September 21, 2015

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. BOX 11330
Columbia, SC 29211

Re: Terrance Johnson v. The State

Appellate Case No.: 2015-000146

Dear Mr. Shearouse:

Enclosed please find for filing Applicant's Motion for Writ of Certiorari.

Respecfully Submitted,

Terrance Johnson October 8/2015

Terrance Johnson #156066
Lieber Corr. Inst.
P.O. BOX 205
Ridgeville, SC 29472

STATE OF SOUTH CAROLINA

In the Supreme Court

Terrance Johnson, #156066, **Applicant,** **Vs.** State of South Carolina, **Respondent.**	**Appellate Case No.2015-000146** **Applicant's Motion For Writ of Certiorari**

Applicant comes before the Court with a Motion for Writ of Certiorari pro se to be filed with the Court at this time.

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. BOX 11330
Columbia, SC 29211

Terrance Johnson #156066
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APPLICANT

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9(A) INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant contends that he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I § 14 of the U.S. Constitution.

ISSUES / QUESTIONS PRESENTED

I Counsel was ineffective for failing to argue that Petitioners stop violated his 4th Amendment rights thus resulting in a Denial of Equal Protection.

II Counsel was ineffective for failing to file a motion to exclude all evidence discovered pursuant to the illegal traffic stop, thus resulting in a denial of Equal Protection.

III Counsel was ineffective for failing to argue that the stop of Petitioners vehicle was pretexual, thus resulting in a Denial of Equal Protection.

IV Counsel was ineffective for failing to call witnesses to trial who would have substantiated that the stop was pretexual thus denying Petitioners 5th and 6th Amendment rights.

To save the Courts time, Petitioner will argue these issues together since the facts of one encompasses the other.

10(a)Claims of Ineffective Assistance of Counsel are evaluated under the two-prong test set forth by the U.S. Supreme Court in Strickland v Washington, 466 U.S. 668, 104 S.ct 2052 (1984). First, a petitioner must show that counsel's performance was deficient by demonstrating his representation fell below reasonable professional norms. Strickland Supra. Once such deficient performance has been shown, a petitioner must show that he suffered prejudiced by demonstrating that but for counsel's performance, there exists a reasonable probability the result of the proceeding would have been different. Strickland Supra, Johnson v State 480 SE2d 733 (1997)

The Fourth Amendment protects against unreasonable searches and seizures. The stopping of a vehicle and the Detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment. Davis v Mississippi 89 S.ct 1394 When ever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person "ID at 16, 88 S.ct At 1877, and the Fourth Amendment requires that the seizure be "reasonable."

A traffic stop must be justified by reasonable suspicion at inception of intrusion and must be reasonably related in scope to circumstances justifying intrusion in the First Instance. See U.S. v Doe 801 F. Supp 1562

Before the Trial Petitioner constantly informed his Lawyer that he was not stopped because of his tag by Officer Butler, but because he was a black man in a high priced sports car. He went on to explain to his attorney that although the officer report, speaks as if he was behind Petitioner, he was never behind petitioner, but pulled beside him at a stop light. As the light changed both pulled off and the officer remained beside him until he came to his destination, in which he signaled and made a left turn to go to the Florist shop. Petitioner then parked, got out, and walked around the car to retrieve his son, it was then that Petitioner saw Officer Butler walking toward him. At this time the officer asked him for his license and registration. Because Petitioner was closest to passenger side, petitioner opened the door retrieved rental agreement from dash and reached across and retrieved his drivers license. The officer then asked Petitioner if he knew that nothing can be surrounding his tag. Petitioner explained that the car came like that from the Jaguar Dealership.

Officer Butler then asked Petitioner why he had out of state tags. Petitioner again explained that the car came that way from the Dealership. Officer Butler then asked Petitioner why was he in the rental car, Petitioner explained that his car was being

repaired. Officer asked for consent to search vehicle. Petitioner said no. Officer Butler then asked Petitioner to sit in vehicle and went to check license and rental agreement. Five minutes later a second Patrolman came, after Officer Butler and the other Patrolman talked for a minute, Petitioner was asked to step to the rear of vehicle, he was then patted down and then told to sit back in vehicle and place his hands on steering wheel, while the officer took the K-9 around vehicle. After petitioner cleared this procedure Petitioner was then told the reason he was stopped. See Trpg 63 Ln 16-25. See Trpg 64 1-15

Petitioner then proceeded into flower shop in which, the cashier said to him that the police was still walking around his car, looking in the windows. Petitioner then went back out and was arrested for a firearm in vehicle and drugs found in console in proceeding search.

During the hearing to suppress the evidence, some of the questions that was asked of Officer Butler, and his inconsistent accounts of what happen, shows the truth of what petitioner argues before this Court. Had Counsel argued that the stop was Pretexual and violated Petitioner's 4th Amendment rights the evidence would have been suppressed.

Trial Counsel asked the Following Questions of PTL Butler: Trpg 20 Ln 10-13
(Q) Did you have an occasion during the time that you were traveling down Rivers Avenue to run the license plate of this car through any type of check?
(A) No, I did not.

If Officer Butler had been behind Petitioner, and his sole purpose to stop petitioner was a tag obstruction, he would have blue lighted petitioner at that time, but when questioned as to, did he blue light petitioner, Officer Butler said he did not, See Trpg 22 Ln 12-14

Officer Butler went on to explain that although it is a violation, normally he does not issue a citation for something like that. See Trpg 24 Ln 19

Although Counsel asked questions surrounding the stop Counsel did not make the motion to suppress based on the stop, Counsel was ineffective in this regard.

The United States Supreme Court has ruled when police lack reasonable suspicion, necessary to support a stop, but use a minor violation to support stop in order to search a person or place for evidence of an unrelated serious crime, the stop is merely Pretexual. In determining whether such a stop is constitutional, the Court should not ask "not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." In other words, an objective analysis of the facts and circumstances of a pretexual stop is appropriate, rather than an inquiry into the officers subjective intent. See Delaware v Prouse 99 S.ct 1391

The record is clear that Officer Butler's stop of Petitioner was Pretexual:
Trpg 20 Ln 25 Officer said he was beside car.

