I never had any of this alleged "stolen" stuff, nor anything else that isn't mine.
- 11) Mr. Gentile is asked, "Did you all stay up all night?" And his response is "I stayed up a while and I started getting tired,..." and "...Then I just remember waking up in the morning." Then, when asked if I was still up or not, he said, "Yeah, he was still up, or he had woken up. One of the two. I don't know." And, "I have no idea 'cause I fell asleep." [Gentile/Direct, Pg.145 L.18-Pg.146 L.6]
- * Mr. Gentile's testimony directly contradicts that of Mr. Kelly's when he testified, "They said they'd been up all night and they would have heard something and all that." [Kelly/Direct, Pg.85 L.14-17]
 - * And again on cross, Mr. Kelly's testimony contradict's Mr. Gentile's. "...I Could tell when I got home talking to them they were still wide awake and drunk basically." And "...They had told me they all night, were both up all night partying and drinking and they were surprised they didn't hear anything is what they had told me." [Kelly/Cross, Pg.106 L.16-24]
 - * Neither Mr. Kelly's, nor Mr. Gentile's Written Statements mention "being up all night". However, the Officer's mention in their Report, that Mr. Kelly told them, both myself and Gentile, "...stayed up all night drinking, and were still up when he returned home." [Case Report]
 - * I think Mr. Kelly must have misunderstood our statement to him that morning. I do not know what Mr. Gentile told him, However, I explained that we were up for a while, until I passed out. And I never heard anything.

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

12) Mr. Gentile testifies that he was driving a "...red GMC Sonoma pickup truck.", that morning. [Gentile/Direct, Pg.146 L.7-10]

* I specifically remember a large blue Chevrolet that was packed with tools.

* Mr. Kelly testified that Mr. Gentile was driving, "...an eighties model Chevrolet that had an air compressor and a bunch of tools in the back,..." [Kelly/Direct, Pg.85 L.5-7]

* If Mr. Kelly was ever asked what color Mr. Gentile's truck was that morning, I'll bet he would say blue.

13) Mr. Gentile testified, "...when I came out of the trailer to go to the truck, I met the next door neighbor. That's when he told me what happened." and "...I didn't really know what was, what actually he was missing. He told me he was missing a couple of guns, but that one was silver and the other one was black,..."

He is then asked "Did you go back in the trailer and talk to Marcus after you talked to the neighbor, to the victim?" And Mr. Gentile testified, "No. I was outside when he came out..." [Gentile/Direct, Pg.146 L.24-Pg.147 L.14]

* First, this directly contradicts Mr. Kelly's statement that he talked to us after we both came out of the trailer. [Kelly/Written Statement]

* And Mr. Kelly testified at trial that, "...I noticed some commotion and I saw their camper door open and Marcus Allison and the Rags individual had walked out." And, "So I went over their and I asked them, and they said that they did not hear anything from my camper." [Kelly/Direct, Pg.84 L.10-17]

* Mr. Gentile stated in his Written Statement, "...when I was getting ready to leave, a next door neighbor came over and asked me if I had seen or heard anybody around his trailer, I replied know (NO). Then I asked him what was stolen, that's when he told me about his laptop and guns. During our conversation, marcus came out of his trailer..." [Gentile/Written Statement]

* It appears that Mr. Kelly and Mr. Gentile are having trouble agreeing on what happened. And wether we asked what was missing or just Mr. Gentile.

TRIAL TESTIMONYDONALD GENTILE "RAGS"
(STATES WITNESS)

- 14) Mr. Gentile testified that after we talked to Mr. Kelly, I asked him to give me a ride to my friends house. And that I gave him a small bag and I grabbed the duffle bag. He said that I "...wanted to go to his friends house, you know, and drop it off." [Gentile/Direct, Pg.147 L.14-Pg.148 L.11]
- * First, I never asked to go to my friends house. He wanted to drop his laundry off at his camper, get more liquor, and then go fishing.
 - * Mr. Gentile testified that we were going to go fishing, but because it was raining, we did not. [Gentile/Direct, Pg.148 L.11-13]
 - * Mr. Kelly states in his Written Statement, that, "...they said that they were going to rag's house to get fishing poles..." [Kelly/Written Statement]
 - * Mr. Gentile states in his Written Statement, "...I was getting ready to leave to go home..." [Gentile/Written Statement]
 - * Also, Mr. Kelly testified that, "The Rags individual had like a small, overnight-type toiletry bag..." [Kelly/Direct, Pg.89 L.13-14]
 - * Mr. Gentile states that, "...When he came back out he had a fishing pole, small hand bag and pair of army boots, then I dropped him off at the top of the hill." [Gentile/Written Statement]
 - * Mr. Kelly never mentions seeing a "fishing pole"; a "small hand bag"; or a "pair of army boots" in my possession. But does mention a "small bag" in Mr. Gentile's possession with a DVD that was the same title as one Mr. Kelly said he was missing.
 - * Mr. Gentile never mentions "fishing"; or "fishing poles" in his verbal statements to police. [Case Report Detail]
- 15) Mr. Gentile is asked, "What did you all do with the bags?" Mr. Gentile responded, "He had took the fishing pole and the other bag. He took the duffle bag and the other bag -- excuse me. Yeah, he took the duffle bag and the other bag and left his fishing pole and stuff like that in the back of my truck. And I said, do you want me to drop them off? And he said he would come get them later."

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He then testified that he took me, "Maybe a quarter of a mile." up the road, to my friends house, and, "I just dropped him off and I left." And, "It was on the end of a drive which is like the top of a hill." And, "...he took both of them at the same time." and when asked, "Did you take him back down to his house?" He said, "No.".
Gentile/Direct, Pg.148 L.9-Pg.149 L.22]

- * This directly contradicts his own statements to Police in the Case Report, when he told them, "...Allison went into his friends house alone, while he waited in the truck. Mr Gentile stated that once Allison got back into the truck, Allison asked him to take him back home. Once they arrived back home, Gentile stated that Allison noticed a Patrol Car in front of the Vict. Camper, and Allison asked him to go around and drop him off at the top of the hill." [Case Report Detail]
- * In his Written Statement, Mr. Gentile states, "...he came back outside with a big green duffle bag which he left at his friends house. When he came back out he had a fishing pole, small hand bag and pair of army boots, then I dropped him off at the top of the hill. I asked him if he wanted his stuff, he said he'll get it later, at that time there was an Officer at that man's trailer." [Gentile/Written Statement]
- * In one of Mr. Gentile's conflicting stories, he states that he just dropped me off at my friends house and left. In another, he states he waited for me, at my friends house, then took me back home, and then saw an Officer at Mr. Kelly's trailer.
- * Wether he waited for me or not, how would he know there was an Officer at Mr. Kelly's trailer if he never came back? Or that I left the bag at my friends house?
- * On Cross, he is asked, "As soon as you got up and saw, the victim of this burglary told you he had been burglarized, you left immediately and never went back?

Mr. Gentile answered, "No. I couldn't go back. The Police were coming and I had a warrant on me. No. I wasn't about to go back there. [Gentile/Cross, Pg.154 L.5-10]

- 16) On Cross, regarding his Written Statement, Mr. Gentile is asked, "Do you remember in that statement saying that after he came back out of the friends house, then he had a fishing pole in his hand?"

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- * And Mr. Gentile answer's, "No, I don't remember that. Then he is asked, "And that then you dropped him back off at his place?" His answer is, " Well, no, I don't remember, I don't remember if I wrote that down or not." [Gentile/Cross, Pg.152 L.5-12]
 - * When asked to reread the last part of his statement, he say's, "Well, we're talking about his house. When he came back out of the house, he came out with a big green bag and when he came back out he had a fishing pole. This was at his house, at his house." [Gentile/Cross, Pg.152 L.20-23]
 - * He is then asked, "You say he had a green duffle bag and then we left and went to his friends house. That's what you just read." Mr. Gentile say's, "No, we didn't go to his friends house. We came out with a fishing pole and then went to his friends house and dropped the bag off, which is when he said he wanted to go to his friends house. That's exactly what happened." [Gentile/Cross, Pg.153 L.2-11]
 - * Mr. Gentile then states, "He came out and I dropped him off at the house, the other house. He came out of the trailer and I dropped him off there. That's what I did. I didn't come back to the trailer. Trust me. I didn't come back there. I know I didn't. I had a warrant." [Gentile/Cross, Pg.153 L.25-Pg.154 L.4]
 - * It appears that Mr. Gentile's story has changed three different times, to suit his current situtation. [Case Report/Gentile]; [Gentile/Written Statement]; [Transc./Gentile]
- 17) Mr. Gentile is asked if he got arrested at the friends house, and his testified, "No. I got arrested down the road." And he can't remember how much later it was but, "It might have been two, three days, maybe. I'm not positive, but it was definitely later, later that week." [Gentile/Cross, Pg.154 L.11-16]
- * First, Mr. Gentile testified on Direct, that he was, "...pulled over on Shiloh Road where I was going...to visit a friend,..." And, "...They took me straight to jail." [Gentile/Direct, Pg.150 L.12-19]
 - * Cpl. Price testified that he located Mr. Gentile "Rags", "...I think it might have been the next day...". [Price/Direct, Pg.129 L.25-Pg.130 L.4]

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- * Cpl. Price testified that he couldn't remember how he was able to locate Mr. Gentile, but after he got his name, he discovered that he had a fugitive warrant for his arrest. [Price/Cross, Pg.133 L.12-20]
- * Cpl. Price then cannot remember if he took Mr. Gentile's Statement or not. But when shown Mr. Gentile's Statement he said, "Yes, sir, that's my statement, yes, sir." [Price/Cross, Pg.134 L.2-9]
- * It appears that both Mr. Gentile and Cpl. Price are being illusive as to when Gentile was arrested and questioned.
- * Mr. Gentile was arrested on May 4, 2010 for "Theft of Utilities". Cpl. Price took Mr. Gentile's Written Statement May 4, 2010, the day after I was arrested.

18) Mr. Gentile testified that he wrote a statement on me because, "They said Marcus wrote a statement against me. That's why they picked me up. That's exactly what he told me." [Gentile/Cross, Pg.155 L.25-Pg.156 L.6]

He is then asked, "...has it been brought to your attention or you know now that that's not true?" And, "Do you now know that he's never written a statement against you?" [Gentile/Cross, Pg.156 L.7-12]

- * Mr. Gentile testified, "I don't know what your talking about. I don't understand." And, "I don't know if he did or he didn't." [Gentile/Cross, Pg.156 L.9-13]
- * He is then asked, "Once you gave your voluntary statement, did the Officer's tell you you were no longer a suspect?" And he testified, "Yes. At that time they said -- no, they said they would get back to me about it, you know, but I had to -- they weren't arresting me for that. I was getting arrested for my warrant." [Gentile/Cross, Pg.157 L.8-13]
- * Later, Mr. Gentile is asked, "After you were released from confinement, you never bothered to call Mr. Allison, your friend, and tell him what happened and you gave your statement?"

Mr. Gentile responded, "No. After I heard that he had written a report against me, that kind of did me a little wrong."

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He was then asked, "So your willingness to give a statement and testify is because you thought he gave a statement against you?"

Mr. Gentile testified, "Well, he did give a statement. The guy told me he gave a statement. That's what the Sheriff said."

He was then asked, "And that prompted you to give your statement?"

And he testified, "Well it prompted me to give the statement after I asked them to see it, to see the statement."

He was then asked, "Did they show you a statement?"

And he testified, "No, they didn't show me a statement."
[Gentile/Cross, Pg.158 L.7-20]

* Given the admissions that were brought to light, it would appear that Mr. Gentile was coerced/provoked into giving a statement and testifying against me, through the use of Fraudulent Misrepresentation by the Sheriff, for the purpose of Malicious Prosecution.

* Also , for the benefit of Mr. Gentile, in that he would no longer be held a suspect, to which he was. It is also notable that Mr. Gentile is a registered sex offender in Florida, and during his time in South Carolina, has never registered. Including before, during, and after this incident.

19) Mr. Gentile testified that when he was arrested and was given a list of the alleged "stolen" items, that he recognized those items in my possession. [Gentile/Cross, Pg.154 L.17-Pg.155 L.9]

* What is interesting, is that Mr. Gentile only describes (2) two guns, in exact detail, a TV and a Laptop.

* Also, that those were the only items Mr. Gentile was told were missing from the Officers and Mr. Kelly.
[Gentile/Cross, Pg.154 L.17-Pg.155 L.9]; [Kelly/Direct Pg.84 L.22-Pg.85 L.3] ;[Price/Cross, Pg.133 L.21-Pg.134 L.1]; [Kelly/Written Statement]

* And Mr. Gentile can't remember what I was drinking, what movies we watched, what music we listened to, and he had trouble remembering his story about cooking-out.

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20) Mr. Gentile was asked if he told the Officer's the name of my friend, that he claims he dropped me off at. He stated that he knew his first name but not his last. And then he was asked if he ever met my friend before, and he stated, "Nope." [Gentile/Cross, PG.156 L.19-Pg.157 L.7]

* However, the Officer's note in the Case Report that, "Gentile stated that he believed the person that lived there was a Jason Martin." [Case Report Detail]

* And, on Direct, Mr. Gentile was asked, "...Do you know the friend that he was going to?" And his answer was, "No. I never really, I met him." [Gentile/Direct, Pg.148 L.22-24]

* And Mr. Gentile never mentions a name in his Written Statement. [Gentile/Written Statement]

21) Mr. Gentile was asked if he washed any clothes at my place. His answer was, "No." [Gentile/Cross, Pg.157 L.23-25]

* Although Mr. Gentile never mentions washing his clothes at my place, he in fact did. And to my knowledge, those were his clothes in the duffle bag that I carried for him because he was complaining about his "bad hip".

* Also, at the other campsite we met each other at, he washed his clothes at my place all the time. It ran my power bill up drastically, because of how much he would wash. My mom knew he did, his girlfriend knew he did, and the landlord knew he did. My power bill went over \$300.00 in one month for it.

