No. 19-6691

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT H. SMITH – PETITIONER,

VS.

STATE OF INDIANA - RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO:

THE INDIANA SUPREME COURT / COURT OF APPEALS

CASE NO: 85A05-1712-CR-2908

DECIDED: MAY 14, 2019

PETITION FOR WRIT OF CERTIORARI

Robert Smith

ROBERT H. SMITH #185788/EE-45
C/O One Park Row
Michigan City, Indiana [46360]

Petitioner 'Pro Se'.

Done under necessity.

QUESTION(S) PRESENTED *(Supreme Court Rule 10 et seq.)*

1) Whether or not the Indiana Supreme Court/Court of Appeals has entered a decision in conflict with other decision(s) previously made in the United States Supreme Court on important matter regarding violation(s) of the 4th, 5th, 6th and 14th amendment(s) of the *United States Constitution* [and] has decided an important federal question in a way that conflicts with a decision by a State Court of last resort (i.e. the Indiana State Supreme Court) and has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the lower court(s) in this matter in a way that conflicts with relevant decisions of this United States Supreme Court as to call for an exercise of this Court's supervisory power and Judicial Review.

2) Whether or not the Petitioner was seized illegally and held in violation of the 4th amendment to the *United States Constitution* and the denial of a fair and impartial trial by jury in violation of the 5th, 6th and 14th amendment(s) to the *United States Constitution*, by the admission of evidence that should have been subject to the 'exclusionary rule' in relation to claim(s) made in any and all the following Cause Number(s);

STATE OF INDIANA (Plaintiff) v. ROBERT H. SMITH (Defendant)
Wabash County, Indiana Trial Cause: 85C01-1608-F4-925; and

ROBERT H. SMITH (Appellant-Petitioner) v. STATE OF INDIANA (Appellee-Respondent) Indiana Court of Appeals/Supreme Court; 85A05-1712-CR-2908;
(Specifically that the Petitioner Robert H. Smith on direct review suffered undue and unfair prejudice when appellate counsel failed to raise the issue(s) and to

actively challenge the admission of evidence that should have been subject to the 'exclusionary rule', due to the ineffective assistance of any and all counsel(s) conducting the Petitioner Robert H. Smith's trial and direct appeal, in violation of the 5th, 6th and 14th amendment(s) to the *United States Constitution.* (See) *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052 (1984).

3) Whether or not the Petitioner Robert H. Smith was unduly prejudiced when the Wabash County Circuit Court #1 by the improper admission of extrinsic evidence relating to prior bad acts, as well as his trial counsel's failure(s) to compel a complaining adverse witness (Name: Amanda Snow) for the purposes of to have the ability to impeach an adverse witness's prior inconsistent statement(s) under *Indiana Rule of Evidence* 613. That the trial court erroneously allowed a witness named John Gillam to supplant testimony for a complaining witness (Name: Amanda Snow) in violation of the '*Hearsay Rule*'. (See) *Indiana Rule of Evidence* 801 et seq.

4) That although "[s]tate courts are the principal forum for asserting constitutional challenges to state convictions." (Referencing) *Harrington v. Richter*, 562 US 86 @ 103 (2011). That [it is] no longer to be true in relation to the State of Indiana for at least some '*Strickland*' claim(s). (Referencing) *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052 (1984) and the recent ruling made in *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017) [1], the ruling incorporates a dissenting opinion by the United States Court of Appeals 7th Circuit Judge Diane Sykes

[1] Application was made for Certiorari under No: S.Ct 17-887 and denied subsequently by (S.C.O.T.U.S.) April 16, 2018.

stating; that it [shall make] the *federal courts*, [and] not state courts the primary forum for more constitutional challenges to state convictions, and that if the state court(s) deny [a] petitioner's application for review (done in good faith) then the federal venue shall be appropriate for the attainment of any and all remedy to United States constitutional violations, based on the equitable doctrine of '*Stare Decisis*'.

5) That any and all trial and/or appellate counsel(s) failure(s) to preserve legitimate 'free-standing' claim(s) during trial and direct review should not be attributable to the Petitioner ROBERT H. SMITH where it shows a clear constitutional error 'prima facie'. (Reference) *Coleman v. Thompson*, 501 US 722 @ 750 (1991); invoking the rule regarding [a] '*narrow exception*' that the; "[d]octrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." That the Petitioner ROBERT H. SMITH was defaulted through no fault of his own when his trial counsel (Kristina Lynn) failed to subpoena the complaining Witness (Name: Amanda Snow) and denied the Petitioner the right to confront any and all adverse witnesses against him in violation of the 5th, 6th and 14th amendment(s) to the *United States Constitution*, and thereby prejudicing the Petitioner and denying him a fair and impartial trial by jury.

