No. 18-8638

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL BENNEFIELD – PETITIONER

VS.

THE STATE OF GEORGIA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF GEORGIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE

PETITION FOR WRIT OF CERTIORARI

MICHAEL BENNEFIELD
195 NORTH BROAD STREET
ALAMO, GA 30411

QUESTION(S) PRESENTED

When Structural Jurisdictional defects prevent a fair proceeding, can any reliable determination of guilt or innocence be deemed fair?

When the Plea Proceedings are deficient in the requirements which are the Constitutional safeguards, is the Plea still held as valid?

LIST OF PARTIES

Paul Howard, District Attorney's Office
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Judge Eric Dunaway, Superior Court of Fulton County
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B-1 to the petition and is

[✓] reported at Georgia Supreme Court; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Fulton County Superior court appears at Appendix A-1 to the petition and is

[✓] reported at Fulton County Superior Court State of Georgia; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

1.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was September 10, 2018. A copy of that decision appears at Appendix B.

[✓] A timely petition for rehearing was thereafter denied on the following date: October 09, 2018, and a copy of the order denying rehearing appears at Appendix C.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including December 28, 2018 (date) on March 8, 2019 (date) in Application No. 18 A 630.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED

Cases:

Statutes and Rules:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona v Fulminante, 499 US 279, 310 (111 S Ct 1246, 113 LE 2d 302) 1991. (Structural error not susceptible to harmless-error review).

Payne v Arkansas, 356 US 560, 2 L Ed 2d 975. (Coerced confessions).

Stinson v State, 279 Ga 177, 178 (2) (611 SE 2d 52) 2005. (Indictment and demurrers).

United States v Leon, 468 US 897, 922 (104 S Ct 3405, 82 L Ed 2d 677) 1984. (Leon good faith exception) [issuance of a warrant and probable cause].

Georgia Uniform Superior Court Rule 26 (2) A preliminary hearing R 26 (1) (2) A: Bound over (commitment hearing).

Gertain v Pigh, 420 US 103 (95 S Ct 854, 43 L Ed 2d 54) 1975 [probable cause prerequisite].

Gentry v State, 281 Ga App 315 (1), 635 SE 2d 782 (2006). (Two-fold validity test for an indictment).

OCGA § 17-7-93 [Fraud in plea].

Griffin v State, 12 Ga App 615, 77 SE 1080 (1913) [Fraud in obtaining plea].

Mecrary v The State, 12 Ga App 623.

OCGA § 17-70-70 (GCA 27-704) [waivers].

Estep v State, 129 Ga App 909, 914 (7) (201 SE 2d 809) 1973.

Georgia Uniform Superior Court Rule 33.

Cleveland v The State, 285 Ga 142 (674 SE 2d 289) 2009. (Effective assistance of counsel).

Robinson v State, 212 Ga App 613, 615 (1) (442 SE 2d 901) 1994. USCR 33.9 [Determining Accuracy of Plea].

Daniels Georgia Criminal Trial Practice Appendix 2011-2012 Edition. Appendix "C" Plea Litany Checklist [form used by office of the Fulton County District Attorney].

Rowland v State, 264 Ga 872 (1995). (Appellate right to review demal).

Strickland v Washington, 466 US 668, 693 (S Ct 2052) 80 L Ed 2d 674 (1984) (Right to effective assistance of counsel).

USCA Fourth Amendment

USCA Fifth Amendment

USCA Sixth Amendment

USCA Fourteenth Amendment

STATEMENT OF CASE

On November 27, 1990, Petitioner was subject of a search and seizure warrant/affidavit # 13376 purportedly issued from the Municipal Court City of Atlanta, Georgia - County of Fulton - Dekalb Magistrate Officer.

In December Petitioner was bound over to Fulton County Superior Court.

On January 29, 1991, the Fulton County Grand Jury returned a true bill special presentation indictment against Petitioner.

On March 27, 1991, Petitioner was arraigned in Fulton County Superior Court on the charges of Malice Murder (1) Count, Rape (2) Counts, Armed Robbery (1) Count.

On April 2, 1991 Defendant's appointed assistance of counsel filed a multitude of motions on the defendant's behalf including demurrers to the indictment, suppression of the warrant, identification and evidence, and requested an evidentiary hearing.