22) Mr. Gentile is asked if he remembered the big stack of DVD's in my camper. He said, "No, no, I don't." And, "No. I really didn't stay that much in the camper." [Gentile/Cross Pg.159 L.4-14]

* Mr. Gentile has borrowed an unknown amount of movies from me an unknown amount of times. He probably still has several of them. I loan my movies to everyone.

23) Mr. Gentile is asked, "Were you suspicious when he showed you the guns or whatever when you first got there?" His answer is, "No. He's always had guns." [Gentile/Cross, Pg.159 L.15-17]

* I have owned many firearms (Rifles; Shotguns; Pistols), and all were purchased by me, legally. And Mr. Gentile has seen several of them before.

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24) When asked if I had any transportation, Mr. Gentile states "He had nothing whatsoever." Then when asked, "So the only way for him to get away from his trailer was with you?", he testified, "Well, he can walk." And, "...He's walked home plenty of times from that guy's house."

* First, I do not understand why I would want to, or be dumb enough to take a (15) fifteen minute walk down the road, in the pouring rain, with traffic whizzing by, and the police everywhere, after my neighbor was broken into. And then, on top of it, still be bone dry.

* Second, even if I ever have walked home from my friends house, how would Mr. Gentile know that? I've never said that to anyone. [Gentile/Cross, Pg.160 L.1-10]

25) During Redirect, Mr. Gentile is asked again about his statements regarding me allegedly coming out of the house with a few items.

* Mr. Gentile states, "Yeah. Its pretty much he came out with the fishing pole and some other stuff."

* He is then asked, by quote from the prosecutor, "...you said: ... When he came back out, he had a fishing pole, a small handbag and a pair of Army boots?".

* Mr. Gentile responded, "That's correct."
[Gentile/Redirect, Pg.160 L.13-Pg.161 L.13]

* Mr. Kelly testified that he saw Mr. Gentile with the small hand bag, and never saw anything in my possession other than the duffle bag. [Kelly/Direct, Pg.89 L.12-17]

* And again on Cross. [Kelly/Cross, Pg.107 L.10-21]

* And in Mr. Kelly's Written Statement. [Kelly/Written Statement]

* And in the Officer's Case Report. [Case Report Detail/ INV. Notes/Supp. By Price-Gentile] Where Gentile admits that he was carrying a small bag.

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- 1) Mr. Price was asked what his current job duties are. He explained that he was currently a Security Officer at the Nuclear Station (Oconee Nuclear Station, O.N.S.), and that he started working there August 23, 2010.

Mr. Price is then asked if he was working for the Sheriff's Office (Oconee County Sheriff's Office, O.C.S.O.), on May 2, and 3, 2010. He explained that he was and that he was a Corporal on the Road Patrol unit.

He was then asked how long he worked there and why did he leave. He explained he worked there for approx. (10) ten years, and he left because, "I was trying to feed my family." [Price/Direct, Pg.112 L.15-Pg.113 L.10]

- * First, approx. (3) three months after my arrest, Mr. Price left the Sheriff's Dept. and went to work for O.N.S. where I used to work in 2008; where Mr. Kelly currently was working; and where most of the Jurors had worked; were working; had family that worked there; or knew someone that either had or was working there.
- * Mr. Price testified that prior to my arrest, he was working for O.C.S.O. for (10) ten years, as a Cpl. on Road Patrol. It is interesting that Mr. Price was no higher of Rank than "Cpl." in (10) years, and stayed on Road Patrol without moving to a better position.
- * Second, why leave (3) three months after arresting me, to go work for O.N.S. after (10) ten years on the force?
- * And why choose that time to "try to feed your family"? What about the other (10) ten years? Were they not hungry then?

- 2) Mr. Price is asked, when he got to Mr. Kelly's camper, did he see evidence of a forced entry, and how. His answer was, yes he did, and "The door was pried..." [Price/Direct, Pg.114 L.22-Pg.115 L.5]

- * Mr. Price center's his theory around the door being "prided", yet in the "lost" photograph's, the door looks nothing like it would if a crowbar was used to "pry" it open. ["Lost" Photographs]
- * Also, Mr. Kelly testified that he had to get the door replaced because, "It was damaged." And it cost him \$800.00. [Kelly/Direct, Pg.89 L.6-9]
- * Ofc. Bowling testified that Cpl. Price, "...was showing me the fresh pry marks on that camper." And, "...I'm

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pretty darn certain that that was what was used to open that pry, that door." And, "...my observation was a perfect match." [Bowling/Direct, Pg.167 L.6-Pg.168 L.14]

- * If any of this was true, it would have been of the utmost importance to get Forensics out to properly ascertain if the crowbar was the tool used for Forced Entry, or not. And to properly preserve that most important piece of evidence.
- * Yet the photographs were "Lost", and the crowbar was placed outside in the pouring down rain, in the wet grass, after the Officer's stuck it in Mr. Kelly's camper door.
- * If there was no aluminum residue on the crowbar before, I'm sure there is now. Unless the rain washed it away.
- * Also, the crowbar was physically touched and handled by almost everyone who took the stand. As well as the rest of the evidence.

3) Mr. Price is asked if he took a list of what Mr. Kelly told him he was missing, and he said he did. He then goes on to describe the alleged "stolen" items, and gives a monetary value for each. [Price/Direct, Pg.115 L.6-Pg.116 L.6]

- * In the Case Report "Narrative", Mr. Kelly's total value is \$1,550.00. In the Case Report "Property List", the value is \$1,550.00. [Case Report]
- * In his testimony, Mr. Price total's it at \$1,250.00. [Price/Direct, Pg.115 L.8-Pg.116 L.6]
- * In Mr. Kelly's testimony, he valued it at \$1,606.00. And if you add the door, it total's \$2,506.00. [Kelly/Direct, Pg.88 L.12-Pg.89 L.9]
- * Judge Culbertson listed the amount of \$1,084.00, on the Sentencing Sheets, for Restitution.
- * Also, while reading from his Case Report, he states, "...assorted DVD's to include...and various other DVD's." [Price/Direct, Pg.115 L.12-15]
- * It is interesting that Mr. Price only shows Mr. Kelly one DVD, after my initial search, yet Mr. Kelly identified all three as his, and has trouble remembering any others that might be missing. Yet never mentioned "House on Haunted Hill" as one he was missing.

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- 4) Mr. Price testified that while he was taking the Initial Report, that I came over and asked several questions. [Price/Direct, Pg.116 L.9-13]
- * While I did go over and talk to them, I was there to try and offer any help I could. And to try to provide support for Mr. Kelly.
- 5) Mr. Price testified that shortly after he left, Mr. Kelly contacted him and told him he saw me, "...enter the wooded area adjacent to his camper..." And, that he came back and "encountered" me in the woods, and I told him I was trying to put up a hammock, and told him, "...Do you want to search my camper for -- ...". [Price/Direct, Pg.116 L.20-Pg.117 L.25]
- * First, I never entered any wooded area. I went behind my camper, where my Table and Chairs; Umbrella; Grill; Propane Tank; and Nylon Hammock were, to cover them up; remove the cushion's on the chairs; let down the umbrella; and take down the hammock, because they were all getting rained on.
 - * Second, Mr. Price never "encountered" me in the wooded area. He walked out of the woods up to my camper, and asked me what I was doing. That's when I told him I was covering my stuff up and taking "down" my hammock. Which took a few trips because of the rain.
 - * I never told him he could search my "camper". I told him he was welcome to look around "outside", and if he needed anything to just ask.
- 6) Mr. Price testified that both he and Ofc. Bowling came back out to the campsite because I called Mr. Price and wanted to talk to him about getting prematurely evicted.
- Mr. Price then testified that I offered them consent to search me again, and they did not, then they asked for consent, and then I consented. [Price/Direct, Pg.118 L.3-Pg.119 L.23]
- * During his testimony, Mr. Price mentions meeting Ofc. Bowling at the campsite and the two going into the woods and searching around. And they, "...spent quite a bit of time in those woods..."
 - * It is interesting that instead of coming to talk to me after I called them out, that they use my unfortunate circumstance to advance their growing suspicions toward me.

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- * Mr. Price testified that after not finding anything, "...we came on out to talk to Mr. Allison in the woods." This implies that I was in the woods, which I never was.
- * Mr. Price testified that, "...we walked up to Mr. Allison's camper and I believe he might have been outside." I was inside my camper when they walked up and knocked on my door, I then stepped outside to talk to them.
- * Mr. Price then testified that they had asked me what I'd been doing all night, and I told them that both myself and Mr. Gentile, "...had been up all night drinking and partying and never went to bed or anything, was up all night partying."
- * I never said this. We were not partying. I was drinking away the depressing and traumatic memories of almost losing my mom. My only surviving parent, that had Brain Surgery two days before. And who's skull still had fresh Staples and Stitches that I had to cut around when shaving her head for her.
- * And why would he be asking me what I was doing all night when he was there at my request for a premature eviction? A situation separate from my neighbors issue. And he never even mentions the eviction.
- * As for the consent, I told them both they were welcome to look around the area as much as they needed, which is why they were, but when they asked me for consent, I told them both they would need a warrant because I had nothing to do with it and I was just trying to help.
- * Also, they asked me these questions after they told me that I was a suspect, which is why I told them they needed a warrant.
- * The reason I called the Officer out to my camper was because my Landlord called me and told me I needed to be out by the end of the week, because the police said I was a suspect. And Mr. Price confirmed this when he arrived at my request.

7) Mr. Price testified that after "I gave consent to search", he went inside my camper and began the search. And then he begins to describe the inside of the camper. [Price/Direct Pg.119 L.21-Pg.120 L.15]

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- * Mr. Price testified that the area directly across from the closet is my Bedroom and that there was another bedroom in the very back. [Price/Direct, Pg.120 L.3-15]
 - * This is incorrect. The area across from the closet is my bathroom. And the ONLY bedroom is in the back. And it was "...full of stuff." because of their search. It was clean before. ["Lost" Photo's]
- 8) Mr. Price testified that, "I think I searched. I think Sgt. Bowling stayed outside to speak with the suspect and began with him." [Price/Direct, Pg.120 L.18-20]
- * When Mr. Price and Sgt. Bowling were talking to me, they were asking for me to consent to a search because, as they put it, "If you didn't do anything wrong, you have nothing to worry about." And, "If you don't give us consent, we're just going to get a search warrant because you are a suspect."
 - * At that time, I got mad and told them to leave. When I started to turn around and go back inside, Mr. Price said, "We'll you told me I can search you anyway, so I'll just make it quick, If you didn't do it, you'll be ok."
 - * That's when Mr. Price started walking inside my camper, and I was attempting to grab him and pull him out, saying "you can't go in there, I didn't tell you you could search me." Then Sgt. Bowling put his hand on my chest, and pushed me back outside saying, "You have to wait out here, he's searching you." And continually telling me to calm down and that if I didn't do anything wrong, I have nothing to worry about.
 - * Then Sgt. Bowling kept trying to change the conversation by asking me questions about school, work, and my car. I eventually calmed down and answered some of his question's. That is when Mr. Price came outside with the Liquor Bottle; the Ammo Box; and A DVD, saying "Look what I found!"
- 9) Mr. Price testified, "I pulled a drawer underneath one of the closets. It didn't come open immediately but it wiggled a little bit and moved, so I figured it was a stuck drawer. So I pulled a little harder..." [Price/Direct, Pg.120 L.21-24]

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- * When Mr. Price "...pulled a little harder...", he must have pulled the drawer completely off the base. The drawer's on old camper's, like mine, have groove's that hold it tightly in place, so it doesn't come out easily in transit.
 - * The drawer had actually broken, for the third time, a week before, and I had just gotten around to re-glueing it a couple of days before being searched.
- 10) Mr. Price testified that when he looked inside the "void" area, he saw the Ammo Box; the South Park DVD's; the House on Haunted Hill DVD; and the Bottle of Whiskey.
- * I find it interesting that if all this stuff was inside a "void" area, wouldn't it not be "void" at all?
 - * The Ammo Box was inside the Rubbermaid tool cabinet that was in my back bedroom, locked. It had a bunch of loose miscellaneous items in it like papers; antenna adapters; loose screws; etc...
 - * The DVD's were with my other 250 plus, in the living room. Almost all are mine, but I had borrowed some from friends and neighbors from time to time. Including Mr. Kelly. And they borrowed mine as well.
 - * The Liquor Bottle was in the trash can, or on the shelf with the imported Mexican Tequila, and the Crown Royal. All empty, I liked the bottles.
 - * There were things that I stuffed in these area's because I had no where else to put them. I have a lot of property. But these items were not where Mr. Price said they were. Just look at the "Lost" Photograph's. [Price/Direct, Pg.122 L.1-18]; ["Lost" Photograph's]
 - * If you look at the "Lost" Photo's, you'll notice that none of these items are seen inside the drawers. With the exception of (3) three DVD's. But those are in a completely separate drawer than Mr. Price testified they were in. And they are together.
 - * In one Photo the DVD's were on the right side of the drawer, and in the other Photo, they are in the middle. And the Heater had to be moved and replaced to take the drawer out.

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- 11) Mr. Price testified that after he brought the items out and showed them to me, that's when I told him to stop searching and he had to get a Search Warrant. [Price/Direct, Pg.122 L.19-Pg.123 L.17]
- * Sgt. Bowling testified to this as well. [Bowling/Direct Pg.164 L.16-Pg.165 L.3]
 - * However, Mr. Kelly testified that after Mr. Price came back out to the campsite and was talking to me, he later woke him (Mr. Kelly) up and asked him to come over and look at some items, then Mr. Kelly testified that he recognized them as his.
 - * Mr. Kelly then testified that after that Mr. Price had to get a search warrant. [Kelly/Direct, Pg.93 L.16-Pg.94 L.5]
 - * It seems strange that both Officer's would leave a substantial detail out like that.
 - * Also, it is at this time that Mr. Price took one DVD to show to Mr. Kelly. Mr. Kelly testified to this as well when he testified, "...and a DVD..." [Kelly/Direct Pg.93 L.23-Pg.94 L.2], and, "I saw the bottle, the box, and I believe one of the DVDs." [Kelly/Cross, Pg.108 L.2-3]
 - * Yet Mr. Price testified that he found (2) two DVD's in the initial search, and then brought them outside.
- 12) Mr. Price testified that after he got the Search Warrant, he went back in and located another DVD (Hills Have Eyes; The Asylum; Hit and Run) and the crowbar. He then said, "...I guess that's pretty much it, what I pulled out of that boarded area." [Price/Direct, Pg.123 L.20-Pg.124 L.3]
- * It is interesting that he never mentioned the "Gloves".
- 13) Mr. Price testified that after he found these items, he turned them into evidence, he has never tampered with them in any manner, and they have been in evidence ever since. [Price/Direct, Pg.124 L.4-Pg.127 L.3]
- * Interestingly, Mr. Price first mentions the "Gloves" when the prosecutor is asking him to identify the states evidence by number. And he then testifies, "These would be black gloves that I found also in the voided or false

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drawer compartment along with these other items, but more specifically with where the crowbar was."