Trpg 23 Ln 24 Officer admits again he was beside vehicle.

During the Suppression hearing and during trial Officer Butler tries to insinuate that he pulled in behind Petitioner, had Counsel listened to petitioner and testimony given, she would have seen officer, could not have pulled behind Petitioner. The officer again on Trpg 23 Ln 11-13 admits he was beside petitioner. Officer further admits on Trpg 25 Ln 24-25 that there were periods of time when he was beside the vehicle. If this is so, why didn't officer just Blue light Petitioner and

have him pull over, but he did not, and the record clearly shows this:

Tr.p. 22, lines 6-14

Q: So you see the car it's a Jaguar, you see the driver, a black male driving the car, and in less than a mile later this car pulls off of Rivers Avenue into a parking lot, the Flower shop, isn't that what happened?

A: Yes, ma'am

Q: At no point during that period of time did you ever put your blue light on, did you?

A: No, I did not

What cannot be seen through the record was that petitioner made a left turn, but to get to the Flower shop had to first, cross two lanes of traffic to pull into the parking lot of the Flower shop. Because officer Butler was baside Petitioner he had to go up cross over three lanes of traffic and come back to pull in where Petitioner had stopped.

Had Counsel subpoenaed Fautain Judon, who gave a written affidavit that clearly shows that both Petitioner and officer Butler were driving side-by-side and that once Petitioner turned, officer Butler had to go up, make an illegal turn and come back to get to where Petitioner was.

Counsel could have showed why Petitioner was not aware that he was even being stopped by officer Butler, until he looked up and saw the officer approaching him on foot and the officer asked for his license and registration.

During trial, the state presented conflicting testimony leading up to the arrest of Petitioner. Testimony from the officer showed that the officer was beside the Petitioner, instead of behind him. Officer constantly explained that he observed Petitioner making furtive movements, and that his suspicion was aroused, However, the circumstances used to questioned Petitioner did not add up to stop the Petitioner for a tag obstruction.

During its charge to the jury, the trial court issued the following instruction on circumstantial evidence:
"Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. (Tr.p. 228-229). Counsel did not object to this instruction or request the trial court issue the long version of the circumstantial evidence instruction pursuant to **State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).** The Petitioner

contend that, based on the circumstantial nature of the evidence presented, counsel should have requested the long version of the instruction.

The law to be charged in a particular case is determined by the evidence presented at trial. **State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000).** A trial court commits reversible error when it fails to give a requested instruction on an issue raised by the evidence. **State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).**

A requested instruction must state the proper test for determining the issue raised and should adequately reflect the facts and theory presented at trial. **Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991)(Counsel ineffective in failing to request additional instruction on self-defense which was warranted by the evidence despite the fact that the trial judge instructed jury in accordance with prior approved self-defense charge).**

A defendant in a criminal trial has the right "to seek out the truth in the process of defending himself". **Davis v. Alaska, 94 S.Ct. 1105.** Few rights are more fundamental than that of an accused to present witnesses in his own defense. **Chambers v. Mississippi, 93 S.Ct. 1038.**

The "deficient performance" prong is easily met here. An

attorney's failure to present available exculpatory evidence is ordinarily deficient, "unless some cogent tactical or other consideration justified it" Washington v Morry, 952 F.2d 1472 (4th Cir 1991) According to Lawrence v Armontrout, 900 F.2d 127, 130 (8th Cir 1990) (Failure to interview alibi witnesses was deficient performance under first STRICKLAND factor, Harris v Reed, 844 F2d 871, 878 (7th Cir 1990) (Failure to call witnesses to contradict eye witness identification of defendant was ineffective assistance)

A Court should "evaluate the conduct from Counsel's perspective at the time" Strickland 104 S.ct At 2065. Tolerance of tactical miscalculations is one thing; Fabrication of tactical excuses is quite another. Kimmelmann v Morrison 106 S.ct 2574, 2588-2589 (1986) (hindsight cannot be used to supply a reasonable reason for decision of counsel) Harris, 894 F2d At 878

There is no tactical reason counsel can give or gave that can justify her performance which denied petitioner the opportunity to present a [complete defense].

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed.....

[T]he adversary system requires that "All available defenses are raised" so that the Government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses, but also those that the state intends to call, when they are accessible.

The investigation should always include efforts to secure information in the procession of the prosecution and Law enforcement Authorities. And of course, the duty to investigate also requires adequate legal research. See United States v. Decoster, 487 F2d At 1204

It is clear that counsel had available witnesses, that could verify Petitioners contention that the testimony of Officer Butler was a blatant fabrication of events to justify a stop that was clearly pretextual, and had counsel properly researched the legal aspect of the events it would have been clear, the events that occurred never happened at separate points.

Petitioner also relying upon the Fifth and Sixth Amendments. The Fifth Amendment provides in part that no person shall ---- be deprived of life, liberty or property without Due Process of Law.

U.S. Const. Amend (V) and the Sixth Amendment provides in part that, "In all criminal proceedings the accused shall enjoy the right ----- to have compulsory process for obtaining witnesses in his favor.

The right to offer testimony of witnesses and to compel their attendance, if necessary, as in plain terms the right to present a Defense, the right to present the Defendants version of the Facts as well as the prosecutions to the jury so they may decide where the truth lies.

Just as the accused has the right to confront the prosecution witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a Defense. The right is a Fundamental Element of Due Process of Law. See Washington v Texas 87 S.ct 1920

Counsel violated petitioner's 5th and 6th Amendment rights by Failing to call witnesses who could have verified that the officer was not behind Petitioner and did not Blue light or pull right in behind petitioner as he claimed.

In addition officer went even further, to admit that, the reason he said he stopped Petitioner wasn't really a moving violation.

See Trpg 24 Ln 17-25 Trpg 25 Ln 1-3

It is clear that Officer Butler was looking for an excuse based on the Fact that Petitioner was a black male in an up dated jaguar?