On November 1, 1993 Petitioner plead guilty to the full count Bill of Indictment Z28706.

On November 19, 1993 Petitioner filed to the Sentence Review Board.

EVENTS AT PLEA PROCEEDING

On November 1, 1993 Petitioner, represented by his two (2) court appointed assistance counsel, was brought over to the Fulton County courthouse for a purported negotiated plea developed from the discussions between the District Attorney's Office and the appointed assistance counsel.

The substance of the plea discussions were never placed before the trial court nor were they reduced to writing.

The reading of the Bill of Indictment was waived by the assistance counsel even through previous pre-trial pleadings were made and demurrers made requesting an evidentiary hearing to determine the proper foundation of probable cause and evidence in possession of the State prosecutor's office having been unresolved.

Then the appointed assistance counsel insisted the defendant plea to the Bill of Indictment and to all its counts without informing him of the benefits of taking the plea to avert trial nor of the minimum that he would benefit.

Petitioner states that because of "constructive denial assistance", the factual basis which the Prosecution Attorney presented to the trial court as factual basis was a negative averment to the actual substance and allowed to be entered as substance, sustained by evidence to establish a valid plea for the November 1, 1993 plea pleadings.

The Prosecuting Attorney neither provided what part of the record was being relied on as foundation for the factual basis of which the evidence would prove reasonable guilt.

The Petitioner was not properly advised of one of his Boykin Rights, the right against compulsory self-incrimination. Instead was read...the "right to testify or not to testify" does not properly convey under these circumstances the fact that the defendant could not be compelled to offer up evidence harmful to himself, and that by the defendant's admission to the Bill of

Indictment he would be stating that he was in fact guilty of all the charges and the inferences in them.

Then the trial court told defendant that he could not withdraw his plea and only recourse was to petition the Sentence Review Board. Neither the trial court nor the appointed assistance counsel informed the defendant of his limited appellate rights nor of the limited post-conviction relief of habeas corpus relief.

On November 19, 1993, Petitioner filed to the Sentence Review Board seeking redress to his plea.

EVENTS TO THE PRESENT

Petitioner filed many letters and motions to the Fulton County Superior Court for a complete compilation of his case record to be able to make a proper redress and litigation of his grievances. Petitioner also wrote to his prior appointed assistance counsel for a copy of, or help to obtain his record, but they never complied.

In 2012 Petitioner filed a Petition for Habeas Corpus relief in the Doge County Superior Court at which time through subpoena to the Fulton County Superior Court Petitioner was given a complete copy of his case file. Petitioner was denied 2014 (12-17C-0355).

Petitioner timely filed for a Certificate of Probable Cause May 6, 2014 and was denied December 11, 2014 (Case # S14H1294).

On June 1, 2015, Petitioner filed to Fulton County Superior Court in a Motion for Leave of Court and for an Out-of-Time Appeal.

On September 12, 2016, Petitioner filed a Motion for Compliance OCGA § 15-6-21 to rule on the pending Motion for Out-of-Time Appeal, with a Motion of Intent to Introduce.

On March 28, 2017, Petitioner filed an addendum to the Out-of-Time Appeal.

On January 25, 2017, Petitioner filed a Mandamus because of his pending motions NOT having been adjudicated.

On March 9, 2018, Petitioner's Mandamus Civil Action No CV300417 was granted.

On March 26, 2018 Petitioner's Motion for Out-of-Time Appeal was denied.

Petitioner timely appealed to the Supreme Court of Georgia April 9, 2018.

September 10, 2018 the Supreme Court affirmed the trial court decision #S18H1410.

September _____ 2018, Petitioner timely filed a Motion for Reconsideration and Motion to Stay the Remittitur; ultimately they were both denied on October 9, 2018.

Now Petitioner appeal to the United States Supreme Court for a Certiorari.

REASONS FOR GRANTING THE PETITION

I. When Structural Jurisdictional defects prevent a fair proceeding, can any reliable determination of guilt or innocence be deemed fair?