[Price/Direct, Pg.126 L.6-15]

- * On Cross, Mr. Price is asked, "...What was unique about those gloves?" He testified, "There's nothing unique about those gloves. They're just gloves." [Price/Cross, Pg.136 L.17-21]
 - * However Sgt. Bowling testified that Mr. Price told him, "...There was actually some gloves wrapped around the crowbar, like the crowbar was laying on top of the gloves and kind of like, kind of like I had the gloves in my hand and grabbed the crowbar and just set them in there." [Bowling/Direct, Pg.165 L.20-Pg.166 L.2]
 - * Yet in the "Lost" Photograph's, the "Gloves" appear to be rolled up by themselves, and in another Photo, they are loose beside other items sitting on the floor. At this time, I did not own Black Gloves, I only had Brown Leather Work Gloves.
 - * As for the Crowbar, It does not appear inside any drawer or compartment, when reviewing the photo's. And it was clearly sitting in the wet grass in another photo.
 - * Also, both Officer's testify to the crowbar being stuck into the alleged "pry marks" on Mr. Kelly's door. [Price/Direct, Pg.127 L.15-25]; [Bowling/Direct, PG.168 L.3-5]
 - * Because of this (Officer's sticking crowbar in door), any exculpatory evidence (ie., lack of paint transfer; or aluminum shavings), tending to show this crowbar was not used in a burglary, has been forever destroyed. And the defendant will never be able to have this crowbar tested to prove his defense.
 - * And due to Mr. Price and Sgt. Bowling manipulating; mishandling and being reckless with the "evidence" and this case, they have severely deprived the defendant of a fair, just and meaningful opportunity for trial.
- 14) Mr. Price was asked, "...before you did that, did you do anything with the crowbar, did you do any kind of investigation with that?" [Price/Direct, Pg.127 L.4-6]

TRIAL TESTIMONYJARRETT PRICE "OFC."
(STATES WITNESS)

Mr. Price testified, "I took the crowbar over to Mr. Kelly's camper, and the mark, the pry mark that was on the door to Mr. Kelly's camper, I fit this crowbar inside that pry mark, and it fit." [Price/Direct, Pg.127 L.4-18]

- * It is important to note that at no time did Mr. Price or Ofc. Bowling, or Inv. Smith call Forensic's and have them process the scene, or the "evidence".
- * By mishandling the crowbar in this way, the Officer's effectively "set-up" the alleged evidence to conform to their own theory and deprive the defense of any opportunity to conduct an independent investigation.
- * Where there was no trace evidence before, there certainly is now. And anything exculpatory, was washed away with the rain, and wiped away with the grass.
- * And this is "tampering" with the evidence.

- 15) Mr. Price is asked if he turned all the items into evidence. He responds, "Well, we took photographs -- of that, and everything we collected pursuant to the search warrant was turned into evidence, yes sir."

He is then asked, "Did you turn the photographs into evidence?" ; "...Do we know where they are?" And; "Where do you think they went, or where do you, do you remember where they were to start?" [Price/Direct, Pg.128 L.8-22]

- * Mr. Price testifies, "Well, they would have been on my camera's memory, which, when I changed jobs shortly after this case and I went to work at Duke,...I'm assuming they got misplaced. I couldn't tell you. ..."
[Price/Direct, Pg.128 L.8-Pg.129 L.6]

Mr. Price is then asked, "...But you took pictures and you did have pictures of everything you testified to?" And his answer is, "I did, yes, sir." [Price/Direct, Pg.129 L.7-9]

- * Officer Bowling was asked, "Isn't it true that when Officer Price left, he turned his camera over to you?" And he testified, "Yes, sir."
- * Ofc. Bowling is then asked, "And since then it's been misplaced?" And he testified, "When an officer leaves the Sheriff's Office, you turn in all your equipment. At that time any officers that don't have certain equipment can get the equipment of an officer who left."

TRIAL TESTIMONYJARRETT PRICE "OFC."
(STATES WITNESS)

And at that time we re-, we give out that equipment to officer's who need it." [Bowling/Cross, Pg.171 L.13-21]

- * Judging by the testimony of the two Officer's, it seems that Sgt. Bowling is responsible for misplacing the Photograph's.
- * At almost every point, the Officer's are allowed to testify as to their "observations". And these observations are what they testify that the photograph's will show.
- * However, being that they are not expert witnesses in the fields to which they testify, their testimony, for the most part is actually Opinions.
- * Also, once I was convicted, and finally arrived at a "yard", besides R+E, I mailed one small, simple letter to the Oconee County Sheriff's Dept. asking for a copy of their Investigation file. They sent this file to me with a disk that had all (29) twenty-nine photograph's burned onto it that the Officer's claim to have "lost".
- * The Photograph's show the Officer's lied, tampered with, manipulated, and converted my personal property to produce the appearance that I was in possession of Burglary Tools, and Stolen Property. Which I was not. ["Lost" Photo's]

16) Mr. Price was asked, "When y'all had to leave and go get the search warrant, did the defendant say anything?"

Mr. Price responded, "...he told me he didn't have anything to do with this burglary, that his friend Rags must have took these things and planted them in his camper while he was asleep in the chair. This was after numerous times he told me that he didn't go to sleep, he had stayed up and partied all night." [Price/Direct, Pg.129 L10-22]

- * First, Mr. Price just admitted that he questioned me without reading me my Miranda Rights, after I was considered a suspect, and then used these statements against me at trial to incriminate and impeach me.
- * Second, I never said that I didn't go to sleep; nor that I stayed up and partied all night; or that Rags must have done it. Mr. Price and Sgt. Bowling are making these statements up, or have severely twisted my words to fit their own theory and suspicions.

TRIAL TESTIMONYJARRETT PRICE "OFC."
(STATES WITNESS)

* And even if I did stay up and party all night, or if I did fall asleep in the chair, what does any of that have to do with a burglary? It sounds to me that they are just trying to make me look bad to the jury.

17) Mr. Price is asked if he ever found any Guns; anything that belonged to Mr. Kelly, or anything in the woods. And Mr. Price testified that they did not. [Price/Direct, Pg.130 L.5-12]

* Being that there were no items found that belonged to Mr. Kelly; there was no evidence that I burglarized Mr. Kelly; There were no Guns; TV's; Laptop's (other than my own); numerous and assorted DVD's; Perscription Pills; (500) Rounds of Assault Rifle Ammo; 3/4 of Liquor or anything else,... why did they continue to prosecute me to an inevitable wrongful conviction?

* And why cover up Police Misconduct; Fraudulent Testimony; Tampering with Evidence; Unduly Suggestive out of Court Identification; Perjury; Withholding Evidence; Witness Coercion/Provocation; Slander; Illegal Search and Seizure; Illegal Detention of Witnesses; Prosecutorial Misconduct; Conversion; Fraud in the Inducement; and several other serious crimes? ...

18) On Cross, Mr. Price was asked again, what it was that I said when he showed me the items he acquired from my camper during the initial investigation, without a warrant, "What did you put in your report that he told you?" And he goes all around the world before he answers with, "...subject advised that those items were his. ..." [Price/Cross, Pg.131 L.20-Pg.132 L.21]

* It would appear that Mr. Price was suddenly stricken with massive confusion, or he was intentionally being illusive to the question.

19) Mr. Price is asked, "Do you recall the DVD collection that Mr. Allison had in his camper when you were doing your search?" His answer is, "Yes, sir."

He is then asked, "Was it an extensive collection?" His answer is, "I don't really recall an extensive DVD collection."

Mr. Burr, my Public Defender then approaches Mr. Price, show's him a picture of my DVD's. Ask's, "Does that look like --". Mr. Price's answer is, "Yes, sir. That is familiar."

TRIAL TESTIMONYJARRETT PRICE "OFC."
(STATES WITNESS)

Mr. Burr then ask's, "And approximately how many DVDs do you think he had?" And Mr. Price's testimony is, "There were several there. There were a couple hundred."
[Price/Cross, Pg.132 L.22-Pg.133 L.11]

- * It would appear that Mr. Price was attempting to be illusive again.
- * At first Mr. Price does recall my DVD collection. Then he doesn't recall how extensive it was until he is shown a picture. And then all of a sudden, "Yes, sir. That is familiar.", "... There were a couple hundred."

20) Mr. Price is asked if he took Mr. Gentile's Written Statement. Mr. Price can't seem to remember, saying, "...I believe so. I believe I did. ... I don't know if I personally did it or not."

Mr. Price is then shown a copy of Mr. Gentile's Written Statement, and he responds, "Yes, sir, that's my statement, yes, sir." [Price/Cross, Pg.134 L.2-9]

- * Once again, Mr. Price demonstrates that he is having problems remembering the events of this case, only when being questioned by the Defense.

- * It is noteable, that Mr. Price was the Officer whom conducted the Illegal Search; the Illegal Questioning; the Misrepresentation of the Defendants Statements; the Interviewing of Mr. Kelly; the locating of Mr. Gentile; the questioning of Mr. Gentile; the preparation of the Written Statements; the majority handling of the "Evidence"; the taking of the Photographs; and played a large part in "Losing" those Photographs; and the illusive and evasive statements during Trial; as well as filing the initial Case Report.

21) Mr. Price is asked what it was that he found after getting the Search Warrant. He testified, "A couple of movies, the gloves, and the crowbar. ..." [Price/Cross, Pg.136 L.2-7]

- * It is interesting that he testified earlier that he found (2) two DVD's in the initial search, yet here the two were found after getting the Search Warrant. [Price/Direct Pg.122 L.8-23]
- * Also, if all this stuff were together, in the same drawer as both Officer's testified to, how did he not see it all at the same time? And why did the other items become suspicious to him after he got the Search Warrant?

TRIAL TESTIMONYJARRETT PRICE "OFC."
(STATES WITNESS)

- 22) When Mr. Price is asked what is unique about the crowbar, he testified, "...I would imagine this area would be unique to this crowbar." [Price/Cross, Pg.136 L.8-10]
- * This is obviously an opinion, and not something a regular Traffic Cop would be qualified to testify to.
- 23) On Redirect, Mr. Price was asked, "...do you remember the Defendant having a bunch of DVDs?" And he answered, "I vaguely remember the collection that he showed me in the picture." [Price/Redirect, Pg.137 L.5-8]
- * It is interesting that before, on cross, Mr. Price did remember the DVD collection that I had; then he didn't remember it; then after being shown the picture, it was familiar again, and he remembered there were a "couple hundred"; and then on Redirect, he only vaguely remembered it. [Price/Cross, Pg.132 L.22-Pg.133 L.11]
- 24) In the Case Report, Mr. Price states that "R/O attempted to dust for prints, yet none could be found." [Case Report]
- * Senior Evidence Technician Patrick Merck, testified that had he been notified, he would have sent someone to the scene to dust for prints, however, no-one did.
- * And, that if it were pouring down rain, they would generally not be dusting for prints, outside. [Merck/Cross-Redirect, Pg.186 L.10-24]
- * If you look at the photograph of the camper door, in the "Lost" photo's, you will notice what appears to be fingerprint dust on the outside handle.

TRIAL TESTIMONYCASEY BOWLING "OFC."
(STATES WITNESS)

- 1) Ofc. Bowling testified that, while both himself and Mr. Price were walking around in the wooded area, they saw me come in and out of my camper "...a couple times."
[Bowling/Direct, Pg.163 L.23-Pg.164 L.6]
 - * During his testimony, Ofc. Bowling never mentions me going into the woods, when I was going in and out of my camper. Which the Officer's would know, because they were in the woods.
 - * This contradicts Mr. Kelly's previous statements about seeing me go in and out of the woods several times.
[Kelly/Direct, Pg.92 L.24-Pg.93 L.18]
 - * Both of these circumstances took place within the same period of time.
- 2) Ofc. Bowling testified that, while talking to me, I again gave consent to search my trailer, and that Mr. Price went inside to start the search, while he waited outside with me, and we had a conversation. [Bowling/Direct, Pg.164 L.7-15]
 - * As discussed within Mr. Price' testimony, I had informed both Officer's they were welcome to look around, but needed a Warrant if they wanted to go in my camper, due to me being a suspect.
 - * At this time, Mr. Price went inside anyway, claiming I had already given consent, and upon my trying to enter to pull Mr. Price out, Ofc. Bowling placed his hand on my chest and said, "Where are you going? You can't go in there, he's searching you. If you didn't do anything you'll be ok." And pushed me back outside, while telling me to calm down, and asking me a bunch of question's.
- 3) Ofc. Bowling testified that Mr. Price came out of my camper with a Liquor Bottle and an empty Ammo Box. And that is when I told him to stop searching and to get a warrant.
[Bowling/Direct, Pg.164 L.16-22]
 - * This contradicts what Mr. Price and Mr. Kelly testified to when discussing the items Mr. Price removed from my camper during his initial search. Ofc. Bowling never mentioned any DVD's.
 - * When Mr. Price came out of my camper with the items, he went straight over to Mr. Kelly's camper and showed them to him. This is when I repeated myself so Mr. Kelly could hear it.

