No. _____

19-8162

IN THE

SUPREME COURT OF THE UNITED STATES

_____

In re: SMITH — PETITIONER
(Your Name)

vs.

DIANE P. WOOD, et al., — RESPONDENT(S)

ON PETITION FOR WRIT OF MANDAMUS

_____
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF MANDAMUS

Curtis Lee Smith
(Your Name)

FCI-TEXARKANA
P.O. BOX 7000
(Address)

Texarkana, TX 75505
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I.

Did the Court of Appeals for the Seventh Circuit adopted a divergent interpretation of the **Supreme Court** of the United States binding precedent case law **Calderon v. Thompson, 523 U.S.538(1998)** (mandate"shall not be recalled except to prevent injustice") standard? Did Seventh Circuit adopt devergent interpretations of Seventh Circuit's binding precedent case law **Barnes v. Briley, 43 F. Appx' 966 (7th Cir.2002)** standard by **sua sponte** denying In re: Smith's motion to Recall Its Mandate, because the jury's verdict is against the **"overwhelming"** weight of the evidence?

II.

Did **Seventh Circuit** cause controversy between the **Third Circuit's** binding precedent case law **Dunn v. Hovic,13 F.3d 58, 60 (3d Cir.1993)**(recall appropriate when omitted postjudgment interest), by seventh Circuit **sua sponte** denying In re: Smith's **motion for the Seventh Circuit to Recall Its(May 4, 2009) Mandate because his post direct appeal judgment showed evidence that his "appellate" counsel only raised "one ground" for relief in his appellate brief?**

III.

Is a petitioner entitled to be heard in a **Writ of Mandamus** or **Writ of Prohibition,** when a court of appeal **refused to act when it had no power to refuse?" Especially, when there is "overwheming"** evidence in the record showing that the jury's verdict is against **"overwheming"** weight of evidence at trial? And, in addition, to that injustice, Petitioner's **appellate** attorney had presented **only ["one ground"]** for relief on his behalf on direct appeal, in which, did not have any merits. And, that **"one ground"** was **Unrelated** as to any material evidence produced on the record at trial or sentencing critical stage of proceedings.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. **Diane P. Wood,** Chief Judge, United States Court of Appeals for the Seventh Circuit.

2. **Ilana Diamond Rovner,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

3. **Michael B. Brennan,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

4. **Ann Claire Williams,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

5. **William J. Hibbler,** District Court Judge, for the Northern District of Illinois-Chicago Division.

6. **Susan S. Kister,** court appointed **appellate** attorney, from St. Louis, Missouri.

7 **Sheri H. Mecklenburg,** assistance attorney for the United States of America, Chicago, Illinois.

8. **Eric E. Sussman,** assistance attorney for the United States of America, Chicago, Illinois.

9. **Carrie E. Hamilton,** lead assistance attorney for the United States of America, Chicago, Illinois.

10. **Michael J. Finn,** paid-private attorney pretrial, trial, and new trial critical stage of proceedings counsel.

11 **Jack I. Rodgon,** paid private attorney pretrial, suppression of evidence and statement, and Quash Arrest critcal stage of proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR ALL WRIT ACT, 28 U.S.C. § 1651(a)
WRIT OF MANDAMUS

Petitioner respectfully prays that a Writ of Prohibition or a Writ of Mandamus, or both, and a Writ of Habeas Corpus 28 U.S.C. § 2241 issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A, at pp.18-19; APPENDIX B, at pp.5-6; APPENDIX C, at pp.12-13; See also, APPENDIX D, at pp.1-6, to the petition for Writ of Mandamus or Writ of Prohibition or both. And a Writ of Habeas Corpus under 28 U.S.C. § 2241.

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[X] reported at 2011 U.S. Dist. LEXIS 91807 (N.D. ILL 2011); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was **December 20, 2018**.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **DECEMBER 20, 2018**, and a copy of the order denying rehearing appears at Appendix **D, pp.1-5, 10.**

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

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

STATEMENT OF JURISDICTION

The court of appeals originally exercised jurisdiction under 28 U.S.C. § 1291, which provides it with jurisdiction over all federal crimes. This Court has jurisdiction over appeals from final judgments of the court of appeals and district courts. This Writ of Prohibition or Writ of Mandamus or both, is taken from the Court of Appeals for the Seventh Circuit's order **sua sponte** denying In re: Smith's Motion for the Seventh Circuit to Recall Its, (Id. at **APPENDIX D, pp.1-10),** Mandate. And, in addition, this Writ of Prohibition or Writ of Mandamus or both, is taken from the United States District Court for the Sevneth Circuit's order **sua sponte** denying In re: Smith's **original** (Id., at **APPENDIX D, PP.6-9.),** filed **28 U.S.C. § 2255 motion,** without granting him an Evidentiary hearing regarding his claim("s") of: 1) Prosecutorial Misconduct; 2) Jury Misconduct; 3) Fruad on the Court; 4) Ineffective Trial Counsel; and 5) Ineffective Assistance **Appellate** Counsel, because she **only** raised **one ground** for relief on direct appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I.

The Fourth Amendment to the United States Constitution provides in pertinent part: The right of the people to be secure in their person, houses, and effects, against unreasonable searches and seizures, shall not be violated.

II.

The Fifth Amendment to the United States Constitution provides in pertinent part: No person ... shall be deprived of life, liberty or property, without due process of law.

III.

The Sixth Amendment to the United States Constitution provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the rigth ... to have the effective assistance of counsel for his defense.

IV.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. A United States Court of Appeals for the Seventh Circuit sua sponte denied Movant Petitioner's motion filed under Barnes v. Briley, 43 Fed. Appx' 966 (7th Cir. 2002); and also, Calderon v. Thompson, 523 U.S. 253 (1998), requesting the Seventh Circuit to Recall Its, (May 4, 2009's), Mandate, because the jury's verdict is against the "overwhelming" weight of the evidence. And because his ineffective assistance Appellate counsel only raised ["one ground"] for relief in his appellate brief. In which did not have any merits, and was Unrelated to any evidence in the record at trial proceeding.

The Due Process Clause guarantees a litigant both notice of the proceeding and "the right to be heard." Richards v. Jefferson County, 517 U.S. 793, 799 (1996)("the right to be heard ensured by due process 'has little reality or worth unless one is pending'")(quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Indeed, even when the proceeding is one administered by the executive branch to decide whether to grant a benefit that a prisoner has a "meer hope" of obtaining, due process requires notice and the chance to be heard. see, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1,11,16 (1979); Swihart v. Wilkinson, 209 F. Appx'456, 459 (6th Cir.2006)("due process is satisfied as long as the procedure used affords the inmate an opportunity to be heard").

1. **Ground One:** Movant Smith did not receive a fair trial having merit. Movant was not found guilty beyond a reasonable doubt. Movant Smith's conviction is based upon the preponderance of the United States' weak evidence. And, that the United States is guilty of **prosecutorial misconduct**, and that the United States having **destroyed the "gun" evidence** in this case, without probable cause. And, also, again the United States, having **["lost** or **destroyed** the **chain of custody – Chevy cargo van"]** which was exculpatory evidence in this case. Now the above aforementioned **"gun"** evidence was intentionly destroyed **["4 months"]** after Movant filed motion for the United States to produce the **gun** at **pre-trial motion to Quash arrest,** and **motion to suppress evidence and statements.** The **"gun"** and **"Chevy cargo van"** was exculpatory evidence in nature and they should not have never been **destroyed** or **lost.** The **"gun"** and **"Chevy cargo van"** was **destroyed** while they were under the United States's control. The United States used perjured testimonies from its witnesses. And the United States **used false, misleading** and **inconsistent evidence.** The government is guilty of presenting complete details information regarding Movant Smith's prior crimes or bad acts, in order to **appeal to the passion, or the prejudice of the jurors.** And, that the United States having made **inflammatory comments** during critical stages of the trial proceedings. That the United States failure to produce alleged **confidential inforant,** and **Officer("s") O'Donnell,** or **Walker** for **["Pre-trial -examination"]** did violate his **Fifth** and **Sixth** Amendment Rights, as incorporated by the **Fourteenth** Amendment, because Movant Smith's

defense counsel could not examinate the United States's Government's Witnesses prior to trial at a suppression of evidence hearing held on July 9, 2007. (Id., Case. 1:10-CV-348-WJH, Doc. 1, at p. 5).

2. **Ground Two:** The district court erred, and abused its discretion. Because the district court **did - not** hold an evidentiary hearing, and the district court violated Movant's due process, by denying Movant's pre-trial motion for the United States to produce alleged confidential informant for trial critical stage of the proceedings. Now, when the district court denied Movant's motion to suppress the evidence and statements. The district court has made a **clear erroneous standard violation['s']** in this case, is especially deferential when the district court [failure to conduct'] a suppression of evidence hearing, in order to hear any conflicting testimony. Movant Smith was deprived of a fair hearing of his **motion to Quash Arrest,** and **motion to Suppress Evidence and Statements.** Because the district court **did - not** - observed **"no"** witnesses by the United States, in order for the court to then reach a determination on whether to believe the United States's interests. Here, Movant Smith argues, that the examination of a particular witness is conducted upon direct examination by his attorney, in which defense counsel would have been able to attempt to **elicit** testimony as to facts in support of his **['defense'] interests.** Because the function of the **direct examination of police officers and confidential informers,** would have afforded Movant Smith's defense counsel a fair opportunity, to examine the United States Government's Witnesss("s") **ATF's Agent Jeff Kosiek; Lieutenant Cap; Officer O'Donnell;** and **Officer Walker,** in order for counsel, in counsel's own way of bring out such material evidence and facts as his defense counsel desires, because the purpose of an examination of witnesses is to elicit honest testimony, not fearful response, and to procure the truth, not cause intimidation to alleged **confidential informer...** Movant Smith's due process was violated, because the district court denied his motion to **Quash Arrest,** and motion to **Suppress Evidence and Statements.** Movant Smith was deprived of due process because the district court denied his motion for the United States to **produce its alleged confidential informer at trial and or at suppression of evidence hearing.** (Id., case 1:10-CV-348, Doc. 1, p. 5; and Doc. 17, at pp. 1-13).

(e) Did you receive an evidentiary hearing on your motion? Yes () **No (X)**

(f) Result: The district court dismissed Movant's **§ 2255** motion, **without** granting him an evidentiary hearing redressing the matter of the case on the merits.

(g) Date of the result: **August 15, 2011.** (Id., case 1:10-CV-348-WJH,. Doc. 1 & 17).

3. **Ground Three:** The district court erred and abused its discretion, because it gave **["incorrect instructions"] to the jurors,** on how the jury were to use the information from the United States, regarding Moavnt Smith's prior bad act evidence such as, his prior unlawful use of a **firearm** and sexual abuse conviction, in order to attack and impeach the credibility of the Movant. (Id.; Doc. 1, p. 5-B; and Doc. 17, pp. 14-16, 35-38).

The jury in this case, committed **Jurors Misconduct.** Because the jurors in this case did — have the ability to **listen** to the district court's **bad instructions,** and the jury was not capable of disregarding improper evidence produced by the United States, by way of prosecutorial misconduct. This evidence regarding Movant Smith's prior bad act convictions were so **decriminating that the jurors could not put it out of their memory and minds.** Here, because at trial, during the jurors deliberation, the jury sent a **note out to the district court, saying**

that **jury was very up - set,** due to their belief that a sex offender, such as Curtis smith **should go to jail for the rest of his life, because he was a sex offender.** (Id., at **Trial,** on April 11, 2008)... **Note:** The district court should have immediately removed the **["bias" and "impartial jurors"]** and ordered a **new trial** on the Court's own motion, after the district court found out that some of the jurors had wanted to convicted Moavnt Smith for prior bad act sex offense, instead of convicting him for his instant offenses of possession of firearm § 922(g)(1); possession of drug § 841(a)(1); and possession of firearm in furtherance of a drug crime. (Id., at case 1:10-CV-348, Doc.1, p.5-B; and Doc.11, pp. 1-4)...

