ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

DANIEL D. HALL, CIRCUIT COURT JUDGE

RECEIVED
JAN 20 2017
S.C. SUPREME COURT

APPELLATE CASE NO: 2016-000995
LOWER COURT CASE NO: 2014-CP-23-5047

BOBBY JOE BARTON, ... PETITIONER,

V.

THE STATE OF SOUTH CAROLINA, ... RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

BOBBY JOE BARTON
S.C.D.C. #163629
McCORMICK CORR. INST.
386 REDEMPTION WAY
McCORMICK, SC 29899
REPRESENTATION, PRO Se

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QUESTIONS PRESENTED

1.) WHETHER P.C.R. COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND COUNSEL WAS NOT IN-EF-FECTIVE FOR FAILING TO ADEQUATELY CONVEY A FORMAL PLEA OFFER; FAILING TO KEEP PETITIONER REASONABLY INFORMED OF CASE AND TO EXPLAIN OFFER FOR APPLICANT TO MAKE AN INFORMED DECISION.

2.) WHETHER P.C.R. COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND COUNSEL WAS NOT IN-EF-FECTIVE FOR FAILING TO OBJECT TO INADMISSABLE EVIDENCE THROUGH TESTIMONY ATTACKING THE DEFENDANTS' CHARACTER BRING OUT PRIOR INCARCERATIONS!

3.) WHETHER THE P.C.R. COURT ERRED IN DENYING RELIEF TO PETITION-ER WHEN THE COURT ERRONEOUSLY FOUND THE PROSECUTION DID NOT COMMIT MISCONDUCT BY KNOWINGLY USE OF PERJURED TESTIMONY GIVEN BY STATE'S WITNESS PATRICIA RICE IN ORDER TO OBTAIN A CONVICTION, PROSECUTION KNEW OR SHOULD HAVE KNOWN HER TESTIMONY WAS PERJURY.

4.) WHETHER P.C.R. COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND THE PROSECUTION DID NOT COMMIT MISCONDUCT BY FAILING TO COMMUNICATE TO IN-VESTIGATORS' THAT THEY MUST NOT USE THE DEFENDANT'S ARREST MUG-SHOT IN ITS' PHOTO ARRAY LAY OUT.

STATEMENT OF THE CASE

On February 16, 2010, the Greenville County Grand Jury indicted Bobby Joe Barton on the charges of armed robbery (AR) and possession of a weapon during the commission of a violent crime on August 9-10, 2010, Barton was represented by Susannah Ross, and the State was represented by L. Mark Moyer, assistant solicitor. The jury found Barton guilty of armed robbery, but found him not guilty of the possession of a weapon during the commission of a violent crime. Judge Miller sentenced Barton to confinement for twenty-five (25) years. Barton filed a notice of appeal on January 17, 2012 (Ct.App. #2010-169826). The Court of Appeals affirmed Barton's convictions and sentences on January 30, 2013. "State v. Barton", Op. No. 2013-UP-058 (Ct.App. filed January 30, 2013). The Court of Appeals issued an order denying the petition on March 20, 2013. This petition for a writ of certiorari to the Court of Appeals follows. The Court denied the Petitioner's petition for writ of certiorari on July 11, 2014. The remittiur was sent on July 25, 2014.

The Petitioner filed an application for post-conviction relief (PCR) on September 12, 2014. Petitioner filed a pro-se "Motion to Amend and Supplemental Pleadings" on December 14, 2014. The Respondent made its return on February 12, 2015. Caroline M. Horlbeck, Esquire was appointed to represent Petitioner, Karen C. Ratigan, Esquire represented the Respondent. Counsel for Petitioner filed an "Amended Application for

Post-conviction Relief" on February 16, 2016. An evidentiary hearing was held on February 18, 2016 before the Honorable Daniel D. Hall, the judge denied Petitioner's PCR application and issued an "Order of Dismissal" on March 14, 2016. (Case No.: 2014-CP-23-5047) filed on March 30, 2016. Caroline M. Horlbeck. Esquire was relieved as Petitioner's counsel on April 7, 2016. R. Mills Ariail, Jr., Esquire, was appointed at some point, he filed a Rule 59(e) motion for reconsideration on April 13, 2016, instead of 59(e) to make specific findings of fact and state expressly its conclusion of law as Petitioner instructed counsel.

This motion was denied on April 29, 2016, this appeal, submitted by R. Mills Ariail, Jr., on May 5, 2016 followed. The Petitioner now seeks a writ of certiorari.

ARGUMENT #1

1.) THE P.C.R. COURT ERRED IN DENYING RELIEF TO THE PETITIONER WHEN THE COURT ERRONEOUSLY FOUND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY CONVEY A FORMAL PLEA OFFER, FAILING TO KEEP APPLICANT RESEASONABLY INFORMED OF CASE STATUS AND FAILED TO EXPLAIN THE PLEA OFFER FOR THE APPLICANT TO MAKE INFORMED DECISION.

IN HIS P.C.R. APPLICATION THE PETITIONER ALLEGES THAT HE IS CHALLENING HIS CONVICTION AND SENTENCE AND THAT HE IS BEING HELD IN CUSTODY UNLAWFULLY FOR THE FOLLOWING REASONS;

1.) IN VIOLATION OF HIS SIXTH & FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I §3&14 OF THE CONSTITUTION TO THE STATE OF SOUTH CAROLINA AND THE LAWS OF THIS STATE, ALSO THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A.) IN-EFFECTIVE ASSISTANCE OF COUNSEL;

B.) PROSECUTIONAL MISCONDUCT THROUGH THE LENS OF IN-EFFECTIVE ASSISTANCE OF COUNSEL; AND,

C.) DENIAL OF DUE PROCESS & EQUAL PROTECTION UNDER THE LAW. See;(APP. P.C.R. TR.22.II. 1-THRU-TR.25.II.-11)

A. HOW THIS ISSUE AROSE

THE CHARGES IN THIS CASE AROSE OUT OF THE ARREST OF "PATRICIA RICE", THE CO-DEFENDANT WAS INITIALLY ARRESTED ON AUGUST 3, 2009.(WAR. NO:#I-478795). MS. RICE IMPLICATED THE PETITIONER AS BEING THE ROBBER. THE PETITIONER WAS ARRESTED ON AUGUST 4, 2009 AND CHARGED WITH ARMED ROBBERY AND POSSESSION OF A DEADLY WEAPON DURING THE COMMISSION OF A VIOLENT CRIME. (WAR. NO:#I-478797 & I-478798)

B. STANDARD OF REVIEW

SUSANNAH ROSS WAS APPOINTED TO REPRESENT THE PETITIONER ON

AUGUST 6, 2009, See; (APP. P.C.R. TR. 16 II. 17-THRU-TR. 17. II. -10). PETITIONER TESTIFIED THAT HE AND COUNSEL DISCUSSED HIS CASE AND THAT HE NEVER DENIED BEING INVOLVED IN THE CRIME BUT DID STATE THAT HE NEVER USED A WEAPON OR PRETENDED TO HAVE A WEAPON THROUGH HIS ACTIONS OR WORDS. See; (APP. P.C.R. TR. 17, II. 11-22, TR. 8, II. 12-THRU-TR. 10, II. -15, TR. 83, II. 18-THRU-TR. 84, II. -11.)