LIST OF PARTIES

(i) ROBERT H. SMITH – Defendant/Appellant-Petitioner;

(ii) THE STATE OF INDIANA – Plaintiff/Appellee-Respondent;

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REFERENCES TO OPINION(S)

The Petitioner respectfully requests that Judicial Notice be taken in accordance with *Federal Rule of Evidence* 201(d) to review the matters as relate to all of the following Cause Number(s) in their entirety;

STATE OF INDIANA (Plaintiff) v. ROBERT H. SMITH (Defendant)
Wabash County, Indiana Trial Cause: 85C01-1608-F4-925; and

ROBERT H. SMITH (Appellant-Petitioner) v. STATE OF INDIANA (Appellee-Respondent) Indiana Court of Appeals/Supreme Court; 85A05-1712-CR-2908 [2]

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[2] (Please reference specifically to [an] '*Oral Argument*' held on the 27th of November, 2018 at the *Indiana University – South Bend, Indiana Campus* where the Petitioner was not present, and that only Appellate Counsel (Daniel Vanderpool) made argument on the Petitioner's behalf. To current date, the Petitioner has made attempts to obtain the full and complete record in Appellate Cause: 85A05-1712-CR-2908 and he has been denied the ability to either access or to modify and correct the record by the Indiana Supreme Court without cause. Due to the Petitioner having no access to the internet, this matter regarding the denial of the Petitioner's access to the full and complete record of proceedings in 85A05-1712-CR-2908 has now risen to an injury of constitutional magnitude. (Reference) (SCOTUS ruling) *Rush v. United States* (1977) (*Citation Omitted*).

TABLE OF AUTHORITIES

Cases (Indiana)

Other Authorities

JURISDICTION

Under United States Supreme Court Rule 13.1 and Title 28 USC § § 1251, 1254(1), (2), 1257, this Honorable Court has jurisdiction by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the United States Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. The Petitioner Robert H. Smith has been procedurally defaulted by no fault of his own and has been prevented from exhausting any and all remedies in the Indiana State Court(s) due to ineffectiveness of his appellate counsel on direct review. (See) *Coleman v. Thompson*, 501 US 722 @ 754 (1991).; "[f]or if the attorney appointed by the State to pursue direct appeal is ineffective, *the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.*: (See) additionally, *Evitts v. Lucey*, 469 US 387, 396 (1985); *Douglas v. California*, 372 US 353, 357-58 (1963) (holding States must appoint counsel on a prisoner's first appeal). (Emphasis-Petitioner). The Petitioner Robert H. Smith has complied with any and all applications timely made in both the Indiana Court of Appeals and the Indiana State Supreme Court. The Petitioner now seeks relief herein to the unlawful conviction and sentence in trial cause: State of Indiana, County of Wabash, Circuit Court No: 85C01-1608-F4-925 that is in violation of federal constitutional law.

Cover Sheet
Appendix 1-5

1) Indiana Court of Appeals Memorandum / Opinion 85A05-1712-CR-2908
Date: 12/14/2018
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2) ICOA - Petition for Rehearing Sought
Denied; 02/15/2019
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3) Indiana Supreme Court Petition for Transfer
filed; Denied; 05/09/2019
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4) Indiana Court of Appeals Memorandum / Opinion 85A05-1712-CR-2908
Certified; 05/15/2019
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5) Cover Letter / S. Norris
dated 08/30/2019
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CONSTITUTIONAL AND STATUTORY PROVISION(S) INVOLVED

The Petitioner is invoking federal review for violation(s) for the following under the laws of the United States;

1) Violation(s) under the 4th amendment to the U.S. Constitution of unlawful seizure of the body, and to the State's unlawful intrusion of a vehicle where no immediate exigent circumstances existed, and by the invocation of a '*community caretaking*' standard for the inventorying and/or the protection of property from loss. A false premise to where the Official(s) stepped outside the scope to seek investigatory premise in order to gather evidence unlawfully without the consent of the petitioner. That any "[c]onsent to search without advice of counsel, was illegally obtained and a violation of the Petitioner SMITH'S right under the Rule invoked by (SCOTUS) in *Miranda v. Arizona*, 384 US 436, 444, 86 S. Ct. 1602, 1612 (1966) (Emphasis-Petitioner). (Reference) *Pirtle v. State of Indiana*, 323 NE 2d 634 (Ind. 1975) and *footnote* [3] .
2) Violation(s) under the 5th amendment to the United States Constitution of the denial of due process of law.