(e) Did you receive an evidentiary hearing on your motion? Yes () **No (X)**

(f) Result: The district court dismissed Movant Smith's § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on the merits.

(g) Date of the result: **August 15, 2011.**

4. Ground Four: The United States is guilty of Prosecutorial misconduct, because United States failure to produce, its alleged **confidential informer,** at Pre-trial hearing of Moavnt Smith's **motion to Quash Arrest,** or **motion to suppress evidence and statements,** or **motion for the United States to produce confidential informer at Trial.** The United States is guilty of using false, misleading, and inconsistant testimony n government's statements evidence during **pre-trial, trial,** and **post-trial,** critical stages of proceedings, including at the **direct appeal** proceedings. The United States, did knowingly, intelligently, and intentionally used perjured testimonies from its Government's Witnesses, **Lieutenant Cap, Officer O'Donnell,** and **Officer Walker.** The United States is guilty of the evidence being **destroyed** and or **lost,** while the evidence was under the **control of law enforcement agency.** The United States is guilty of telling the jurors all about the **complete detail information** regarding Movant Smith's prior conviction("s") for Unlawful use of a firearm, and sexual abuse, in 1996. The United States did knowingly, and intentionally used **Fed.R.Crim.P. Rule 404,** in order to appeal to the passion and prejudice of the jury in this instant case. Which Fed.R.Crim.P. **Rule 403,** requires the **exclusion of evidence** when the probative value is **substantially outweighed** by the danger of unfair prejuice, **confusion of the issues,** which **mislead a jury.** The United States is guilty of making **rude** and **inflammatory comments** regarding Movant Smith's **character.** And, then the United States, turn around and weighed that **prior bad act character against him,** by telling the jurors, the entire full and completed details regarding Movant Smith's unlawful firearm and sexual abuse **prior convictions** at trial, during the United States' **["closing argument"],** and also, during its **cross - examination of Smith.** (Id., at Doc. 1, p. 5-A; and Doc. 11, p. 2).

(e) Did you receive an evidentiary hearing on your motion? Yes () **No (X)**

(f) Result: The district court dismissed Movant's § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of case on its merits

(g) Date of the result: **August 15, 2011.** (Id.)

Application 5(d) Grounds raised attachment pages (Cont'd)

5. **Ground Five:** Movant Smith's **["Three - attorney(s)"]** are guilty of being ineffective assistance of counsel for failure to employ binding precedent case law, in the motion(s) that they having filed on his behalf.

a) Movant's ineffective **appellate** counsel at **direct appeal,** failure to investigate evidence in the record, that show Movant's **trial** counsel was guilty of ineffective assistance of counsel for failure to file a **motion for a direct verdict, or direct judgment.** (Id., case. 1:10-CV-348. Doc. 1, p. 25)**(Trial, p. 240);**

b) Movant's ineffective **appellate** counsel, failure to advance his argumentation, that his **trial** counsel is guilty of ineffective assistance of counsel, for failure to **object to Presentence Investigation Report("PSR").** Ineffective **trial** counsel failed to file **timely motion** challenging sentencing enhancements on the date of sentencing; Id. (case 1:10-CV-348, at Doc. 17, p. 51, 64).

c) Ineffective **appellate** counsel failure to employ binding precedent case law, such as, United States v. **Seib,** 555 F. Supp. 2d 981 (E.D. Wis. May 16, 2008). **Appellate** counsel having **refused** to advance Movant Smith's argumentation, that **he was not sentenced to ['serve']** a term of **['imprisonment']** with respect to his **July 24, 1992,** and or **December 9, 2004,** simple battery**["judgments"],** which were based upon the explicit factual finding by the State of Illinois court. Id. (case 1:10-CV-348, at Doc. 1-1, pp.34-47)(Doc. 9, p. 1, 4)(Doc. 17, pp.3-4,43, 54-55).

d) Ineffective **appellate** counsel, on direct appeal, failure to advance Movant Smith's argumentation, that there was **jurors misconduct** involved in this case. Based upon evidence in the record showing that some of the jurors told the district court that it should sentence Movant Smith to life in prison because he is a **convicted** sex offender.(Id., at case 1:10-CV-348, Doc.1-1, pp. 39 of 64).

On April 11, 2008, the district court erred, and abused its discretion, by not ordering a **New Trial,** based upon the court's own motion. Because the jury was **["bias** and **impartial"].** The judge should have immediately removed **tainted** and **corrupted bias impartial jury,** because the jury having been exposed to the information regarding Movant Smith's prior convictions for unlawful possession of a firearm, and sexual abuse. The record show, that the district court allowed the United States to **["introduce additional information"]** regarding Movant Smith's prior bad act convictions to the jury, in order to **["test the credibility"]** of Movant Smith. Id., at **Trial,** p. 279). The district court found that there was **"no necessity for any limiting instructions to the jury. (Id., Trial,** pp.276-279). Therefore, the record shows that the district court and the United States did knowingly violated Movant Smith's **Due Process Clause,** pursuant to **Federal Rule of Criminal Procudure, Rule 404(a)(b).**, which states: the evidence of a person's prior crimes, wrong or bad acts not admissible to prove the character or credibility of a person in order to show action in conformity. The district court, **did not restrict** the United States from further inquiring into that of Movant Smith's **two prior convictions.** (Id., **Trial,** p. 280). **Here,** ineffective **appellate** counsel failure to advance Movant Smith's argument that the district court having allowed the United States to use evidence of Movant's prior conviction for **unlawful use of a firearm,** to now support the United States claim that because Movant Smith having firearm in the pass, so, therefore, he must **have had a firearm violation in this instant case.** (Id., case 1:10-CV-348-WJH, at Doc. 11, p. 2). Here the district court failure to preform any balancing **test,** to determine the probative value of this **outside extrinsic influences**

that did not have nothing to do with the **chain of custody evidence** in this instant case, such as: information regarding Movant Smith's prior conviction of sexual abuse, and unlawful firearm convictions. And, then weighed it against the prejudicial effect that these prior bad acts and conviction evidence may have had on the jury, in this instant case.(Id., at Doc. 11, p. 2).

(e) Did you receive an evidentiary hearing on your motion? Yes() **No (X).**
(f) Result: The district court dismissed Movant Smith's § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on the merits.
(g) Date of the result: **August 15, 2011.**

6. Ground Six: Ineffective **appellate** counsel failure to advance Movant Smith's argumentation, that under criminal law procedure, that jurors are presumed to be capable of disregarding improper evidence presented to them at trial - **unless the evidence is so incrimination** that the jurors could not be expected to put it out of their minds. Here, on **direct appeal,** Movant Smiht's ineffective **appellate** counsel failure to advance Movant argument that his conviction should be **reversed,** based upon evidence in the record, showing the United States' prosecutor("s") making **["inflammatory statements in its Closing Argument"],** did violate Movant Smith's due process. Therefore, he is entitled to relief under Federal Rules of Criminal Procedure, **Rule 52(b). Rule 52(b)'s reversal is warranted** where there is (1) error, (2)that is plan, and (3) that affects substantial rights pf the defendant, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. (Id., case 1:10-CV-348-WJH, at Doc. 11, p. 3).

(e) Did you receive an evidentiary hearing on your motion? Yes() **No (X)**
(f) Result: The district court dismissed Movant Smith's § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on its merits.
(g) Date of the result: **August 15, 2011...**

7. Ground Seven: Ineffective **appellate** counsel failure to advance Movant Smith's argumentation, that his **["arrest"]** is in violation of his **Fourth Amendment Rights. Because there is evidence in the** record showing that he may have been arrested **without a valid arrest warrant** on **Septeber 24, 2006.** Here, on January 14, 2008, at(case 1:06-CR-441-WJH, Doc.50, **Pretrial Conference, p. 27.**), Movant Smith, having testified that he was actually arrested on or about **September 24, 2006,** by **["two Unknown Named Chicago Police Officers"],** while he was **["standing"]** on his fiance's **front porch...** Movant Smith testified that while he was parking his vehicle in front of his fiance's house, the two police officers had passed him by in the street. And about 15 minutes later, the same two police officers had returned back to his fiance's house to find Movant Smith, standing on his fiance's front porch. (Id., **Trial,** p. 299). The **two Unknown named Chicago Police Officers,** ordered Movant Smith to come over here to their squad car, which was parked in the middle of the street. Now, the one officer who was standing in the street, ordered Movant Smith to give his driver's license to the officer who was sitting inside of the police squad car, to check for any out-standing arrest warrant. Officer told Movant Smith that he have an out-standing warrant for his arrest and place him in the squad car. Upon his arrest Movant Smith having requested multiple times for the **Chicago Police**

Officers to show him a copy of the alleged **arrest warrant,** which the arresting officers never showed him a copy of alleged arrest warrant. On or about, **September 25, 2006,** Movant Smith was taken into **federal custody.** Movant Smith testified that he asked the arresting **Acohol, Tabacco, Firearm("ATF")**'s Special Agent **Jeff Kosiek,** to show him a copy of the alleged arrest warrant, but, however, Agent Kosiek, never showed Movant Smith a copy of alleged arrest warrant. Movant Smith argues that the district court ordered **["bench arrest warrant"]** on **["June 23, 2006"].** Now, 28 days later, on **["July 21, 2006"],** the (Court only) **Bench Warrant was returned ["unexecuted"].** Here, Movant Smith argues, that on **["September 24, 2006"],** at that specific point in time, that the Chicago police officer made an unconstitutional **warrantless arrest,** as to the person of Movant Smith, in violation of the **Fourth Amendment** as incorporated by the **Fourteenth Amendment** to the Constitution of the United States of America. The Chicago Police Offficers made an unconstitutional **Warrantless arrest,** as to Movant Smith's person, because the evidence in the record show, that at the time of his arrest, the **June 30, 2006,** (Court only) **Bench Warrant** issued as to Movant Smith, was untimely and invalid. Therefore at the time of his arrest - the **Chicago Police Officers ["did - not - have - valid - arrest warrant"].** Therefore, Movant Smith imprisonment, is in violation of the **Fourth** and **Fourteenth Amendments** to the Constitution. Therefore, Movant Smith is entitled to immediate release, based upon this constitutional violations. (Id., case 1:10-CV-348-WJH, at Doc. 1-1, pp. 34-36; and Doc. 17, p. 13)...

(e) Did you receive an evidentiary hearing on your motion? Yes () **No (X).**
(f) Result: The district court dismissed Movant Smith's § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on its merits.
(g) Date of the result: **August 15, 2011.**

8. Ground Eight: Ineffective assistance **appellate** counsel failure to advance Movant Smith's argument that he is entitled to relief under the Supreme Court's recent decision in **Begay** v. United States, 170 L.Ed.2d 490 (2008). Because his sentence exceeds the statutory maximum authorized by law, based upon evidence in the record showing that his **["July 24, 1992"],** State of Illinois Compiled Statute: **720 ILCS 5/12-3(A)(1), simple battery judgment,** was not an aggravated "violent felony" for Armed Career Criminal Act's **§ 924(e)(2)(B)(i)**'s enhanced sentencing. Ineffective **appellate** counsel failure to raise issue on direct appeal that the district court erred, and abused its discretion, by incorrectly calculating armed career criminal act statute, applied overrepresented Offense level Points and Criminal History Category Points **upward variance.** (Id., case 1:10-CV-348-WJH, at Doc. 9, pp. 1,4).