IN THE PRELIMINARY STAGE OF THE CRIMINAL PROCEEDINGS COUNSEL VISITED THE PETITIONER IN THE COUNTY JAIL ON JANUARY 29, 2010 AND SAID THEY ARE OFFERING YOU FIFTEEN (15) YEARS. COUNSEL NEVER WENT INTO ANY DETAILS EXPLAINING THE TERMS OR CONDITIONS OF THE OFFER. COUNSEL BECAME IRRITATED WITH PETITIONER AND FROM THAT POINT SHE REFUSED TO ELABERATE ANY DETAILS OF WHAT THE FIFTEEN (15) WAS ACTUALLY FOR. COUNSEL NEVER EXPLAINED THE PLEA OFFER WAS FOR STRONG ARMED ROBBERY, RATHER THAN ARMED ROBBERY. COUNSEL NEVER EXPLAINED THERE WERE SOME TERMS AND CONDITIONS THE DEFENDANT WOULD HAVE TO AGREE TOO IN ORDER TO RECIEVE TO OFFER. SHE NEVER INFORMED THE PETITIONER THAT THEY WERE WILLING TO DISMISS THE WEAPONS CHARGE. THE DEFENDANT'S MAIN ARGUMENT WAS HE DID NOT HAVE A WEAPON NOR DID HE USE A REPRESENTATION OF ANY WEAPON. See; (APP. P.C.R. TR. 25 II. 14-THRU-TR. 26 II. -6.) & TR. 82, II. 23-THRU-TR. 83 II. -20, TR. 93, II. 2-7, & TR 99, II. 17-THRU-TR. 100, II. -2) HAD COUNSEL EXPLAINED THE WEAPON BEING DISMISSED, PETITIONER WOULD HAVE KNOWN THE OFFER IN ALL LIKLIHOOD WOULD HAVE BEEN STRONG ARMED ROBBERY. COUNSEL NEVER EXPLAINED THEY WERE OFFERING A FIFTEEN (15) YEAR SENTENCE STRAIGHT-UP OR WITH A RECOMMENDATION OF FIFTEEN (15) SUSPENDED TO EIGHT (8) YEARS, FOLLOWED BY PROBATION AND WITH RESTITUTION OF $500.00 DOLLARS AND COOPERATION IN PROSECUTING ANY OTHERS INVOLED. See; (APP. P.C.R. TR. 18, II. 13-THRU-TR. 19. II. -13.) ALSO SEE; (EXHIBIT-#1 WRITTEN PLEA OFFER)

THE PETITIONER TESTIFIED THAT HAD HE KNOWN THE PLEA OFFER WAS FOR STRONG ARMED ROBBERY AND NOT FOR ARMED ROBBERY AS HE WAS CHARGED,

HE WOULD HAVE ACCEPTED THE PLEA OFFER AND WOULD NOT PROCEEDED TO TRIAL AND RISK BEING CONVICTED OF THE GREATER OFFENSE AND RECIEVE A MUCH LARGER SENTENCE OF (25) YEARS VERSES (15) YEARS. See: "GLOVER V. UNITED STATES," 531 U.S. 198, 203, 121 S.Ct. 696 (2001)(THE SUPREME COURT HELD: THAT ANY AMOUNT OF ACTUAL JAIL TIME HAS A SIXTH (6TH) AMENDMENT SIGNIFICANCE.)

THE PETITIONER ENTERED INTO EVIDENCE A SWORN AFFIDAVIT OF ACTIONS COUNSEL SUSANNAH ROSS COMMITTED AND OMITTED IN THE COURSE FAILURE TO CONVEY THE PLEA OFFER AND WHEN THE PLEA OFFER BECAME COGNIZABLE TO THE PETITIONER AND HIS STATEMENT THAT HAD HE KNOWN ABOUT THE PLEA OFFER BEFORE IT'S EXPIRATION DATE OF APRIL 30, 2010, HE WOULD HAVE ACCEPTED THE PLEA OFFER. See; (APP. P.C.R. TR. 23, II. 3-THRU-TR. 24, II. -13) ALSO, See; (EXHIBIT-#2 AFFIDAVIT) See; "ARIZONA V. DONALD," 10 P.3d. 1193 (2000)(PERSUASIVE AUTHORITY). 198 ARIZ. 406. (COUNSEL'S FAILURE TO CONVEY A FORMAL PLEA OFFER FROM THE PROSECUTION LED THE DEFENDANT TO MAKE AN UNINFORMED DECISION TO REJECT A PLEA OFFER AND PROCEED TO TRIAL.

THE PETITIONER TESTIFIED THAT COUNSEL ALLOWED THE PLEA OFFER EXPIRATION DATE OF APRIL 30, 2010 TO ELAPSE. See; (APP. P.C.R. TR. 26, II. 3-16) ALSO, See; "MIZZOURI V. FRYE," 564 U.S. 1058, 132 S.Ct. 1399 (2012) (THE SUPREME COURT HELD: 1.) (DEFENSE COUNSEL HAS A DUTY TO COMMUNICATE FORMAL PLEA OFFER FROM THE PROSECUTION TO ACCEPT ON TERMS AND CONDITIONS THAT MAY BE FAVORABLE TO THE ACCUSED, 2) COUNSEL WAS DEFICIENT IN FAILING TO COMMUNICATE TO DEFENDENT PROSECUTOR'S PLEA OFFER BEFORE IT EXPIRED.)

THE PETITIONER TESTIFIED THAT HE NEVER MADE BOND ON HIS CHARGES, THEREFORE HE WAS CONFINED TO THE COUNTY JAIL FOR OVER A YEAR. SINCE JANUARY 29, 2010 COUNSEL NEVER MADE ANYMORE PROFESSIONAL VISIT FOR "159" DAYS. COUNSEL ALLOWED THE PLEA OFFER OPPORT-

-UNITY TO ESCAPE AND ONLY MADE ANY MORE CONTACTS ON JULY 7, 2010, FIVE DAYS BEFORE HIS INITIAL JULY 12, 2010 SCHEDULED JURY TRIAL. See: (APP. P.C.R. TR. 17, II. 4-22, & TR. 23, II. 3-THRU-TR. 24, II. -4.)

THE PETITIONER STATES BECAUSE OF COUNSEL ACTIONS OR NON-ACTIONS THAT SHE VIOLATED RULE 407 OF SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT, A LAWYERS RESPONSIBILITIES. "RULE 1.3, DILIGENCE," Sub. sec. [1.] PROVIDES A SHOULD PURSUE A MATTER ON BEHALF OF A CLIENT DESPITE OPPOSITION, OBSTRUCTION OR PERSONAL INCONVIENCE TO THE LAWYER. COUNSEL FAILED TO DO DUE DILIGENCE BY REFUSING TO GO TO THE COUNTY JAIL WHILE THE PLEA OFFER WAS ACTIVE AND BY REFUSING TO MAKE AVAILIABLE A COPY FOR THE DEFENDANT TO READ HIMSELF. COUNSEL FAILED TO COMMUNICATE WITH THE DEFENDANT AS REQUIRED BY "RULE 1.4, COMMUNICATION" Sub. sec. (A), (1), (2) (3), (4), AND (5), (b). See: (APP. P.C.R. TR. 26, II. 7-THRU-TR. 27, II. -19) EXHIBIT-#3 JAIL PROFESSIONAL VISITATION SHEET SHOWING COUNSELS' VISITS TO DEFENDANT AND DEFENDANT SHOWING UP TO MEET COUNSELOR. See; IN COMPARISON "LAFLER V. COOPER," 564 U.S. 1058, 132 S. Ct. 1399 (2012) (THE SUPREME COURT HELD THAT: PETITIONER WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE IN ADVISING PETITIONER TO REJECT THE PLEA OFFER AND GO TO TRIAL.)

THE PETITIONER ARGUES BECAUSE COUNSEL FAILED TO ADEQUATELY CONVEY THE FORMAL PLEA OFFER AND IT'S TERMS AND CONDITIONS IT CAUSED HIM TO REJECT THE OFFER AND TO PROCEED TO TRIAL. See; "DAVIE V. STATE," 384 S.C. 601, 675 S.E.2d. 416 (S. Ct. 2009) (THE S. Ct. HELD COUNSEL'S FAILURE TO COMMUNICATE THE STATE'S INITIAL FIFTEEN (15) YEAR PLEA OFFER CONSTITUTED DEFICIENT PERFORMANCE. i.e., See; "PEOPLE V. CULPEPPER," 1?? Misc. 2d, 550, 567 N.Y.S. 2d. 327, 328 (1990) (FINDING NO PREJUDICE WHERE DEFENDANT DID NOT STATE THAT HE WOULD HAVE ACCEPTED THE ALLEGED PLEA OFFER, IF IT HAD BEEN TRANSMITTED.