The U.S. Supreme Court and Federal Courts has constantly ruled that investigatory stops are invalid as pretexual unless "a reasonable officer would have made the seizure in the absence of illegitimate motivation. See U.S. v Smith 799 F2d at 708

The record shows that Officer Butler's motivation for the stop of petitioner was not in anyway based on an equipment violation, it was only a pretext to seize Petitioner to further investigate a hunch as seen in this question asked by Counsel:
Trpg 139 Ln 18-25
(A) Yes. He was making a lot of furtive movements in the car. I could actually observe him from the passenger -- the drivers side mirrors of the vehicle looking around, actually making furtive movements in the car and what not. There was a lot of indicators to me that there may be some possibility of criminal activity going on.

(Q) So based on the fact that you sat there and said there might be something going on, I might need to talk to this person, that's when he pulled off Rivers Avenue into the parking lot of the Flower shop and you decided to get behind him and at that point turn your blue light on?

(A) No ma'am, I found a legal and valid equipment violation on his vehicle which I then stopped him for

Notice that the stop wasn't based on a equipment violation, but only a Pretext to stop Petitioner. Officer Butler did not say he saw a violation, but that he found a legal and valid violation which as said earlier was a pretext to further investigate a

hunch.

This is the same officer that testified that he normally doesn't issue a ticket for tag obstruction, "Trpg 24 Ln 19" and the same officer that testified that it is not a moving violation. Trpg 25 Ln 1-3

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalk; Nor are they shorn of those interest when they step from the sidewalks into their automobiles.

In the U.S. Supreme Court Case Delaware v Prouse 99 S.ct 1391, a patrolman in a police cruiser stopped an automobile occupied by respondent and seized marijuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At the hearing to Suppress the patrolman could give no valid reason for stopping the vehicle, and his reason was purely Pretexual.

The Court granted motion to Suppress finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment.

Given the multitude of applicable "traffic and equipment regulation" in any jurisdiction upholding a stop, on the basis of a regulation seldom enforced, opens the door to the arbitrary exercise of police discretion condemned in Terry v Ohio 88 S.ct 1884 and its progeny. Anything less [than the reasonable officer standard] would invite intrusions upon constitutionally guaranteed rights, based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction See Terry Supra 88 S.ct at 1880

This kind of Standarless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the Field be circumscribed, at least to some extent. See Delaware v. Prouse 99 S.Ct. at 1400. Any other standard, which allows virtually unfettered discretion by upholding a stop even if the underlying regulation is rarely enforced and even if motivated by an illegal purpose simply cannot pass muster under U.S. Supreme Court Authority.

Because the stop was illegal and pretexual at its inception any evidence obtained during this intrusion is product of the Fruits of the Poisonous Tree Doctrine. Even though Officer Butler tried to separate the stop from the viewing of the weapon. Officer Middleton testified that from the time the door shut and Petitioner walked into the flower shop, was only about three to four seconds. Tr.p. 64, lines 11-15.

In Brown v. Illinois 95 S.Ct. 2254, the Court held repeatedly that consent is not voluntary when in such close temporal proximity to an illegal stop.

U.S. v. McSwain 29 F.3d 558 (consent not voluntary when obtained only a few minutes after illegal seizure); U.S. v. Fernandez 18 F.3d at 883 (only moments elapsed between illegal detention and seizure).

U.S. v. Maez, 872 F.2d 1444 (Taint of illegal seizure not purged when consent form signed 45 mintues later).

These cases show that 3 or 4 seconds between the illegal stop and the seizure of evidence is, in no way, enough time to erase the taint of the illegal Pretexual stop.

As the U.S. Supreme Court has ruled, review of stops must first start at the inception of the intrusion. Had Officer Butler not seized Petitioner for pretexual reasons, the seizure of the evidence obtained would have never occurred.

Insofar had Counsel called Jacquelin Gaillard to testify, she would have verified also that officers never left the vehicle, but continued to lean over and look into the vehicle windows. As seen in these questions:
Trpg 65 Ln 6-13

(Q) So your are two or three feet away and the hood of the car is kind of hitting you chest level. Did you kind of lean in and just kind of look?
(A) Huh-uh. I saw something shinny, you know, and I just looked at it and I said: That's a gun.
(Q) You had to kind of lean down to look?
(A) I leaned down a little bit.

Although the officers testified that as they were walking back to their vehicles they viewed gun. This is not plausible. Had Counsel called Jacquelin Gaillard it could have clearly been verified that officer never walked away from vehicle, but continued to look through the Petitioner's windows until they found a reason to enter vehicle. They had asked petitioner for consent to search vehicle, and he had responded by saying NO, they had taken the K-9 around the vehicle to check for drugs to no avail. The officer continued to look for a reason to enter vehicle.

It is clear that no reasonable officer would have pulled petitioner over, for the equipment violation that Officer Butler used as a Pretext to stop petitioner, absent the invalid purpose.

In "U.S. v McSwain Supra" a Trooper stopped Mr. McSwain for the sole purpose of ensuring the validity of the vehicles temporary

registration sticker. Once the Trooper approached the vehicle on foot and observed that the temporary sticker was vaild and had not expired, the purpose for the stop was satisfied. The Trooper's further detention of the vehicle and travel itinerary and to request his license and registration exceeded the scope of the stop's underlying justification.

As in the case at Bar, once officer Butler saw that the vehicle's tag, year and date was valid, and Petitioner told him that the car came that way from the rental dealership, the stop was satisfied, however, as the record has clearly shown the tag obstruction was only a pretext to further investigate a hunch.

QUESTION PRESENTED

I. WHETHER TRIAL COURT ABUSED IT'S DISCRETION BY REFUSING TO ANSWER THE JURY' S SPECIFIC QUESTION UPON THEIR REQUEST ?

II. WHETHER TRIAL COURT ABUSED IT'S DISCRETION BY REFUSING TO GRANT THE APPELLANT'S MOTION FOR MISTRIAL ?

The circumstantial evidence instruction given in the Petitioner's case was approved in State v. Grippon, 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997). Prior to Grippon, trial courts generally gave the traditional instruction approved in State v. Edwards : every circumstance relied upon by the State must be proved beyond a reasonable doubt and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. State v. Edwards, 298 S.C. 275, 379 S.E.2d 889. While approving the new instruction in Grippon, the Supreme Court has noted that the traditional Edwards instruction is still acceptable. Grippon, 327 S.C. 82, 489 S.E.2d 463; State v. Needs, 333 S.C. 134, 156 N.13, 408 S.E.2d 857, 868 N.13 (1998); State v. Graddick, 345 S.C. 383, 548 S.E.2d 210, N.212 (2001).