In Arizona v Fulminante, 499 US 279, 310 (111 S Ct 1246) 113 LE 2d 302) (1991). Structural error not susceptible to harmless error review as a "defect affecting the framework within which the trial proceeds rather than simply an error in the trial process itself". Such errors "infect the entire trial process". Brecht v. Abrahamson, 507 US 619, 630 (113 S Ct 1710) 123 L Ed 2d 353 (1993) and "necessarily render a trial fundamentally unfair" Ross 478 US at 597, 106 S Ct 3101. Put another way, these errors deprive defendants of "basic protections" without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair." Id; at 577-578, 106 S Ct 3101.

Personal jurisdiction is obtained pursuant to OCGA § 17-2-1(2). "It is the policy of the state to exercise its jurisdiction over crimes and persons charged with the commission of crime to the fullest extent allowed under the Constitution of the United States. OCGA § 17-2-3 in part, "This State claims jurisdiction of an offense committed on any of her boundary lines with other states, of the county bordering on that part of the line where the offense was committed and if doubtful as to which two counties as set forth in subsection (g) of Code Section 17-2-2 for either county, and will proceed to arrest, indict, try, and punish unless the other State makes a demand for the accused person..." After the aforementioned OCGA statutes have been invoked, then the judicial process has been initiated in taking jurisdiction over the person; and considered "personal jurisdiction". Personal jurisdiction is consummated by an arrest of that individual which leads to the arrest procedure. Upon an arrest the safeguard of the Constitution must set forth the necessitated procedure Georgia Bill of Rights Article I, Section I, Para XIII and the United States Constitution provides in that part, the right of the people to be secure in their person...against unreasonable seizures shall not be violated. No warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the...persons...to be seized.

Petitioner asserts that the search and seizure warrant (Affidavit was petitioned to the Magistrate Court by the Affiant based on intentional misrepresentation designed to deceive the issuing Magistrate in an effort to obtain the warrant). Kelly v Curts, 21 F 3d 1554, 1544 (11th Cir 1994) (...a police officer violates the Constitution if in order to obtain a warrant...perjures...or testifies in reckless disregard of the truth). State v. Peterson, 868 SE 2d 786, 743 (LA App 1st Cir 2003). CF intentional misrepresentation designed to deceive the issuing magistrates are made by the affiant in seeking to obtain the warrant, the warrant must be quashed").

Petitioner states in Book 3631, page 70 of the Affidavit made by the Affiant to the Magistrate Court, which is certified as true and correct on file in Municipal Court, City of Atlanta.

The address of the residence to be searched was changed to that of the defendant. The composite drawing being shown (did not look like defendant) to a maintenance person who said they knew the defendant and who let Michael in to his sister's residence several times is false because it never occurred; neither the manager nor assistant manager. There was never any statements verifying those statements said to have been made by those persons and not many people knew defendant because he had not long ago moved to that residence, a few months early.

Petitioner states that if the Affiant or police official is dishonest by fraudulently misleading or misrepresenting facts unknown to secure the issuance of a warrant [arrest or search and seizure] what does the law provide?

In United States v Leon, 468 US 897, 922; 104 S Ct 3405, 82 L Ed 2d 677 (1984) stands the principle the Courts generally should not render inadmissible evidence obtained by police officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause.

The Leon good faith exception applies to all but four limited sets of circumstances. Id. At 923, 104 S Ct 3405. The four sets of circumstances are as follows:

(1) Where "the magistrate or judge in issuing a warrant was mislead by information in an

affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) "where the issuing magistrate wholly abandoned his judicial role in the condemned" Lo Ji Sales Inc v New York, 442 US 319 (99 S Ct 2319) 60 L Ed 2d 920 (1979); (3) where the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable", and (4) where depending upon circumstances of the particular case a warrant is "so facially deficient i.e.; in failing to particularize the place to be searched or things to be seized—that the executing officer cannot reasonably presume it to be valid."

The Leon good faith exception requires suppression "only if the officer[s] were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Id at 926, 104 S Ct 3405. The purpose of the exclusionary rule is to deter unlawful police misconduct therefore when officers engage in "objectively reasonable law enforcement activity" and have acted in good faith when obtaining a search warrant from a judge or magistrate, the Leon good faith exception applies. Id at 919-20 (104 S Ct 3405) Martin, 297 F 3d at 1312-13.