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[3] It has additionally been reiterated that; "The Indiana Supreme Court held [that] a consent to search obtained from a citizen *in custody* is invalid under Article 1 § 13 of the *Indiana Constitution*, unless that person is informed of his right to counsel before consenting to a search." That this premise applies specifically to homes *and vehicles*. (See) *Dycus v. State of Indiana*, 108 NE 3d 301 (Ind. 2018), 18S-CR-488, (Indiana Appellate Cause: 49A05-1705-CR-978); (Previous Ruling) 90 NE 3d 1215, 1220-26 (Ind. Ct. App.. 2017).

3) Violation(s) under the 6th amendment to the United States Constitution of the denial of a right to a fair and impartial trial by jury, the right to effective counsel for defense, and access to compulsory process to obtain witnesses in his favor, and for the trial counsel(s) failure(s) to properly challenge any and all prior inconsistent statement(s) made by witness's and for failure(s) to employ proper trial strategy for impeachment purposes, and for any and all counsel(s) failure(s) to proffer proper affirmative defenses for mitigation purposes.

4) Violation(s) under the 8th amendment of unlawful restraint of liberty done with malice and 'ill-will' inflicting cruel and unusual punishment against the petitioner.

5) Violation(s) under the 14th amendment to the United States Constitution as applies to the State's (i.e. denial of the equal protection clause) re: the laws of the United States. (Note* proper application of both the 5th, 6th amendment(s)).

STATEMENT OF THE CASE

Appellant-Petitioner Robert Smith (hereafter 'Smith') tenders this Petition for a Writ of Certiorari to the Indiana Supreme Court under necessity to obtain fair review of the issues previously affirmed erroneously by the Indiana Court of Appeals and denied review by the Indiana Supreme Court in 85A05-1712-CR-2908. Smith asserts that his inherent rights under the 4th, 5th, 6th, 8th and 14th amendment(s) of the *United States Constitution* were violated by the conviction and

sentence imposed in Indiana Cause Number: 85C01-1608-F4-925. Specifically, that 'Smith' suffered injury by violation(s) prohibiting the State from conducting [an] unreasonable search and seizure and the denial of a fair and impartial trial by jury, both in violation of the due process and equal protection clauses of the United States Constitution, which has application to the State(s) under the 14th Amendment.

'Smith' was convicted and sentenced after a jury trial to the Indiana Department of Corrections (IDOC) for the following;

Count I; Habitual Traffic Violator (HTV) as a Level '5' felony; (6 yrs.)

Count II; Possession of Methamphetamine, as a Level '4' felony; (12 yrs.)

Count III; Illegal possession of a hypodermic syringe, a Level '6' felony; (2 yrs)

Count IV; (CHWOL) 'Carrying a Handgun without a License', as a Class 'A' Misdemeanor (*Indiana Code* § 35-47-2-1); merged with Count V.

Upon a jury conviction upon Count(s) I-IV, the Petitioner was the subsequently convicted in a bench trial of Count(s) V and VI;

Count V; An enhancement on Count IV, as a convicted felon within the past fifteen (15) years raising it to a Level '5' felony; (6 yrs.) and

Count VI; An enhancement as an habitual offender under Indiana Code § 35-50-2-8 (d) (1) [4]; (13 yrs.) attached to Count II;

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[4] As applies to the Petitioner Robert H. Smith;

Indiana Code § 35-50-2-8: Habitual offenders; (d) A person convicted of a felony offense is a habitual offender if the state proves beyond a reasonable doubt that: (1) the person has been convicted of three (3) prior unrelated felonies; and

The trial court sentenced 'Smith' to an aggregate term of twenty-five (25) years to be fully executed in the IDOC. 'Smith' believes the conviction and sentence as imposed is erroneous, and should have been reviewed by the court in accordance with *Indiana Appellate Rule* 7(B). In addition, that no exigent circumstances existed at the point of initial contact with law enforcement beyond hearsay of the complaining witnesses John Gillam and Amanda Snow. The original officer initiating the events Phillip Mickleson 'created' exigent circumstance(s) by claiming at the scene that 'Smith' could not declare 'ownership' of a vehicle (A Chrysler Sebring 2-door 'Coupe' License No. IN-726EN) owned by one Brittney Saylor of Peru, Indiana. (Reference) Trial Trans. Vol. 2 of 3 pp. 85 ¶ 19 through pp. 86 ¶ 6;

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>
> OFFICER MICKLESON: [I] "Asked him ['Smith'] whose vehicle it was, He just said a buddy.
>
> Q. That they were in?
>
> A. Yep.