(e) Did you receive an evidentiary hearing on your motion? Yes () **No (X).**
(f) Result: The district court dismissed Movant Smith's : 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on the merits.
(g) Date of the result: **August 15, 2011.**

9. Ground Nine: Ineffective **appellate** counsel failure to advance Movant Smith's argument that he is entitled to relief under the Supreme Court's recent decision in **Johnson** v. United States, No. 08-6925, March 2, **2010.** Because his sentence exceeds the statutory maximum authorized by law, based upon evidence in the record showing that his **December 9, 2004, ["simple battery"] judgment** was not

an aggravated **'violent felony'** for Armed Career Criminal Act's § 924(e)(2)(B)(i)'s enhanced sentencing purposes. Because the State of Illinois Compiled Statute: **720 ILCS 5/12-3(A)(1), simple battery - judgment,** was not an aggravated 'violent felony' for armed career criminal act's § 924(e)(2)(B)(i) enhanced sentencing. Because he **["did not - serve"] a term of imprisonment that exceeded one - year.** (Id., case 1:10-CV-348-WJH, at Doc. 17, p. 3). In **Johnson(2010),** the Supreme Court decided that § 924(e)(2)(B)(i)'s definition, and thus consitutes a violent felony under the Armed Career Criminal Act's § 924(e)(2)(B)(i)enhanced sentencing and a person that has three previous convictions for a violent felony committed on occasions different from one another shall be imprisoned for a minimum of 15 - years and a maximum of life imprisonment. A "violent felony" is defined **"any crime punishable by ('imprisonment') for a term ('exceeding - one - year')"].** (Id., at Doc. 17, p. 4). Here, Movant Smith argues that the State of Illinois' states court's **judgment,** as to punishment was entitled to **deference,** as the offenses were ["not **punishable"**] by a term of imprisonment **exceeding one year, in prison** or **in jail.** Because Movant Smith's **simple battery - judgment** state sentence in **["1992"** and or **"2004"],** does not meet all of the requirements under the United States Sentencing Guidelines **§ 2L1.2 cmt.** Application Note 1, definition of "felony offense. (Id., at Doc. 17, p. 43). Therefore, under **Johnson(2010)** the Movant Smith's prior state court's **judgment("s"),** regarding the **1992** and **2004 simple battery** no longer qualify for armed career criminal act enhanced sentencing.

(e) Did you receive an evidentiary hearing on your motion? Yes() **No (X)**
(f) Result: The district court dismissed Movant Smith' § 2255 motion, **without** granting him an evidentiary hearing redressing the matter of the case on its merits.
(g) Date of the result: **August 15, 2011.**

10. Ground Ten: Movant Smith is entitled to relief under the **Sixth Amendment,** as incorporated by the **Fourteenth Amendment,** to the Constitution of the United States of Ame ica. Because there is evidence in the record that showing the Movant Smith's pre-trial attorney, trial attorney, and his **appellate** attorney's unprofessional errors having prejudice Movant Smith, at **critical stages of proceedings.** Here, claims of ineffective assistance of counsel are governed by two - prong - test, set forth in Strictland v. Washington, 466 U.S. 668, 687-88, 694 (1984). To succeed on any claim of ineffective assistance of counsel, a defendant must show that: (1) the attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that for the attorney's unprofessional errors, the result of the proceedings would have been different. Strickland, (supra). see, Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 602 (2001).

(e) Did you receive an evidentiary hearing on your motion? Yes() **No (X)**
(f) Result: The district court dismissed Movant's ineffective assistance of counsel claim("s") in Movant's **§ 2255** motion, **without** granting him an evidentiary hearing redressing the matter of the case on its merits.
(g) Date of the result: **August 15, 2011.**

B. STATEMENT OF FACTS, BACKGROUND OF THE CASE, REGARDING THE UNITED STATES MADE FALSE AND MISLEADING STATEMENT AT MOTION TO QUASH ARREST AND MOTION TO SUPPRESS EVIDENCE PROCEEDINGS

1. The unresolved issue before this Honorable, Supreme Court of the United States, is whether at the time of the Petitioner, Curtis Smith's hearing before the District Court, of his: 1. Motion for the Government to Produce Informant. (Doc. 25); and 2. Motion to Quash Arrest and Suppress Evidence and Statement. (Doc. 27)., is whether the Prosecutor, Carrie E. Hamilton, did knowingly, deliberately and intentionally with reckless disregard for the truth, made false and misleading statements in violation of Franks? Franks v. Delaware, 483 U.S. 154 (1978). And the other unresolved issue before this Court, is whether the Government's Non-Disclosure of the identity of the alleged confidential informant, in violation of Brady? Brady v. Maryland, 373 U.S. 83 (1963).

2. In her suppression of evidence argument, Ms. Hamilton argued to the trial Court, that the confidential informant was just a mere "Tipster" who was sitting in the [back seat] of the police car, when the Chicago Police Officers Walker and O'Donnell, allegedly saw a drug transaction happened between Curtis Smith and Denise Evans on January 30, 2005. At hearing of the motion to Produce Informant and motion to Quash Arrest and Suppress Evidence and Statements, the Prosecutor Ms. Hamilton, argued as follows:

[Ms. Hamilton]: The only other thing I would add is that the defendant says that the witness is crucial to establish that there was no delivery. This defendant isn't actually charged with that delivery. With respect to the drugs, what he's charged with is possession with the intent to deliver. And certainly what the confidential informant would add to his defense is nothing. What the confidential informant -- whatever he may or may not have seen from the back seat of the police car, which is a guess, defendant's best position is that the informant saw nothing. But what the confidential informant did was provide the police with information that this defendant was selling heroin out of a van that he described.

The confidential informant in the presence of the police officers called this defendant, and set up a drug transaction for a specific time and location. That the officers then went to that specific location at that specific time, saw the defendant in the van that had been described. So that alone is enough, at least for the suppression hearing. And certainly there is additional circumstantial information about the delivery regardless of what anyone saw in terms of a hand-to-hand. So the informant's privilege should -- is not overcome. (Criminal case No. 06-CR-441, Document("Doc"). # 30, pp. 3-4). But to ask the government to pierce the privilege of protecting an informant in a drug case is obviously a huge thing. I don't think that the burden has been overcome in this case for the reasons in my motion and for those additional reasons. (Doc. 30, p. 4).

In rebuttal, the Petitioner's defense counsel, Mr. Rodgon, then argued that the government should produce the conficential informant under Brady. Brady v. Maryland, 373 U.S. 83 (1963)("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or

bad faith of the prosecution." 373 U.S. at 87); See Kyles v. Whitley, 131 L.Ed. 2d 490, 115 S. Ct. 1555, 1556 (1995)... In rebuttal, the Petitioner Curtis Smith's defense counsel, Mr. Rodgon argued as follows:

[Mr. Rodgon]: Just briefly, Judge, this -- as I understand the facts, they allegedly set up what was to be a delivery to the informant, by happenstance they said they saw a delivery go down. And the informant was present. He is a witness to the transaction. And he was -- and just under Brady we should be able to talk to this person and see what he saw and what he didn't see. We deny there was ever a delivery, Judge. And that certainly goes to the credibility of the police officers, who say they saw a delivery which we say never happened.

Second of all, your Honor, I think since he is part of the transaction, we would be able to have him as a witness to the crime -- to the crime. This is not a situation where the informant is not present. He is at the scene. So I submit that as -- he is a witness as a government -- witness, who set up the transaction, and he is present to witness it. Plus he is a witness if there was no transaction. So I think we have established the burden there. Second of all, going back to the original motion, Judge, I think we have given you enough to give us a hearing on that motion alleging whether or not there was probable cause to go in the van, take my client out of the van, search the van. And I think we should be entitled to that minimal thing. (Doc., p. 5).①

C. **Testimony of Police Officers Michael O'Donnell, proves that the Government had Lied, and Made False and Misleading Statements about the Informant being a mere "Tipster" who was sitting in the back seat of the police car**

1. Transcript ("Transc.,"), p. 4)). At Trial, the sole fact established by the evidence presented by the Government's witnesses, the Chicago Police Officers O'Donnell and Walker, testimony clearly show: (1) that an alleged Confidential Informant was not a mere "Tipster" sitting in the back seat of the police car; (2) that the evidence show, the Informant was an active participant in the basis of establishing probable cause for the officers to place the Petitoner Curtis Smith under surveillance, and thereafter, place him under arrest; (3) the evidence show, the Informant played a prominent role in the police officers alleged "formulated plan" scheme, for the Informant to place a phone call to Petitioner and to "negoticate" a set up entrapment "attempted Intent to Deliver Controlled Buy drug transaction crime with the Petitioner; and (4) that the evidence show, that the alleged Confidential Informant is the only person, that could have testified that he/she, had made a phone call to the Petitioner Curtis Smith, and actually talked with the Petitioner on the phone, and set up a drug transaction with him. Testimony of Officer O'Donnell and Officer Walker was marginal as to any facts that could even arguably identify the Defendant Curtis Smith as the person on the phone, talking with an alleged confidential informant, and thereafter, was selling a $10 bag of heroin to Denise Evans in this case.

Officer O'Donnell testified that he did not see a drug transaction happen between Curtis Smith and Denise Evans, and that he did not hear or see the informant talking to Curtis Smith on the telephone in this case. Officer O'Donnell testimony as follows:

① . Document("Doc". 30)

2. (Transcript, p. 4), at Trial, on Direct-examination. Testimony of Chicago Police Officer, Mr. Michael O'Donnell, Officer O'Donnell, testified that himself and his partner Officer Walker were on routine patrol, and that they were involved in a narcotics investigation on the evening of January 30, 2005. He testified that they had received information from Officer Walker's informant, that the Petitioner, Curtis Smith was selling heroin by phone order. And that Curtis Smith was driving around in a white van "with" ladders on top of it. Officer O'Donnell testified that once the officers received this information, they had "formulated a controlled buy plan", scheme, to use the help of the confidential informant to set up an entrapment drug transaction, in order to place Curtis Smith under arrest. Officer O'Donnell testified that the informant made a phone call to Petitioner Curtis Smith, and negotiated and arranged the attemped drug transaction for a [$10] bag of heroin. (Transc., p. 5). Officer O'Donnell testified that he was driving the police car. And that he drove himself and Officer Walker to the area of 79th, 80th and Ashland, because the drug purchase was going to take place at 80th., and Ashland. (Transc., p. 6).

He testified that once he saw Curtis Smith's white van "with" ladders on top, had pulled up and parked, Officer Walker who was now on foot started walking across the street towards the van, because he was going tomake a "controlled buy" with Curtis Smith. Transc., p. 10).

3. Testimony of Officer O'Donnell, he testified that he saw Denise Evans walking on the sidewalk, and she stopped at the passenger door window of Curtis Smith's van. And once Denise Evans had stopped at the passenger's door, that is when Officer Walker started flagging him with hand signal, to come on, come on. He testified that after seeing the flagging signal he drove his police car through the "median" and made his U-Turn and pulled in front of the Chevolet van and parked. Officer O'Donnell testified that he "immediately got out the police car walked to the driver's side of the van, opened the door, and told Curtis Smith to turn the vehicle off. (Transc., pp. 11-12).

4. (Transcript, p. 24), on Cross-examination, Officer O'Donnell changed his testimony. Officer O'Donnell testified that Officer Walker's informant-this same informant had given him information "about two weeks prior" to January 30, 2005, that Curtis Smith was selling heroin out of his van, by phone order. He testified that Officer Walker's informant was not a criminal.(Transc., p. 25).

5. Officer O'Donnell testified that Officer Walker's informant was sitting inside of the police car, with himself and Officer Walker. He testified that he had actually talked with the informant, because the informant was inside of the police car with them. (Transc., p. 26). Officer O'Donnell testified that even though the informant had given him more detailed description of Curtis Smith and the white cargo van "with" ladders on top. And that Curtis Smith was driving around selling heroin out of the van by phone order, he still did not take this information to a Magistrate Judge, for a search and seizure warrant for Curtis Smith, even after Officer Walker had told him, that the informant said Curtis would meet them in "20-minutes." (Transc., pp. 27-28).

6. Officer O'Donnell testified that the phone call between Curtis Smith and the informant was not recorded. Officer O'Donnell testified that he was not "privy" to the phone call conversation between the informant and Curtis Smith. Because he wasn't there, and he had no knowldge about anything that was said on the phone between the informant and Curtis Smith. (Transc., p. 28).