THE PETITIONER TESTIFIED ON RECORD AT THE P.C.R. HEARING, THAT HAD HE

KNOWN THE PLEA OFFER WERE FOR STRONG ARMED ROBBERY, INSTEAD OF ARMED ROBBERY THAT HE WOULD HAVE ACCEPTED THE PLEA OFFER AND NOT PROCEEDED TO TRIAL. See; (APP. P.C.R. TR. 24.II.1-4, TR.21.II.17-20.)

THE PETITIONER TESTIFIED THAT COUNSEL NEVER ACTUALLY SHOWN HIM A COPY OF THE WRITTEN PLEA OFFER FOR HIM TO REVIEW. PETITIONER TESTIFIED THAT HE ONLY BECOME COGNIZABLE OF THE PLEA OFFER WHEN HE FILED A MOTION REQUESTING THE COMPLETE CLIENT FILE ON FEBRUARY 2, 2011. See; (APP. P.C.R. TR. 18.II.15-THRU-TR.19.II.-13. see; EXHIBIT-#1, FORMAL PLEA OFFER) See; ALSO (APP. EXHIBIT-#4, COPY OF DATE STAMP ENVELOPE RECIEVING THE COMPLETE INMATES FILE) TR. 29.II.17-THRU-TR.31.II.-18.)

THE PETITIONER TESTIFIED THAT COUNSEL FAILED TO KEEP PETITIONER REASONALBLY INFORMED OF THE STATUS OF THE CASE, AND BECAUSE OF THAT COUNSEL CAUSED PETITIONER THE LOSS OF AN OPPORTUNITY TO ACCEPT THE PLEA OFFER BEFORE IT EXPIRED. See; (APP. P.C.R. TR. 25.II.14-THRU-TR.26.II.-16.)

C. DISCUSSION

TO ESTABLISH DEFICIENT PERFORMANCE DURING PLEA NEGOTIATIONS A PETITIONER MUST PROVE THAT THE LAWYER EITHER (1.) GAVE ERRONEOUS ADVICE, OR (2.) FAILED TO GIVE INFORMATION NECCESSARY TO ALLOW THE PETITIONER TO MAKE AN INFORMED DECISION WHETHER TO ACCEPT THE PLEA OFFER. See; "HILL- V. LOCKHART," 474 U.S. 58, 106 S.Ct. 366, 88 L.Ed.2d 203. See; "DAY" 969 F.2d. 42

PETITIONER TESTIFIED THAT COUNSEL FAILED TO ADEQUATELY CONVEY THE TERMS AND CONDITIONS OF THE PLEA OFFER AND THAT COUNSEL FAILED TO EXPLAIN THE MATTER THAT HE MAY MAKE AN INFORMED DECISION. (see: APP. P.C.R. TR. 21.II.2-20.)

TO ESTABLISH PREJUDICE IN THE REJECTION OF A PLEA OFFER, A PETITIONER MUST SHOW A REASONABLE PROBABILITY THAT ABSENT HIS ATTORNEYS' DEFICIENT ADVICE OR NOT ADEQUATELY CONVEYING THE TERMS AND CONDITIONS HE WOULD HAVE ACCEPTED THE PLEA OFFER AND DECLINED TO GO FORWARD TO TRIAL.

PETITIONER TESTIFIED THAT HAD HE KNOWN THE PLEA OFFER WAS FOR STRONG ARMED ROBBERY AND NOT ARMED ROBBERY THEN HE WOULD HAVE ACCEPTED THE PLEA OFFER AND THE DIFFERENCE BEING HE WOULD HAVE RECIEVED 15 YRS RATHER

THAN 25 YRS AND THAT IS THE PREJUDICE IT SELF THE GREATER SENTENCE VERSUS THE SMALLER SENTENCE. See; (APP. P.C.R. TR. 24, II. 1-4). See; "LAFLER V. COOPER", 566 U.S. 1058, 132 S.Ct. 1376 (2012) (THE SUPREME COURT HELD; 1.) THE SIXTH (6TH) AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL EXTENDS TO THE CONSIDERATION OF PLEA OFFERS THAT LAPSE OR ARE REJECTED, THAT RIGHT TO, ALL CRITICAL STAGES OF THE CRIMINAL PROCEEDINGS. See; "MONTEJO V. LOUISIANA", 556 U.S. 778, 786, ALSO "HILL V. LOCKHART", 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d. 203 (1985)

THE PETITIONER STATES AND ASK THE COURT TO NOTE AS IN "DAVIE", id THERE WERE NO FORMAL COLLOQUY OF TERMS AND CONDITIONS STATED PRIOR TO TRIAL, @ 609-611. THE SAME APPLIED IN PETITIONER'S CASE. THERE IS NOTHING IN THE RECORD TO INDICATE THE TRIAL JUDGE EDWARD MILLER WOULD HAVE NOT ACCEPTED A PLEA DEAL OR THE PROSECUTION WOULD HAVE WITHDRAWN IT.

IN "DONALD", id. (PERSUASIVE AUTHORITY) (THE COURT RECOGNIZE THAT A CRIMINAL DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO A PLEA BARGAIN;" see; "UNITED STATES V. OSIF", 789 F.2d. 1404, 1405 (9th CIR 1986) & "STATE V. McKINNEY", 185 ARIZ. 567, 575, 917 P.2d. 1214, 1222 (1996) "BUT ONCE THE STATE ENGAGES IN PLEA BARGAINING, THE DEFENDANT HAS A SIXTH (6TH) AMENDMENT RIGHT TO BE ADEQUATELY INFORMED OF THE CONSEQUENCES BEFORE DECIDING WHETHER TO ACCEPT OR REJECT THE OFFER. SEE; "DAY," 969 F.2d. 043, AND "BECKHAM", 639 F.2d. 267 (PERSUASIVE AUTHORITY.)

THE PETITIONER ASK THE COURT TO TAKE NOTE OF THE P.C.R. JUDGE STATING HIS OBSERVANCE OF THE WITNESSES AND HIS ABILITY TO PASS UPON THEIR CREDIBILITY. see; (APP. ORDER OF DISMISSAL, PAGE 5, LINE 3-7.) THE COURTS FINDING TRIAL COUNSELS TESTIMONY AS CREDIBLE, EVEN THOUGH COUNSEL NEVER TESTIFIED ANY TERMS OR CONDITIONS OF THE PLEA OFFER WHEN ASK WHAT WAS THE STATE WILLING TO DO? COUNSEL OMITTED THE TERMS AND THE CONDITIONS WHEN GIVEN TO OPPORTUNITY TO STATE THEM. See; (APP. P.C.R. TR. 85, II. 3-11) COUNSEL EVEN STATES WHEN HOLDING THE PLEA OFFER

THAT, "SHE'S NOT SURE IF IT'S ON THERE!" TERMS AND CONDITIONS OF THE PLEA OFFER. THE COURT STATED IF THERE WAS ANY BREAKDOWN IN COMMUNICATION BETWEEN COUNSEL AND APPLICANT IN THIS CASE IT WAS DUE TO APPLICANTS CONDUCT. CITING "UNITED STATES V. PELLERITO," 878 F.2d. 1535, 1543 (1st CIR.-1989) See; (APP. ORDER OF DISMISSAL, PAGE 6, LINE 5-THRU-PAGE 8, LINE-9.)