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not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) for at least one (1) of the three (3) prior unrelated felonies and the time the person committed the current offense.

(j) Habitual offender is a status that results in an enhanced sentence. It is not a separate crime and does not result in a consecutive sentence. **The court shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced.** If the felony enhanced by the habitual offender determination is set aside or vacated, the court shall resentence the person and apply the habitual offender enhancement to the felony conviction with the next highest sentence in the underlying cause, if any.

(k) A prior unrelated felony conviction may not be collaterally attacked during a habitual offender proceeding unless the conviction is *constitutionally invalid.*

Q. All right. Could they give you a name of whose vehicle they were in?

A. No.

Q. They said they were waiting for a friend.

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A. Yep. Waiting for a friend to drive them.

Q. Okay. Did they say who that friend was?

A. They didn't.

Q. All right. Just that they were waiting for a friend to drive them?

A. Mm – hmm (yes).

As noted in the Indiana Court of Appeals Appellate Memorandum/Opinion dated December 14, 2018; in 85A05-1712-CR-2908 ¶ [7] that the vehicle was located in a parking spot in the [Shell] gas station's small parking lot. (See) State's Exhibit '1': Which is an aerial photograph of the gas station, which shows approximately ten to twelve parking spots. Note* additionally; Officer Mickleson's testimony (curiously omitted by Appellate Counsel Daniel Vanderpool on direct appeal) was 'dubious' re: the ability of 'Smith' as being allowed to 'leave' the scene at the Shell station before and once a cursory inquest was done re: the complainant(s) statement(s) that 'Smith' had threatened them and that 'Smith' did not know anything about it? Officer Mickleson's testimony was fallacious (i.e misleading and deceptive) and this attributes to the Officer's veracity being dispositive with re: to 'Smith's' version of events. (See) Trial Trans. Vol. 2 of 3 pp. 104 ¶ 17 through pp. 105 ¶ 4;

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THE COURT: For the Record, the witness [Mickleson] is referencing State's Exhibit '1'.

Q. So you pulled in the far north entrance?

A. Correct.

Q. Off of Wabash Street, correct?

A. Correct.

Q. And then you said you parked behind the vehicle?

A. Yes.

Q. So you were blocking the Chrysler Sebring in at that point?

A. No.

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Q. They could have moved and left? There was - -

A. There was room.

So at this time Officer Mickleson creates an undue controversy citing the inference that at any time 'Smith' was 'free to leave', knowing full well that [Mickleson] was subsequently creating an 'exigent circumstance' based on the erroneous version that 'Smith' had failed to identify the owner of the 'Chrysler Sebring'. Based on this premise, it was Officer Mickleson who then made a unilateral decision to impound the vehicle even though the City of Wabash Indiana Police Department had no established policy with re: of the decision to impound vehicles (See) Suppression Tr. Vol. 2 pp. 11-14, 16-18; App. Appx. Vol. 2 pp. 115-116 That "The police in this particular case were solely trying to use a procedural mechanism in order to go on a 'fishing expedition' to gather additional evidence (i.e. a report of alleged possession of a handgun) to use against 'Smith'.

It has been established that 'Once a vehicle has been stopped for 'investigative' purposes, law enforcement officer(s) may search [a] vehicle for weapons if the officer(s) reasonably believe they might be in danger.' (See) *Sanders v. State of Indiana*, 576 NE 2d 1328 (Ind. App. 1991) ; Whether reasonable, there are specific reasonable inferences that officer's are entitled to draw based on the facts. (See) *Collett v. State of Indiana* 338 NE 2d 286 (Ind. 1975).; however, Officer's do not have probable cause to search car merely based on a traffic violation. (In the Petitioner's case, being a 'HTV') *Porter v. State of Indiana*, 512 NE 2d 454 (Ind. App. 1987) *trans. denied; California v. Acevedo*, 111 S.Ct. 1982 (1991). Based on the Officer's statement(s), they were required to investigate the complainant(s) statement(s) first in order to indicate that the information being provided against Smith was trustworthy and that there was reasonable inference that a crime had been committed. (See) *Shepard v. State of Indiana*, 500 NE 2d 1172. The vehicle in question may only have been subject to a warrantless search if justified by some other exception under the 4th amendment's warrant requirement. This would have been only been reasonable had there been an incident between the arresting Officer's and the vehicle's occupant Robert H. Smith. There was no incident, therefore in relation to the Court's ruling in *Arizona v. Gant.* 556 US 332, 335, 343 (2009); only incident to the arrest of the occupant, police may search the *passenger* compartment of the vehicle;