7. Officer O'Donnell that he drove the police car to the alley of 79th between Ashland and Marshfield to meet up with the informant. He testified he drove the police car and relocated to the alley on 81st and ashland, with the informant, and Officer Walker inside of the police car with him.(Transc., p. 29). Officer O'Donnell testified that he had dropped the informant and Officer Walker off in the alley on 81st and Ashland, and he stayed in the police car while Officer Walker and the informant started walking to the pay phone at the gas station on the corner of 81st and Ashland. (Transc., p. 30). Officer O'Donnell testified that when Officer Walker and the informant came back to the alley, they did not get back in the police car. He testified that Officer Walker told him about the phone call, then the informant and Officer Walker started walking Northbound, towards 80th and Ashland. (Transc., p. 31)

8. Testimony of Officer O'Donnell regarding the officers Formulated Plan scheme. Officer O'Donnell testifed that when the informant and Officer Walker was in the alley at 81st and Ashland, they had "formulated a plan", and his part in the plan was: (1) to watch for the cargo van; and (2) to watch for the "informant" and "Officer Walker" to make the controlled buy, with Curtis Smith.(Transc., p. 32). And, further, Officer O'Donnell testified that "he was anticipating Curtis Smith to arrive, driving a white van "with" ladders on top, because that is the information that he had received from the same informant prior to January 30, 2005. (Transc., p. 32).

9. Officer O'Donnell, changed his testimony, and he admitted, that he never saw Denise Evans standing at the passenger's side door window of the Chevolet cargo van: Officer O'Donnell admitted that he never saw Curtis Smith making a leaning motion towards the passenger's side door of the van.(Transc., pp. 78-79). Officer O'Donnell admitted that he never saw Denise Evans, standing at the passenger's side door window of the van, because it was very difficult for him to see. because he was "cutting across 79th and Ashland doing his U-Turn." (Transc., p 80).

Further, Officer O'Donnell admitted that he did not see anything being exchanged, nor, nothing being given by the Petitioner Curtis Smith to Denise Evans, because it was very difficult for him to see anything.(Transc., p. 81).

10. Officer O'Donnell, changed his testimony, and he admitted the fact that he never cut across the median on 79th and Ashland doing his alleged U-Turn, in this case. Officer O'Donnell admitted he never cut across the median to make a U-Turn, because of the Raised Yellow Striped Concrete Sidewalk with its attached Raised Flower Planter in the median had prevented him from making or doing such a U-Turn. Officer O'Donnell testimony as follows: question by defense counsel Mr. Finn. [Mr. Finn]: Q. And when you cut across this area here, is there anything that's in between the Eastside and the Westside of Ashland? A. Not at the point that I cross. Q. But there's a median, correct? A. Not where I crossed at. Q. Is there a -- I'm not suggesting that it's raised, but is there paint that indicates -- A. Yes. (Transc., p. 56). Q. Okay. And there's nothing that's raised where you crossed, correct? A. No. Q. But there's Yellow Stripes? A. I think there is marking on the ground, on the street. Q. Okay. And maybe we can use the Government's Exhibit Map. Officer O'Donnell could you indicate -- could you tell the jury what this is right here? A. Oh, boy. That looks like that might be one of those raised planters. (Transc., p. 57). Q. Okay. And this portion right here where this planter is, is this raised? A. A little bit, yes. Q. What about this rounded concrete area, is this raised as well? A. Yes. Q. All right. And North of this area, there's an -- there's an identical one there closer to 79th street, isn't there? A. Yes. (Transc., p. 58). Q. I'm tendering

to you what I've labeled as Defendant's Exhibit No. 8 for identification. Do you recognize that? A. Yes. Q. What do you recognize that to be? A. It looks like a diagram that I might have drawn. Q. You don't remember? A. Yeah, it looks like it's -- it looks like a drawing I might have given for the -- when they were questioning me about the case. Q. When you say they, who are you referring to? A. assistance United States attorneys. Q. Okay. And you drew on that diagram? A. Yes. Q. And what did you draw? A. It's a -- it looks like a rough drawing of turning -- making U-Turn in front of a vehicle. (Transc., pp. 84-85).

D. Testimony of Police Officer Corey Walker, proves that the Government lied, and Made False and Misleading Statements about an informant being a mere "Tipster" who was sitting in the back seat of the police car

1. Testimony of Chicago Police Officer, Mr. Corey Walker. Officer Walker testified that himself and his partner Officer O'Donnell was on "routine patrol," on January 30, 2005. Officer Walker testified that he was driving the police car, when he got flagged down by one of his confidential informant on 79th and Ashland. (Transc., p. 96). Officer Walker testified that he instructed the informant to meet him in the alley, on 79th, between Ashland and Marshfield, because he was concerned for the informant's safety. He testified that he didn't want the people on the street to see himself and the informant talking. (Transc., p. 97). Officer Walker testified that he drove the police car to the alley to meet his informant.

Officer Walker testified that the informant told him that Curtis Smith, was driving and selling heroin out of a white cargo van. Officer Walker Testifies that the informant said he can make a phone call to Curtis Smith and order up some narcotics for the officer. (Transc., p. 98). Officer Walker testified that the informant had instructed him to meet him at the pay phone at the gas station at 81st and Ashland. Officer Walker testified that he drove the police car, and relocated car to alley at 81st and Ashland. He testified that once in the alley, he had left Officer O'Donnell in the car while he walked to the gas station, to meet the informant at the pay phone. (Transc., p. 99).

2. Officer Walker testified that he could only hear the informant side of the phone conversation, and he heard the informant tell the person on the other end of the phone that he wanted to purchase a $10 bag of heroin. And once the call was finished, that himself and the informant was on foot, and they walked back to the police car together. Officer Walker testified that they did not get back into the police car. He testified that he told Officer O'Donnell exactly what happened and that the informant told him, that Curtis Smith was going to meet them at 80th and Ashland in "20" minutes. (Transc., p. 100).

3. Testimony of Officer Walker, regarding the officers' alleged Formulated Plan scheme. Officer Walker testified that his part in the plan was:(1) Officer Walker testified that he was going to use informant to make a phone call to Curtis Smith; (2) that Officer Walker was going to use Contingency Funds and Marked Money to purchase a $10 bag of heroin from Curtis Smith; and (3) he was bring the informant with him to set up Curtis Smith, because the informant had a relationship with Curtis Smith, and the informant knew Curtis Smith already. (Transc., p. 103).

van. Officer Walker testified that himself and his informant were on foot when Curtis Smith, parked his Chevolet cargo van. Officer Walker testified that the informant and himself, "initially walked Southbound on Ashland, and then they walked at a diagonal Southeast bound across Ashland, headed towards the van. (Transc., p. 139). Officer Walker testified that himself and this informant was standing on the sidewalk on the Westside of the street on Ashland, when he first saw Denise Evans, and she was already standing at the passenger's side door window before he could cross the street. (Transc., p. 140). The Prosecutor, Ms. Mecklenburg, objected to that line of questioning, by defense counsel Mr. Finn. Because Mr. Finn's questions clearly show, that "if" there were an alleged informant involved in this case, then the informant was walking with Officer Walker in the street, before Officer Walker told the informant ["to go away"] because he was now going to use Denise Evans to establish probale casue to arrest Curtis Smith. id., The defense counsel, Mr. Finn's questions as follows:

[Mr. Finn]: Q. At what -- where were you exactly when you first saw Denise Evans? A. I was on the street on the Westside. Q. Were you on the street or on the sidewalk? A. I was on the sidewalk about to enter into the street. Q. And as you're on the sidewalk, she's probably what, 20 feet, 30 feet behind the van? Or what was your estimate there? A. When I actually looked back and saw her, she was pretty close to the van. I saw her walking behind it. Then before I could cross, she was at the passenger's side window. Q. Okay. Then before you could cross the street, she was already at the passenger's window. She stopped walking. A. Yes. Q. And then you started to cross the street? A. Yes, sir. Q. Why did you cross the street at that point? Ms. Mecklenburg: Objection, your Honor. This has been gone over. Asked and answered. The Court: Overruled. [Officer Walker]: A. Why did I cross the street? To place Denise Evans under arrest because it was a drug transaction in front of me.(Transc., p. 140).

8. Testimony of Officer Walker, regarding him being present in the Processing Room when the Petitioner Curtis Smith had allegedly made an oral confession about finding the gun in a wall

Officer Walker testified that he was present in the Processing Room at the police station when Officer O'Donnell was questioning Curtis Smith. Officer Walker testified that he overheard Curtis Smith tell Officer O'Donnell that he found the gun in a wall. (Transc., pp. 116-117).

9. Testimony of Officer O'Donnell, proves that Officer Walker had lied and gave false testimony about being present in the Processing Room when Curtis Smith made an oral statement: Officer O'Donnell did not Mirandize Curtis Smith

Officer O'Donnell testified that his partner Officer Walker was not in the Processing Room with him and Curtis Smith. Further, Officer O'Donnell testified that while he was questioning Curtis Smith "there was nobody else in there with us." (Transc., p. 73). Officer O'Donnell admitted that he did not give Miranda - warning to Curtis Smith. Testimony of Officer O'Donnell as follows:

[Officer O'Donnell]: A. I do not remember if I had Mirandized him. I am not required as a police officer to Mirandize anyboby and I don't remember if I even did that, because I don't -- getting in to depth questioning him.(Transc., p. 67).

4. Testimony of Officer Walker, established the fact, that the officers did not have sufficient probable cause to place the Petitoner Curtis Smith under arrest, by blocking and intercepting the path of Curtis Smith, while he was driving his Chevolet cargo van

Officer Walker testified that he had blocked the path of Curtis Smith, in order to jog, and catch up with Denise Evans. He testified that the only reason he needed to catch and retain Denise Evans was to see "if" she had actually bought narcotics from Curtis Smith. Officer Walker testified that he had detained Denise Evans about 20 feet away from Curtis Smith Chevolet van.(Transc., p. 105-106). Officer Walker testified that when he got back to the Chevolet van, Officer O'Donnell was just standing by the driver's side door of the van waiting for him to get back with Denise Evans. (Transc., p. 109). Officer Walker testified that Officer O'Donnell did not place the Petitioner Curtis Smith in custody, only, after he told Officer O'Donnell that "it was a positive, he had found and recovered the narcotics from Denise Evans. Thereafter, Officer O'Donnell, had went back to the chevolet van, and found a white towel, but he didn't open it up. Officer O'Donnell just told him that he found gun-drugs.(Transc., p. 110).

NOTICE: Officer Walker, changed his testimony, and he admitted that himself found the drugs and gun. Officer Walker testified that he found drugs. (Transc., p. 114). Officer Walker testified that himself found the gun. (Transc., p. 115).

5. (Transcript, p. 129), on Cross-examination, Officer Walker testified that Officer O'Donnell was not driving the police car. he testified that his partner Officer O'Donnell was sitting in the passenger's seat. Officer Walker testified that he did not let the informant get in the police car. And, further, Officer Walker testifed that he had only talked with the informant throught the driver's side door window. Ms. Mecklenburg: Objection, your Honor. The Court: Sustained. (Transc., p. 130).

6. Testimony of Officer Walker, regarding the "Profile Match" of the Petitioner Curtis Smith's Chevolet cargo van.

Officer Walker testified that his informant is a criminal and the informant had been arrested before. (Transc., p. 136). Officer Walker testified that this informant had made a phone call to Curtis Smith, and this informant had told him a number of details, that identified the heroin seller, as a male Black named Curt, and that Curt drives a white van. Officer Walker testified that even though he had all this information that identified the seller, he still did not take this information and the informant in front of a Magistrate Judge to get a search and seizure warrant for the Petitioner Curtis Smith. (Transc., p. 137). Further, Officer Walker testified that this informant told him that Curtis Smith drivers "just a white van "no" ladders on top." Transc., p. 138).