Because the evidence leading up to Petitioner being detained was circumstantial and there were no direct traffic violations that Petitioner violated the required inferences of the facts necessary to prove the traffic offense that lead to the offense charged. The Edwards traditional instruction was appropriate. Although techically a correct statement of law, the Grippon charge was not supported by the evidence presented as there was no direct evidence that substantiated the stop of Petitioner's vehicle. Under Strickland v. Washington, 466 U.S. 691, 104 S.Ct. 2066, counsel was ineffective for failing to ask the court for the proper evidence charge.

In a criminal case, no fact, not even an undisputed fact, may be determined by a trail Judge, rather a Judge is to remain painstakingly neutral in the jury deliberations of the facts and evidence testified to on record.

Defendant has a right to have jury resolve disputed factual issues. U.S. v Wofford 122 F3d 787.

The following occurred during Petitioners trial:

Trpg 240 Ln 13 THE COURT: I have two notes from the jury. The first note: Whether or not statue dealing with possession of stolen pistol requires defendant to know pistol was stolen.

Ln 17 MR. KNISLEY: Yes

Ln 18 THE COURT: Is there any exception to me simply writing yes on the note?

Ln 20 MR. BIANCHI: None from the State.

Ln 21 MS. GAY: Nor from the defense, your Honor.

Trpg 240 Ln 22 THE COURT: The second note: Clarify when car was returned to Enterprise rental dealer. 16, January '04 or 29 January '04. What is on Court record.

Trpg 241 Ln 1 MS. GAY: Your Honor, I would take the position that what is on the record --- I don't know what your piece of paper says, but the man testified it was the 16th of January, which is rather odd.

Ln 5 THE COURT: I don't remember what he testified to, but I can

have the Court reporter look it up.

Ln 8 MR. BIANCHI: I think we made a mistake. If you look at the date, it was due back --- obviously that creates confusion. I have where it was picked up on the 29th. It was towed on the 28th and picked up on the 29th.

Ln 13 THE COURT: They have the rental agreement back there.

Ln 15 MRS. GAY: They do.

Ln 16 THE COURT: Then what they are asking me for is what witness testified to, because they [specifically] (emphasis added) said: Clarify when car was returned to Enterprise rental dealer. 16 January or 29 January 04. When was it returned to the dealer? He testified that it was returned on Jan 16th and then he testified that he picked it up from Jennings on---

Ln 24 MS GAY: He didn't say a date. He said I picked it up from Jennings.

Trpg 242 Ln 9 MR. BIANCHI: Your Honor, he says the defendant had the -- I don't believe he specifically said that the car was returned on the 16th.

THE COURT: The question was asked directly of him: And when was the car returned? He said Jan 16, 2003:

At this point in the proceedings the Trial Judge after clarifying what was on the record had a judicial responsibility to send back to the jury what was requested for. Trial Counsel went on to explain in the next line:

Trpg 242 Ln 15 MS. GAY: Yes, ma'am. That is exactly what was

said on the stand. The question, as I am reading it from the jury, is: What are we supposed to be doing here? They want to know was the testimony was that it was returned January 16, and the answer would be yes.

MR. BIANCHI: I would answer that the jury gets to see the whole testimony where right after that he says ---

Ln 24 THE COURT: That's not what they asked me for. **[I have to answer directly what they have asked for]** (emphasis added) The question is: Clarify when car was returned to Enterprise rental dealer 16 January 04 or 29 January 04? **[What is on record?]** (emphasis added)

Trpg 243 Ln 4 I assume they mean what did the person from Enterprise testify to. The record reflects he said January 16. They have the rental agreement in there. That's for them to hash out with what the rental agreement says versus what he said. That's a credibility issue for them to deal with, with the witness and I'm not going to get into -- when a jury ASKS a question, they are not eliciting additional argument. **[It is a cut and dry answer.]** (emphasis added) I'm not going to get into weight issues. I'm not going to get into how you interpret the testimony. **[I don't think that is proper.]** (emphasis added)

Petitioner would show that even though the Trial Judge explained what she was required to do, and what the Trial Judges position was in this circumstance, Trial Judge still did not send the note back with the answer the jury ask for and this is further cemented by the Trial Judge:

Trpg 244 Ln 18 THE COURT: I am trying to determine based on what the jury asked how I need to respond to them. They asked a very

direct question which requires a very direct answer. Now, the fact that it could be subject to different interpretations subject to different arguments, those are things y'all should have anticipated in addressing your closing arguments. In our rules there is no provision for additional closing arguments once the jury is deliberating, I'm just trying to figure out a clear and concise way to answer them. And the question is very direct: **[clarify when the car was returned to Enterprise dealer. January 16, 2004 or January 29, 2004 ? What is on the record ?]** (Emphasis added)

The question before this Court is whether The Honorable Deadra L. Jefferson was in error for refusing to answer the question contained in the juror's second note. The caselaw clearly proves that judge Jefferson abused her discretion by refusing to answer the question contained in the juror's second note: **see, U.S. v. Jackson, 257 F.2d 41 (this Court noted ... asking a specific question based on the evidence requires the court to read back the relevant testimony).** In **Bollenbach v. U.S. ,66 S.Ct. 402,** the higher courts held that " a trial judge has some obligation to make reasonable efforts to answer a question from the jury".

On page 242, line 25, Judge Jefferson acknowledged this legal and moral obligation by stating " I have to answer directly what they asked for."

On page 244, line 12, the trial court told the solicitor " my only job is to answer what the jury has asked me ". On page 244, lines 20-21, the trial court said "they asked a very direct question which requires a very direct answer". see, U.S. v Jackson, 257 F.2d 41 (asking a specific question based on the evidence requires the court to read back the relevant testimony); Bollenbach v. U.S., 66 S.Ct. 402 (a trial judge has some obligation to make reasonable efforts to answer a question from jury).