> (1) "when it is reasonable to believe that evidence of [an] offense of arrest might be found in the vehicle" or

(2) "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

In Smith's case, the State asserted only 'constructive possession', making inference that Smith had the ability to maintain control and dominion over the gun in question, and that constructive possession may be imputed to the driver of the vehicle. *Woods v. State of Indiana*, 640 NE 2d 1089, (Ind. Oct. 06, 1994); *Young v. State of Indiana*, 564 NE 2d 968 @ 972 (Ind. 1991); *trans. denied.* "A warrantless search of an automobile may be conducted during the course of an arrest under the exception which permits a search of the immediate area that is within the arrestee's control." *Boushehry v. State of Indiana*, 622 NE 2d 212 (Ind. 1993). In the trial of the Petitioner SMITH, the cross-examination of Officer George Ryan Short even concluded that [Short] had no visual sighting of a supposed handgun while he effectively was looking into the vehicle on the driver's side of the vehicle [i.e. Smith's immediate area]. (See) Trial Trans. Pg. 177 ¶ 16-26;

16. Q. – back also and do you – are you able to see the gun on the
17. passenger floorboard?
18. A. I didn't see it until I was on the passenger side.
19. Q. Was anything covering it up?
20. A. I can't tell you exactly today, but I believe so because
21. I'm sure I would have seen it if it wasn't. But I can't say
22. what was on it today. It's been too long.
23. Q. Do you believe you moved something –
24. A. Yes.
25. Q. – to see the gun?
26. A. Right. [5]

[5] Please Note * this response as given by Officer George Ryan Short would imply that the gun in question was located *only after being moved from somewhere other than the passenger floorboard,* giving proper inference that the gun would not have been in the

It has been ruled upon that; "Where a police officer approached [a] defendant and asked to search [the] car in connection with an *anonymous tip*, defendant was '*in custody*'. The Officer erred by obtaining defendant's consent to search without giving [a] '*Pirtle*' [6] warning about [the] right to consult with counsel; [as relates to the Petitioner SMITH] [any implied] consent was invalid and the resulting search violated the 4th amendment of the *United States Constitution* and *Indiana Constitution*, Article 1§ 11. (Reference) *Sellmer v. State of Indiana*, 842 NE 2d 358 (Ind.2006); *Brown v. State of Indiana*, 18A-CR-1, (07C01-1604-F2-195) (Ruling: January 15, 2019). That the *Indiana Constitution* affords such a right is progressive towards the way the protection of a person's right against unlawful search and seizure should be preserved by Officer(s) who are sworn to uphold both the Indiana and United States Constitution(s), even more so, this was the deliberate intention of the founders when the United States Constitution was drafted and ratified.[7] (See) *United States v. LaGrone*, 43 F.3d. 332, 337 (7th Cir. 1994); that although "Federal

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immediate control or dominion of the Petitioner SMITH, thereby discrediting the State's argument with regards to the petitioner maintaining any '*constructive possession*' over the gun.

[6] *Pirtle v. State of Indiana, 323 NE 2d 634 (Ind. 1975) Id.*

[7] (Referencing) *Blufford Hayes, Jr., v. Jill Brown, Warden of the California State Prison at San Quentin 399 F.3d. 972 @ 988* (9th Cir. October 12, 2004, Argued and Submitted *En Banc*, Filed: March 07, 2005); Quoting, Sidney R. Thomas J., "As we stated in '*Bowie*' 236 F.3d 1096; The authentic majesty in our Constitution derives in a large measure from the rule of law – principle and process instead of person. Conceived in the shadow of an abusive and unanswerable tyrant who rejected all authority save his own, our ancestors wisely birthed a government not of leaders, *but of servants of the law.* Nowhere in the [United States] *Constitution* or in the *Declaration of Independence,* nor for that matter in the *Federalist* or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any **oath-beholden servant** of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use *of false evidence* to secure a conviction in court." (Emphasis-Petitioner).