THE PETITIONER ASK THE COURT TO TAKE NOTE THAT THE CASE OF "PELLERITO," THE DEFENDANT'S SHARE NO SIMILIARITIES AS REFERRED TO BY THE COURT. IN CASE MENTIONED THE DEFENDANT "RIVERA-MARTINEZ," WAS A PSYCHIATRIC PATIENT SUFFERING FROM AN "IMBALANCE PERSONALTY DISORDER," AND UNDER "THE INFLUENCE OF ANXIETY DRUGS." Id 1542. MR. MARTINEZ STATED IN OPEN COURT THAT HE WAS SATISFIED WITH COUNSEL SERVICES, DURING RULE 11 COLLOQUY. HIS ATTORNEY STATED HE PUT IN 200 hrs. IN PREPARATIONS. THE RECORD SHOWS THE STATE HAD A STRONG CASE AGAINST THE DEFENDANT AND THERE WERE OVER-WHELMING EVIDENCE AGAINST HIM.

THE PETITIONER ON THE OTHER HAND WAS NOT A PSYCHIATRIC PATIENT, WERE NOT SUFFERING FROM DEPRESSION NEITHER WERE HE THEN OR NOW IN NEED OF ANY **PSYCHIATRIC MEDICATION** OR **PSYCHIATRIC TREATMENT**. PETITIONER MADE IT KNOWN PRIOR TO TRIAL HE WISH TO **RELIEVE** COUNSEL WITH A FORMAL COMPLAINT AND FILED A COMPLAINT WITH THE S.C. BAR ASSOCIATION. See; (APP. TRIAL TR. 6, L. 8-THRU-TR. 16 L.-12) ALSO, See; (APP. P.C.R. TR. 94, L. 10-14). COUNSEL DID NOT INVEST TIME IN HIS CASE AND DID NOT PUT UP A DEFENSE AT TRIAL.

THE RECORD DOES NOT SUPPORT COUNSEL'S CLAIM THAT SHE ADEQUATELY CONVEYED THE PLEA OFFER OF IT'S TERMS AND CONDITIONS AND THAT THE PETITIONER CAUSED THE BREAKDOWN IN THE COMMUNICATIONS.

THE PETITIONER STATES THE P.C.R. ERRED IN DENYING RELIEF BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT THE HEARING.

PETITIONER STATES FOR THESE REASONS CERTIORARI SHOULD BE GRANTED AND ALLOW FULL BRIEFING ON THIS ISSUE.

ARGUMENT # 2

THE PCR COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE EVIDENCE THROUGH TESTIMONY ATTACKING THE DEFENDANT'S CHARACTER BY BRINGING OUT PRIOR INCARCERATIONS.

A. HOW THE ISSUE AROSE BELOW

PETITIONER WAS IN TRIAL BUT DID NOT PUT UP ANY DEFENSE NOR A CHARACTER WITNESS TO ATTEST HIS CHARACTER.

THE STATE CALLED ITS KEY WITNESS "PATRICIA RICE", WHOM WAS ARRESTED AND INDICTED AS A PRINCIPAL AND CO-DEFENDANT IN THE CASE. THE PROSECUTION CALLED HER AS A WITNESS AGAINST THE DEFENDANT. AFTER TESTIFYING ON DIRECT FOR THE STATE, "MS. RICE" WAS CROSS-EXAMINED BY DEFENSE COUNSEL. THE PROSECUTION DECIDED TO RE-DIRECT EXAMINATION ON ITS WITNESS. THE PROSECUTION ASKED "DID SHE CALLED THE POLICE ON THE DEFENDANT FOR DOMESTIC VIOLENCE?" WITNESS STATES "SURE", THE PROSECUTION ASK "BUT YOU SIGNED SOMETHING SO THAT THEY WOULDN'T PROSECUTE IT"? THE WITNESS STATED "IT HAD BEEN SOME TIME AGO. HE HAD ALREADY BEEN INCARCERATED FOR SOMETHING ELSE. HE HAD MADE TIME FOR THAT. THAT WAS IN THE PAST. LET IT GO". (APPENDIX, TRIAL TRANSCRIPT, TR. 175, II. 7-18).

PETITIONER TESTIFIED AT THE P.C.R. HEARING THAT COUNSEL FAILED TO OBJECT, CONTEMPORARY OR OTHERWISE TO TESTIMONY THAT WAS INADMISSIBLE. SEE; (APPENDIX, P.C.R TRANSCRIPT TR. 49, II. 21-THRU-TR. 51, II. 1)

B. STANDARD OF REVIEW.

PETITIONER ARGUES THAT THIS TESTIMONY WAS NOT ONLY IN-ADMISSIBLE BUT WAS ALSO HIGHLY PREJUDICIAL. THE TESTIMONY VIOLATED S.C.R.E., RULE "404" WHICH PROVIDES; CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTION; OTHER CRIMES. SEE S.C.R.E. 404(A)(1) "CHARACTER OF ACCUSED". EVIDENCE OF A PERTINENT TRAIT OF CHARACTER OFFERED BY AN ACCUSED, OR BY THE PROSECUTION TO REBUT THE SAME. "IN S.C. CRIMINAL CASES, THE STATE CAN NOT ATTACK THE CHARACTER OF A DEFENDANT UNLESS AT FIRST THE DEFENDANT PLACES HIS CHARACTER IN ISSUE. SEE; "STATE V. NELSON", 331 S.C. 1, 501 S.E.2D 716 (S.CT. 1998).

THE PETITIONER TESTIFIED AT THE EVIDENTIARY HEARING (P.C.R.) THAT AT TRIAL THE HE ELECTED NOT TO TAKE THE STAND, DID NOT PUT UP ANY EVIDENCE NOR DID HE PLACE HIS CHARACTER IN ISSUE. SEE; (APPENDIX, P.C.R. TRANSCRIPT TR. 50, II. 2-8) SEE; (APPENDIX, TRIAL TRANSCRIPT, TR. 209, II. 14-THRU-TR. 210, II.— 13).

S.C. RULES OF EVIDENCE 404(B) OTHER CRIMES, WRONGS, OR ACTS: PROVIDES: EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS IS NOT ADMISSIBLE TO PROVE THE CHARACTER OF A PERSON IN ORDER TO SHOW ACTION IN COMFORMITY THEREWITH. SEE; "STATE V. LYLES", 125 S.C. 406, 118 S.E. 803 (1923)(PROVIDES THAT EVIDENCE OF OTHER CRIMES OR PRIOR BAD ACTS ARE IN-ADMISSIBLE TO SHOW CRIMINAL PROPENSITY TO COMMIT A CRIME OR TO DEMONSTRATE THE ACCUSED IS A BAD INDIVIDUAL). CONTINUATION OF 404(B) ALSO PROVIDES: IT MAY HOWEVER, BE ADMISSIBLE TO SHOW MOTIVE, IDENTITY, THE EXISTENCE OF A COMMON SCHEME OR PLAN, THE ABSENCE OF MISTAKE

OR ACCIDENT, OR INTENT. SEE: "STATE V. JACKSON", 293 S.C. @324, 360 S.E.2D @319, AND "STATE V. CHEATHMAN" 349 S.C. 101, 561 S.E.2D 618 (CT. APP. 2002).

IN THE CASE "GETER V. STATE", (DISTINGUISHED), 409 S.E.2D 344 (S.CT. 1991) THE SUPREME COURT HELD THAT: EVIDENCE THAT DEFENDANT WAS PREVIOUSLY JAILED ON UNSPECIFIED CHARGES WAS NOT ADMISSIBLE UNDER ANY EXCEPTION, NOR WAS IT ADMISSIBLE AS IMPEACHMENT EVIDENCE.

THE PETITIONER'S CASE IS DISTINGUISHED FROM "GETER'S" ID. CASE IN SEVERAL WAYS DUE TO THE FACT THAT EVIDENCE IN "GETERS" CASE WAS OVERWHELMING, AND THE WERE FOUR VICTIMS ALSO MULTIPLE CHARGES AND MR. GETER TOOK THE WITNESS STAND IN HIS OWN DEFENSE.