The trial court responses in relation to the above caselaws shows that the trial court was aware that it had a legal and moral obligation to answer the question contained in the second note. Thus, Judge Jefferson failure to fulfill her legal and moral obligations by refusing to answer the question contained in the jury's second note constitutes an abuse of discretion. see, U.S. v. Jackson, 257 F.2d 41 (asking a specific question based on the evidence requires the court to read back the relevant testimony).

On page 246, lines 11-25, the record reflects that the trial court called the foreman of the jury into the courtroom. The trial court asked the foreman to clarify what the inquiry is requesting. The foreman indicated that he and a couple of jurors were having a disagreement about when the state's witness, John

Crumble, testified that the car the police found the cocaine and pistol in, was returned to the Enterprise Rental Dealer. The foreman could not recall. The foreman indicated the jury could not deliberate and reach a conclusion until it received clarification as to when Mr. Crumble testified this car was returned to Enterprise Rental. In U.S. v. Clavey, 565 F.2d 111, 118, the higher court held that **"when the jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy"**. Howver, the record reflects that the trial court refused to answer the question contained in the juror's second note.

On page 249, line 2, Judge Jefferson states that she is not going to answer the question contained in the jury's second note on the grounds that it's a factual issue. The higher courts have stated **"as a general rule, it's discretionary with the court to grant or refuse a jury's request, but this discretion is based upon a two-fold rational: first, that requests to read testimony may slow the trial where the testimony is too lengthy; and second, that reading only a portion of the testimony may cause the jury to give that portion undue emphasis"**. Thus, **Rabb** holds that a trial judge abuses his discretion where the refusal to read requested testimony is not supported by one of these reasons. see, U.S. v. Rabb, 453 F.2d 1012.

It is clear from this point that the trial judge knew what the responsibility was for the court. The jury sent back a direct question and the record reveals a direct answer. Although trial counsel made several statements as to what was revealed on the record should be sent back to the jury. Trail counsel made no objections to the trial judge taking part in the jury's guilt finding apparatus. The trial judge gave very brief explanations of hoe the trial court must not enter in the fact finding procedure of the jury, but still continue to do just that, with no objections from trial counsel.

Petitioner contends that he was denied his Sixth Amendment right to the effective assistance of trial counsel that is guaranteed by the Sixth Amendment of the United States Constitution. Petitioner further contends that the trial record is replete with viable evidence which shows that the trial judge knowingly committed abuse of discretion by refusing to send back a direct answer asked by the jury.

It must be viewed in conjunction, that when a jury is deliberating on a verdict and a question is sent to the judge regarding a testimony on the record. That testimony is evidence that the jury may consider in their decision of the verdict, it was an abuse of discretion for the trial judge to refuse to send

back what was read on the record.

The inquiry, in other words, is not whether in a trial that occurred without error, a guilty verdict would have surely been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributably the abuse of discretion.

Surely this was not the case, for the jury asked a question and was denied that specific answer without interference from trial court.

It is the jury's providence to decide credibility of testimony from the witness stand. When the jury asked the question, and the record was replete with the answer to the question, the question and answer was required to be sent back to the jury without secular interference. Where the trial court's directions prevented the jury from determining guilt beyond a reasonable doubt on every element of the offense the denial of a fair trial has occurred. And Petitioner had a due process right to have a fair trial by a jury of his peers.

And under the United States Supreme Court case **Strickland v. Washington, 466 U.S. 689, 104 S.Ct. 2065.** Counsel was ineffective for failing to object to trial court's abuse of discretion in failing to return the jury's note with requested answer.

The question contained in the jury's second note required the judge to read back the relevant portion of John Crumble's testimony and the failure of the Petitioner's trial court to read the relevant portion of the testimeny on the grounds presented during trial constitutes an abuse of discretion because it's not supported by the reasons outlined in "Rabb". see, Rabb, 453 F.2d 1013-1014. Furthermore, the trial court stated that John Crumble gave two conflicting dates. This is not true. John Crumble testified the date was January 16, 2004. Tr.p. 176, lines 14-26; p. 177, lines 1-5. Therefore, the trial court used false and inaccurate information to support its decision. The court and the solicitor placed undue emphasis on the Rental Agreement. Tr.p. 178, lines 5-19. Thus, the other information in the record shows that the jurors did nnot place undue emphasis on the requested testimony. Rather, it was the testimony that went to the heart of the jury's determination of guilt or innocence. see, U.S. v. Zarintash, 736 F.2d 66 (1984). The foreman told the judge that it could not deliberate without a response to the question contained in the jury's second note. In Zarintash, the higher court ruled that this court's actions constitutes an abuse of discretion.

CONCLUSION

The trial judge's refusal to answer the question contained in the jury's second note constituted an abuse of discretion.

see, U.S. v. Zarintash, 736 F.2d 66 (1984). Accordingly, the Petitioner requsts this Honorable Court to grant him a writ of certiorari on the issue.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT THE PETITIONER'S MOTION FOR MISTRIAL

The record before this Court of Appeals reflect that the jury's foreman entered the courtroom and announces that the jury has reached a verdict. This jury foreman signed the verdict forms stating that the verdict of guilty is by unanimous consent. However, the trial court polled the jury and discovered that one or two jurors does not agree with the guilty verdicts. The records suggests that this juror was improperly coerced into entering a guilty verdict and that he basically did so without understanding the elements of the gun charge.

The trial counsel mentions something to the court about an Allen Charge. The trial court states the Allen Charge would not be appropriate. The trial counsel motioned for mistrial. However, the trial court denied the motion for mistrial. Today, the Petitioner argues the trial court abused its discretion by refusing to grant the motion for mistrial.