Constitutional Law provides no provision to consult with counsel before consent to search is obtained, however the *Indiana Constitution* affords such a right." (Reference; *Dycus v. State, Id.* and *Sellmer Id.,* @ 365; *Jones v. Brown*, 756 F.3d. 1000 (7th Cir. February 19, 2014).

With re: to Issue two (2) 'Smith' was severely prejudiced during the trial proceedings when the trial court admitted evidence of prior bad acts that the Appellate Court ruled as 'harmless error'. (See) Memorandum/Opinion of December 14, 2018 in 85A05-1712-CR-2908 ¶ [32]. 'Smith' suffered irreparable harm and prejudice under Indiana Rule of Evidence 403 [8], [and] that the victim(s) unsubstantiated statement(s) re: 'Smith's' alleged possession of a 'pink' handgun two (2) weeks previously from the date of his arrest in trial cause: 85C01-1608-F4-925 had no business being testified to in front of the jury, which was too strained and remote to be reasonable, and the extrinsic evidence was therefore inadmissible and should have been excluded. As 'Gillam' claimed to have only 'seen' a gun in Smith's' possession on the 1st of August, 2016. Not that he [Smith] was attempting to use it in a threatening manner towards him [Gillam]. Please additionally note that the witnesses (Gillam and Snow) had claimed to have not seen 'Smith' for a least a month prior to the events in question. This claim is proof of prior inconsistent statements and they should have been raised by trial counsel Kristina

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[8] (For Comparison re: *Federal Rule of Evidence* No. 403; "The Court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following; (i) unfair prejudice; (ii) confusing the issue(s); (iii) misleading the jury; (iv) wasting time; or (v) needlessly presenting cumulative evidence."

Lynn as a basis for impeachment, as it went to the credibility of the witnesses and for the trier(s) of fact (i.e. the jury) to be able to judge this accordingly. The evidence was truly devoid of substance and failed to meet the standards under *Indiana Rule of Evidence* 404(b), as mere possession of a handgun (allegedly) is not evidence with re: to [either] ill-conceived motive, intent etc. Due to all these verifying factor(s) and incorrect statements as were elicited in error under Indiana law, 'Smith' now requests this cause be reviewed for a Writ of Certiorari by the United States Supreme Court.

ARGUMENT

1. The trial court improperly admitted evidence of a handgun found during a search of a vehicle the Petitioner Robert H. Smith was driving.

The Indiana Court of Appeals Court deviated from its State Supreme Court precedent previously as established in *Clark v. State of Indiana*, 994 NE 2d 252 @ 260 (Ind. 2013) was erroneous as ('reversal' would be required when the admission [was] clearly against logic and the effect of the facts and circumstances and the error affect[ed] a parties substantial rights) *Id.* @ 260. The State's argument is that ['Smith's'] standing under the 4th amendment to the *United States Constitution* was non-existent, and that he had no inherent right to challenge the search because he did not own the vehicle and did not establish proof to Officer Mickleson that he had the owner's permission to drive it. The informing issue at the forefront of the events

in question was only exigent on 'Smith' allegedly making threat(s)(these were never substantiated on the date of offense) against the complainant(s) Gillam and Snow, not whether or not 'Smith' had permission to use the vehicle that is the point of controversy herein. The vehicle location and the Officer's initial contact with 'Smith' were demonstrative of solely an investigatory process, despite their suspicions re: 'Smith's' apparent 'HTV' status. This fact alone did not give rise to an exigent circumstance in order to give police the right to infringe on 'Smith's' right to 'consent' to a search of the vehicle on August 16, 2016 (As 'Smith' had claimed to be 'buying' the vehicle from a friend). (See) *Hester v. State of Indiana*, 551 NE 2d 1187 (Ind. Ct. App. 1990) ("[d]river of car had standing to challenge search and seizure of items found therein, even though he claimed no property interest in either car or items found inside"). The police solely used the 'inventory and booking' process as a 'ruse' for a premise to take unlawful control of the vehicle and rummage for any and all incriminating evidence (i.e. At this point, an 'alleged' handgun) against 'Smith'. Note * Record of Proceedings in Cause No: 85C01-1608-F4-925 and the Warrant Application on August 17, 2016 re: the DNA Collection for the Petitioner 'Smith'. (See) Laboratory Case No. 16F-02642 done by the Indiana State Police – DNA Serologist Bryan Good. Results as attributable to 'Smith' were that a conclusive DNA match was never established with re: to either actual and/ or constructive possession of the handgun found. Police presumption should have been subject to the exclusionary rule under both Indiana Rule of Evidence No(s) 403 & 404(b) et seq. (See) *Wong-Sun v. United States*, 371 US 471, 83 S.Ct. 407 (1963) re: '*Fruit of*

the Poisonous Tree' doctrine. The Officer's and the court subsequently abused their discretion as the court ignored the inherent rights of the Petitioner 'Smith' specifically under the 4th amendment of the *United States Constitution.*