Petitioner also asserts the search warrant/affidavit was returned to the magistrate after it was executed November 27, 1990. December 3, 1990 returned. And because of an overzealous law enforcement, evidence was tainted. Being a coat with the purported victim's blood on it.

Petitioner states that because he was not afforded a preliminary hearing to test the validity of what probable cause supports the defendant's detainment and whether it was enough to possibly indict and hold for trial.

Georgia Uniform Superior Court Rule 26.2(4)
The purpose of a preliminary hearing is simply to determine whether there is probable cause to believe the accused guilty of the crime charged and if so, to bind him over for indictment by the grand jury. It is a critical stage in the proceeding entitling the defendant to the presence of counsel. State v Middlebrooks, 236 Ga 52 (2); 222 SE 2d 343 (1976). Like it is a "critical stage"

in the proceedings entitling the defendant to the presence of counsel. Wilson v State, 181 Ga App 435 (2) (352 SE 2d 618) (1987). Gertein v Pigh, 420 US 103 (95 S Ct 854, 43 L Ed 2d 54) 1975. We hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest (43 L Ed 2d 65).

Ga Uniform Superior Court Rule 26 (1), (2) A states: On each case which is bound over, a memorandum of commitment shall be entered on the warrant by the judicial office.

Petitioner states that he was never formally placed under arrest. No arrest warrant exists charging with any infraction to Georgia law nor had there been issued in Georgia for any offenses or violation pursuant the charges being detained.

Petitioner states that because neither a preliminary hearing nor evidentiary hearing was ever conducted, no proper foundation of probable cause nor established support of factual basis with which a trial can be properly conducted was put to the test.

On April 2, 1991, a multitude of motions where timely filed by the Petitioner's first appointed assistance counsel which complained of the deficiencies and inadequacies in the evidence, warrant, indictment, identification, and discovery to properly allow the defendants enough information to defend those charges and stand trial. The demurrer protested the Fifth Amendment and Fourteenth Amendment clauses, being the right to be informed, and due process.

Due process of law requires that an indictment put the defendant on notice of the crimes with which he is charged and against which he must defend. An indictment apprises a defendant that he may be convicted of the crime named in the indictment, of a crime included as a matter of law in the crime named, [and] of a crime established by facts alleged in the indictment regarding how the crime named was committed. Stinson v State, 279 Ga 177, 178 (2) (611 SE 2d 52) (2005). Coleman v State, 732 SE 2d 466 (2012).

The Petitioner asserts that Fifth Amendment violation has occurred in this case due to his guaranteed right to be informed of the nature and cause of the accusation and allegations against him in the indictment Z28706 drawn and return in the manner it was. And that the indictment drawn and returned in the manner it was, was inadequate to prepare his defenses and to plead any judgment in the instant case as a bar to any later proceedings against him based on those same alleged offenses in contravention of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States.

In Gentry v State, 281 Ga App 315 (1), 635 SE 2d 782 (2006) cert denied (January 22, 2007). "The test for validity of an indictment is two-fold: First the indictment must not mislead the defendant so that he is unable to prepare a defense; and second, the indictment must protect the defendant from double jeopardy." See also United States v Simmons, 96 US 360, 362; 24 L Ed 819 (1877).

In State v Evans, 265 Ga 33, 334 (1) (2), 454 SE 2d 468 (1995). Accord Wharton v Henry, 266 Ga 557, 558 (1), 469 SE 2d 27 (1996) requires the trial court judge to determine the factual basis for the defendant's plea on the record. This is done to ensure that the defendant knows that the [acts] he committed constitutes the crime with which he is charged.

Petitioner states that without the acts which violate the law in the commission of the offenses charged, there can be no violation of State or United States law.

Petitioner states that his Fifth and Fourteenth Amendments have been violated by the way the Bill of Indictment Z28706 was framed.

First in State v Collins, 270 Ga 42 states: Ga Code Ann § 16-6-1 defines the offense of rape as carnal knowledge of a female "forcibly" and "against her will". The statute itself defines carnal knowledge as any penetration of the female sex organ by the male sex organ.

Under the influence of the model penal code the Georgia Supreme Court has judicially interpreted the term "forcibly" and "against her will" as [two separate elements] in rape cases. The terms "against her will" means without consent. The term "forcibly" means "acts of physical force, threats of death, or physical bodily harm or mental coercion such as intimidation". See also House v State, 236 Ga App 405 (1999); Drake v State, 239 Ga 232 (236 SE 2d 748).