IN PETITIONERS CASE THERE WERE NO OVERWHELMING EVIDENCE AS TESTIFIED BY INVESTIGATOR M. JARVIS, SEE (APPENDIX, TRIAL TRANSCRIPT, TR. 194, II. 21-THRU-TR. 195, II.-23 AND TR. 208, II. 4-THRU-TR. 209, II.-7, TR. 210, II. 23-THRU-TR. 211, II. 1-9, 15-20, TR. 212, II. 1-24, AND 249, II. 8-22). THE STATE'S CASE WAS BUILT UPON AN CONFESSED INEBRIATED VICTIM WHO TESTIMONY WAS CONTRADICTORY FROM START TO FINISH. THE OTHER STATES WITNESS WAS ARRESTED CHARGED AS A PRINCIPAL IN THE CRIME AND WAS OFFICIALLY INDICTED (2009-GS-23-9564) FOR ARMED ROBBERY IN THIS CASE. PATRICIA RICE HAD COMPELLING MOTIVATION FOR ESTABLISHING PETITIONER'S GUILT. BASED UPON SEVERAL REASONS 1.) SHE WAS ARRESTED, 2.) FORMALLY INDICTED, AND 3.) HER KNOWLEDGE THAT JUST AS THE PROSECUTION DISMISSED HER CHARGES, THAT THE SAME COULD RECHARGE HER ANY DAY AND TIME.

C. DISCUSSION.

THE TESTIMONY THIS WITNESS GAVE WAS A NON-RESPONSIVE AND WAS NOT RELEVANT TO THE QUESTION ASKED, NEITHER WERE IT CONNECTED TO THE CRIME FOR WHICH THE PETITIONER WAS BEING TRIED FOR.

COUNSEL ALLEGE THE SHE DID NOT OBJECT BECAUSE SHE DID NOT WANT TO DRAW ATTENTION TO THE JURY AND THAT WAS HER STRATEGY. SEE APPENDIX, ("ORDER OF DISMISSAL", PAGE 11, LINE 3-20, SEE; P.C.R. TR. 103, II. 5-17). COUNSEL TESTIFIES THAT SHE IS NOT SURE WHERE THE MR. RICE SAID THAT HE WAS IN JAIL. IN "DAWKINS V. STATE", 346 S.C. 151, 551 S.E.2D 601 (2001) THE COURT HELD THAT COUNSEL CANNOT ASSERT TRIAL STRATEGY AS A DEFENSE FOR NOT OBJECTING TO TESTIMONY OF IN-ADMISSIBLE EVIDENCE WHICH CONSTITUTE ERROR OF LAW AND IS INHERENTLY PREJUDICIAL.

PETITIONER STATES THAT BY ALLOWING THIS IN-ADMISSIBLE EVIDENCE TO GO BEFORE THE JURY UN-OBJECTED TO THERE IS A REASONABLE PROBABILITY IT TOOK THE JURY AWAY FROM THE REAL ISSUE FOR WHAT THE PETITIONER WAS CHARGED WITH ARMED ROBBERY AND PREJUDICED THEM. EVEN THOUGH IT DID VIOLATE THE S.C. RULES OF EVIDENCE, RULE 404 AND THE LYLE RULE. SEE; "STATE V. LYLE", 125 S.C. 406, 118 S.E. 803 (1923).

THIS TESTIMONY OF A NON--RESPONSIVE ANSWER VIOLATED PETITIONER'S RIGHT OF DUE PROCESS CLAUSE AND IT'S GUARANTEE TO A FAIR TRIAL. SEE "UNITED STATES V. GONZALEZ", 548 U.S. 140, 147, 126 S.CT. 2557, 165 L.ED.2D 409 (2006). (THE ERROR COMPLAINED OF

IS A REVERSIBLE ERROR. WHERE THERE IS NO-OVERWHELMING EVIDENCE AS IN THE PETITIONER'S CASE.

THE PETITIONER STATES THE P.C.R. COURT ERRED IN DENYING HIM RELIEF BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT THE HEARING. AND THE RECORD DOES NOT SUPPORT COUNSEL'S CLAIM OF TRIAL COURT STRATEGY DUE TO THE FACT THAT THE ERROR COMPLAINED OF WAS INHERENTLY PREJUDICIAL AND THE EVIDENCE IN THE CASE WAS NOT OVER-WHELMING.

THE PETITIONER RESPECTFULLY STATE FOR THESE REASONS, CERTIORARI SHOULD BE GRANTED AND ALLOW FULL BRIEFING ON THIS ISSUE.

ARGUMENT #3

THE P.C.R. COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND THE PROSECUTION DID NOT COMMIT MISCONDUCT BY KNOWINGLY USE PERJURED TESTIMONY IN ORDER TO OBTAIN A CONVICTION, PROSECUTION KNEW OR SHOULD HAVE KNOWN THE TESTIMONY WAS PERJURY.

A. HOW ISSUE AROSE

PRIOR TO TRIAL DEFENDANTS' CO-DEFENDANT PATRICIA RICE WAS ARREST AND CHARGED WITH ARMED ROBBERY (WAR.# I-478795). MS. RICE GIVE A STATEMENT AGAINST DEFENDANT BUT STATED "SHE DID NOT SEE A KNIFE OR A WALLET BUT DEFENDANT WAS THE ONE WHO TOOK WHATEVER WAS MISSING". MS. RICE WAS FORMALLY INDICTED (2009-GS-23-9564) ALONG WITH THE DEFENDANT ON FEBRUARY 16, 2010.

ON JANUARY 8, 2010 APPROXIMATELY 10:21 A.M. DID OBSERVE HIS CO-DEFENDENT PATRICIA RICE TALKING WITH THE PROSECUTOR MARK MOYER AND HIS FEMALE INVESTIGATOR IN THE GREENVILLE DETENTION CENTER PRO-V-ROOM. See; APP. EXHIBIT-#3 & #6, P.C.R. TR. 26 ll. 3-THRU-TR. 27 ll. -20 & TR. 38 ll. 4-THRU-TR. 49 ll.-11.) THE COUNSEL FOR MS. RICE ATTORNEY CHRISTOPHER POSEY WAS ABSENT AND NOT PRESENT AT THEIR SECRET MEETING. THE PETITIONER ASK THE COURT TO MAKE NOTE THAT MS. RICE WAS AT THAT TIME OFFICIALLY UNDER INDICTMENT. See; "MASSIAH V. UNITED STATES", 377 U.S. 201, 84 S.Ct. 1199 (S.Ct. 1964) (POST-INDICTMENT-INTERROGATION) "THE S.Ct. HELD THAT "ONCE AN INDICTMENT ATTACHES ALL INTERROGATIONS MUST CEASE OUTSIDE THE PRESENCE OF COUNSEL". See; "SPANO V. NEW YORK", 360 U.S. 315, 323, 79 S.Ct. 1202 (-) (THE S.Ct. HELD THAT "ANY SECRET INTERROGATION WITHOUT THE PROTECTION AFFORDED BY THE PRESENCE OF COUNSEL, CONTRAVENES THE BASIC DICTATES OF FAIRNESS IN THE CONDUCT OF CRIMINAL CAUSES AND THE FUNDAMENTAL RIGHTS OF PERSON'S CHARGED WITH A CRIME. See; "PEOPLE V. WATERMAN,"

,9 N.Y.2d. 561, 565, 216 N.Y.S. 70, 175 N.E.2d. 445. AND "PEOPLE V. DI-BIASI," 7 N.Y. 2d @ 551, 200 N.Y.S. 2d @ 25 (PERSUASIVE AUTHORITY) SUPRA. (THE EVIDENCE LEARNED FROM THIS MEETING WAS IN VIOLATION OF THE DEFENDANT'S RIGHT OF DUE PROCESS AND A RIGHT TO A FAIR TRIAL.) AS IN "SPANO," id. "THE WITNESS MS. RICE WITHOUT THE GUIDING HAND OF HER ATTORNEY "CHRIS POSEY," IS NO MATCH AND DOES NOT HAVE ENOUGH KNOWLEDGE THE LAW TO TALK WITH A SEASONED PROSECUTOR AND A VETERAN INVESTIGATOR AND TO HAVE THE COURT TO BELIEVE THAT A PRUDENT ATTORNEY WOULD WAY-LAY HIS CLIENT ALONE WITH THEM IS INCONCIEVABLE AND PERMIT THIS OUT-SIDE HIS PRESENCE.