TRIAL TESTIMONYCASEY BOWLING "OFC."
(STATES WITNESS)

- 4) Mr. Bowling testified that after they stopped the search, they called the on-call Investigator, which was Sgt. David Smith. And Sgt. Smith came out, got the warrant signed, then stayed outside with me while Bowling and Price went back inside and continued the search. [Bowling/Direct, Pg.164 L.23-Pg.165 L.5]

- * Ofc. Bowling admits with this testimony that he was not the Investigator, but Sgt. Smith was.
- * Also, Ofc. Bowling previously mentioned that while Mr. Price went inside to search me, that, "...And at that time I stayed outside when Mr. Allison and Coporal Price went inside the trailer after he got consent from Mr. Allison, and I was outside just talking to Mr. Allison." [Bowling/Direct, Pg.164 L.8-12]
- * This is obviously untrue. I tried to go inside, but Ofc. Bowling pushed me back out. And in Mr. Price' testimony, he testified that Ofc. Bowling stayed outside as well.

- 5) Mr Bowling goes on to testify that during their search, "...Corporal Price showed me where he had found a few of the items..." [Bowling/Direct, Pg.165 L.8-9]

And that, "...we looked, he looked a little deeper." And, "There was actually some gloves wrapped around the crowbar, like the crowbar was laying on top of the gloves and kind of like, like I had the gloves in my hand and grabbed the crowbar and just set them in there. Those were in there." Then goes on to describe the DVD's,; Ammo Box; and Liquor Bottle, all in the same spot. [Bowling/Direct, Pg.165 L.20-Pg.166 L.6]

- * It is interesting that Ofc. Bowling is testifying this much to "Hearsay", and an "out of court identification", yet no-one is objecting.
- * Also, it would appear that Ofc. Bowling has actually seen what he is describing himself, yet on cross, he denies seeing it, or being at the same part of the camper when he claims Mr. Price found it. [Bowling/Cross, Pg.169 L.23-Pg.170 L.17]
- * And then on Redirect, he once again claims to have been present when the "evidence" was found. [Bowling/Redirect, Pg.173 L.23-25]
- * But again, on Recross, he denies being in the camper when Mr. Price claimed to find the "evidence", and then said he was, "...at the other side of the camper.", and

TRIAL TESTIMONYCASEY BOWLING "OFC."
(STATES WITNESS)

that he never saw the Ammo Box; Liquor Bottle; or DVD's, when Mr. Price claimed to find them in the cabinet. [Bowling/Redirect, Pg.174 L.11-Pg.175 L.10]

* It is noteworthy, that the "House on Haunted Hill" DVD, and the "Black Gloves" were not listed on the Inventory of Items Seized (Search Warrant) from my residence, that was signed by "Sgt. Casey Bowling; Cpl. Price; Sgt. David Smith; and Judge Will Derrick"

* Also, Judge Derrick is the Judge whom dismissed my case at Prelim. [General Sessions Tracking Sheets/Dated: 6/18/2010 - Entered Computer: May 14, 2010 - Filed, Clerk of Court: Jun. 18, 2010 @ 1:20pm]

6) Mr. Bowling testifies that, "My observation is somebody tried to hide it behind this fake drawer.", when discussing the crowbar. [Bowling/Direct, Pg.166 L.13-17]

* It is obvious that this type of a statement is an opinion, and not an observation.

7) Mr. Bowling testified, "...Well, Corporal Price, you know, it looks like somebody stores all their tools back here in this room but you have one tool left by itself back there behind this cabinet." [Bowling/Direct, Pg.166 L.22-25]

* If Sgt. Bowling never saw any of these items himself, but instead, as he claims, Mr. Price told him about it, why would he make a statement such as this?

* Also, my "tools" were locked up in the Rubbermaid tool cabinet before Mr. Price searched me initially.

8) Mr. Bowling testified that the "pry marks" on Mr. Kelly's camper door were, "...all on the right side of the door frame..." [Bowling/Direct, Pg.167 L.6-10]

* If you look at the "Lost" Photo's of Mr. Kelly's door, it appears that the aluminum part of the frame is on the left side, not the right. ["Lost" Photo's]

9) Mr. Bowling goes on to discuss the V-shape mark on the door frame. [Bowling/Direct, Pg.167 L.13-18]

* Looking at the "Lost" Photograph's, there doesn't appear to be any V-shape anywhere. ["Lost" Photo's]

TRIAL TESTIMONYCASEY BOWLING "OFC."
(STATES WITNESS)

- 10) While attempting to describe his "observation" regarding the crowbar and the "pry marks", Mr. Bowling testifies quite a bit about his own crowbar experiences. And how he's never owned one like it. [Bowling/Direct, Pg.168 L.9-14]
- * These statements are personal opinions and personal theories that have nothing to do with this case. They should never have been allowed.
- 11) Mr. Bowling testifies that I told him that I was up all night drinking and watching movies. [Bowling/Direct, Pg.168 L. 18-Pg.169 L.2]
- He goes on to add that I changed my story and said that, "...he had been asleep all night in a chair in his house and that his friend had been up all night." [Bowling/Direct Pg.169 L.3-10]
- * I never changed my "story" at all. I told them the same thing from beginning to end. And it still has not changed.
 - * Once again, we have another egotistical officer that didn't like the facts as they were stated to him, and he had to change them to fit his theory. Just look at his previous testimony...
 - * Also, not one of these Officer's ever mentions "Cooking out".
- 12) Mr. Bowling testifies that Cpl. Price was the only one who found the items that were admitted into evidence; Cpl. Price left some of the items on the steps, in the rain; and that there were some tool bags and other tools in the back bedroom. [Bowling/Cross, Pg.170 L.1-Pg.171 L.1]
- * It becomes clear that Mr. Price has seriously tampered with and manipulated my personal property to produce the appearance that these items are "evidence" and were used in a break-in, or were stolen from Mr. Kelly.
 - * It's apparent that Mr. Bowling has contributed to the "cover-up" of Mr. Price's recklessness or malicious intent, and to my wrongful conviction.
 - * It is apparent that each officer is subtly trying to place blame on the other. (eg., Cpl. Price testifies he turned his camera into Sgt. Bowling, and then the Photo's were lost; And Sgt. Bowling testifies that this was Cpl. Price's case, and he found everything, and was in charge of everything).

TRIAL TESTIMONYCASEY BOWLING "OFC."
(STATES WITNESS)

13) Mr. Bowling is asked when Officer Price left, if he turned his camera over to him, and ..."since then it's been misplaced?" He said, yes, and that he re-issued the camera to someone else. [Bowling/Cross, Pg.171 L.8-21]

* The "Lost" Photograph's were sent to me after I wrote a letter to the Oconee Sheriff's Dept. asking for a copy of the Investigation file.

14) Mr. Bowling was asked if this was his case, and if he was the Lead Investigator. He said that this was Corporal Price's case, and that he was not the Lead Investigator, "At that time..."

He was also asked if he filed any Reports regarding this case, and his answer was no. [Bowling/Cross, Pg.171 L.22-Pg.172 L.13]

* It is interesting that the very reason Mr. Bowling did not have to be sequestered was because of the guise that he was the Lead Investigator, although he admitted he was not. [Defense Motion to Sequester the witnesses, Pg.60 L.3-Pg.61 L.18]

* The Lead Investigator was Sgt. David Smith. The Defense never got to question him, even though he filed a Report; got the Search Warrant signed and delivered; inventoried the "seized evidence"; and was listed as a witness on the State's Potential Witness List for trial.

Mr. Bowling was asked by the State, on Redirect, if he was the supervisor on scene; if he was there when the "evidence" was seized; if he took part in that with Cpl. Price; and if he was present when all the "evidence" was found. He answered yes to it all. [Bowling/Redirect, Pg.172 L.25-Pg.173 L.25]

* However, Mr. Bowling testified that he was called for assistance within the middle of the case. [Bowling/Redirect, Pg.173 L.16-20]

* And on Recross, when proffered about it again, he once again admitted that he was not inside when the "evidence" was found; he didn't see it when Cpl. Price "found" it; and he never saw the DVD's, Liquor Bottle, or Ammo Box inside the "cabinet". [Bowling/Recross, Pg.174 L.11-Pg.175 L.10]

* It is interesting how Mr. Bowling changes his story to fit the current situation, and was preaching about how this raises a "Red Flag" with Law Enforcement earlier.

A P P E N D I X - B

P R E J U D I C I A L S T A T E M E N T S
P R O S E C U T I O N

PREJUDICIAL STATEMENTS

PROSECUTION

CLOSING ARGUMENT

1) Statement regarding "Hand of One":

"I would submit to you that it doesn't apply because I think one person did this burglary and that's our contention. But if you find that the Gentile guy was involved in it in your deliberations, that they were both involved in it, the hand of one, hand of all would apply, in the fact that, you know they both participated in the crime." [Transc. Pg.206 L.3-9]

* This argument effectively circumvents the state's Burden of Proof in that it relieves them of proving all the elements of the charges "Beyond a Reasonable Doubt", and proving the defendant's culpability, by placing the burden on the defendant to prove both his own and Gentile's innocence. This is an impossible burden for the defense to overcome and violates due process.

2) Statement regarding "Photo's":

"The pictures I think would show would be damaging to the Defendant because it would have just backed up what the officers told you." [Transc. Pg.207 L.12-15]

* This statement suggests that the picture's would not be adverse to the prosecution, which is the only benefit the defense received from the state's "loss" of the Photo's. (ie., Jury Charge [Transc. Pg.239 L.20-Pg.240 L.7])

3) Statement regarding "Doing Burglaries":

"People don't do burglaries when somebody is sitting there watching them. They do it when the guy leaves at 5:30 to go to a 12-hour shift and they know that. That's when they go in your house and steal your stuff." [Transc. Pg.207 L.23-Pg.208 L.3]

PREJUDICIAL STATEMENTS

PROSECUTION

* This type of statement establishes hatred and content toward the accused. It circumvents the elements of the charges and provides a prejudicial emotional aggravation in the jurors minds that points directly to the only source, the accused.

4) Statement regarding "No means to Acquire":

"The guy had no means to acquire new pistols and new laptops and new TVs without stealing them."
[Transc. Pg.208 L.18-20]

* As with other prejudicial statements, this is a foul blow, in that it undermines the facts presented during trial, and adds deceit and fraud to the prosecutions arsenal. It unfairly infers that the accused had none of these items previously, or any way to obtain them, and had to steal them from Mr. Kelly.

This is essentially lying to the jury to coerce them into pointing the finger at the defendant. The defendant did have his own TV's and Laptop, and this was not pointed out to the court.

5) Statement regarding "The exact ones stolen":

"But its the breakdown of the exact titles that were found that lets you know that those were the exact ones stolen. ... How come those were the only ones that were taken from the victim's trailer, the only ones found in his hidden cubbyhole?" [Transc. Pg.209 L.16-22]

* This prejudice statement argues against the facts that were previously established during trial by Mr. Kelly's own testimony in that, Mr. Kelly testifies he can't be sure all three DVD's are his and swears he has watched all of his, yet one DVD was never opened.

Clearly, in the least, that DVD is not Mr. Kelly's. Yet this statement by the prosecution is somehow meant to unfairly argue against the facts to establish bias toward the accused.

PREJUDICIAL STATEMENTS

PROSECUTION

6) Statement regarding "He's not a burglar":

"He's not a burglar. They didn't charge him. There wasn't any evidence to charge him, He cooperated. ... He was not charged. He didn't do it." [Transc. Pg.211 L.7-12]

* This statement unduly suggests that the facts and evidence presented do not matter. That you must listen to the state when they say something. "Disregard the evidence and listen to me. I know!"

Also, that the accused didn't cooperate, "he was charged." The prosecution is vouching for a witness and making statements the facts do not support, and that were never introduced as evidence.

7) Statement regarding "Serial numbers":

"Yeah, we don't have the serial numbers because they never got the stuff back because he got rid of it. We didn't get the stuff back because he was slick enough to get it out of there in a bag." ... "...he knew they were armed."

"That's not unusual with burglars and stuff. They're gonna fence that stuff and get it out of there pretty quick, which is what he did." [Transc. Pg.211 L.18-Pg.212 L.4]

* These statements are unduly suggestive in that they are factual assertions about what the accused did, or didn't do. As if there is no debate, or as if this is the prosecutor's first hand knowledge. They are statements that are not supported by facts.

8) Statement regarding "Hey, search my trailer":

"This Defendant is the one that kept saying, "Hey, search my trailer" until they found the stuff. ... his story had been, I was up all night, I never went to bed. He told that to the victim, he told that to the officers, he said he never went to sleep. [Transc. Pg.212 L.18-23]

PREJUDICIAL STATEMENTSPROSECUTION

* The prosecutor is adding words to the accused's "out of court" statements, and supporting the officer's fraudulent testimony in that, I never told anyone I was "up all night and never went to bed", or "never went to sleep."

The Officer's changed my statements to fit there scenario and make me look guilty. I had always said: We stayed up drinking and playing on the internet late at night, until I passed out. I woke up at some point and noticed Rags wasn't there, but all the lights were on and I didn't see his truck.

9) Statement regarding "He changed his story":

"When this stuff was found hidden, he changed his story to, first it was, Well, that's my stuff. He knows that's not his stuff." ... "Then he changed his story a third time to where, Well, I fell asleep on this chair. Rags must have done it. We know Rags was the only one that fell asleep. He stayed up all night. He told the police several times and he told the victim several times. So he's caught in a lie at that point in time."
[Transc. Pg.212 L.24-Pg.213 L.10]

* At no point in time have I ever "changed my story". I told them what I knew, and have never said otherwise. The officer's are the ones who changed what I said, to conform to their theory. And by saying that "Rags was the only one that fell asleep.", is a lie. No-one ever said that and there was no evidence to it at all.

Furthermore, I told the officer's, I fell asleep. Rags wasn't even there when the officer's arrived. He didn't tell them anything. And Mr. Kelly said, "They said maybe about 1:00 in the morning they had heard a ruckus up the hill..."[Transc. Pg.84 L.18-20].

And, "They said they'd been up all night and they would have heard something..." [Transc. Pg.85 L.14-17]. If Rags fell asleep, he couldn't have said that. The prosecutor is making fraudulent statements to coerce/provoke the jury into convicting me.