In Walker v State, 270 Ga App 733 (2004) states: A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. OCGA § 16-6-1 (A) (1). Carnal knowledge occurs when there is penetration of the female sex organ. And in Gordon v State, 324 Ga App 774 (2014) states § 16-6-1 (a) (1)...The state must prove the element of force as a factual matter in forcible rape cases rather than presuming force as a matter of law based on the victim's age.

Petitioner states that the plain error exists first in counts [1] and [3] of the aforesaid Bill of Indictment in the two rape counts. The actual force necessary to establish the offense was not established in the framing of these offenses to constitute the element of rape.. Nor was the information developed of how the acts occurred. Hence counts [1] and [3] the rape charges, were deficient and were properly demurred, but never adjudicated.

Petitioner states that count [3] of the aforementioned Bill of Indictment, the armed robbery count does no have the prerequisite aggravated assault count to properly establish the elements of the offense of armed robbery, nor does the count [3] have how the commission of the armed robbery was purportedly to have occurred, to establish the prerequisite of OCGA § 16-8-41 statute.

Petitioner states also that in count [4] of the Bill of Indictment malice murder the count does not presume how the defendant was purported to have committed the murder with enough specificity to properly make a defense. And thus the question is raised if the elements of malice murder was adequately explained as when the rote reading of the Bill of Indictment and the charged offenses into the record at a plea hearing. See Gaddy v Linahan, 780 F 2d 943 (1986).

In United States v Brown, 995 F 2d 1493 (10th Cir 1993) ("failure of the indictment to allege an essential element of an offense...is a jurisdictional defect requiring dismissal...The absence of prejudice to the defendant does not cure what is necessarily a substantive jurisdictional defect in the indictment"). United States v Gayle, 967 F 2d 483 (11th Cir 1992) ("A criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense"). Citing United States v Italiano, 837 F 2d 1480 (11th Cir 1988). United States v Deisch, 20 F 3d 139 (5th Cir 1994) ("To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense").

Also, the Grand Jury Clause of the United States Constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentation or indictment of a Grand Jury." US Const Amend V. The Court said that "To comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offenses so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense." United States v Santerano, 45 F 3d 622, 624 (2nd Cir 1995).

Thus will a conviction lie when having been purportedly timely demurred; not adjudicated the Bill of Indictment nor proper foundation of probable cause by preliminary hearing nor evidentiary hearing stand, nor was the evidence by evidentiary hearing established as factual to sustain a conviction.

Petitioner states that if a "negative averment" is made by the State through the waiver of the formal reading of the Bill of Indictment into the record to allege factual basis for a plea uncontested by the defendant's appointed assistance counsel of which lays the foundation for the defendant's conviction, on the Bill of Indictment known to have deficiencies unresolved, has not the Petitioner's due process and Sixth Amendment right to effective assistance of counsel been denied. Can any judgment be held as reliable to determine guilt or innocence?

Petitioner states that because no preliminary hearing nor evidentiary hearing proceeding had been subject for deliberation and that the complaints in the indictment being the acts alleged by the defendant not included in the indictment to show how [his] act constituted the offense charged and being the offenses which were charged could be carried out in numerous ways and these complaints having been properly demurred has not the Petitioner's Fifth Amendment right to be informed and Fourteenth Amendment due process been violated? And that any judgment adjudicated is unreliable.

Petitioner states that these defects and errors were allowed to carry over into the plea proceeding of November 1, 1993 by the constructive denial assistance by his appointed assistance counsel to the degree of being in violation of the Sixth Amendment guaranteed right to "effective assistance of counsel". Strickland v Washington, 466 US 668 (693 S Ct 2052) 80 L Ed 2d 674 (1984).

Petitioner states that due to counsel's lack of effective performance the fundamental structure of the proceeding was constitutionally offensive and impacted Petitioner in an extremely detrimental fashion. That being the conviction and sentence he is now grieving. And his hardships in post-conviction review.

Ineffective assistance of counsel is analyzed under Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. At 687-88 However "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment".