THE CO-DEFENDANT WAS RELEASED ON JULY 9, 2010 AFTER BEING LOCKED UP FOR ELEVEN (11) MONTHS. See (APP. TRIAL TR. 169, LL. 9-THRU-TR. 170, LL. -7) THE PROSECUTION SEND LETTERS TO COUNSELS' OF HIS INTENTIONS TO DISMISS HER CHARGES. See; (APP. P.C.R. EXHIBIT-#7, & P.C.R. TR. 46, LL. 3--23)

PETITIONER WAS SCHEDULED FOR JURY TRIAL JULY 12, 2010 BUT BECAUSE THE PROSECUTION COULD NOT FORMALLY GET MS. RICE CHARGES DISMISSED AND PURGE OUT OF THE JUDICIAL DATA BANK UNTIL JULY 13, 2010 PER HER INMATES TRACKING SHEET, PETITIONER TRIAL WAS PUT OFF. A WITNESS THAT HAS PENDING CHARGES AND DIRECTLY CONNECTED TO THE CHARGE DOES NOT MAKE A GOOD WITNESS.

B. STANDARD OF REVIEW

ON AUGUST 9, 2010 DEFENDANT'S TRIAL BEGINS THE PROSECUTION'S IMPEACHES HIS OWN WITNESS BY BRINGING OUT FACTS BEFORE THE JURY THAT SHES BEEN CON-VICTED OF FALSE STATEMENTS TO THE POLICE. THE NEXT THING HE DOES IS GOES INTO THE MITIGATING CIRCUMSTANCES OF THE CONVICTION, ALL ARE VIOLATIONS IN TRIAL RULES. THEN HE GOES ON AS TO GIVE THE JURY THAT NO TYPE OF DEAL HAS BEEN MADE BET-WEEN THE STATE AND THE WITNESS. HE ASK DOES SHE UNDERSTAND THAT HER CHARGES ARE OVER. MS. RICE ACKNOWLEDGES THAT SHE UNDERSTANDS. (See; APP. —

TRIAL TR. 157, II. 18—THRU—TR. 158, II.—12. ALSO P.C.R. TR. 38, II. 5-THRU-TR. 49, II.—11.) SEE; "GIGLIO V. UNITED STATES," 405 U.S. 150 (UNDERSTANDINGS & DEALS)

ON DIRECT EXAMINATION THE PROSECUTOR ASK MS. RICE, "WHAT DID YOU SEE THE DEFENDANT DO?"

MS. RICE STATES "I DIDN'T REALLY SEE NOTHING!" SEE; (APP. TRIAL TR. 162, II. 19-25)

MR. MOYER ASK AGAIN "WHAT DID YOU SEE HAPPEN?"

MS. RICE STATES "I DIDN'T SEE HIM DO NOTHING IN PARTICULAR, IT WAS DARK!"

MR. MOYER ASK MS. RICE AGAIN, "WHAT DID YOU SEE?"

MS. RICE STATES AGAIN "I DIDN'T REALLY SEE HIM DO ANYTHING!" SEE; (APP. TRIAL TR. 164, II. 1-5)

THE PROSECUTION NEXT BRINGS MS. RICE ATTENTION OF TALKING TO THE POLICE OFFICER AND THAT SHE WAS ARRESTED, AND ASK DIDN'T YOU? AT THIS LINE OF QUESTIONING THE PROSECUTOR USED THE LINE OF QUESTIONING DIRECT AT THE WITNESS CONCERNING WHAT SHE TOLD THE POLICE OFFICER AND DID YOU TELL THE POLICE OFFICER TEN(10) TIMES IN SUCCESSION TO REMINDER HER OF HER FORMER POSITION IN THE ARMED ROBBERY. SEE; (APP. TRIAL TR. 164, II. 1-THRU-TR. 166, II.—5). THE LINE OF QUESTIONING AND THE ANSWERS GIVEN THROUGH TESTIMONY WILL DEMONSTRATE THE INFLUENCE OF FEAR, DURESS OR THE STIPULATION WHETHER TO PROSECUTE; THE PROSECUTOR'S IMPROPER SUGGESTIONS, INSINUATIONS AND ASSERTION OF PERSONAL KNOWLEDGE OF THE CASE AS A WITNESS ARE APT TO CARRY MUCH WEIGH AGAINST THE ACCUSED WHEN THEY SHOULD CARRY NONE. SEE; "BERGER V. UNITED STATES," 295 U.S. 78 (1935).

PATRICIA RICE WENT ON TO TESTIFY THAT THE DEFENDANT "JACKED THE

VICTIM UP AGAINST THE TRAILER. See; (APP. TRIAL TR. 166, II, 1-18.). THIS TESTIMONY IS INCONSISTENT TO THE TESTIMONY THE VICTIM EDWIN PEREZ GAVE. THE VICTIM IN HIS ENTIRE TESTIMONY STATES THAT HE WAS PUSHED DOWN. IN THE BIGGERS HEARING AND TRIAL. See; (APP. TRIAL TR. 56, II, 4-THRU-TR. 58, II, -20) ALSO (TRIAL TR. 109, II, 24-THRU-TR. 111, II, -16). PETITIONER ASK THE COURT TO MAKE NOTE OF THE DIFFERENCE BETWEEN JACKED UP AND PUSHED DOWN.

THE WITNESS MS. RICE ALSO TESTIFIES TO LEAVING THE SCENE AND WALKING HOME. See; (APP. TRIAL TR. 167, II, 19-23)

COUNSEL FOR DEFENSE ASK MS. RICE ABOUT CHANGING HER TESTIMONY FROM THE WRITTEN STATEMENT. See; (APP. TRIAL TR. 171, II, 5-25) * ESP. 14-25). See; "BOONE V. PADERICK," 541 F.2d. 447 (U.S. Ct. 4th Cir. 1976) (THE SIGNIFICANCE FOR CREDIBILITY PURPOSE OF AN AGREEMENT OF FAVORABLE TREATMENT; TENTATIVENESS MAY INCREASE IT'S RELEVANCY. THIS IS BECAUSE A PROMISE TO RECOMMEND LENIENCY (WITHOUT-ASSURANCE OF IT) MAY BE INTERPRETED BY THE PROMISE CONTINGENT UPON THE QUALITY OF THE EVIDENCE PRODUCED. THE MORE THE UNCERTAINTY OF THE AGREEMENT, THE GREATER THE INCENTIVE TO MAKE THE TESTIMONY PLEASING TO THE PROMISER AND COMMIT PERJURY.