It is more than obvious considering the sequence of events that are solely based on unsubstantiated 'threats' by the complainant's (Gillam and Snow) who were trying to impugn 'Smith' in order to avoid having to be held accountable for their illicit actions of 'liquidating' the 'Smith's' property without his consent. Due to the lack of exigency and Officer Mickleson's contradictory testimony (Supra), this violated 'Smith's' rights and goes to [a] bias recognizable under *Indiana Rule of Evidence* 616, that the Officer adhered to against him. (See) *Friedel v. State of Indiana,* 714 NE 2d 1231 (Ind. Ct. App. 1999); ("Where police did not have probable cause to search the defendant's vehicle following a traffic stop solely because a computer check revealed he had a lengthy criminal record.") Trial Trans. 77 ¶ 23 through 78 ¶ 5 – 85C01-1608-F4-925. Whereupon this issue should have been thoroughly reviewed by the Indiana Supreme Court and relief granted by proper suppression of the search results (where Officer 'Mickleson' attempted to invoke *Indiana Code* § 9-22-1-5 as a false premise for vehicle seizure, although it had been ascertained that 'Smith' had 'standing' to assert ownership lawfully). This false premise additionally tainted the ability of the Petitioner 'Smith' to have a fair and impartial trial by jury in violation of the 4th, 5th, 6th, 8th & 14th amendment(s) of the *United States Constitution.*

2. That the Appellate Court ruled erroneously when it affirmed the trial court's admission of extrinsic evidence or prior bad acts was 'harmless error'.

As for review, the Petition for Rehearing filed on January 11, 2019 succinctly pointed out that the allegation re: the 'pink' handgun that was allegedly in the possession of 'Smith' on the 1st of August, 2016 were too strained and remote to be considered reasonable, and that particular 'extrinsic' evidence was inadmissible and any and all testimony relating to it by the Complainant 'Gillam' should have been suppressed. The witnesses (both Gillam and Snow) had a 'financial motive' for testifying against 'Smith' due to the theft of property asserted by 'Smith'. The jury should have clearly been allowed to hear those matters in controversy as they were demonstrative as to motive, intent etc., and relevant as to the witnesses' credibility. (See) *Domangue v. State*, 654 NE 2d 1 (Ind. Ct. App. 1995). Therefore, the admission with re: to 'Smith's' alleged 'prior bad acts' couldn't be considered 'harmless'. As such, the admission weighed in the balance sufficiently leaned the scales in favor of the State. This is contradictory with re: to the Memorandum/Opinion given on December 14, 2018 ¶ [31]; in the ruling the Indiana Court of Appeals cited and were in agreement with the argument put forth by 'Smith'; "[t]hat the trial court erred by admitting evidence that 'Smith' possessed a pink gun at an earlier date." *Id.,* then [The Court] deviated from its own ruling. The Court should additionally acknowledge that the standard practice of Indiana Court's premise regarding the "[u]ncorroborative testimony of one (1) witness [is]

sufficient to sustain conviction" (with re: to Petitioner SMITH being convicted solely on the testimony of one (1) witness who claimed to have direct knowledge [John Gillam] while the main complainant and witness [Amanda Snow)]was exempt from testifying) is egregious and needs to be abolished (See) *Johnson v. State, 804 NE 2d 255, 256 (Ind. App. 2004).* The Petitioner 'Smith' wishes and prays the Court to rule on his issues in the spirit of its ruling in *Zavodnik v. Harper*, 17 NE 3d 259 (Ind. 2014); Stating that 'economic discrimination' in the Halls of Justice is wrong, and since "Indiana's Admission to the Union (December 11, 1816 C.E.) that (the State) has been a 'leader' in providing fair treatment to indigent person(s) while in Court." (Emphasis added)

Indiana's '*fundamental error*' rule sometimes affords relief to claimants who *did not preserve an issue before the trial court and seek to raise it for the first time on appeal.* As is similar to the federal '*plain error*' doctrine; "[w]ith respect to [a] forfeited claim when intervening case establishes a new rule, "[w]e must apply the 'plain error' doctrine to analyze the failure to submit the question of materiality to the jury." (See) *United States v. Rogers*, 118 F.3d. 466, 470-71 (6th Cir. 1997). Therefore, had Smith's Appellate counsel raised these issue(s) adequately there is a reasonable likelihood that the Indiana Court of Appeals would have reversed and remanded for re-trial. The Petitioner, therefore, received ineffective assistance of appellate counsel. *Id., Strickland v. Washington*, 466 US @ 681, 694; 104 S.Ct. 2052 (1984); and *Lawrence v. State of Indiana*, 464 NE 2d @ 1294 (Ind. 1984).