7. Testimony of Officer Walker proves by the proponderance of the evidence that the informant played a prominent role in this instant case. And this alleged confidential informant was not sitting in the back seat of the police car as the government had falsely stated at trial and at Motion to produce informant, and at the suppression of evidence hearing

Officer Walker testified that when he saw the Petitioner Curtis Smith van pulled up and parked, himself and this informant started walking towards the

E. Testimony of Officer O'Donnell, regarding the "Tainted" Evidence and Recovered Property Section's Inventoried Drugs and Gun Evidence. The Prosecution told the Courts that the Drugs and Gun was found by Officer O'Donnell. But, Officer O'Donnell testified that the Drugs and the Gun was found by his partner, Officer Walker.

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1. Testimony of Chicago Police Department Officer. Mr. Michael O'Donnell. Officer O'Donnell testified on cross-examination, that himself had found the $139. And he testified that the Drugs and gun was found by Officer Walker. At trial, Officer O'Donnell's testimony as follows:

Officer O'Donnell testified on direct-examination that the drugs, $139 and gun was found by himself. (Transc., pp. 37-38). On cross-examination, Officer O'Donnell admitted that the drugs and gun was found by Officer Walker. [Mr. Finn]: Q. Thank you. Officer, I have handed you what I have marked as Defendant's Exhibit No. 2 for identification. And do you recognize that? A. Yes. Q. What do you recognize that to be? A. It's a police inventory for the narcotics. Q. And where it says down at the lower portion, found by, what does it say? A. Officer Walker. (Transc., p. 39). Q. Officer, I have handed you what I have marked as Defendant's Exhibit No. 3 for identication. Do you recognize it? A. Yes. Q. What do you recognize it to be? A. An inventory slip for the handgun. Q. And in the portion where it describes who found that property, what does it say? A. Officer Walker. (Transc., p. 40).

Q. And I'd like you to read what it says for the description of that property. A. Firearm, High Standard Manufacture Corporation, derringer serial number No. 2479759, .22 caliber hand pistol, 3 - inch barrel in a blue steel finish. Q. So you never really saw this serial number that was on the gun that was found in the van? A. I believe probably Officer Walker wrote it down and gave it to me. Q. I'm confused. A. Because he writes the weapon description down and then gives it to me. (Transc., pp. 41-42). Q. Did you take special precaution to ensure that the serial numbers you read off this beat-up weapon were correct? A. You will have to ask Officer Walker because he did the inventory on it. Q. When Officer Walker relayed the serial numbers to you, did you then look at the weapon to see if those were the same numbers you saw? A. I don't -- I probably didn't, because I wouldn't double check -- what my partner would be doing anyway. (Transc., p. 42).

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2. Testimony of Officer Walker, regarding the "Tainted" inventoried drugs and gun evidence. Officer Walker testified that the Drugs and Gun was found by himself

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Testimony of Chicago Police Officer. Mr. Corey Walker. Officer Walker testified on direct examination, that the 16 bags of narcotics that were taken out of Curtis Smith's Chevolet cargo van, was found by himself. (Transc., p. 114). Officer Walker testified that for the Derringer, serial number No. 2479759, .22 caliber hand pistol, was found by himself. (Transc., p. 115). Officer Walker testified that, for the money $139, was found by his partner Officer O'Donnell. (Transc., p. 115).

3. Officer Walker, changed his testimony regarding the drugs and gun evidence that he had found. Officer Walker had changed his story, and said he had made a mistake. Officer Walker testified that the drugs and gun evidence was found by his partner Officer O'Donnell

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Officer Walker testimony on direct-examination as follows, questions by the Prosecutor, Ms. Mecklenburg:

[Ms. Mecklenburg]: Q. And can you tell us who wrote in for each of the Evidence and Recovered Property Section ("ERPS") inventories slip? A. For the second ERPS inventory slip, which are the 16 bags plus the one clear plastic bag, I put on here it was found by me. But that is a mistake. It was found by Officer O'Donnell. (Transc., p. 114). And for the third ERPS inventory slip for the gun. I put on here the gun was found by me, but that is a mistake. It was found by Officer O'Donnell. (Transc., p. 115).

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4. Testimony of Officer Walker admitted that he had made a Third mistake while he was filing the description of the narcotics he had found

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On cross-examination, Officer Walker admitted he had made a third mistake when he was filing the description of the narcotics found in connection with Curtis Smith's arrest. Officer Walker testified that he failed to write an accurate depiction of bags use to package the heroin. (Transc., p. 119). Officer Walker testified that he wrote [15 - knotted] bags on the Evidence and Recovered Property Section's inventory label. but, that was another mistake he had made, because he should have wrote [15 - Ziploc] bags on the ERPS inventory label instead. (Transc., pp. 120-121).

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5. Testimony of Officer Walker regarding the protective pat-down search of felicia Jackson and Steve Sanford the passengers in the Chevolet cargo van. The Government stated, that the officer let the passengers go because the officer did not find any drugs or substantial sums of money or contraband on them

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On cross-examination, Officer Walker admitted that he was not looking for drugs or money when he did his protective pat-down search on Felicia Jackson and Steve Sanford. Officer Walker testified that he did not know if Felicia Jackson or Steve Sanford had any drugs or money on them, because he weren't looking for drugs or money on either of them. Officer Walker testimony as follows, question by defense counsel, Mr. finn:

[Mr. Finn]: Q. Now counsel for the government asked you if you found any drugs on either Felicia Jackson or Steve Sanford, and you said, no, correct? A. Correct. Q. But you weren't looking for drugs when you did your protective pat-down, were you? A. No. Q. And you weren't -- that's not the purpose for a protective pat-down, is it? A. No, it's not. Q. Okay. So you don't know if Steve Sanford or Felicia Jackson had drugs or money on them, do you? A. No. (Transc., pp. 126-127).

6. Testimony of Officer Walker regarding himself being present in the Processing Room, when Curtis Smith had allegedly made an Oral Statement of finding the gun in a hole in the wall. But, Officer O'Donnell testified that Officer Walker was not in the Processing Room

Officer Walker testified that he was present in the Processing Room, at the police station when he overheard the Petitioner Curtis Smith make an Oral statement, saying he found the gun in a hole in the wall. (Transc., p. 116). But, however, Officer O'Donnell testified on cross-examination that Officer Walker was not present in the Processing Room when Curtis Smith made an alleged Oral statement. Officer O'Donnell testimony as follows, questions by defense counsel Mr. Finn:

[Mr. Finn]: Q. All right. When you read Curtis Smith his Miranda, who was present? A. I was the only one in the Processing Room, at the 6th District. Q. Okay. You don't recall if Officer Walker was there? A. If you're asking me if Officer Walker was in the Processing Room, I don't think so. (Transc., p. 73).

F. Testimony of Lieutenant Richard Cap, regarding the order he received from an "Unknown person" on the phone, to find the gun in the weapon vault and destroy it. The Government told the Courts, that the gun was inadventently destroyed by a mistake

Testimony of Chicago Police Officer. Lieutenant. Mr. Richard Cap. Lieutenant Cap testified on direct-examination, that in the year of 2006, he had received a telephone call from an ["Unknown person"]. And the person on the other end of the Phone, had ordered him to check the weapon vault, and see, whether the gun recovered from the arrest of petitioner Curtis Smith was still actually in the weapon vault. (Transc., p. 162). Lieutenant Cap testified that he told the person on the other end of the phone that the gun was still in the weapon vault.

Lieutenant Cap also testified that after he had finished his phone call with the Unknown person, thereafter, he ordered an officer working under his supervision to research the status of the State of Illinois' charges that were pending against the Petitioner Curtis Smith. Lieutenant Cap - testified that the officer under his supervision and himself had discovered the status of the case against Curtis Smith had been "Nolle Prosequi'd. And based upon there research, that gun was marked for destruction. (Transc., p. 163). Lieutenant Cap, testified that on March 29, 2007, he put the chain of custody seized gun in the furnace and destroyed it. (Trans., p. 165).

On cross-examination, Lieutenant Cap testified that, due to inadvertent, he had marked the gun for destruction by a mistake. Lieutenant Cap testimony as follows, questions by defense counsel:

[Mr. Finn]: Q. Okay. You said that -- it sound like there is a lot of paperwork involved in this process, which is a good thing, I think. Don't you? A. Oh, yes, very much so. Q. Because you don't want to destroy a gun that's supposed to be used in evidence in court, do you? A. Well, unfortunately I made a mistake this time and it got by me. And I have to admit that it was -- it was a mistake. It should have been held. I was revamping the way that thing were done. And unfortunately I missed that -- I missed the part where they Nolle Prosequi'd the case. (Transc., p. 167).

G. Testimony of the Government's Key-eyewitness, Alvin Green (Forensic Evidence Technican), regarding fingerprints and the condition of the gun. The Government told the Court, at the Motion for a New Trial Hearing, that Alvin Green had seen and verified serial number on the gun

Testimony of Chicago Police Officer. Mr. Alvin Green. Officer Green testified that he don't recall if there was any rust on the gun. (Transc., pp.179-187). Officer Green testified that he did not find any fingerprints on the gun. The gun was clean. (Transc., pp. 188-190). There is no evidence at trial, that Alvin Green testified that he had seen, and or, verified any serial number being on the gun when he examined the gun.

H. Testimony of the Government's Key-Expert witness, Rosa Lopez (Forensic Chemistry Specializing in the Analysis of Controlled Substances). The Government told the Court, that the heroin bag found on Denise Evans was packaged the same way, as the heroin bags found in Curtis Smith's van

Testimony of Illinois State Police Officer. Ms. Rosa Lopez. Officer Lopez testified that Denise Evans one bag of heroin, was not packaged up the same way and the weight of heroin in Denise Evans's one bag was different from the weight found in each of the heroin bags found in connection with the arrest of Curtis Smith. Officer Lopez testified that Denise Evans's one bag of heroin, was packaged up at a weight of 0.10 grams. (Transc., p. 201). Officer Lopez testified that the 15 baggies of heroin found in connection with the arrest of Curtis Smith, weighed 0.15 grams a piece. And, further, Officer Lopez testified that in each of those individual baggies, they weighed more than the one bag that came from Denise Evans. (Transc., p. 202).

I. The Government rested its case, and the Petitioner's ineffective Trial Counsel Mr. Finn, refused to file a Motion for a Judgment of Acquittal, and or, a Motion for a Directed Verdict or a Direct Finding

Government having rested its case, defense counsel, Mr. Finn had refused to file a motion for a Directed Verdict or a Directed Finding, or a Judgment of Acquittal. After the Government had call its last witness and rested the trial proceedings went as follows:

[The Court]: You may be seated.
[Mr. Sussman]: Hopefully they learned something they didn't learn in school last week, right?
[The Court]: Government having rested. Defense?
[Mr. Finn]: Ordinarily, Judge, I would -- well, I'm not going to make a motion for a directed verdict or a directed finding. I'd rather just proceed with my case in chief.
[The Court]: Okay. Are you prepared to call witnesses?
[Mr. Finn]: Yes, we have one witness. Curtis Smith. (Transc., p. 240).

J. PETITIONER'S TESTIMONY REGARDING HIS WARRANTLESS DE FACTO ARREST

1. Curtis Smith testimony regarding his being Indicted in June of 1994 of possession and unlawful use of a firearm (".38 handgun") and sexual abuse. Petitioner testimony regarding his prior criminal convictions on March 7, 1996 of sexual abuse and unlawful possession of a firearm

Testimony of Petitioner Curtis Smith. Mr. Curtis Smith testified that in 1994 his first company went out of business, because in 1994 he was framed by his ex girlfriend and her dauther, on charges of sexual abuse. Petitioner testified that in June of 1994, he had been indicted of unlawful use of a firearm, in connection with his arrest ofthe sexual abuse charge. Petitioner testified that he was convicted in 1996, of sexual abuse and unlawful use of a firearm.(Transc., p. 244). Petitioner Curtis Smith testified that he had got out of prison in 1997. And, that he had recevied two years probation, and that he had to register as a sex offender for ten-years, as well. (Transc., p. 245).