The record reflects that two jurors voted to find the Petitioner guilty. One juror told the trial court that he does not agree with the guilty verdict. The trial court told this juror that all 12 must agree on the verdict. The trial counsel wanted the trial judge to issue an Allen instruction so that the juror who did not agree with the guilty verdict would understand that all 12 do not have to agree on the guilty verdict and that

he must come to and abide by his own decision even if it results in a hung jury as to some charges. The trial court states that the Allen charge would not be appropriate. The trial court acknowledges that this jury has not reached a unanimous verdict and the trial court states that it sees this as no different than a hung jury and the caselaws show that a deadlock or hung jury triggers an Allen instruction. see, Jenkins v. U.S., 380 U.S. 445-446, 85 S.Ct. 1057. Thus, the failure to instruct this juror that his task is to conscientiously come to and abide by his own decision even if it results in a hung jury as to some counts violates the Petitioner's Due Process. And there is no cure for this Due Process violation. The failure to issue an Allen instructioon when the jurors did not reach a unanimous decision prejudiced the defense because it subjected this juror to improper coercion and the record reflects that this improper coercion is implicit in the circumstances. see, Jimines, 40 F.3d 980.

The record reflects that the trial court questioned the jury foreman about an inquiry the jury made concering key testimony offered by an Enterprise Rental Dealer during the Petitioner's trial. The jury foreman indicated that a couple of jurors were disagreeing with him about key testimony in the case. The testiomony went to the heart of the case. The jury foreman informed the trial court the jury could not deliberate and come to a conclusion. The trial court abused its discretion and told

the jurors that were in disagreement that they must settle the dispute amongst themselves. Therefore, the jury foreman re-entered the courtroom and informed the trial court that the jury reached a verdict. The jury foreman signed the verdict forms and stated that the jurors reached a unanimous verdict. However, the trial court polled the jurors and one of the jurors indicated that he did not agree with the guilty verdict. The record reflect that the other jurors pressured this juror into entering a guilty verdict. And that he did so without understanding the elements of the gun charges.

We have a juror that entered a guilty verdict but does not agree with the guilty verdict as the jury foreman claims. Thus, we can infer that the other jurors improperly coerced this juror into entering a guilty verdict. This juror changed his verdict during polling and indicated that he does not agree with the other 11 juror's verdict of guilty and the trial court is going to send this juror back into deliberations with the other 11 jurors. But, the trial court refuses to instruct this juror that he does not have to go along with the other 11 jurors and help him to understand that his task is to abide by his own decision even if it results in a hung jury as to some counts. The improper coercion is implicit in the circumstances. see, Weaver v. Thompson, 197 F.3d 359, 366-367. Thus, the record clearly reflects that the Petitioner's Due Process rights were trampled upon by the trial court and there is nothing that could be done at this stage to cure this Due Process violation. Accordingly, the Petitioner requests a reversal.

CONCLUSION

The Constitution guarantees equal protection under the law. Petitioner was denied that equal protection because his 14th, 5th, and 6th Amendment rights were violated.

Counsel's representation in this case strikes at the heart of the denial of her client's Constitutional rights to a Defense and her representation fell wholly short of the standard outlined in **Strickland v. Washington, 104 S.Ct. 2052.**

Petitioner should receive a new trial.

CERTIFICATE OF SERVICE

I, Terrance Johnson, do hereby certify that I have served all parties with a copy of Applicant's Motion for Writ of Certiorari by way of United States Postal Mail Service on the following date: October 5, 2015

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. BOX 11330
Columbia, SC 29211

s/ Terrance Johnson
October 8/2015

EXHIBIT 1

AGENCY I.D.
SC0100300

INCIDENT REPORT

CASE NUMBER
2004[illegible]379

INC. Yes / END No

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED
1. 35A TRAFFICKING COCAINE	■ YES ☐ NO	☐ YES ■ NO	HIGHWAY/ROAD/ALLEY	
2. 280 POSSESSION OF STOLEN FIREARM	■ YES ☐ NO	☐ YES ■ NO	HIGHWAY/ROAD/ALLEY	
3.	☐ YES ☐ NO	☐ YES ☐ NO		

TYPE VICTIM: ☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ■ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)
RIVERS//COLUMBIA NORTH CHARLESTON SC

ZIP CODE: 29405-

WEAPON TYPE: HANDGUN

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK
01/28/2004	15:35		01/28/2004	15:58

DISPATCH DATE/TIME 24 HR. CLOCK

DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME
01/28/2004	15:35	15:35	15:58

LOCATION NO: 23

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE): BUTLER, CHRISTOPHER TROY

RELATIONSHIP TO SUBJECT #1 / #2 / #3 | RESIDENT | RACE | SEX | AGE | ETH | DAYTIME PHONE | EVENING PHONE

ADDRESS: LACROSS RD. | CITY: NORTH CHARLESTON | STATE: SC | ZIP CODE: 29418- | LOCATION NO.

DAYTIME PHONE: 843-554- | EVENING PHONE: - -

VICTIM NO. 1

VICTIM'S NAME (LAST, FIRST, MIDDLE): NORTH CHARLESTON

RELATIONSHIP TO SUBJECT #1 / #2 / #3 | RESIDENT | RACE | SEX | AGE | ETH. | DAYTIME PHONE | EVENING PHONE

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS: 4900 LACROSS RD | CITY: NORTH CHARLESTON | STATE: SC | ZIP CODE: 29418- | LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐ YES NO ■ EXPLAIN—

VICTIM (NO. 1) USING: ALCOHOL ☐ YES NO ☐ UNK. ☐ DRUGS: ☐ YES NO ☐ UNK. ☐ TYPE:

COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ■

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐

SUBJECT NO. 1

■ SUSPECT ☐ RUNAWAY ☐ WANTED ■ WARRANT ■ ARREST ■ JAIL ☐ SUMMONS

* J—This Jurisdiction. S—State. O—Out of State. U—Unknown

NAME, (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
JOHNSON, TERRANCE DAVID	B	M	37	N	04/14/1966	507	189	BLK	BRO

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC

ADDRESS: DOGWOOD RD. #15-3 | CITY: NCHAS | STATE: SC | ZIP CODE: 29414- | LOCATION NO.