Petitioner states that because no proper foundation of probable cause was laid nor of evidence in the State's profession by evidentiary hearing even though timely motions and demurrers were filed. And these motions also having been preserved for appellate review or post-conviction challenge, but instead Petitioner appointed assistance counsel's choice was to avoid the adversarial testing of trial and insist the defendant to plead to the waived reading of indictment instead of the bill of indictment known to have deficiencies and inadequacies to properly defend

against, and sustain on conviction. And allowing the prosecuting attorney assertion of a negative averment in factual basis of what the state's evidence would have proved had the defendant chose trial proceedings.

Petitioner states that had he known those critical facts of which should be taken into consideration of pleading instead of trial; the Petitioner would have insisted on trial because the outcome would have been different.

Petitioner also states that through the misrepresentation of his appointed assistance of counsel, the Petitioner was deceived into entering a purportedly negotiated plea which purportedly been discussed between the State and counsel's assistance that offered no benefit to the defendant whatsoever.

OCGA § 17-7-93 pg. 293 provides "Fraud in obtaining a plea as basis for withdrawal an exception to the rule that withdrawal is in the Court's discretion occurs in case fraud has been practiced to obtain the plea of guilty". Griffin v State, 12 Ga App 615, 77 SE 1080 (1913). The Supreme Court quoting from Smith v Cuyler, 76 Ga 654, 660 (3 SE 406) said "Fraud is not a thing that can stand even when robed in judgment" See also Griffin v State, McCrary v The State, 12 Ga App 623. It has been said that withdrawal of the plea should be allowed whenever interposed on account of "flattery of hope or torture or inadvertence or mistake" or "in cases where justice requires it". 2 Enc P&P 777. See also, Id 780-792. In CxC 353 the rule is thus stated: To authorize the acceptance and entry of a plea of guilty and judgment and sentence thereon, the plea must be entirely voluntary. It must not be induced by fear or by misrepresentation, persuasion, or the holding out of false hopes nor made through inadvertence or ignorance."

Petitioner also states that fraud was practiced on the court by the collusion of the State prosecuting attorney and the appointed assistance counsel for the defendant. By his signature to a document without his expressed permission changing his plea from not guilty to guilty. See by reference of the certified copy of the Bill of Indictment Z28706 Book 02462 page 768 on the

back of this page is a stamp placed at the very bottom with a statement embodying the defendant waives a copy of indictments and list of witnesses full panel, formal arraignment, and pleads.

And the sections for the signature of the prosecuting attorney (DA) defendant and attorney is where the defendant's signature was forged. And this document was signed before the Court proceeding of November 1, 1993 to secure a guilty plea to the Bill of Indictment. The indictment was signed by an officer from the District Attorney's office other than the prosecuting attorney at the plea hearing, but shown to be made or signed that day.

In Daniel's Georgia Criminal Trial Practice 2006 (2010-2011 Ed) Chapter 13. 22 Waiver 2006 Ed pg 549-550 OCGA § 17-70-70 (GCA 27-704) distinctly states:

(a) The waiver should expressly state that the defendant waives "indictment by a grand jury". The signing of a statement on accusation to the effect that the defendant waives "formal arraignment copy of bill of indictment, list of witnesses sworn before the grand jury..."do not amount to waiver of indictment, however if a defendant signs a waiver embodying the above-styled language and subsequently enters a guilty plea, he has waived his defense to the deficiency of the waiver.

(b) Ga Crim Trial Prac 2006 Ed Chapt (13-4) page 532 states: An indictment is not objectionable because it contains on its back a list of witnesses who testified before the grand jury and is not objectionable if it has printed on the back a statement that the defendant waives a copy of a bill of indictment and list of witnesses before the grand jury arraignment. Estep v State, 129 Ga App 909, 914 (7) 201 SE 2d 809 (1973); See also Balkcom v McDaniel, 234 Ga 470, 471 (2) 216 SE 2d 323 (1975).

II. When the plea proceeding is deficient in the requirements which are the constitutional safeguards is a plea still held valid?

Georgia Uniform Superior Court Rule 33.4 (B) states: To aid the defendant in reaching a decision, defense counsel, after appropriate investigation should advise the defendant of the alternatives available and considerations deemed important by him in reaching a decision.