AARON JONES TESTIFIED AT THE P.C.R. HEARING ON BEHALF OF THE PETITIONER. MR. JONES TESTIFIED TO SEEING PATRICIA RICE WITH THE PETITIONER ATLEAST TWICE THE MORNING OF JULY 25, 2009. HE STATED THAT HE SAW BOTH THE PETITIONER AND MS. RICE FIRST APPROXIMATELY 1:00 a.m. - 1:30 a.m. FOR ABOUT 30-40 MINUTES, THEN AGAIN APPROXIMATELY 7:30-8:00 a.m. THE SAME MORNING OF JULY 25, 2009. See; (APP. TR. PCR TR. 73, II, 6-THRU-TR. 81, II, -19.). "THE STATE FAILED TO OBJECT OR TO STRIKE MR. JONES TESTIMONY." See; ("STATE V. FRANK," 262 S.C. 526, 205 S.E.2d 827 (S. Ct. 1974) (TESTIMONY DEEMED CREDIBLE, WHERE THERE IS NO OBJECT OR TO STRIKE P.C.R. WITNESS TESTIMONY). P.C.R. JUDGE RULED AARON JONES TESTIMONY NOT CREDIBLE EVEN AFTER MR. JONES STATED

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HE KNEW IT WAS JULY 25, 2009 BECAUSE THE PETITIONER WAS ARRESTED SEVERAL DAYS LATER AND THAT WAS ON A FRIDAY NIGHT. See (APP. P.C.R. ORDER OF DISMISSAL, PAGE 10, LINE 21-22)

C. DISCUSSION

THE PETITIONER ASK THE COURT TO NOTE THE P.C.R. COURT STATING HIS OBSERVANCE OF THE WITNESES AND TO PASS ON THEIR CREDIBILITY. See; (APP. ORDER OF DISMISSAL, PAGE 5, LINE 3-7) P.C.R. COURT FINDINGS WERE THAT COUNSEL WAS CREDIBLE AND ASSERTING SHE KNEW THE PROSECUTION MET WITH MS. RICE/CO-DEFENDANT. ALSO THE PROSECUTOR TESTIFIED THAT HE HAD NO CONCERNS THAT MS. RICE WAS TELLING THE TRUTH. See; (APP. ORDER OF DISMISSAL, PAGE 10, LINE 7, 8 & P.C.R. TR. 72 II. 1-17)

THE COURTS' FINDING AND RULING PETITIONER DID NOT DEMONSTRATE DEFICIENT PERFORMANCE NOR DID HE SUFFER ANY PREJUDICE.

THE PETITIONER PRESENTED DIRECT EVIDENCE THROUGH TESTIMONY AND PHYSICAL EVIDENCE OF EXHIBITS THAT THE PROSECUTOR VIOLATED A CARDINAL RULE OF THE CONSTITUTION. "MASSIAH V. U.S." (POST INDICTMENT INTERROGATION) "MASSIAH RULE" (ONCE INDICTMENT ATTACHES ALL INTERROGATION MUST CEASE.) See; "U.S. V. McHAN," 101 F.3d. 1027 (CA. 4th, N.C. 1996) (TO ESTABLISH A DEAL THERE FIRST BE A MEETING OF THE MIND.) See; "GIBSON V. STATE," 334 SC 515 (S. Ct. 1999) AND "RIDDLE V. OZMINT," 369 SC 39 (S.-C. 2006) (THE WITNESS CHANGING THEIR TESTIMONY FROM ORIGINAL STATEMENT AFTER MEETING WITH THE SOLICITOR SECRETLY.) See; "NAPUE V. ILLINOIS," 360 U.S. 264 (1959) AND "GIGLIO V. U.S.," 405 U.S. 150 (1972) (DEAL AND AGREEMENT WHETHER THEY BE SUGGESTED, IMPLIED OR SOMEOTHERWISE, AND UNDERSTANDING BETWEEN PROSECUTOR AND CO-DEFENDANT. See, ALSO "BERGER V. U.S.," 295 U.S. 78 (1935) (THE Ct. HELD IN A CRIMINAL PROSECUTION IS NOT THAT IT SHALL WIN A CASE BUT THAT JUSTICE SHALL BE DONE.

THE PETITIONER ASSERT THE PROSECUTION KNEW MS. RICE TESTIMONY WAS PERJURY OR SHOULD HAVE KNOWN, CONSTITUTES DENIAL OF DUE PROCESS. See; "MOONEY V. HOLOHAN," 294 U.S. 103 (1935) & "ALCORTA V. TEXAS," 355 U.S. 28 (S. Ct. 1957) (THE S. Ct. HELD THAT THE CONVICTION MUST BE SET ASIDE TO CORRECT OR A MISTRIAL.)

PETITIONER STATES FOR THESE REASONS WRIT-OF-CERTIORARI SHOULD BE GRANTED.

JAN 1 2014
MOON LAW

ARGUMENT # 4

THE P.C.R. COURT ERRED IN DENYING RELIEF TO PETITIONER WHEN THE COURT ERRONEOUSLY FOUND THE PROSECUTION DID NOT COMMIT MISCONDUCT BY FAILING TO COMMUNICATE INSTRUCTIONS TO INVESTIGATORS THAT THEY MUST NOT USE DEFENDANT'S ARREST MUGSHOT IN IT'S PHOTO ARRAY LAY OUT.

A. HOW ISSUE AROSE

THE PETITIONER ARGUES THE PROSECUTOR KNEW THAT THE VICTIM HAD OBTAINED AN ARREST MUG SHOT OF THE DEFENDANT WITHIN HIS DAYS OF ARREST. THE PROSECUTION ADMITS TO MEETING WITH THE VICTIM TWICE. See: (APP. P.C.R. TRANS. TR. 67. II. 6-25) ALSO (TRIAL TR. 133. II 22-THRU-TR. 134. II-5) BUT PRIOR TO THE DEFENDANT'S TRIAL THE PROSECUTION NEVER INFORMED THE DEFENSE THAT HE WENT TO THE VICTIMS HOME, THE CRIME SCENE. See; "GIBSON V. STATE;" 334 SC 515 (S.CT. 1999). THE NIGHT OF THE ROBBERY THE FIRST OFFICER ON THE SCENE WAS JUSTIN LANGFORD, GVILLE COUNTY SHERIFF DEPT. HE DESCRIBED THE VICTIM AS EXTREMELY INTOXICATED AND THE DESCRIPTION OF THE ROBBER WAS A 25-30 YR. OLD BLK MALE, See; (APP TR. 148. II. 11-23 & TR. 153. II 25-THUR-TR. 154. II. 1-21 & TR. 153. II. 1-8) See; PETITIONER P.C.R. TESTIMONY; TR. 53. II. 1-THRU-TR. 54. II.-9) ALSO TR. 57. II. 6-THRU-TR. 58. II. -13.)

B. STANDARD OF REVIEW

ON JANUARY 8, 2010 THE VICTIM, HIS BROTHER MET WITH TRACY KING OF GREENVILLE COUNTY SHERIFF DEPT. TO DO AN PHOTO-ARRAY LAYOUT IN HIS OFFICE OF THE BASEMENT. INVESTIGATOR KING NEVER GIVES IT A THOUGHT TO USE A SPANISH SPEAKING OFFICER BUT ALLOWS A FAMILY MEMBER AND VICTIM INSIDE A LINE-UP. OFFICER KING ADMITS TO NOT SPEAKING SPANISH. See (APP. TRIAL TR. 44. II. 14, 15) AND THE VICTIM EDWIN PEREZ ADMITS TO SPEAKING OR UNDERSTANDING VERY LITTLE ENGLISH. HE ADMITS TO FINDING A MUG-SHOT MAGAZINE WITH THE DEFENDANT IN IT ON THE FLOOR. See (APP. TRIAL TR. 123. II. 4-20). HE AND HIS BROTHER DISCUSSED THE DEFENDANT PHOTO IN THE MUG-SHOT MAGAZINE. See; (APP. TRIAL TR. 130. II. 1-7); THE MUG-SHOT PHOTO WAS THE EXACT PHOTO PLACED IN THE PHOTO ARRAY AND THE VICTIM EDWARD PEREZ ADMITS TO THIS. See; (APP. TRIAL TR. 67. II. 3-THRU-TR. 68. II.-5.). THE INVESTIGATOR TRACY KING ADMITS THIS IS THE SAME PHOTO FROM THE MUGSHOT MAGAZINE. (See; APP. TRIAL TR. 51. II. 4-13)