PREJUDICIAL STATEMENTS

PROSECUTION

10) Statement regarding "Into the woods":

"Him going back out into the woods at least four times, from what the victim saw, pouring down rain, soaking wet, out there. When the police catch him out there, he says he's putting up a hammock. There are no hammocks out there. He is not putting up a hammock. I submit to you he was either hiding something or looking for a place to hide something." [Transc. Pg.213 L.13-20]

* These statements are extremely prejudice, unduly suggestive, and very unfair. They are also fraudulent. At no time whatsoever did I ever go into the woods (My camper was next to the tree line, and Mr. Kelly's camper was in front of mine, like box cars on a train.).

I went to the back side of my camper to cover my grill, propane tanks, take DOWN my vinyl hammock, lower the umbrella on the patio furniture, and remove the seat cushions, because it was raining and they were all getting soaked. Also, I NEVER said I was putting a hammock up, I said taking DOWN.

Lastly, not one article of my clothes were muddy or wet, as would be the case if someone entered a swamp ridden wooded area, in the pouring down rain, "at least four times". Not even my shoes were wet or muddy.

11) Statement regarding "Small Shovel":

"...particularly, as the victim told you, he had what appeared to be some sort of a small shovel in his hand when he was going out there. So if he buried it or covered it up with leaves or something like that, it would be easy to hide." [Transc. Pg.213 L.24-Pg.214 L.3]

* This statement is prejudice and unduly suggestive because there was no shovel ever found, I never owned a shovel at all, I never went into the woods, and neither my clothes nor shoes were wet or muddy.

Also, if there was a shovel, why didn't they find one? They "found" a crowbar, and a pair of "black gloves". It would be stupid to leave those but get rid of a shovel.

PREJUDICIAL STATEMENTS

PROSECUTION

12) Statement regarding "The only tool that's hidden":

"Now, there are other tools in his house, but this thing is the only tool that's hidden."
[Transc. Pg.214 L.13-14]

* This statement is prejudice and false. There was never a "hidden" crowbar. My only crowbar was in my tool cabinet, with my other tools. And the "lost" pictures show no crowbar was in the "compartment". And lot's of tools were thrown around my bedroom, during the search, with the tool cabinet open. [Photo's]

13) Statement regarding "Gloves":

"Officer Bowling testified that the gloves were put there in a manner that looked like somebody used to gloves to grab the crowbar." [Transc. Pg.214 L.18-20]

* This prejudice statement is attempting to coerce the jury to disregard, or forget that Officer Bowling lied about seeing the gloves allegedly wrapped around the crowbar and, "plant the seed" that because he is an officer, he is to be belived at all times.

Even when, during cross-examination, Officer Bowling is caught in a lie about this allegation, and has to correct himself, and then place the blame on Cpl. Price.
[Bowling/Direct, Pg.165 L.20-Pg.166 L.5; L.13-17, and; L.22-25], Then his story changes: [Bowling/Direct, Pg.169 L.11-15]; [Bowling/Cross, Pg.169 L.23-Pg.170 L.17; Pg.173 L.23-25; Pg.174 L.25-Pg.175 L.10]

14) Statement regarding "Found the stolen stuff":

"When they found the stuff, the stolen stuff in the hidden compartment behind the freshly glued face..."
[Transc. Pg.215 L.15-16]

* This statement unfairly accuses the defendant of being in possession of stolen property and hiding it "...behind the freshly glued face,...".

PREJUDICIAL STATEMENTS

PROSECUTION

The evidence presented, and this statement, are extremely prejudice and accusatory, in that there was no substantial circumstantial, or direct evidence presented, that the defense had a meaningful opportunity to rebut, that tended to prove these accusations in a fair and non-prejudicial way.

The officer's testimony regarding these items, and the location, could have been rebutted by the introduction, or at least the review, of the alleged "lost" photographs. (The Photo's prove the officer's were lying).

The prosecutor's statement reinforces the officer's lie, and further harms the defense because the proof (Photo's), were withheld by either officer's, the prosecution, or by both.

15) Statement regarding "Rags must have put it there":

"But that's when he changed his story from, I was up all night to, uh-oh, that's my stuff. And then it was, Well, Rags must have put it there. So we know Rags didn't put it there." [Transc. Pg.216 L.2-6]

* This statement is prejudice because it, once again, suggests that I changed my story, which I never did, and never will. The truth will not change. The officer's changed and twisted my words to aid in their prosecution.

The only time I said anything about Rags was when explaining that the liquor I drank that night was R+R, which was what Rags brought over the night before.

As far as the prosecutor's comment about, "So we know Rags didn't put it there.", this is a false statement. No-one ever asked Rags, or anyone else, if he he put anything anywhere. And it is completely unsupported by the evidence and facts presented at trial.

PREJUDICIAL STATEMENTS

PROSECUTION

16) Statement regarding "As Rags told you":

"As Rags told you, he dropped him off with two bags and hadn't seen him since."

* This statement is clearly fraudulent, in that comparing what Gentile told the officers the morning of his arrest, as described in the [Case Report Detail], and in his written [Sworn Voluntary Statement], and finally his [Trial Testimony], Mr. Gentile is not being truthful about where he went, or what he did.

And the fact that the prosecutor knows his witness is not being truthful, and continues to assert and reinforce this lie, is solicitation of perjury, obstruction of justice, obstruction of the administration of justice, and a very foul blow.

17) Statement regarding "Before it was stolen":

"...minus the ammo that was in this box at one time before it was stolen; the gloves; the liquor bottle, ... in the same, same compartment, same hidden compartment, glued from the next-door neighbor ..."
[Transc. Pg.216 L.17-23]

* This is another prejudice statement that once again tries to make erroneous presumptions (ie. items being stolen; all being in hidden compartment; compartment being freshly glued), into evidentiary facts that were never proven or introduced at trial.

Nor was the defense given an opportunity to introduce photographic evidence that would prove these accusations a lie. ("Lost" Photograph's)

18) Statement regarding "Rags saw these pistols":

"...Rags saw these pistols and gave a description of them." ... "...Rags described it to a T exactly what it looked like. So we know he had it."
[Transc. Pg.217 L.3-9]

PREJUDICIAL STATEMENTS

PROSECUTION

* In making this statement, the prosecutor is relying on and supporting fraudulent testimony that was coerced and provoked from Gentile by fraudulent misrepresentation from the Sheriff, in order to take the suspicion off of himself, and cast it on the only other available source, [me], while "cutting a deal" with the police to no longer be held a suspect, and not arrested, in this case. [Transc. Pg.157 L. 8-13]

It is also notable that Gentile can describe pistols in exact detail, yet cannot remember the type of liquor he was drinking (R+R)[Gentile/Cross, Pg.157 L.25-Pg.158 L6], [Photo's of R+R bottle]; the music that was playing; the movies that were watched; the food that we allegedly ate after "cooking out"[Gentile/Direct, Pg.145 L.8-11; Pg.146 L.16-19]; what I was drinking (R+R)[Gentile/Cross, Pg.155 L.14-19]; the clothes he washed; where we went the next morning [Gentile/Cross, Pg.152 L.1-12; Pg.153 L.7-17]; or even what kind of truck he was driving. [Gentile/Direct, Pg.146 L.7-10]; [Kelly/Direct, Pg.85 L.5-7] (Ask Mr. Kelly what color Gentile's truck was).

Also, Gentile only discusses (2) two pistols, where there were allegedly (3) three that were claimed to be missing. [Gentile/Direct, Pg.144 L.7-19];[Case Report Detail]; [Gentile/Voluntary Written Statement]

19) Statement regarding "Rag's didn't do this thing":

"Rags didn't do this thing, this Defendant did it. As I told you, he gave a statement because the police told him the Defendant had given a statement. Yeah, the Defendant did give a statement. He said, Well, Rags must have done that is what he said. It's not like they lied to him when they told him that. [Transc. Pg.217 L.16-22]

* This is prejudice because it makes the jury believe that I gave a statement to the police blaming Gentile. This is NOT true at all. I never said anything like that, or gave a written statement ever. [Gentile/Cross, Pg.155 L.25-Pg.156 L.13]

This is a false claim by the police and prosecution, and they're using it instill distrust, dishonesty, and maybe even spite against me, in the juror's minds.

PREJUDICIAL STATEMENTSPROSECUTION

20) Statement regarding "Officer's did a good job"

"The officer's in this case did a good job. They were lucky they found a hidden compartment." ... "They did a good job. And he's guilty of both charges. He's guilty."
[Transc. Pg.217 L.23-Pg.218 L.6]

* This is an opinion statement made by the prosecution as to their own contentions. These statements are not facts. Certainly not facts brought out at trial. And the prosecution's stating of their opinion by way of asserting it as fact to the jury is very prejudice against the defense because the evidence, now known, would be adverse to the prosecutions assertions.

A P P E N D I X - C

DEFICIENCIES AND ERRORS
WITH
AFFIDAVIT

DEFICIENCIES AND ERRORSAFFIDAVIT

Affidavit attachment A, "Reason for Affiant's belief property sought is on subject premises", states:

- * Another camper was broken into at the same location;
- * (Steven Allison) was the victim's neighbor;
- * (Rags) had the movie "House of a Thousand Corpses";
- * Allison allegedly gave consent to search;
- * Cpl. Price located DVD's, an Ammo Box, and a Bottle of Liquor, in a fresh glued fake drawer facing;
- * The Victim identified the property as his;
- * Allison stated that he had smoked some marijuana;

- 1)
 - A] I was never charged with another "break-in", and no other "break-in" was mentioned in any report;
 - B] I am not (Steven Allison); See research on (Allison);
 - C] (Rags) had the movie, not me;
 - D] I never gave consent to search my camper/residence;
 - E] Cpl. Price located (2) two DVD's, (3) three liquor Bottles, and the Empty Ammo Box, before obtaining a search warrant. And these items were never together, but in separate locations;
 - F] Mr. Kelly testified that he is not sure if these items are his or not, and does not mention them in his written statement;
 - G] I never said I smoked marijuana;
- 2) Affidavit is dated (3, Nov. 2009). This was marked through, not initialed, and changed to May, 2010;

DEFICIENCIES AND ERRORSAFFIDAVIT

- 3) Affidavit (attachment A), is dated (5, Jan. 2010). This was marked through, initialed, and changed to (3rd May, 2010);
- 4) Main Affidavit lists (9) nine items in the Description of Property Sought, that were never located;
- 5) The Main Affidavit, and Attachment A, lists the Lead Investigator as Inv. Sgt. David B. Smith, not Sgt. Bowling, as the prosecutor asserted to the Judge at trial;
- 6) No Crowbar or Black Gloves were listed on either the Main Affidavit or Attachment A, yet both were introduced at trial as evidence, and as being in the same exact same location as the rest of the items.

A P P E N D I X - D

DEFICIENCIES AND ERRORS
WITH
SEARCH WARRANT

DEFICIENCIES AND ERRORSSEARCH WARRANT

- 1) The Search warrant was signed, filled out, and sworn to by Investigator Sgt. David B. Smith. Smith never appeared for trial. Cpl. Price testified at trial that he himself typed the search warrant.

Prosecutor Wagner asserted at trial that Sgt. Bowling was the Chief Investigating Officer. Sgt. Bowling testified that he was only there to assist Cpl. Price, and this was his case.

- 2) Under Description of Property, a list of property to be seized is found. None of these items are listed on the Affidavit, with the exception of (1) one DVD, and the mention of drugs.

The Affidavit states that I told the officer's that I had smoked Marijuana, however, this is not true.

- 3) The (Description of Property) does not list: Gloves; Ammo Box; Military Surplus Pistol; Crowbar; 7.62x39 HP Ammo; House on Haunted Hill DVD, or; Military Duffle Bag.

Yet these items were either mentioned in the Case Report as stolen, or used against me at trial, or taken from my camper.

- 4) On the (Inventory of Seized Property), or the (True and Detailed account of all property taken), listed are:

(2) two DVD's; (1) one Empty cardboard Ammo Box; (1) one Empty Whiskey Bottle; (1) Crowbar; and (1) one Laptop.

* The Laptop belongs to me and was returned (2) two month's **after** my conviction. It was withheld, and the Defense could not use it as exculpatory evidence.

* The Whiskey Bottle was empty, and in the trash can, where it had been for a week. Mr. Kelly said his was 3/4 full.

* The Ammo Box was empty, and in the tool cabinet with all kinds of loose screws, wires, papers, and other misc. junk. Mr. Kelly said his had (500) five-hundred rounds in it.

DEFICIENCIES AND ERRORSSEARCH WARRANT

* The Crowbar was locked in my tool cabinet, with my other tools. Not in a "hidden cubbyhole" with gloves "wrapped" around it, like Sgt. Bowling testified to, then changed his story. Also, Cpl. Price never said that.

* The (2) two DVD's were with my (2) two STACKS of (250) two-hundred and fifty plus DVD's. Not in a "hidden cubbyhole" like Price and Bowling said.

Furthermore, the (Inventory Report) only mentions (2) two DVD's, when (3) three DVD's were used as evidence against me at trial, with a pair of Black Gloves that do not appear on the Report either.

Both officer's testified that (3) three DVD's and a pair of Black Gloves were seized from my camper. If this were true, they would be listed on the (Inventory Report of Items Seized) from my residence.

5) Mr. Kelly reported these items missing:

"Various DVD's"; a Sanyo Flatscreen TV; a Vizio Flatscreen TV; a 1911 45cal. Pistol; a 38 Derringer Pistol; Perscription Pills; and 500 Rds. of 7.62x39 HP Ammo.

* He never turned in, or had, any proof of these items (ie., Serial Numbers; Owners Manuals; Remote Controls; extra Ammo Clips; Photographs; Witnesses; or anything that could have shown their existence).

And not one of these items was ever located, if they even existed to begin with. Yet I was accused and convicted of stealing them and sentenced to 25 years in a maximum security prison. ... Unbelievable...