In Cleveland v The State, 285 Ga 142; 674 SE 2d 289 (2009) states: The Sixth Amendment US Const Amendment VI guarantees a criminal defendant's rights to competent counsel performing to the standards of the legal profession in deciding whether or not to plead guilty. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleading, and laws involved, and then offer his informed opinion as to what plea should be entered. The plea bargaining process is a critical stage of the criminal proceeding where an attorney involvement is crucial because available defenses may be as irretrievably lost if not then an there asserted with plea bargaining the norm and the trial the exception, the most criminal defendants the plea process is the critical stage of their prosecution. See also Lloyd v The State, 253 Ga 647 (373 SE 2d 3).

Ga Uniform Superior Court Rule 33.5 (B) provides: If a tentative plea agreement has been reached, upon request of the parties, the trial judge may permit the parties to disclose the tentative agreement and the reasons therefore in advance of the time for the tendering of the plea...

GA URSC (USCR) Ga Uniform Rules for the Superior Courts 33.8 Defendant to be informed

The Judge should not accept a plea of guilty or nolo contendere from a defendant without first:
(A) Determining on the record that the defendant understands the nature of charge(s);
(B) Informing the defendant on the record that by entering a plea of guilty or nolo contendere one waives:

(7) the right not to incriminate oneself and that by pleading not guilty or remaining silent and not entering a plea, one obtains a jury trial and

(C) Informing defendant on the record

(1) of the terms of any negotiated plea

(2) of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law

33.9 Determining Accuracy of Plea

In Robinson v State, 212 Ga App 613, 615 (1), 442 SE 2d 901 (1994) the court said "We strongly caution...courts in the interest of judicial economy, to comply in spirit and in letter with the requirements of Uniform Superior Court Rules 33.7-33.9..." See also Daniel's Georgia Criminal Trial Practice 2011-2012 Edition Appendix C Plea Litany Checklist [This form is used by the Office of the Fulton County District Attorney].

(7) Do you understand that you have the right to plead either "guilty" or "not guilty" to these charges and if you plead "not guilty" or remain silent, you may obtain a jury trial?

(8) Have you reviewed the waiver of rights form which you have signed? (Enter the waiver of rights form into record)

(14) Has your attorney advised you of the minimum and maximum sentence for each charge?

(15) Do you understand that if you enter a plea of guilty, the State has promised to recommend a sentence of _____, but that the Court does not have to accept that recommendation and can sentence you to the maximum on each charge, and can have you serve those sentences consecutively?

(17) Do you understand that you waive any and all defenses by entering a plea of guilty?

(18) Do you understand that if you went to trial, you have the right to trial by jury, the right to see, hear, and confront witnesses called to testify against you, and the right to remain silent and not incriminate yourself?

(19) Do you understand that by pleading guilty you are giving up the following:

(b) the right to remain silent and not incriminate yourself;

(i) the right to appeal should you be convicted of these charges

(22) Is it your decision to waive these right rights and enter a guilty plea because you are in fact guilty?

(23) Are you pleading guilty because you have decided that it is in your best interest to do so?

(24) Are you aware that even if you do not admit guilty, this is a plea of guilty and places you in the same position as if you were convicted by a jury at a trial?

(25) How do you plead to the charges of _____ in Indictment No. _____ ?

(26) Is this guilty plea freely and voluntarily given with full knowledge of the charge(s) against you?

(27) Do you understand that you have a very limited right to appeal this guilty plea conviction?

(28) Do you understand that you have only four (4) years from today for a felony charge and 12 months from today for a misdemeanor charge to file a habeas petition with respect to this guilty plea?

NOTE: These numerations were not applied in the plea proceeding of the petitioner contentions.

SUMMARIZE FACTUAL BASIS FOR THE PLEA

When the normal plea process under which the FCRP 11, GA USCR 33 and OCGA § 17-7-93 maintain as the procedures for establishing a valid pleading by a defendant is done "arbitrary capriciously" has no the Fourteenth Amendment clause of due process and equal protection been nullified under those circumstances?