2. Testimony of Curtis Smith regarding the "Antique 1895 Gun," that Steve Sanford had found in a secret compartment in the wall

Petitioner Curtis Smith testified that Steve Sanford had found an old and rusted out "Antique" handgun. Curtis Smith testified that he thought the gun was manufactured in the year of 1895, because of the close proximity to where the gun was found, there was an "antique - beer - bottle" with the year of 1895 stamped on its ceramic cap. Curtis Smith testified that Steve Sanford had found the gun in a secret compartment in the wall in a place behind, where the built-in wall China cabinet had once been. Petitioner Curtis Smith testified himself and Steve Sanford had been working, rehabbing a building that was built in the 1800's. And during the job Steve Sanford had found an old antique 1895 rusty out trigger handgun in the wall behind the China cabinet. (Transc., p. 249).

3. Testimony of Curtis Smith regarding the facts that due to an accident in his Chevolet cargo van, two months earlier. The passenger's side door could not be open, and the passenger's side door window could not be let down. So a drug transaction with Denise Evans never even happened

Curtis Smith testified he was involved in an accident in his Chevolet van on November 27, 2004, just two months prior to his arrest on January 30, 2005. He testified that the passengers's side door could not be opened up to allow felicia Jackson and Steve Sanford to exited the van through the passenger's side door, as Officer Walker had claimed they did. Petitioner Curtis Smith testified that the passenger's side door window could not be let down, because due to the accident on that side of the van, the passenger's side door window handle was broken off of the door. Curtis Smith testified that a drug transaction between himself and Denise Evans never even happened throught the passenger's side door window. (Transc., p. 250). And, further, Petitioner Curtis Smith testified, that the passenger's side door couldn't be opened-up, because due to the accident, right there by the Quarter Panel and the Wheel Well, the passenger door was hit and bent-up in such a way it could not be open.(Transc., p. 252).

4. Testimony of Petitioner Curtis Smith regarding the fact that Denise Evans was actually his Third passenger. Denise Evans was actually inside of the Chevolet cargo van, with the Petitioner on January 30, 2005

a. Curtis Smith testified that Felicia Jackson and Denise Evans were both known prostitutes and they both were riding with him in Chevolet van. Curtis Smith testified between 8:00., and 8:30 p.m., himself and Steve Sanford was at the gas station on the corner on the Westside of the street at 81st and Ashland. (Transc., p. 249). Curtis Smith testified that he went inside of the gas station to pay for gas and play the lottery. And once he came out from the inside of the gas station and walking back to his van at the pumps. He saw Felicia Jackson sitting on Steve Sanford's lap, on the passenger's side of the Chevolet van. (Transc., p. 254). Petitioner Curtis Smith testified that once he had finished gassing up his van, then he saw Denise Evans walking towards him. Denise Evans told him she was cold, and her prostitution business had been slow on that day. Curtis Smith testified that Denise Evans had asked him to give her a ride up to the Blockbusters Video Store (located at 7931 South Ashland), because she was going in the store to steal some CD's. (Transc., p. 255).

b. Petitioner Curtis Smith testified that once he had parked the van, himself and his passengers had started to wipe the steam off of the steamed-up van windows. Because the Heater Core had just busted and it steamed up the windows of the van. Curtis Smith says while he was wiping the steam off of the window, he had notice the unmarked police car that Officer Walker was driving. The car parked on the Westside of the street, with its lights turned on. The police car was parked about 150 feet away from his Chevolet cargo van. (Transc., p. 251). Curtis Smith testified that once he and his passengers wiped clean all the steam off of the windows, that is when Denise Evans got out of his van, and she started walking northbound towards the Blockbuster Video Store. He testified that he had parked his van, about 30 feet away from the Blockbuster Store. (Transc., p. 256). Curtis Smith testifed after Denise Evans had exited the van, he began to drive away. And this is when he saw Officer Walker driving the unmarked police car over and on top of the raised concrete sidewalk part of the attached raised concrete flower planters in the median in the middle of Ashland Avenue. Curtis Smith testified that Officer Walker drove the police car "head-on" in his direction, in front of his Chevolet van, and intercepted and blocked the path of his van, by parking the police car in a 45 - degree diagonal angle in front of the Chevolet cargo van. Curtis Smith testifed that he saw Officer Walker take off his seat belt jump out of the driver's side door of the police car and started chasing Denise Evans. (Transc., p. 256).

5. Curtis Smith testified, that he saw Officer O'Donnell unbuckle seatbelt and get out of the passenger's side door of the police car. The Government told the Courts that Officer O'Donnell was driving the police car and blocked and intercepted the path of Curtis Smith's Chevolet cargo van

Curtis Smith testifed that Officer O'Donnell exited the police car from the passenger's side door, and walked to the front passenger's side fender of the police car. Then Officer O'Donnell had pointed his gun at the head of Curtis Smith. (Transc., p. 256). Curtis Smith testified that while

Officer O'Donnell was aiming the gun at his head, Officer O'Donnell had shouted "driver, turn off the engine," and "everybody, put your hands on the dash-board, so I can see them!" Curtis Smith testified that once himself, Felicia Jackson and Steve Sanford had complied withthe order. Then, Officer O'Donnell had immediately ran to the driver's side door of the Chevolet cargo van door, and opened-up the door and reach in the van, and grabbed Curtis Smith by the back of the neck and snatched him out of the van door. And, placed handcuffs on him immediately. (Transc., p. 257)

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6. Testimony of Curtis Smith regarding the officer Probable Cause to Arrest him. Officer O'Donnell's reason for arresting Curtis Smith was because he suspected Curtis Smith was having sex with prostitute Denise Evans in the van, because the van's windows was steamed up

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Petitioner Curtis Smith testified that after Officer O'Donnell had snatched him out of the van, he had asked Officer O'Donnell, what probable cause did they have to block the path of his van, then arrested him immediately? Officer O'Donnell stated, that he had observed Curtis Smith and his passengers wiping the steam off the steamed up windows, and he ran Curtis Smith's license plates numbers and found out that Curtis Smith was a registered sex offender. Curtis Smith testified that Officer O'Donnell, stated, that it's a crime for a sex offender to be having sex with prostitutes in his van on the street.(Transc., p. 264). Curtis Smith testified Officer O'Donnell had ordered Felicia Jackson and Steve Sanford to crawl over to the driver's side seat and exist the van from the driver's side door. Curtis Smith testified that Officer O'Donnell had searched both, Felicia Jackson and Steve Sanford. And Officer O'Donnell had found [two nickel ("0.05") grams] bags of heroin, inside of Steve Sanford's pants pocket. Thereafter, Officer O'Donnell told Steve Sanford, that he was going to take him to jail for possession of the [two nickel ("$5.00")] bags of heroin. But if you tell me that Curtis Smith had sex with Denise Evans I will let you go. Steve Sanford and Felicia Jackson said, no, Curtis Smith did not have sex with Denise Evans in the van. Thereafter, Officer O'Donnell said, I'm taking you two to jail for possession and I'm going to let Curtis Smith go. Curtis Smith testified that Steve Sanford started to cry, and in exchange for his freedom Steve Sanford told Officer O'Donnell that he had more nickel bags of heroin and a rusty out trigger gun in his toolbag in the rear cargo portion of Curtis Smith's Chevolet van. Curtis Smith testified that Officer O'Donnell had taken $559 from him, but, the Evidence and Recovered Property Section's inventory slip show only $139 was found on Curtis Smith. Curtis Smith testified that he was framed and robbed by Officer O'Donnell. (Transc., pp. 266-303).

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7. Curtis Smith testified that the only reasons why the officers had Blocked and intercepted the path of his Chevolet cargo van, in the first instance, was because they had seen him open the door and let a known prostitute ("Denise Evans") get out of his van, and the windows of the van was steamed up, and it was at 9:30, 10:00 o'clock p.m., on a Sunday night parked outside of the Blockbuster Video Store on Ashland Avenue. The officers had arrested Curtis Smith because, they had believed that Curtis Smith had been having sex with prostitutes in his Chevolet cargo van. (Transc., p. 264).

8. Testimony of Curtis Smith regarding Steve Sanford's deathbed confession

Petitioner Curtis Smith testified that he got a deathbed confession from Steve Sanford, because he knew Sanford was dying and that Sanford would have been a key-eyewitness for the defense. Because those were Steve Sanford's drugs and gun. Curtis Smith testified that Steve Sanford stated, that he had 17 nickel bags of heroin, and that included the two bags that Officer O'Donnell had found in his pants pockets. And, each individual bag of heroin's packaged up weight was 0.05 grams. (Transc., pp. 266-267). Curtis Smith testified that he did not give Officer Walker consent to search his Chevolet cargo van. (Transc., p. 269). Curtis Smith testified that Steve Sanford had opened up the two rear middle doors of the cargo van, and that's where "Officer Walker" got inside of the van, and found the drugs and gun inside of Steve Sanford's toolbag. Curtis Smith testified that he did not give Steve Sanford, nor, Officer Walker, the permission at that point in time to, enter his Chevolet van. (Transc., p. 303). And, further, Curtis Smith testified that Officer Walker was the only officer that got into the Chevolet cargo van, to search it. Curtis Smith testified that Officer O'Donnell never, even enter the Chevolet van, in this instant case. (Transc., pp. 303-304).

9. Petitioner Curtis Smith's trial counsel, Mr. Finn, objected to the Government's use of Fed.R.Evid.P. 404(b); and Fed.R.Evid.P. 609(a)(2) evidence prior to cross-examination

a. [The Court]: Government indicated that they felt, based upon the testimony that has been received from Mr. Smith, that now they felt that they had a right to broach the subject of the earlier conviction that was more than ten years old, based upon the defendant's testimony. Counsel for the defendant objected to that. So I determined we would have a hearing and make a determination before the cross-examination began. (Transc., p. 274).

b. [Mr. Finn]: My objection is based on the -- what I believe is the government's intent to bring forth testimony in evidence of a previous conviction for purposes of impeachment. The conviction is more than ten years old. it is, according to federal rules of evidence, something that would be used under Rule 609 to attack or impeach the defendant's credibility, or any witness's credibility for that matter. The other purpose I believe is for the elicitation of the evidence and testimony is to basically answer this testimony by the defendant that his conviction of his crime that he was alleged of committing and that he was convicted for was not his fault or a conspiracy. And they want to address that issue. And they feel like they have a right to because he opened the door. (Transc., p. 274). As to that reason for bringing that testimony in, I believe that would be considered prior bad act testimony or evidence or character evidence. And, Judge, you have to make a determination when that evidence is brought out, whether or not the probative value of it outweighs the prejudicial effect it will have on the defendant. And my belief is that if the government is allowed to go into that area and elicit testimony of prior bad acts, or bad character, that its going to be highly prejudicial to the defendant, especially the nature of the offense that's involved. And the evidence is on the record on direct testimony, according to the defendant that he did -- he was convicted of this crime, He actually gave factual basis for his convictions. (Transc., p. 275).

10. The Court, erred in denying Counsel for the defendant's Objection to the Government's use of Rule 404(b) evidence under Fed.R.Evid.P. 609(a)(2). The Court, abused its discretion by not weighing the prejudicial effect that the defendant's prior convictions of possession and unlawful use of a firearm (".38 Pistol "), and sexual abuse, was going to be highly prejudicial to the defendant. The Court erred in its determination that there is nothing similar between the Petitioner's instant federal § 922(g)(1) possession of a firearm and his State of Illinois possession and unlawful use of a firearm prior conviction.

[The Court]: The Court also finds that the nature of the act, there is nothing similar between the two acts. The charges that are now pending are not at all similar to these charges which he was allegedly convicted of. And so to bring forth evidence of that conviction certainly has no bearing upon whether or not the defendant did this act because he did a dissimilar act at some point in the past. (Transc., p. 279). So that taking into account that the defendant himself raised the prior bad act and testified to it, he also testified that in effect what happened in this case, that the officers again for some kind of improper motivation arrested him, charged him with this crime, just like what happened before when he was charged of that sexual crime, I think the government has a right to rebut that evidence. And they can rebut that evidence by producing witnesses regarding it, or they can rebut it by asking him questions to test his credibility further with regards to those two incidences. And, therefore, I think based upon the law and based upon what has taking place in this Court, to restrict the government from inquiring into that area the defendant has used it in the manner which I have described would be improper. So I think, as I did say before, I was going to, based upon my understanding of the law, suggest that the government would not be allowed to use this evidence absent something happening in the case that opened the door. I think that something has happened. And, therefore, the government is not going to be restricted from cross-examining him. (Transc., p. 280).