A P P E N D I X - E

DEFICIENCIES AND ERRORS
WITH
PROPERTY INVENTORY LOG

DEFICIENCIES AND ERRORSPROPERTY INVENTORY SHEET

1) At trial, (3) three DVD's were admitted into evidence and used against me. The (Property Inventory Sheet) lists only (2) two DVD's. Clearly a 3rd was added into evidence after the officer's search and seizure.

2) At trial, a pair of Gloves were introduced as evidence against me. However, the (Property Inventory Sheet) does not list any Gloves at all. Clearly the Gloves were added into evidence after the officer's search and seizure.

3) The (Property Inventory Sheet) lists a "Box w/ Wolf Ammunition 7.62x39HP". This insinuates that there is ammunition inside the box. And Mr. Kelly claims he is missing (500) five-hundred rounds of that same ammo.

However, the Pistols he claims are missing do not use that ammo. No ammo. was ever located, and my empty ammo. box didn't have ammo. in it.

This brings into question why Mr. Kelly would have (500) five-hundred rounds of Assault Rifle Ammunition, and (3) three different caliber Pistols, while traveling across country to a NUCLEAR FACILITY. Nor proof that any of these items belong to him.

4) The (Property Inventory Sheet) lists 1 crowbar, and a Box w/ Wolf Ammo. Yet these items were not listed in the (Affidavit), or the (Search Warrant). Yet were introduced as evidence against me at trial.

5) The (Search Warrant) lists:

A Gateway Computer; Acer Laptop Computer; House of a Thousand Corpses DVD; Sanyo Flatscreen TV, 19in; Vizo Flatscreen TV, 22in; Rock Island 1911 45cal. Pistol; Chrome 38 Derringer Pistol, and; Pills Bottles and Drugs.

Not one of these items were ever located, or proven to exist. Yet I was convicted of stealing them all.

DEFICIENCIES AND ERRORSPROPERTY INVENTORY SHEET

- 6) The (2) two DVD's, Ammo Box, Whiskey Bottle, and Crowbar, were obtained before a Search Warrant was issued, and without my Consent to Search. Contrary to what Sgt. Bowling and Cpl. Price testified to.

If I had ever given consent, then why is there no signed (Consent to Search) form? Because I never gave consent!

A P P E N D I X - F

DEFICIENCIES AND ERRORS
WITH
ARREST WARRANTS

DEFICIENCIES AND ERRORS

ARREST WARRANTS

- 1) The Arrest Warrants state that:
- A] "There is probable cause to believe that Defendant did commit a crime.";
- B] "That on May 2/3, 2010, ...one Marcus Daniel Allison did take and carry away...";
- C] "That on May 2/3, 2010, ...one Marcus Daniel Allison did enter a dwelling...with intent to commit a crime therein. ...entered the dwelling at night...armed with a firearm.".

** These sworn statements by Law Enforcement, and signed by judge Derrick, insist that the foregoing allegations are true. However, there are no evidentiary facts that support them.

** Furthermore, during trial, the state failed to meet it's "Burden of Proof" in establishing all the elements of the charges. Also, Cpl. Price testified that there was no probable cause, before his search.

** Lastly, Mr. Gentile's written and verbal statements to police assert that I allegedly showed him the pistols immediately upon his arrival, which he claimed was at 9:00pm. If you believe Gentile, the crime must have occurred during the day.

- 2) There was never any evidence at all that would show I entered a dwelling. No fingerprints; footprints; DNA; clothing; witnesses, or anything.

 The same can be said of the "Intent" element. There was nothing to even suggest it.

- 3) The Warrants were signed and dated by Judge Derrick on 05/04/2010. I was arrested (1) one day prior to the warrants being issued, and there were no arbitrary or exigent circumstances that would justify such process.

DEFICIENCIES AND ERRORSARREST WARRANTS

- 4) The warrants were issued by Judge Derrick under the erroneous assumption that the officer's had "consent" to search my camper. Which they did not.

The Officer's fraudulently misrepresented the circumstances and other facts in order to acquire a search warrant. And subsequently, an arrest.

- 5) The Arrest Warrants were not properly disposed of pursuant to RULE 3 (SCRCrimP), (eg., No markings formally dismissing the warrants were made on the face of it.)

However, the General Sessions Tracking Sheets, and my Criminal History Report show they were dismissed, at the Preliminary Hearing, due to "Officer no show".

- 6) No TV's; Laptops (other than my own); Pistols; or Prescription Pills were ever located or proven to exist. And no serial numbers or other methods of identification were ever provided.

The officer's kept my laptop for the entire (2) two years before my trial, and a couple of months after as well. It was only returned to my mother, by Sgt. Bowling, after a month of her requesting, and getting "run-around".

- 7) The total value of the items quoted on the warrants is \$1,550.00. Yet Mr. Kelly's testimony at trial puts the total at \$1,606.00. And the amount the Judge ordered for restitution is \$1,084.00.

Also, Mr. Kelly testified that his door cost \$800.00 to get replaced. The "lost" Photo's show the door clearly did not need replacing. Insurance scam?

- 8) The Warrants make no mention of any DVD's; Liquor Bottle; 500rds. of Ammo; or Gateway Computer. Yet the Liquor Bottle; DVD's; and Ammo Box were all used against me at trial to convict.

A P P E N D I X - G

T R I A L B R E A K D O W N

T R I A L

BREAKDOWN

MONDAY

April 23, 2012

11:06am Jury Voir Dire;

11:50am Jury selected and left the courtroom;

12:00pm Jury entered the courtroom, Judge spoke with Jury;

12:00pm Jury excused until next day at 9:30am;

12:02pm Trial adjourned until 9:30am on April 24, 2012;

TUESDAY

April 24, 2012

09:37am Trial continued, Pretrial Motions began;

09:37am Discussion about "Gentile's" Criminal Record, and how Defense received it "12 minuets ago";

09:43am Motion to exclude 3rd Party Guilt by State, Denied;

09:45am Motion to include 3rd Party Guilt by Defense, Granted. (If I was convicted under "Hand Of One, Hand of all", Gentile should have been too. He was "Primary Suspect #2" on Case Report, yet was never charged.);

00:00am Motion to suppress evidence, by Defense, Denied;

00:00am Motion regarding discussion of Crowbar, Allowed;

00:00am Motion to Sequester the witnesses, Granted; (Discussion regarding "Chief Investigating Officer")

09:56am Recess for Defense to look over State Witness "Gentile's" Criminal Record/Discussion in Chambers;

T R I A L

BREAKDOWN

10:41am Trial resumed, discussion about "Gentile's" Criminal Record;

10:47am Jury entered, Judge gave Preliminary Instructions;

00:00am Opening Statements for Prosecution/Defense;

00:00am Witnesses take the stand;

12:25pm Jury left courtroom, everyone excused for lunch;

02:00pm Afternoon Proceedings;

02:02pm Jury entered the courtroom, State Witness "Gentile" took the stand;

00:00pm Remaining witnesses testify;

00:00pm State Rests it's case;

03:05pm Jury left the courtroom;

03:05pm Defense Motion for Direct Verdict, Denied;

00:00pm Defendant Sworn-In, 15 Min. recess, not Testifying;

00:00pm State 3rd Party Guilt Motion renewed, Denied;

03:30pm Jury entered the courtroom;

03:33pm Jury excused for the day;

03:35pm Court Adjourned for the day;

WEDNESDAY
April 25, 2012

09:35am Trial resumed, Charge Conference regarding "Firearms/Night-time" elements, and "Hand of One";

T R I A L

BREAKDOWN

09:43am Jury entered courtroom;

00:00am Discussion at Sidebar, "Procedural Matter";

09:45am Defense Rests, "So the Defense rests without presenting a defense in this case.";

00:00am Closing Arguments, State/Defense;

00:00am Jury Charge by Judge;

10:46am Jury left the courtroom;

10:52am Jury started deliberations;

11:25am Jury question, Court's Exhibit 2;

11:35am Court considered other matters while waiting for a response from the Jury;

11:45am Jury note, Court's Exhibit 3, was answered by the Foreman and returned to the court;

00:00am Recess taken for Court Reporter to find Jury's requested testimony audio playback;

12:20pm Jury entered courtroom to hear audio playback;

01:11pm Note from Foreman requesting "bathroom break";

01:12pm Jury left courtroom for break;

01:22pm Note from Jury, satisfied with audio playback;

01:24pm Jury entered the courtroom, Judge spoke to Jury;

01:26pm Jury left the courtroom for further deliberations and lunch;

01:40pm Jury question, Court's Exhibit 6;

01:47pm Recess taken, for lunch;

T R I A L

BREAKDOWN

02:27pm Court resumed, considered other matters while awaiting Jury questions or verdict;

03:00pm Jury reached a Verdict;

03:07pm Jury entered the courtroom;

00:00pm Jury published Verdict, Guilty;

00:00pm Jury Polled, all guilty;

03:14pm Jury excused for the week;

00:00pm Presentence Report requested by Defense, Denied;

03:22pm Defendant Sentenced, 30 Years, 25/5 Concurrent, Trial Concluded.

...

A P P E N D I X - H

E X H I B I T R E C O R D
C O M M E N T S

EXHIBIT RECORDCOMMENTS3 DVD'S

Only (2) two DVD's were listed as being taken from my Property. However, during trial, a third DVD magically appears. This third DVD has never been opened, although Mr. Kelly testified that he has watched all three. [Kelly/Cross, Pg.105 L.5-Pg.106 L.5]

CROWBAR

The Crowbar has no identifying marks on it whatsoever that link it to any burglary. The Officer's admit through their own testimony that it was left out in the rain. And it is clearly seen in the wet grass in the Photo's they claim they "lost".

Furthermore, the Officer's admit they "stuck" it in Mr. Kelly's door frame. This destroyed any opportunity the Defense had to have it tested for Metallic Trace Analysis, to prove it never touched Mr. Kelly's door.

AMMO BOX

The Ammo Box has no identifying marks on it that would link it to this case, at all, except that it is an Ammo Box for 7.62x39HP Ammo. Which I have owned many of, as well as other people. Mr. Kelly never proved he owned a rifle that took this caliber ammunition, but I can. And I have a witness that I bought it from that sell's it all the time.

EXHIBIT RECORDCOMMENTSEVAN WILLIAMS WHISKEY BOTTLE

The Evan Williams Whiskey Bottle, was said by Mr. Kelly to contain 2/3rds of a bottle of liquor. Yet not one drop was in the bottle taken from me. This is because it is my empty bottle from a week before, that was in the trash.

Both myself and Gentile drank R+R whiskey from 10:00pm, until I passed out and woke-up the next morning to my neighbor knocking on my door. There is no way I could have drank both "Liter" bottles, and been sober enough to talk to the police, less than 8 hours later, with no sleep, while drinking beer, and smoking pot. Unless I'm Superman.

And the liquor bottle was left out in the pouring down rain as well. Until I picked it, and the other items up, that the Officer's left in the rain, and placed them back inside my camper. And miraculously left no fingerprints on anything.

BLACK GLOVES

These gloves are not mine. They were never listed on the inventory of items taken from my camper, and they were never tested. Nor were they proven to have been used for any burglary. And the Officer's stories conflict as to how they say they found them. Plus one Officer testified that there is nothing special about them at all. And "they're just gloves".

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	FOR THE TENTH JUDICIAL CIRCUIT
	)	
	)	
Marcus Daniel Allison, SCDC #350669,	)	Case No. 2020-CP-37-00319
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	(Appointment of Counsel NOT Requested)
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief (PCR) action commenced by Marcus Daniel Allison (Applicant) on May 20, 2020, the State makes this return:¹

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. Applicant was arrested on August 2, 2010, following an investigation into an incident involving a break-in to the dwelling of Bruce Kelley. During its August 2010 term, the Oconee County Grand Jury indicted Applicant for first-degree burglary (2010-GS-37-0745A) and grand larceny—\$1,000 to \$5,000 (2010-GS-37-0746A).

¹ The State's return was originally due on August 31, 2020. *See* Rule 12(a), SCRCPP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, the State respectfully asks this Court to accept this return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

A. Trial

On April 23–25, 2012, Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson. Keith Denny, Esquire and Wilson Burr, Esquire (collectively, Counsel) represented Applicant. Assistant Solicitor David Wagner prosecuted the case. On April 25, 2012, the jury convicted Applicant as indicted. Judge Culbertson sentenced Applicant to concurrent terms of twenty-five years' imprisonment for first-degree burglary and five years' imprisonment for grand larceny.

B. Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Carmen V. Ganjehsani perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

- I. Whether the trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and his friend acted together to burglarize the victim's home and steal from him.
- II. Whether the trial court properly denied Appellant's motion to suppress evidence regarding the freshly-glued false drawer and the crowbar pry marks where Appellant failed to show the lost photographs possessed exculpatory value apparent before they were lost and failed to show he could not have obtained evidence of comparable value by other means.

Following briefing and oral argument, the Court affirmed Applicant's convictions and sentences. *State v. Allison*, 2014-UP-473, (S.C. Ct. App. filed December 17, 2014). The case was remitted back to the circuit court on January 5, 2015. Applicant commenced this PCR action on May 20, 2020.

C. Initial Post-Conviction Relief Action and Subsequent Appeal: 2015-CP-37-0316

On April 13, 2015, Applicant filed his first PCR action, alleging he was being held in unlawful custody for the following reasons (verbatim):

1. "No consent was given for the search of the trailer/house. My lawyer failed to object to this search"
 - a. "There has been evidence discovered that could have only come from my house or had been stolen by someone else"
2. "No evidence was presented that showed that I broke into a residence. My lawyer failed to object at trial."
 - a. "My lawyer did not object to information that showed I had not broken into a residence"
3. "The State did not provide, or my attorney did not obtain information that was pertinent to my defense. Specifically, pictures in the possession of the Oconee County Sheriffs office"
 - a. "There are now pictures which were not provided in Discovery that show I was innocent"
4. "The pictures that were lost show that the house was not broken into as alleged"
 - a. "Should have had expert testimony to show no break in from the information concerning the tool marks that had been provided in Discovery."
5. "These pictures were after discovered evidence that was withheld pursuant to Brady"
 - a. "My lawyer failed to subpoena a witness who would have stated that I was not present during the alleged break in."