DAYTIME PHONE | EVENING PHONE

SUBJECT(NO. 1) USING: ALCOHOL: ☐ YES NO ☐ UNK. ☐ DRUGS: ■ YES NO ☐ UNK. ☐ TYPE: COCAINE

ARRESTED NEAR OFFENSE SCENE ■ YES NO ☐ TOTAL # ARRESTED 1

DATE/TIME OF OFFENSE: 01/28/2004 3:35:32 PM

DATE/TIME OF ARREST: 01/28/2004 3:58:00 PM

NARRATIVE

****

Narrative Title: TRAFFIC STOP // ARREST
Date Entered: 01/28/2004 10:24:10 PM

I (PTL. BUTLER) WAS ON PATROL OF RIVERS AVE. ON 01-28-2004 AT APPROX. 15:35 HRS. WHILE TRAVELING EAST BOUND ON RIVERS AVE. I OBSERVED A GRAY IN COLOR JAGUAR WITH A LICENSE TAG OBSTRUCTION. THE DRIVER APPEARED TO BE VERY TENSE IN THE VEHICLE WHILE CONTINUING TO LOOK IN THE REAR VIEW AND DRIVERS SIDE MIRRORS. I INITIATED A TRAFFIC STOP ON THE VEHICLE FOR THE TAG OBSTRUCTION.

PROPERTY EST.

TYPE (GROUP)	DRUGS/NARCOTICS	FIREARMS					TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED	$0.00	$350.00					
SEIZED							$350.00

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY —

JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

ADMINISTRATIVE

SUBJECT IDENTIFIED ■ YES ☐ NO | SUBJECT LOCATED ■ YES ☐ NO | ■ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ■ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ EXTRADITION DENIED. 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
BUTLER, CHRISTOPHER	01/28/2004	183			
MIDDLETON, TONY	01/28/2004	113			

FOLLOW-UP INVESTIGATION ☐ YES NO ■ OFFICER

BOTH THE MONTH AND YEAR STICKERS WERE COVERED UP BY THE TRIM TAB. THE DRIVER PULLED INTO A LOCAL FLORIST SHOP AT THE CORNER OF RIVERS AVE. AND COLUMBIA ST. I THEN APPROACHED THE VEHICLE WHERE I IDENTIFIED THE DRIVER AS LORD AL NUR ALLAH BY A S.C. DRIVERS LICENSE. MR. ALLAH WAS ON THE DRIVERS SIDE AND WALKED AROUND TO THE PASSENGER SIDE TO ENTER THE VEHICLE. ONCE IN THE VEHICLE MR. ALLAH REACHED BACK OVER TO THE DRIVERS SIDE TO RETRIEVE HIS WALLET. THIS SEEMED STRANGE CONSIDERING HE COULD HAVE ENTERED THE DRIVERS SIDE OF THE VEHICLE. MR. ALLAH SEEMED TO WANT TO DISTANCE HIMSELF FROM THE DRIVERS SIDE. AT THIS TIME I CALLED FOR A BACK UP UNIT AND ASKED MR. ALLAH TO HAVE A SEAT BACK IN HIS VEHICLE WHILE I CONDUCTED A LICENSE CHECK. MR. ALLAH'S LICENSE CHECK CAME BACK CLEAR.

MR. ALLAH WAS THEN INFORMED ABOUT THE LICENSE OBSTRUCTION WITH A VERBAL WARNING BUT WAS NOT CITED. MR. ALLAH THEN ENTERED THE FLORIST SHOP WITH HIS SON. OFFICER MIDDLETON AND I THEN BEGAN TO WALK BACK TO OUR PATROL VEHICLE'S. WE PASSED BY THE VEHICLES PASSENGER SIDE. A SHINY PIECE OF METAL WAS OBSERVED TO BE UNDER THE DRIVERS SEAT. A CLOSER LOOK THROUGH THE WINDSHIELD OF THE VEHICLE REVEALED THAT THIS OBJECT WAS THE BARREL OF A HANDGUN IN PLAIN VIEW. MR. ALLAH THEN BEGAN TO WALK BACK OUTSIDE. AS HE EXITED THE FLORIST STORE DOOR HE WAS THEN DETAINED FOR THE UNLAWFUL CARRYING OF A FIREARM. THE HANDGUN WAS THEN RETRIEVED FROM THE VEHICLE. THE SERIAL # TMJ 19378 D WAS THEN RAN THROUGH NCIC. THE SERIAL NUMBER CAME BACK TO THE CORRECT FIREARM AND BEING IN A STOLEN STATUS OUT OF BERKELEY COUNTIES JURISDICTION. A TEN MINUTE HIT WAS RAN AND THEN CONFIRMED STOLEN BY BERKELEY COUNTY DISPATCH.

AT THIS TIME I VERBALLY READ MR. ALLAH HIS RIGHTS. AN INVENTORY OF THE VEHICLE WAS THEN CONDUCTED. LOCATED INSIDE THE CENTER CONSOLE WAS A PLASTIC BAG. INSIDE THE PLASTIC BAG WAS 5 SEPARATE BAGGIES OF A WHITE POWDERY SUBSTANCE WHICH TESTED POSITIVE FOR COCAINE. THE TOTAL WEIGHT OF THE BAGGIES WAS APPROX. 75.6 GRAMS OF COCAINE. THE CHARGE OF TRAFFICKING COCAINE WAS THEN ADDED. MR. ALLAH WAS ALSO CHARGED WITH POSS. OF A STOLEN FIREARM, AND POSS. OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. THE VEHICLE WAS THEN TOWED BY JENNINGS TOWING CO. LOCATED AT 2026 MEETING ST. THE VEHICLE WAS NOT SEIZED DUE TO IT BEING A RENTAL VEHICLE THROUGH ENTERPRISE RENT A CAR CO. MR. ALLAH'S SON WAS THEN TURNED OVER TO HIS BROTHERS GIRLFRIEND UPON HIS REQUEST. (LASHAUN S. FLOYD, 5208 NAPOLEON DR. APT. B N. CHAS, S.C.) MR. ALLAH WAS THEN TRANSPORTED TO THE CHARLESTON COUNTY DETENTION CENTER. THE COCAINE WAS THEN PLACED INTO NCPD EVIDENCE TO BE SENT TO SLED FOR ANALYSIS. THE HANDGUN WAS ALSO PLACED INTO EVIDENCE. THE REST OF MR. ALLAH'S PROPERTY WAS TAKEN BY CCDC (CELL PHONE, KEYS, AND JEWELRY). DURING THE BOOKING PROCESS AT THE JAIL IT WAS FOUND THAT MR. ALLAH'S NAME WAS AN ALLIAS. HIS PRINTS WERE RAN AND CAME BACK TO TERRANCE DAVID JOHNSON. MR. ALLAH STATED THAT HE HAD LEGALLY CHANGED HIS NAME. I THEN CHECKED HIS PRIOR ARREST RECORD, FOR OTHER ALIASES AND PRIOR DRUG AND GUN ARRESTS TO SEE IF HE WAS A CONVICTED FELON. WHILE DOING SO, I OBSERVED AN ALERT TO CONTACT THE FEDERAL BUREAU OF INVESTIGATION IN REFERENCE TO POSSIBLE TERRORISTS ACTIVITY. I THEN NOTIFIED, MY SUPERVISOR, SGT. JOHNSON OF THIS INFORMATION. SGT. JOHNSON THEN NOTIFIED THE PROPER FEDERAL AUTHORITIES WHO RESPONDED AND CONDUCTED THEIR OWN INVESTIGATION.