Petitioner Claim: The fact that the Indiana Court(s) reasonably found that the Petitioner's trial counsel was not ineffective for the way she attempted to impeach the State's witness John Gillam was erroneous and violated the Petitioner's rights to due process of law and to the guarantee under the 14th amendment as applies to the State(s) of equal protection of the laws. The Petitioner's trial counsel had an inherent right to confront any and all adverse witnesses adequately and to demonstrate effectiveness in the questioning of trial witnesses in accordance with the 6th amendment to the *United States Constitution.*

Where a person testifies against a defendant in exchange for any and all deal(s)/plea(s)/reduction(s) in sentence it is imperative that the State discloses any and all agreement(s) whether written or unwritten. (Note) *Driscoll v. Delo, 71 F.3d. 701 (8th Cir. 1995)* where; "Trial Counsel's failure to properly utilize witnesses' prior inconsistent statements for impeachment purposes constitutes ineffective assistance." Asserting that there was an underlying motive for John Gillam's statements that were given, and that Petitioner Smith wanted it rooted out. The Petitioner's trial counsel already had foreknowledge that there existed a bias, interest and/or motive for John Gillam to testify falsely, due to a specific fact that was obfuscated and then subsequently was never made completely clear. The fact was that the witness John Gillam had an ulterior motive to testify falsely or to profit from the Petitioner' conviction in the case. If the Petitioner's trial counsel had shown the witness bias under *I.R.E.* 616, it is quite likely that the outcome of the Petitioner's trial would have been different. It should additionally be noted that any and all bias of important witnesses is to be considered a significant issue of high probative value and is thus is generally considered admissible over Indiana Rules of

Evidence 403 objections. Note that "A witness may be impeached by showing that he or she has a financial interest or *stands to profit from outcome of the case; Koo v. State of Indiana, 640 NE 2d 95 (Ind. App. 1994)* It is further demonstrative of ineffectiveness of trial and appellate counsel(s) where they denied the Petitioner the ability to be able to impeach John Gillam to show an implicit bias. It is reversible constitutional error to prevent the Petitioner in his criminal action under 85C01-1608-F4-925 from fully impeaching important state witnesses by showing their personal biases or motives to assist the prosecution. Petit ioner believes that a factual predicate for the claim(s) has been established and proper evidentiary hearing(s) will expand the record to prove the constitutional error(s). Which the State Court(s) should deal with. That the facts, [when] proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the Petitioner guilty of the crime(s) had there been no constitutional error(s).

REASONS FOR GRANTING THE PETITION

The Petitioner has suffered an unlawful conviction and sentence of constitutional magnitude. This matter is unconscionable in the annal(s) of American Constitutional Law, and in need earnest review for any and all appropriate relief to the Petitioner. (See) *Thompson v. State of Indiana* , 270 Ind. 677, 389 NE 2d 274 (Ind. 1979); that, "[f]undamental constitutional guarantees are [to be] absolute, and are outside the discretion of any court to ignore or deny." (Emphasis-Petitioner).

CONCLUSION

WHEREFORE, the Petitioner herein tenders this Petition for Certiorari in good faith for review of any and all issue(s) of newly discovered evidence not previously presented or heard. Petitioner asks that this pleading be construed liberally as he is a 'pro se' prisoner making this application under necessity to gain relief. (Reference) *Erickson v. Pardus*, 551 US 89, 94 (2007) and *Haines v. Kerner*, 404 US 519, 92 S.Ct. 594 *rehearing denied*, 405 US 948, 92 S.Ct. 963 (1972). The Petitioner believes he is entitled to relief. This is done under necessity, and the Petitioner requests that this Petition for a writ of certiorari be granted in the interests of fundamental fairness and justice. SWORN to under Title 28 USC § 1746(1). Respectfully Submitted by Petitioner;

Robert Smith

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