The State requested an evidentiary hearing through its return on February 8, 2016. On February 23, 2018, the PCR court convened an evidentiary hearing before the Honorable J. Cordell Maddox, Jr.

Applicant was present at the hearing and represented by William G. Yarborough, III, Esquire. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented the State. Applicant; Applicant's stepfather, Steven Earl Holcombe; Applicant's trial counsels, Keith Denny and Wilson Burr; and Solicitor David Wagner; testified at the hearing. By order signed April 16, 2018, and filed April 19, 2018, Judge Maddox denied the application on all grounds and dismissed the action with prejudice.

Applicant subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCp, challenging the PCR court's finding that the photographs in question do not fall under the scope

of *Brady*. The State made its return on May 14, 2018. Judge Maddox denied the motion by order issued October 3, 2019 and filed October 9, 2019.

While Applicant's Rule 59(e) motion was pending in the circuit court Applicant filed a *pro se* notice of appeal with the Supreme Court. On August 27, 2019, the Court dismissed the notice of appeal without prejudice pursuant to *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). The remittitur was issued on September 12, 2019.

On October 9, 2019, Judge Maddox issued an order denying Applicant's 59(e) motion. Applicant then filed a *pro se* motion to reinstate his PCR appeal pursuant to Rule 260, SCACR, on February 25, 2020. By order dated June 9, 2020, the Supreme Court dismissed the notice of appeal based on Applicant's failure to establish the notice of appeal was timely served.

II. CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective Assistance of Trial Counsel: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 9, 10, 11, 12, 14, and 15, to the S.C. Constitution, and corresponding Laws, were denied due to the many failure's, error's, and omission's[sic] of Trial Counsel, for Counsel's failure to adequately:
 - a. Investigate Law, Fact, and Evidence;
 - b. Impeach State Witness's[sic];
 - c. Defend his Client;
 - d. Object and move to Suppress/Strike;
 - e. Request beneficial Jury Instructions, and a;
 - f. Conflict of Interest's[sic]
2. State Misconduct: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1,

Section's 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to:

- a. Police Misconduct;
 - b. Prosecutorial Misconduct;
 - c. Judicial Error, and Abuse of Discretion, and;
 - d. Lack of Subject Matter Jurisdiction.
3. Excessive Sentencing: Petitioner's 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 12, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Excessive Sentencing, where petitioner was sentenced in excess of the mandatory minimum for a first offense, and no mitigating factor's[sic] were provided by counsel, nor sufficient aggravating factor's provided by the State, to warrant/justify the 25 year sentence.
 4. Ineffective Assistance of Appellate Counsel: Petitioner's 1st, 5th, 6th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 14, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Appellate Counsel's failure to properly argue:
 - a. The Insufficiency of the Evidence, and;
 - b. The 'Hand of One' Jury Instruction.
 5. Totality of the Circumstances: Petitioner's 1st, 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied by the Totality of the Circumstances, as enumerated in PCR ISSUE'S (a thru d) above, and resulted in:
 - a. Denial of Counsel at Critical Stages;
 - b. Cumulative Misconduct, and;
 - c. Cumulative Error.

On June 8, 2021, Applicant filed an amended application, raising the following additional grounds for relief:

1. Ineffective assistance of PCR counsel: Petitioner's 1st, 5th, 6th and 14th Amendment Rights to the US Constitution; Article 1, Sections 2, 3, 9 and 14 of the South Carolina Constitution; S.C. Code of Laws Ann. § 17-23-60, § 17-27-90, § 17-27-100, and § 18-1-30; Rules 1.1 (Competence) at C.[5], Rule 103 (Diligence) at C.[1], and Rule 3.2 (Expediting Litigation) at

C.[1], were denied and/or violated based on Counsel's failure's[sic] to:

- a. Investigate, prepare, file, and litigate all petitioner's claims on the initial application;
- b. Utilize available evidence in support of petitioner's claims; and
- c. Prepare and timely file the notice of appeal.

Applicant requests relief as follows:

"Vacate Conviction/Sentence and release from imprisonment, or; Grant New Trial, or; Commute Sentence, or; Resentence to minimum due to not being a Burglary 1st, or; other relief the court deems proper/just."

Attached to this return and incorporated by reference are the Oconee County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. MOTION TO DISMISS

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Because this application is procedurally barred, the State requests this Court issue a conditional order of dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.² *See* S.C. Code Ann. § 17-27-70(b) (establishing

² A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). In making its return in support of the motion for summary judgment, the State would respectfully show this court:

A. Statute of Limitations

As an initial matter, this action should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act³ (the Act). Specifically, the Act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(A)–(C).

Our Supreme Court has held that the statute of limitations shall apply to all applications

³ S.C. Code Ann. § 17-27-10 to -160

filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant’s second and current PCR application was filed well after the expiration of the statutory filing period. Applicant was convicted on April 25, 2012, and the remittitur from the direct appeal was issued on January 5, 2015. This application was filed on May 20, 2020—over *five years* after the requisite filing period expired.

Accordingly, this action should be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive

This action should further be summarily dismissed because it is successive to Applicant’s

previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief actions; thus, these

allegations are successive and barred under section 17-27-90. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were” (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989))). Applicant has failed to meet the burden imposed upon him, and this Court should summarily dismiss the application as successive to Applicant’s previous PCR applications.

Applicant’s current allegations of ineffective assistance of trial counsel and “state misconduct” were raised in the proceeding based on Applicant’s prior application for post-conviction relief. Applicant’s remaining allegations could have been raised in his previous action; thus, these allegations are successive and barred under section 17-27-90.

C. *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant’s previous state proceedings, this action is further barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

Applicant had a full opportunity to litigate all of his post-conviction relief claims in his prior action. The finality of the previous court rulings should be respected, and this Court should summarily dismiss this action as barred by the principles of *res judicata*.

D. Failure to State a Claim

This application should further be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant’s contention he received ineffective

assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* “is limited to its particular factual situation” and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR

application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action and filed a *pro se* notice of appeal. The appeal was then dismissed without prejudice because the 59(e) was still pending in the circuit court. After the order denying Applicant’s 59(e) was issued, Applicant filed a *pro se* motion to reinstate his PCR appeal. The appeal was then dismissed based on Applicant’s failure to establish the notice of appeal was timely served. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.” Therefore, Applicant’s allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims. This Court should dismiss this claim for failing to state a cognizable claim upon which relief can be based.

E. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law,

criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

305 S.C. at 451-52, 409 S.E.2d at 394-95.

The United States Supreme Court has explained that “the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). “Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of ‘becoming a constructive citizen.’” *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring)). In his concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years

after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. ALL OTHER CLAIMS

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

[Conclusion and signature on following page]

V. CONCLUSION

WHEREFORE, having made its return, the State moves to summarily dismiss the application because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrines of *res judicata*; and because continued litigation by Applicant frustrates the need for finality of litigation.

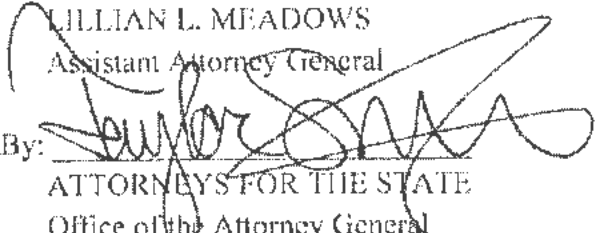
Respectfully submitted,

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for Lillian
Meadows

August 12, 2021

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

7/11/21 12:52 PM

Marcus Daniel Allison, SCDC #350669,

Case No. 2020-CP-37-00319

Applicant,

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Marcus Daniel Allison (Applicant) on May 20, 2020. The State made its Return on August 12, 2021, requesting the application be summarily dismissed.¹

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. Applicant was arrested on August 2, 2010, following an investigation into an incident involving a break-in to the dwelling of Bruce Kelley. During its August 2010 term, the Oconee County Grand Jury indicted Applicant for

¹ The State's return was originally due on August 31, 2020. *See* Rule 12(a), SCRCPP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State's request to accept its return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

first-degree burglary (2010-GS-37-0745A) and grand larceny—\$1,000 to \$5,000 (2010-GS-37-0746A).

A. Trial

On April 23–25, 2012, Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson. Keith Denny, Esquire and Wilson Burr, Esquire (collectively, Counsel) represented Applicant. Assistant Solicitor David Wagner prosecuted the case. On April 25, 2012, the jury convicted Applicant as indicted. Judge Culbertson sentenced Applicant to concurrent terms of twenty-five years' imprisonment for first-degree burglary and five years' imprisonment for grand larceny.

B. Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Carmen V. Ganjchsani perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

- I. Whether the trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and his friend acted together to burglarize the victim's home and steal from him.
- II. Whether the trial court properly denied Appellant's motion to suppress evidence regarding the freshly-glued false drawer and the crowbar pry marks where Appellant failed to show the lost photographs possessed exculpatory value apparent before they were lost and failed to show he could not have obtained evidence of comparable value by other means.

Following briefing and oral argument, the Court affirmed Applicant's convictions and sentences. *State v. Allison*, 2014-UP-473 (S.C. Ct. App. filed Dec. 17, 2014). The case was remitted back to the circuit court on January 5, 2015. Applicant commenced this PCR action on May 20, 2020.

C. Initial Post-Conviction Relief Action and Subsequent Appeal: 2015-CP-37-0316

On April 13, 2015, Applicant filed his first PCR action, alleging he was being held in unlawful custody for the following reasons (verbatim):

1. "No consent was given for the search of the trailer/house. My lawyer failed to object to this search"
 - a. "There has been evidence discovered that could have only come from my house or had been stolen by someone else"
2. "No evidence was presented that showed that I broke into a residence. My lawyer failed to object at trial."
 - a. "My lawyer did not object to information that showed I had not broken into a residence"
3. "The State did not provide, or my attorney did not obtain information that was pertinent to my defense. Specifically, pictures in the possession of the Oconee County Sheriff's office"
 - a. "There are now pictures which were not provided in Discovery that show I was innocent"
4. "The pictures that were lost show that the house was not broken into as alleged"
 - a. "Should have had expert testimony to show no break in from the information concerning the tool marks that had been provided in Discovery."
5. "These pictures were after discovered evidence that was withheld pursuant to Brady"
 - a. "My lawyer failed to subpoena a witness who would have stated that I was not present during the alleged break in."

The State requested an evidentiary hearing through its return on February 8, 2016. On February 23, 2018, the PCR court convened an evidentiary hearing before the Honorable J. Cordell Maddox, Jr.

Applicant was present at the hearing and represented by William G. Yarborough, III, Esquire. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented the State. Applicant; Applicant's stepfather, Steven Earl Holcombe; Applicant's trial counsels, Keith Denny and Wilson Burr; and Solicitor David Wagner; testified at the hearing. By

order signed April 16, 2018, and filed April 19, 2018, Judge Maddox denied the application on all grounds and dismissed the action with prejudice.

Applicant subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, challenging the PCR court's finding that the photographs in question do not fall under the scope of *Brady*. The State made its return on May 14, 2018. Judge Maddox denied the motion by order issued October 3, 2019 and filed October 9, 2019.

While Applicant's Rule 59(e) motion was pending in the circuit court Applicant filed a *pro se* notice of appeal with the Supreme Court. On August 27, 2019, the Court dismissed the notice of appeal without prejudice pursuant to *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). The remittitur was issued on September 12, 2019.

On October 9, 2019, Judge Maddox issued an order denying Applicant's 59(e) motion. Applicant then filed a *pro se* motion to reinstate his PCR appeal pursuant to Rule 260, SCACR, on February 25, 2020. By order dated June 9, 2020, the Supreme Court dismissed the notice of appeal based on Applicant's failure to establish the notice of appeal was timely served.

II. CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective Assistance of Trial Counsel: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article I, Section's 3, 9, 10, 11, 12, 14, and 15, to the S.C. Constitution, and corresponding Laws, were denied due to the many failure's, error's, and omission's[sic] of Trial Counsel, for Counsel's failure to adequately:
 - a. Investigate Law, Fact, and Evidence;
 - b. Impeach State Witness's[sic];

- c. Defend his Client;
 - d. Object and move to Suppress/Strike;
 - e. Request beneficial Jury Instructions, and a;
 - f. Conflict of Interest's[sic]
2. State Misconduct: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to:
 - a. Police Misconduct;
 - b. Prosecutorial Misconduct;
 - c. Judicial Error, and Abuse of Discretion, and;
 - d. Lack of Subject Matter Jurisdiction.
 3. Excessive Sentencing: Petitioner's 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 12, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Excessive Sentencing, where petitioner was sentenced in excess of the mandatory minimum for a first offense, and no mitigating factor's[sic] were provided by counsel, nor sufficient aggravating factor's provided by the State, to warrant/justify the 25 year sentence.
 4. Ineffective Assistance of Appellate Counsel: Petitioner's 1st, 5th, 6th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 14, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Appellate Counsel's failure to properly argue:
 - a. The Insufficiency of the Evidence, and;
 - b. The 'Hard of One' Jury Instruction.
 5. Totality of the Circumstances: Petitioner's 1st, 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied by the Totality of the Circumstances, as enumerated in PCR ISSUE'S (a thru d) above, and resulted in:
 - a. Denial of Counsel at Critical Stages;
 - b. Cumulative Misconduct, and;
 - c. Cumulative Error.

On June 8, 2021, Applicant filed an amended application, raising the following additional grounds for relief:

1. Ineffective assistance of PCR counsel; Petitioner's 1st, 5th, 6th and 14th Amendment Rights to the US Constitution; Article 1, Sections 2, 3, 9 and 14 of the South Carolina Constitution; S.C. Code of Laws Ann. § 17-23-60, § 17-27-90, § 17-27-100, and § 18-1-30; Rules 1.1 (Competence) at C.[5], Rule 103 (Diligence) at C.[1], and Rule 3.2 (Expediting Litigation) at C.[1], were denied and/or violated based on Counsel's failure's[sic] to:
 - a. Investigate, prepare, file, and litigate all petitioner's claims on the initial application;
 - b. Utilize available evidence in support of petitioner's claims; and,
 - c. Prepare and timely file the notice of appeal.