THE PETITIONER BRINGS TO THE ATTENTION OF THE COURT COUNSEL FOR THE DEFENSE SUSANNAH ROSS CONFIRMS THE TIMEING OF THE MUG-SHOT COMING INTO EVIDENCE AND THE STATE PROVIDED TO HER. See; (APP. TRIAL TR. 51, II. 4-8) STATING "LET ME SHOW YOU A COPY THAT WAS PROVIDED TO ME IN THE AUGUST 8th -- AUGUST 10th MUG-SHOT MAGAZINE. UH WHO IS THAT PICTURED ON PAGE 3 OF THE "MUG-SHOT" MAGAZINE?" INV. TRACY KING RESPONDED "MR. BARTON." IT HAS BEEN DOCUMENTED THAT THE VICTIM EDWIN PEREZ HAD THIS MUG-SHOT MAGAZINE AT LEAST SIX TO TEN DAYS AFTER DEFENDANTS ARREST. HE STATES HE FOUND IT ON THE FLOOR. WHAT FLOOR? WE KNOW HE HAD IT FOR (5) MONTH PRIOR TO THE PHOTO ARRAY LAY OUT. THE PROSECUTION ADMITS TO MEETING WITH THE VICTIM TWICE AND HE ADMITS TO BEING TOLD BY THE VICTIM THAT BOBBY BARTON IS THE PERSON WHO ROBBED HIM! See; (APP. EXHIBIT-#8-A LETTER INTRODUCED INTO EVI- MARK MOYER, PROSECUTOR SENT TO COUNSEL SUSANNAH ROSS.) See; P.C.R. TR. 58, II. 16- -THRU-59, II.-10 & P.C.R. TR. 64, II. 25-THRU-TR. 66, II.-15). IN MR. MOYER'S LETTER TO MS. ROSS HE PLAINLY OR FOR BETTER WORD HE CLEARLY STATES THE VICTIM TOLD HIM "SHORTLY" AFTER THE ARREST OF BOBBY BARTON, HE SAW BARTON'S PHOTOGRAPH IN THE MUGSHOT MAGAZINE," AND CONVEYED "THATS WHO ROBBED HIM." THE PROSECUTOR ATTEMPTS TO RECANT HIS MESSAGE THAT HE CLEARLY CONVEYED IN THE LETTER OF EXHIBIT-#8.) MR. MOYER IS ATTEMPTING TO MAKE A DISTINGUISATION BETWEEN "SOON" AND "SHORTLY" AFTER MR. BARTON'S ARREST, THE VICTIM TOLD HIM THAT HE SAW THE DEFENDANT IN THE MUG-SHOT MAGAZINE. See; (APP. P.C.R. TR. 68, II. 1- -THRU-TR. 71, II.-25)

C. DISCUSSION.

THE PETITIONER WOULD LIKE TO NOTE THE P.C.R. COURT STATED THAT IT "HAD THE OPPORTUNITY TO OBSERVE EACH WITNESS THAT TESTIFIED AT THE HEARING AND TO CLOSELY PASS UPON THEIR CREDIBILITY. SEE; (APP. ORDER OF DISMISSAL, PAGE 5, LINE 3-7.) THE ONLY FINDING REGARDING CREDIBILITY

WAS THE P.C.R. COURT WAS IN ITS CONCLUSION THAT COUNSEL AND THE PROSECUTOR WERE CREDIBLE BECAUSE HE DID NOT KNOW ABOUT THE MUG-SHOT USE IN THE PHOTO ARRAY. See: (APP. ORD. OF DISSMISSAL, PAGE 15, LINE 12-THRU-PAGE 16, & PAGE 17, LINE 1&2) AND THAT PETITIONER FAILED TO MEET THE BURDEN OF PROVING COUN- FAILED TO RENDER EFFECTIVE ASSISTANCE. See; "FRASIER V. STATE", 351 S.C. @389, 570 S.E.2d. @174.

THE PETITIONER ASSERTS THAT THE PROSECUTION IS THE CHIEF IN CHARGE IN A CRIMINAL PROCEEDINGS AND IS RESPONSIBLE AT ALL TIMES FOR LETTING HIS LEFT HAND KNOW WHAT THE RIGHT HAND IS DOING AT ALL TIMES. See; "SANTOBELLO V. NEW YORK," 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 427 (1971). THE PETITIONER HAVE PUT UP EVIDENCE AND GIVEN TESTIMONY TO SUBSTANTIATE THAT THE PROSECUTION COMMITTED MISCONDUCT HIS ACTION OR NON-ACTIONS AND DENIED THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION BY NEGLECTING HIS DUTIES AND OBLIGATION OF A FAIR AND IMPARTIAL IDENTIFI-CATION PROCESS. REGARDLESS WHETHER BY COMISSION OR OMISSION THE PETITIONER WAS DENIED A FAIR PHOTO ARRAY. THE POLICE MAY HAVE ACTUALLY COMMITTED THE ACTIONS BUT THE PROSECUTOR MUST CARRY THE BLAME. See; "BOONE V. PAD-ERICK" 541 F.2d. 447 (4th Cir., 1976) ALSO "BARBEE V. WARDEN," (PERSUSIVE AUTHOR-ITY) 331 F.2d. 842 (U.S.C.APP. 4th Cir. 1964) (POLICE ARE ALSO PART OF THE PROSECU-TION & ANY TAINT ON THE TRIAL IS NO LESS IF THEY, RATHER THAN THE STATES ATTORNEY WERE GUILTY THEMSELVES.) See; ALSO "U.S. V. BLAYLOCK," 20 F.3d. 1458, 1468 (9th Cir., 1994) THE Ct. held THAT A FAIR TRIAL DOES NOT NEGATE A CONSTITUTIONAL VIOLATION. (6th & 14th AMEND U.S.C.A ALSO S.C).

THE PETITIONER ARGUES BECAUSE THE PROSECUTION FAILED TO UPHOLD HIS DUTIES AND OBLIGATION AS CHIEF IN CHARGE OF A CRIMINAL PROSECUTION HE COMMITTED MISCONDUCT BY VIOLATING THE PETITIONERS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW. (6th & 14th) AMEND. U.S.C.A. & S.C. FOR THE REASONS PETITIONER ASK THAT PETITION FOR WRIT-OF-CERTIORARI BE GRANTED.

CONCLUSION

FOR THE REASONS STATED, THE PETITIONER ASK THIS COURT TO GRANT THE PETITION TO WRIT-OF-CERTIORARI AND TO ALLOW FULL BRIEFING ON THESE ISSUES.

RESPECTFULLY SUBMITTED,

BOBBY JOE BARTON,
S.C.D.C. NO.#163629
McCORMICK CORR. INST.
386 REDEMPTION WAY
McCORMICK, SC 29899

REPRESENTATION PROSe

THIS 18 DAY OF JANUARY, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
DANIEL D. HALL, CIRCUIT COURT JUDGE

OPINION NO.: 2014-CP-23-5047 (COURT OF COMMON PLEAS, FILED 9/12/14)
2009-GS-23-10018

BOBBY JOE BARTON . . . . PETITIONER,

V.

STATE OF SOUTH CAROLINA . . . . RESPONDENT.

APPELLATE CASE NO: 2016-000995

CERTIFICATE-OF-SERVICE

I CERTIFY THAT A TRUE COPY OF THE PETITION FOR WRIT-OF-CERTIORARI AND A COPY OF THE APPENDIX IN THIS CASE HAS BEEN SERVED ON "PATRICK SCHMECKPEPER," ATTORNEY GENERALS' OFFICE AND "PAUL B. WICKENSIMER," COURT OF COMMON PLEAS, 13th CIRCUIT, THIS 18th, DAY OF JANUARY, 2017.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 18, DAY OF January, 2017
J Franklin
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 12.16.2019

/s/ Bobby Joe Barton
BOBBY JOE BARTON, PRO SE
S.C.D.C. NO:# 163627
McCORMICK CORR. INST.
386 REDEMPTION WAY
McCORMICK, SC 29899