EXHIBIT 2


Smiling Faces. Beautiful Places
692 SKX
4
SC 06
PALMETTO

EXHIBIT 3

AFFADAVIT of FAUNTAIN JUDON

DATE: November 18, 05
Re: Witness to incident on January 28, 04
Involving the detention and arrest of Terrance Johnson

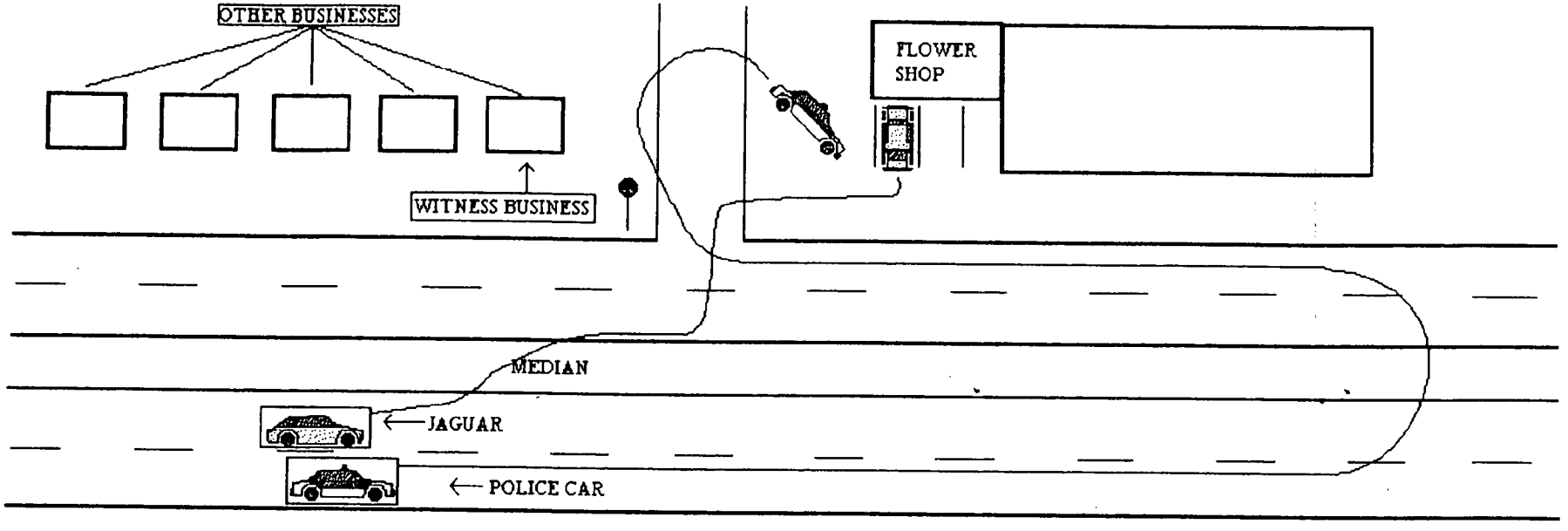
As I was looking for my children outside of our family business, Judon's Sewing & Alterations, I observed on Rivers Ave, a grey Jaguar in the near lane and a North Charleston police office in the far lane coming towards me. As I turned to walk back in the business I saw the Jaguar pull into the florist next door and the police car make an illegal turn to the side of the Jaguar.

11-18-05

Signature

7088 Corley Dr. N. Cha
330-3333 S.C. 294

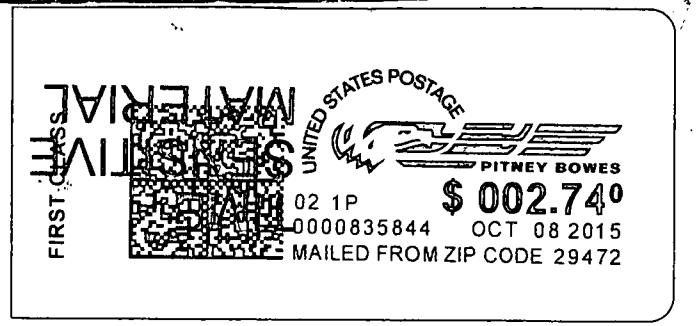
EXHIBIT 4



What cannot be seen through the record was that petitioner made a left turn, but to get to the Flower shop had to first, cross two lanes of traffic to pull into the parking lot of the Flower shop. Because Officer Butler was beside Petitioner he had to go up cross over three lanes of traffic and come back down to pull in where Petitioner had stopped.

Had Counsel Subpoenaed Fautain Judon, who gave a written Affidavit that clearly shows that both Petitioner and Officer Butler were driving side by side and that once Petitioner turned, officer had to go up, make an illegal turn and come back to get to where Petitioner was

TERRANCE JOHNSON 156066-E-A-48
LIEBER CORR. INST. P.O. BOX 205
RIDGEVILLE, S.C. 29472



THE HONORABLE DANIEL E. SHEAROUSE
CLERK, S.C. SUPREME COURT
P.O. BOX 11330 COLUMBIA, S.C. 29211