Applicant requests relief as follows:

"Vacate Conviction/Sentence and release from imprisonment, or; Grant New Trial, or; Commute Sentence, or; Resentence to minimum due to not being a Burglary 1st, or; other relief the court deems proper/just."

Before this Court are the Oconee County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

Because there is no genuine issue of material fact which would necessitate an evidentiary hearing, this Court hereby informs the parties of its intent to dismiss the application as procedurally barred. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *See also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an

evidentiary hearing). Pursuant to section 17-27-70 and -80 of the South Carolina Code, this Court makes the following findings of facts and conclusions of law based upon the pleadings, records submitted by both parties, and the applicable law:

A. Statute of Limitations

As an initial matter, this Court finds this action must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act² (the Act). Specifically, the Act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(A)-(C).

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for

² S.C. Code Ann. § 17-27-10 to -160

summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant’s second and current PCR application was filed well after the expiration of the statutory filing period. Applicant was convicted on April 25, 2012, and the remittitur from the direct appeal was issued on January 5, 2015. This application was filed on May 20, 2020—over *five years* after the requisite filing period expired.

Accordingly, this action must be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive

This Court further finds Applicant’s allegations of ineffective assistance of trial and appellate counsel must be summarily dismissed as successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish

that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief actions. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were” (citing *Gamble v. State*, 298 S.C.

176, 178, 379 S.E.2d 118, 119 (1989)). Applicant's allegations of ineffective assistance of trial counsel and "state misconduct" were raised in the proceeding based on Applicant's prior application for post-conviction relief. Applicant's remaining allegations could have been raised in his previous action; thus, these allegations are successive and barred under section 17-27-90. Applicant has failed to meet the burden imposed upon him, and this Court must summarily dismiss the application as successive to Applicant's previous PCR action.

C. *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant's previous state proceedings, this Court further finds this action is barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered "the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the merits." *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the

applications, as well as those that *could have* been raised. *Id.* at 616-17, 274 S.E.2d at 415-16 (emphasis added).

Applicant has litigated a previous PCR application in the circuit court, where he had a full opportunity to raise all his allegations of ineffective assistance of trial and appellate counsel. The finality of the previous court rulings should be respected, and this Court must summarily dismiss this action as barred by the principles of *res judicata*.

D. Failure to State a Claim

This Court further finds this application must be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant's contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only

applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action and filed a *pro se* notice of appeal. The appeal was then dismissed without prejudice because the 59(c) was still pending in the circuit court. After the order denying Applicant’s 59(c) was issued, Applicant filed a *pro se* motion to reinstate his PCR appeal. The appeal was then dismissed based on Applicant’s failure to establish the notice of appeal was timely served. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Therefore, Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims. This Court must dismiss this claim for failing to state a cognizable claim upon which relief can be based.

E. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

305 S.C. at 451-52, 409 S.E.2d at 394-95.

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.'" *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 262

(1973) (Powell, J., concurring)). In his concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

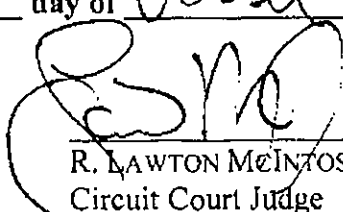
Pursuant to section 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Oconee County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Lillian L. Meadows
Post-Conviction Relief Division – 10th Circuit

Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Oconee County Clerk of Court and opposing counsel within twenty (20) days, and this Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 5 day of October, 2021.



R. LAWTON McINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson, South Carolina

2021 OCT 12 P 2:20

CLERK OF COURT
OCEAN COUNTY
SC

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Marcus Daniel Allison, SCDC #350669,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2020-CP-37-0319

CONSENT ORDER VACATING THE
CONDITIONAL ORDER OF DISMISSAL
AND GRANTING RELIEF PURSUANT
AUSTIN V. STATE

FILED OCONEE COUNTY SC
MELISSA C. BURTON
CLERK OF COURT
2021 OCT -3 P 3:14

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Marcus Daniel Allison (Applicant) on May 20, 2020. The State made its return on August 12, 2021, requesting the action be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a conditional order of dismissal signed October 6, 2021, and filed October 12, 2021, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said order in which to show why the dismissal should not become final. The conditional order was served on PCR counsel, E. Charles Grose, Jr., Esquire, on October 20, 2021. PCR counsel conferred with the State, who agreed that Applicant is entitled to *Austin* review of his initial post-conviction relief action. This Court agrees.

Our Supreme Court has held that every PCR applicant is entitled to a full and fair opportunity to present claims in one PCR application, or one "bite at the apple." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). This "bite" includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755-56. Accordingly, successive applications are generally disfavored "because they

allow an applicant to receive more than 'one bite at the apple.' " *Id.* at 261, 523 S.E.2d at 755; see generally *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.").

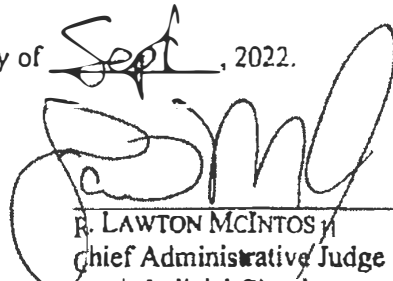
However, our Supreme Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755; cf. S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). *Austin* provides for belated appellate review of the denial of a prior PCR action after the statute of limitations has expired where PCR counsel's failure to timely appeal prevented the applicant from seeking appellate review. 305 S.C. 453, 409 S.E.2d 395; see, e.g., *Hope v. State*, 328 S.C. 78 n.1, 492 S.E.2d 76 n.1 (1997) (permitting an *Austin* appeal where original PCR counsel failed to appeal from the first denial of PCR); but see *Alice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (limiting the reach of *Austin* and holding that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel).

A PCR applicant is entitled to an *Austin* appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds the applicant was denied his or her right to appeal, the applicant can petition for certiorari and the Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Alternatively, if the PCR court finds the applicant never in fact sought discretionary review, the applicant may

appeal that finding, and the Supreme Court will review the appeal based on the normal "any evidence" standard. *Id.* at 455, 409 S.E.2d at 396 (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (highlighting that "any evidence" of probative value contained in the record is sufficient to uphold the PCR judge's factual findings on appeal)); *see generally Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (explaining that this Court "give[s] great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses").

Based on the foregoing, this Court finds Applicant did not knowingly and intelligently waive his right to appeal his initial post-conviction relief action and, as such, he may petition the Supreme Court of South Carolina pursuant to *Austin v. State*. Accordingly, this Court hereby **GRANTS** Applicant's request for belated appellate review of his initial post-conviction relief action and **VACATES** its October 6, 2021, order of dismissal.

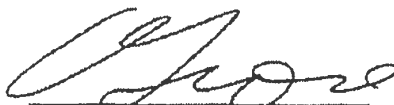
AND IT IS SO ORDERED this 26 day of Sept, 2022.


R. LAWTON MCINTOS
Chief Administrative Judge
Tenth Judicial Circuit

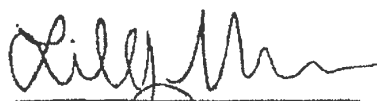

South Carolina

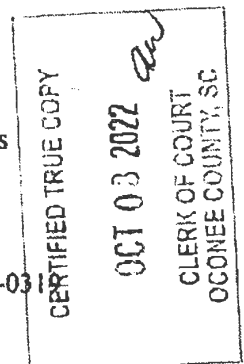
FILED OCOFEE COUNTY, SC
MEISSA C. BURTON
CLERK OF COURT
2022 OCT - 3 P 3: 14

I SO MOVE:


E. Charles Grose, Jr., Esquire
Counsel for Applicant

I CONSENT:


Assistant Attorney General Lillian L. Meadows
Counsel for the State



00745A

652

WITNESSES

J D PRICE, Oconee Co Sheriff's Dept.

Justin Ward

The State of South Carolina

County of Oconee

COURT OF GENERAL SESSIONS

Term

THE STATE

vs.

Marcus Daniel Allison

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

AUG 2 2010

VERDICT

GUILTY

Foreperson of Petit Jury

Date:

DRW

Indictment for

Burglary (After June 20, 1985) - First degree

SC Code: 16-11-0311

CDR Code: 0079

FILED
CLERK OF COURT
2010 AUG - 2 A 11: 55
WILKINSON COUNTY, SC

ENTERED
JB
COMPUTER

STATE OF SOUTH CAROLINA)
COUNTY OF Oconee)

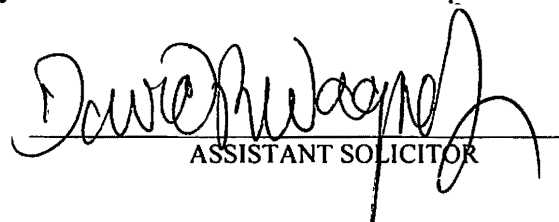
INDICTMENT

At a Court of General Sessions, convened on _____, the Grand Jurors of Oconee County present upon their oath:

Burglary (After June 20, 1985) - First degree

That **Marcus Daniel Allison** did in Oconee County, on or between **May 2, 2010 and May 3, 2010**, willfully and unlawfully enter the dwelling of Bruce Kelley located at 350 Old Oak Rd., Lot 10, without consent and with the intent to commit a crime therein and aggravating circumstances were present, to wit: when, in effecting entry or while in the dwelling or in immediate flight he or another participant in the crime, is armed with a deadly weapon or explosive; and/or the entering or remaining occurred in the nighttime. This is in violation of §16-11-311 of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

DOCKET NO. 2010GS37 **00746A**

WITNESSES

J D PRICE, Oconee Co Sheriff's Dept.

Justin Ward

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

*True Bill*Foreperson of Grand Jury
Date:*Chris Oatis*
AUG 2 2010

VERDICT

*Guilty*Foreperson of Petit Jury
Date:The State of South Carolina
County of Oconee

COURT OF GENERAL SESSIONS

Term

THE STATE

vs.

Marcus Daniel Allison

DRW

Indictment for

Grand Larceny, Value More Than \$1,000 But
Less Than \$5000SC Code: 16-13-0030(B)(1)
CDR Code: 0478FILED
CLERK OF COURT
OCONEE COUNTY, SC
DEVELOPMENTAL
COURT

2010 AUG -2 A 11:55

ENTERED
COMPUTER

STATE OF SOUTH CAROLINA)
COUNTY OF Oconee)

INDICTMENT

At a Court of General Sessions, convened on _____, the Grand Jurors of Oconee County present upon their oath:

Grand Larceny, Value More Than \$1,000 But Less Than \$5000

The Defendant, **Marcus Daniel Allison**, did in Oconee County, South Carolina, on or between **May 2, 2010 and May 3, 2010**, feloniously take and carry away the goods of Bruce Kelley, valued at more than \$1000 but less than \$5000, described as follows: a 18 inch flat screen tv, 22 inch flat screen tv, Acer laptop, rock island 1911 military pistol, .38 derringer, a military surplus pistol and a box of ammo with intent to deprive the owner permanently of such property, all in violation of Section 16-13-30(B)(1), Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

656 STATE OF SOUTH CAROLINA)
COUNTY OF Oconee)
STATE VS.)
Mr. Marcus Daniel Allison)
AKA:)
Race: W Sex: M Age: 32)
DOB: SS#:)
Address: Gibson Rd.)
City, State, Zip: Seneca, SC 29672)
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS3700745A
A/W#: DIAN130186
Date of Offense: 5/2/2010
S.C. Code §: 16-11-0311
CDR Code #: 0079

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Burglary / Burglary (After June 20, 1985) - First degree

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: *David R. Wagner* SC Bar# *44058* Defendant *[Signature]* Attorney for Defendant *[Signature]* SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed X years
and/or to pay a fine of \$ X; provided that upon the service of X days/months/years and/or payment
of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3/30/2011
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ Set by SCDPPPS _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk *Beverly H. Whitfield*
Court Reporter: *Robin S. Hild*
SCCA/217 (03/2011)

Presiding Judge *[Signature]*
Judge Code: *2148*
Sentence Date: *April 25, 2012*

COUNTY OF Oconee
 STATE VS.
Mr. Marcus Daniel Allison
 AKA:
 Race: W Sex: M Age: 32
 DOB: [REDACTED] SS#: [REDACTED]
 Address: Gibson Rd.
 City, State, Zip: Seneca, SC 29672
 DL#: [REDACTED] SID#: [REDACTED]

INDICTMENT/CASE#: 2010GS3700746A
 A/W#: DIAN130187
 Date of Offense: 5/2/2010
 S.C. Code §: 16-13-0030(B)(1)
 CDR Code #: 0478

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Larceny / Grand Larceny, value more than \$1,000 but less than \$5,000

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-13-0030(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0478

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 6/10/12 [Signature] 6/10/12
 Wagner, David R. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed X years
 and/or to pay a fine of \$ X; provided that upon the service of X days/months/years and/or payment
 of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 4/25/2012 3/30/2011 (MHC)
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☒ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
 Total: \$ 1084.80 plus 20% fee: \$
 Payment Terms:
☐ Set by SCDPPPS

Recipient: Bruce Kelley 7446 Hwy 111 N
Bresboro AR 72416

*Fine:
 § 14-1-206 (Assessments 107.5%) \$
 § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$
 § 56-5-2995 (DUI Assessment) \$12 \$
 § 56-1-286 (DUI Breath Test) \$25 \$
 Proviso 47.9 (Public Def/Prob) \$500 \$
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$150 \$
 § 50-21-114(BUI Breath Test Fee) \$50 \$
 § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$
 Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.00
 3% to County (if paid in installments) \$ 390
 TOTAL \$ 13390

 days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp.
 May serve W/E beginning
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ beginning
 \$ paid to Public Defender Fund
 Other:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Robin S. Field

SCCA/217 (03/2011)

Presiding Judge Morgan T. Culbertson

Judge Code: 2148

Sentence Date: April 25, 2012 ✓