Petition states that his appointed assistance counsel's unprofessional conduct caused the defendant to be barred for post-conviction relief. On page 9 of the plea transcript the trial court told the defendant that he could not withdraw the plea and only recourse was to the Sentence Review Panel which he did on the 19th of November 1993. The petitioner's appointed assistance counsel through "constructive denial assistance" by not objecting nor clarifying throughout the plea proceeding and became agents of the prosecution and denied the defendant effective counsel assistance guaranteed by the Sixth Amendment.

In Rowland v State, 264 Ga 872 (1995) states: An attorney who through negligence, ignorance, or misinterpretation of the law fails to perform routine duties resulting in a dismissal of his client's appeal thereby denying such client a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all.

The fundamental Georgia law recognizes the defendant's right to effective assistance of counsel on appeal from a criminal conviction and permit an out-of-time appeal if the defendant was denied his right to appeal through counsel's negligence or ignorance if the defendant was not adequately informed of his appeal rights. Smith v State, 263 Ga App 414; Barnes v State, 243 Ga App 703, 704 (534 SE 2d 440) (2000). See Eisele v State, 238 Ga App 289 (519 SE 2d 9) (1999).

Petitioner must also show that his appellate rights were denied due to no negligence of his own. Howse v State, 262 Ga App 790, 791 (586 SE 2d 695) (2003) (282 Ga App 584) Hasty v State, 213 Ga App 731, 732 (445 SE 2d 836) (1994).

Petitioner further shows "a criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea. A direct appeal will lie from a conviction and sentence entered on a guilty plea only if the issue can be resolved by reference of facts appearing in the records" Smith v State, 266 Ga 687. Morrow v State, 266 Ga 3 (463 SE 2d 472) (1995).

Petitioner states that the State concurs that the Petitioner met the criteria for the issues to be resolved can be resolved by way of the records and found "page (9) of the plea transcript Petitioner referred to as being told by the Court that he could not appeal the sentence but only the severity to the Sentence Review Panel. Petitioner states that the State deemed his out-of-time appeal asserting his grounds had no merits.

Petitioner stated that the defendant plead not guilty and asserted his innocence of the charged offenses up to the day of the November 1, 1993 plea proceedings. And due to the "constructive denial of assistance" the defendant was counseled to plead guilty to the Bill of Indictment by "self-incrimination".

Ga. Const. 1983, Art I, Sec I, Para XVI states "No person shall be compelled to give testimony tending in any manner to be self-incriminatory". Also the Fifth Amendment of the USCA.

In Payne v Arkansas (356 US 560) 2 L Ed 2d 975, see also Stein v New York, 97 L Ed 1522, 346 US 156 states: Even though the highest court of a state with powers of review much wider than those permitted to the United States Supreme Court found no cause for upsetting a conviction on the ground that it was based on a coerced confession, the United States Supreme Court's review penetrates the judgment of the state court and searches the record in the trial court.

Petitioner states that as these cases his confession to guilty was coerced. Theirs was at the very beginning...of their criminal proceeding by the police officers and the petitioner's of latter stages proceedings by officers of the Court being the Court appointed counsels coerced confession of defendant to the Bill of Indictment Z28706, instead of placing the trial proceeding to an effective adversarial testing envisioned by the Sixth Amendment of the Untied States Constitution of effective assistance of counsel.

CONCLUSION

The Petitioner for Writ of Certiorari should be granted because of the plain errors and manifest injustice in this case. Petitioner asks the Court to vacate the judgment because of the Constitutional violations Petitioner is suffering from in the adjudication of the criminal adversarial proceeding in this extraordinary circumstance. That the Petitioner might obtain a trial of true adversarial testing to the ends that a reliable outcome can be obtain in innocence or guilty, consistent with the Constitutional value of the United States of America.

The petition for a writ of certiorari should be granted.

Respectfully Submitted this 21 day of February, 2019.

/S/ Michael Bennefield
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Without Prejudice or Recourse
Michael Bennefield (GDC # 768180)
Petitioner, Pro Se

SHERRY TRAVIS NOTARY PUBLIC Comm. Exp. 06/24/21 WHEELER COUNTY, GA

Sherry Travis 02/21/19

CERTIFICATE OF AFFIRMATION

I declare (or certify, verify, or state) under State and Federal Law, under penalty of perjury that the foregoing is true and correct.

Executed this 21 day of February, 2019.

/S/ Michael Bennefield
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Without Prejudice or Recourse
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