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11. Cross-Examination: by Mr. Sussman, regarding Defendant's prior arrest in June of, 1994, of sexual abuse. The Government is guilty of Prosecutorial Misconduct. The Government told the jury the complete details regarding defendant's prior conviction of sexual abuse. The Government, even introduced the age of the ex-girlfriend's daughter, in which was highly prejudicial to the defendant

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At trial, Mr. Sussman, told the Judge and the jury that he had made "a very bland stipulation, that the defendant had a prior criminal conviction." (Transc., p. 366). But, however, on cross-examination, Mr. Sussman's Stipulations were not very bland at all. Does Prosecutorial Misconduct occur when Prosecutor use cumulative Rule. 404(b) evidence of defendant's prior conviction? Mr. Sussman, questioned the defendant as follows:

[Mr. Sussman]: Q. Mr. Smith, I want to start with your earlier portion of your testimony. You described for us how one of your businesses went out of business because what you told us was an ex-girlfriend set up a plot to say that if you didn't get her money, she was going to have her daughter say that you sexually offended her. That's what you testified to, is that correct, sir? (Transc., pp. 282-283). You were living in the residence with your girlfriend

and her ten-year old daughter and her other daughter, correct? A. True. Q. And, sir, at about 11:00 o'clock at night, you went to the ten-year old daughter's room to tell her you were going to kiss her good night. But instead, you grabbed her and you forced her up against the wall and rubbed your crotch in her, isn't that correct, sir? A. False. I did time for that, sir. I mean, what that got to do with this case here? (Transc., p. 284). Q. Sir, the truth of the matter is, there was no plot to frame you for a sexual assault. The truth of the matter is, you did sexually assaulted your girlfriend's ten-year old daughter.

That's the truth, correct? A. False, false. Q. Well, sir, do you remember on March the 7th of 1996 appearing in a state court? Do you remember that, sir? A. I remember when I was forced to cop-out ("plea guilty") by Jack Rodgon. Yeah, I remember that very well. (Transc., p. 285).

Mr. Sussman: Your Honor, I move to strike at this point as unresponsive.
The Court: The motion to strike will be allowed.
Mr. Sussman: Q. Sir, in fact, your were convicted. And on March the 7th of 1996, pursuant to your plea, you were convicted of aggravated sexual assault of a minor, correct? A. Yes, sir. (Transc., p. 286).

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12. Cross-Examination: By Mr. Sussman, regarding Defendant's prior arrest in June of 1994, of possession and unlawful use of a firearm (".38 caliber handgun"). Defendant was convicted on March 7, 1996 of this offense. The Government use of defendant's prior conviction of unlawful possession of a firearm, to show the jury that the defendant had a propensity to illegally possess a handgun. Does Prosecutorial Misconduct occur, when the Government use cumulative Rule. 404(b) evidence regarding defendant's prior conviction of possession and unlawful use of a firearm (".38") caliber handgun?

At trial, Mr. Sussman, told the Judge and the jury, that he had made "a very bland stipulation" regarding defendant's prior conviction of unlawful use of a firearm. But, however, on cross-examination, Mr. Sussman's stipulations were not bland at all, regarding defendant's prior conviction of unlawful possession of a .38 caliber. Mr. Sussman's questioned the defendant as follows:

[Mr. Sussman]: Q. Now, let's talk about something else you told us about that evening. You said that then you heard someone at the door that evening, and you grabbed your .38. You remember saying that? A. Oh, yeah, I remember that. Q. Because you kept your .38 nearby, right? A. Because I kept a lot of money. Q. Kept a lot of money, and you need a gun to protect yourself, right, sir? A. I need a gun to protect my house. Q. Right. And you kept that gun loaded, right? A. In my house. Q. Because you were going to shoot someone if you had to, right, sir? That's why you grabbed your gun -- A. -- breaking in my house, yes, sir. I was going to shoot somebody if I didn't know who that was breaking in my house. I think the Constitution say that if someone is breaking in your house and they enter your premises, knocking down your door, you can shoot -- (Transc., p. 292). Q. Well, the fact of the matter is, sir, you knew you did not have the same rights as everyone else and that you did not have a right to have a gun at that point in time isn't that correct, sir? A. I was just trying to use a little mother's wit. Which would I prefer, for somebody to break in my house and kill me because I'm under rules that say I'm not suppose to have it? (Transc., pp. 293-308).

13. Redirect-Examination: By defense counsel, Mr. Finn, regarding an erroneous sexual assault in 1995 that never happened. Curtis Smith was indicted in 1994 of sexual abuse, and not in 1995. Is it a Sixth Amendment violation, under Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984), when defense counsel, Mr. Finn's unprofessional error of asking for a Redict-Examination, that opened the door for the Government on Recross-Examination, to introduce into evidence, additional damning evidence of another prior conviction from 1978?

At trial, after the Government having rested, the Petitioner, Curtis Smith's defense counsel, Mr. Finn, had asked the Court, for permission for Redict-Examination. Mr. Finn, had asked a question using the wrong year of 1995. Mr. Finn, questioned the defendant as follows:

[Mr. Finn]: Q. Curtis, did you sexually assault somebody in 1995? A. In 1995? Q. Yes. A. No, sir. Q. Have you ever sexually assaulted anybody? A. No, I haven't. (Transc., p. 309).

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14. Recross-Examination: By Mr. Sussman, regarding Mr. Finn's erroneous question regarding a sexual assault being committed in the erroneous year of 1995

Q. Mr. Smith, you said you've never sexually assaulted anyone? A. No. Q. Mr. Smith, you sexual assaulted that ten-year old girl, right? A. No, I didn't. Q. Sir, and that's not even the first person you sexually assaulted, is it, Mr. Smith? Mr. Smith, in November of 1978, you raped someone, didn't you sir. A. No. I did not.

Mr. Sussman: Your Honor, the government would offer into evidence a conviction from 1978.

The Court: Again, we will deal with that issue outside.

[Mr. Sussman]: Q. Sir, in fact, you were convicted of raping someone on July 13, 1979, isn't that correct? A. I had a rappie ("co-defendant"). Q. You were convicted of rape and deviate sexual assault, isn't that correct, sir? A. What do that have to do with this case, that was over 20 years ago? (Transc., p. 310).

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15. Ineffective trial counsel, Mr. Finn filed second Objection to the Government's use of Fed.R.Evid.P. 404(b) evidence, after the Prosecutor having rested his Recross-Examination

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The Court: The government had made mention of two certified copies of convictions. Mr. Sussman: That's correct, your Honor. The Court: Any objection to the admission of -- (Transc., p. 312). Mr. Finn: Yes, Judge. Under Rule 609, it's cumulative. He decided -- he's got a choice. He can present the certified copies or he can elicit it through cross and he chose to elicit it through cross. Mr. Sussman: First off, the defendant denied it. Secondly, I don't believe the rules of evidence -- my reading of Rule 803.22 in terms of judgment of a previous conviction, it is admissible. And there is no -- it's admissible to prevent any fact essential to sustain the judgment, not but including -- -- including when offered by the government in criminal prosecution purposes of impeachment. the Court: I think it's an easy issue. The government asked

the question. The defendant denied the convictions. And, therefore, the government is obligated to complete its impeachment by putting forth these certified copies to prove what they alleged in their questioning. Mr. Finn: Well, I think that the witness eventually did say that he was convicted. I don't think he denied it. (Transc., p. 313). Mr. Sussman: I don't think that's what the testimony was. To the extent that the defense wants to stipulate to those two convictions. I am perfectly willing to accept a stipulation in lieu of putting in the actual certified convictions. Just so the record is clear, I do intend to, because I didn't elicit it because I just did not want to elicit his conviction for unlawful use of a weapon by a felon. So I would redact that the sexual assault of a minor conviction. but if the defense wants to offer the stipulation so there is no -- there is no dispute, I will accept the stipulation and not move that into evidence. The Court: Which way you -- Mr. Finn: I am not going to stipulate. I am just going -- my objection is that it's cumulative and it's not proper. The Court: Okay. Then those items will be admitted. (Transc., p. 314). Mr. Sussman: Your Honor, I will -- we will prepare -- I just want the record to be clear. We will prepare the redacted convictions, and we will offer them tomorrow before we begin the closing arguments. (Transc, p. 326).

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16. **The Court erred in its denying Defendant's Motion for a Judgment of Acquittal.**

The Court's decision in denying defendant's motion for a Judgment of Acquittal was contrary to evidence. Was the Court, fair and impartial? If someone is deprived of his right to an impartial tribunal, then, is he denied his constitutional right to due process, regardless of the magnitude of the individual and state interest at stake? The Court's opinion as follows regarding its denying motion for a judgment of acquittal:

> [Mr. Finn]: We are at a motion now. Judge, I'd like to make an oral motion on behalf of the defendant, judgment for acquittal. I mean, I don't have an argument prepared. I believe though that after the evidence that you heard, I think you should acquit the charges.
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> [The Court]: Okay. After listening to the evidence which the Court has heard, the Court finds that there is sufficient evidence for the jury, if they so choose, to return a verdict of guilty as to the charges now pending. And, therefore, I must respectfully deny your request for directed verdict at the close of all the evidence. (Transc., p. 326).

K. **Closing Argument On Behalf Of The Government: By Ms. Mecklenburg. Does Prosecutorial Misconduct occur, when prosecutor makes false and misleading statements? Is it Prosecutorial Misconduct, when prosecutor raised issues in its closing of the defendant's prior conviction of unlawful use of a .38 caliber handgun, in order to show the jury, that defendant has a propensity to posses a gun in violation of 18 U.S.C. § 922(g)(1), "because defendant had a .38 before." Government's statements as follows:**

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1. [Ms. Mecklenburg]: So let's talk about the officers' testimony first and why it makes sense. Michael O'Donnell and Corey Walker, they are tactical officers who told you that their mission every night is to take drugs off the street. They told you they have made thousands of drugs arrests. (Transc., pp.333-338).

2. And here is the reason that you know that the defendant confessed the night of his arrest. Because it's exactly the kind of statement that you heard the defendant make on the stand. You saw the defendant, what he does when he's confronted with wrong doing. He minimizes it. He makes excuses. He told you that he pled guilty to the sexual assault of the ten-year old girl because he had a bad lawyer. he didn't want to go away for 30 years. When he was confronted with his use of heroin, he said, oh, I only used it twice.(Transc., pp. 339-340).

3. So let's turn to Count 2, which is the charge of knowingly and intentionally possessing a controlled substance with intent to distribute. We know the defendant intended to distribute the cocaine and heroin for two reasons. First, the quantity and the packaging of the drugs. And second, the officers actually saw the defendant distributing the drugs. And the officers testified that they saw exactly that, the defendant transferred the drugs to Denise Evans, she had the dime bag in her hand, just like the ones that the defendant had on hand. (Transc., pp. 342-343).

4. And finally, let's talk about Count 3, which charges the defendant with using or carrying the gun in furtherance of or in relation to the crime of drugs. And here the defendant himself gave us some insight into why the gun was used. He told you that he had a prior gun, a .38. And he knew that he wasn't supposed to have a gun. But he said he kept the gun anyway because he thought it was necessary to protect his valuables. he said to Mr. Sussman, what would you do if you were in my shoes? I had to protect my valuables. (Transc., p. 344). And that is exactly why the defendant had the gun here, to protect his valuables. It wasn't lying in the back of the van, in Steve Sanford's toolbag, or waiting to be appraised. It was lying in the defendant's lap with his drugs, where he could reach it, with easy access to it, to protect his valuables, his drugs and his money. (Transc., p. 344).

L. Closing Argument On Behalf Of the Defendant, Curtis Smith: By Mr. Finn. Does defense counsel, become constitutional ineffective, by raising issue of defendant's prior conviction of sexual abuse? Defense counsel, Mr. Finn's statements in his closing argument as follows:

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1. [Mr. Finn]: Ladies and gentlemen, Curtis Smith lied about his criminal convictions. Maybe he lied because he did not think that you would judge him fairly if you believed that he was a sex offender. It was wrong for him to lie, and there is no excuse for it. Some of you may be disgusted or repulsed by Curtis Smith because he is a sex offender. (Transc., p. 345). You may think that for cases such as those he should pay and pay until the day he dies. If that's your opinion, keep it to yourself because it's an improper basis to find him guilty for this case. (Transc., p. 346). Curtis Smith is not an articulate speaker. For over two months now, he has been on administrative segregation, which means every day, 23 hours, complete isolation, one hour exercise, no interaction with others. His communication skills have lost whatever luster they may have had. Curtis Smith knew that the government let the gun be destroyed long before this case went to trial. I told him that as part of the discovery process. He could have very easily come into court and tell you that there never was a gun. It would have made the government's case a lot more difficuilt to prove, you know, to prove him guilty beyond a reasonable doubt because they didn't have the actual gun. I mean, they're not -- it's difficult as it is. You don't have the actual gun. You can't see the serial number, and

you can't confirm that it came from out side of the State of Illinios. Had he come in here and said, there never was a gun, then they'd have to prove the existence of it as well. (Transc., p. 347).

2. Finn - closing regarding Officer Walker testimony about seeing paper money being exchanged for drugs

a. Do you really believe that Officer Walker saw green paper money being exchanged for a small item? It was 9:00 p.m., in January. It was dark. Officer Walker said he saw two people on the passenger side seat of the van. He was unable to make out the gender of these people. He couldn't tell if they were both females or male. Yet he was, according to him, able to see paper money. Does that make sense? (Transc., pp. 348-349). The traffic and pedestrian traffic was not as light as Officer O'Donnell would have you believe. It was 9:00 p.m. It was a Sunday night. But we're not talking about Mayberry. We're talking about Chicago. And we're talking about Gresham in Chicago. We're talking about Ashland Avenue, a major north-south street. But even if you believe Officer O'Donnell and his ghost town scenario, wouldn't that make him, officer Walker and this alleged informant stand out even more? I mean, Officer Walker's testimony is that he's basically right across the street with an informant. At one point he's in the middle of Ashland withthe informant. But through this whole time they say Curtis Smith is always looking the other way. (Transc., p. 350). And if Officer O'Donnell's ghost town scenario was true, why did they have to meet in an alley off to the side and secretly out of sight so that the informant wasn't seen with them? If Officer Walker really was at the gas station at 81st and Ashland when he said he was, he probably would have saw Curtis Smith there gassing up, or putting air in his tires or buying his lottery tickets. But they were never there. They never made a phone call. There was no informant. Police officers do use informants, and informants are real. They're useful to tac officers. They're useful to narcotics officers in making drug busts. And I'm sure Officer Walker has his informants. We don't contest the existence or use of drug informants. We contest the use of one in this case. (Transc., p. 351).

b. And by the way, isn't it nice to have an informant? You can say that this informant gave you all kinds of information about the defendant, make no record of it, and not produce him in court. As a matter of fact, if you want, once you make an arrest, you can pick whatever identifying information about the defendant you want and say you had it beforehand, that you got it from your confidential informant. Now, why would Officer O'Donnell and Officer Walker do something like that? It makes the defendant look guilty before he even takes the stand. And he never gets a chance, any defendant, Curtis Smith especially, to cross-examine this alleged informant.

Mr. Sussman: I object at this point in time, your Honor.

The Court: Sustained. (Transc., p. 352).

[Mr. Finn]: If you think about it, having an informant is kind of like having an oral confession. You put on your uniform. You come into court and you say trust me, folks. I'm a police officer. I was there. I know what he said. That's what he said. What about proof, officer? Well, trust me. He said what I said he said. We've got too many drug cases here to take written confessions. I don't have time for that. It's in my report. Read my report. It's in there. He is guilty. All right? We got information about him from our confidential informant.

Trust me. We got the bad guy. the case is close. Does that -- is that how -- is that good enough? How about showing me the informant?

Mr. Sussman: I object, your Honor. Defense has subpoena power.

The Court: This is argument. The objection will be overruled.

[Mr. Finn]: How about showing me the gun? Show me the towel. Are those even the right drugs? Officer Walker said there was 15 baggies that were Ziploc -- or that were knotted. He said they were clear plastic, not purple bags. What about the money? How about showing the money? (transc., p. 353)

3. Finn - closing regarding Three Important Contradictions the Officers made between their testimony regarding this alleged Informant

a. There are three important contradictions the officers made between their testimonies regarding this alleged informant. The first one is, Officer O'Donnell testified that the information they had received from their informant was that it was a white cargo van with ladders on top. Every time I said, white cargo van, he would say, with ladders on top. And when I asked Officer Walker about the information he received, I asked him, did the informant tell you it was a white cargo van with ladders on top. No, no ladders, just a white cargo van. (Transc., p. 353). The second thing is that Officer O'Donnell testified that their confidential informant was not a criminal. Officer Walker said he was. (Transc., p. 353). And the third and most important thing out of these three important thing is that Officer O'Donnell said that Officer Walker got this information from his informant on some other day. It wasn't the day of the bust but it wasn't too long ago either. He didn't really know how Officer Walker got the information either. But remember what Officer Walker said? Officer Walker said, they got their information from their informant that same day, the day of the arrest. In fact Officer O'Donnell was in the car when officer Walker 's informant flagged him down. Officer Walker had a conversation with this informant. (Transc., p. 354).

b. And do you remember what he said about who was driving the car? Officer Walker said he was driving the car. He was driving the car when the confidential informant flagged him down. He rolled down the window and talked to him, and Officer O'Donnell was sitting right next to him. (Transc., p. 354). Now these three contra dictions are important because they all have to do with the confidential informant and the information the officers recieved, because the officers stories don't match. Both of these cops' stories don't match. And when you make stuff up, it's hard to make two people stories match, come up with the same stories. The fact that they couldn't keep their stories straight supports our contention that there was no confidential informant in this case. (Transc., p. 354).

4. Finn - closing regarding Officer O'Donnell not being interested in an arrested drug offender's drug supplier, when the offender has given him that information

Counsel, by the way, brought up Officer O'Donnell's testimony about not being interested in the offender's supplier when giving that information. You heard the government's expert's ("Agent Popovits") testimony. You know, you judge Officer O'Donnell's credibility on that issue.(Transc., p. 355)

5. Finn - closing regarding the tainted drugs and gun ERPS inventory evidence

You heard both Officers Walker and O'Donnell testify that it was important for them to fill out their reports accurately and correctly. They testified that they were trained on how to fill out their forms. They testified that an important part of their job is to gather and inventory evidence. They both testified

that Officer O'Donnell found the gun and O'Donnell found the drugs. But the inventory copy said that Officer Walker found the gun and Officer Walker found the drugs. (Transc., p. 355). Now, he tried to rehabilitate himself and he said that it was his fault -- I'm speaking of Officer Walker -- that he made a mistake. It was a computer mistake, if you believe that. And is that acceptable?

The inventory copy also said 15 clear plastic knotted bags, which all contain a white powdery substance. But that was a mistake too, according to Officer walker. It should have said Ziploc bags instead of knotted bags, he said. However, Officer Walker got the other inventory copy right for Denise Evans. He described that bag as a Ziploc bag and not a knotted bag. So he was not using the wrong description throughout all of his inventory copies. He knew the distinction between the types of bags used. But what does that tell you about the government's drug evidence? (Transc., p. 356).

6. Finn - closing regarding the facts that the Officers did not get a signed Affidavit from the alleged informant. And the Officers did not take the information given by informant to a Magistrate Judge to get a search and seizure warrant, as to Curtis Smith and the van, prior to de facto arrest

These officers did not get an affidavit from the informant. Officers Walker and O'Donnell did not take the information to a Magistrate Judge to get a warrant or permission to record a phone call. They did not record the alleged phone call that set up this controlled buy. they didn't use an officer safety overhear device. they did not use a surveilling officer or surveilling officer team or anyone else other than Officer O'Donnell. They did not use an enforcement officer or enforcement officers other than Officer O'Donnell. (Transc., p. 357).

Well, that's not the way it works. And you heard the way it works from the governemnt's drug expert ("Agent Popovits"). Doing thing by the book means following procedures. It sometimes means you got to jump through hoops. You got to fill out some forms. (Transc., p. 358).

7. Finn - closing regarding Lieutenant Richard Cap testimony, and how the destruction of the gun, was prejudicial to the Petitioner. And the destruction of the gun made it impossible for Curtis Smith to prove that the gun did not have a serial number on it

There is more procedures and precautions and paperwork. You heard from the Lieutenant Cap. He testified and told you all the precedures and the steps he had to take and go through so that he could melt the most important piece of evidence in this case. Lieutenant Cap was a nice map. He basically stood up and he took a bullet for the government. He took one for the team. He said, oh, shucks, I made a mistake. I melted the gun because we have too many guns, and I shouldn't have done that. (Transc., p. 358). If the government wanted the gun, they could have subpoenaed the gun. They do it all the time. Lieutenant Cap himself said that he received subpoenas from the U.S. Attorney's Office.

And if he receives a subpoena, he complies with it. He even takes phone calls, he said. Well, in this case there was phone call, and there was no subpoena. The gun was never test-fired to see if it actually even worked. The defendant never had an opportunity to have his own fingerprint analyst look at the gun, to see if he could find fingerprints. (Transc., p. 358). It really doesn't matter what the gun looked like. What matter is if it came from outside of the State of Illinois because it isn't here. You can't look at the

serial number, the number that confirmed that it came from out of state. We don't know that Officer Walker didn't make another one of his inventory blunders when he wrote down the serial number. And remember, he testified of making at least three of those. (Transc., p. 359).

8. Finn - closing regarding Officer O'Donnell testimony that Curtis Smith told him that he had a long-time heroin habit

Officer O'Donnell testified that Curtis Smith told him that he had a long-time heroin habit. Officer O'Donnell testified that Curtis Smith told him that he had a heroin supplier and was willing to give up his name. None of this was recorded by Officer O'Donnell, by the way. He didn't think it was important enough to include it in his report, according to himself. He just wanted to throw it out there, throw it out there at trial for the jury to consider. (Transc., p. 360). By the way, how could an admission of guilt as to selling heroin not be important enough to include in an arrest report on a drug bust for selling heroin? That's a direct -- he said that the defendant said, I sell heroin, and that wasn't important enough to put in his arrest report, on a heroin bust? but what did he put -- What did he think was important to put in his report? Well, He put in his report, we were doing a teardown, gut job, on a house. That gets into his report, but I sell heroin doesn't. Curtis Smith never told Officer O'Donnell I sell heroin. He never told him he had a heroin habit. I guarantee if he did it would be in his arrest report.(Transc., p. 360).

9. Finn - closing regarding the fact that the heroin bag found on Denise Evans was not packaged the same as the heroin bags found inside of Steve Sanford's toolbag, located in the rear portion of the van.

The weight of the drugs is something you need to consider. The weight of the alleged dime bags from the 15 found in Steve Sanford's toolbag, does not match the weight of the drug found on Denise Evans. Her bag, her one bag, was .1 grams, according to the government's lab technician ("Rosa Lopez"). From eight items taken from Steve Sanford's toolbag, the average weight was .15 grams per bag. (Transc., p. 360). Now, that doesn't sound initially like a big difference at first. But .1 grams is two thirds of .15 grams. It's significantly smaller. It's a third smaller. This shows that Denise Evans got her bag of heroin from a different seller, because it was a much different weight than the bags that Steve Sanford had. (Transc., p. 361).

10. Finn - closing regarding the cumulative mistakes made by the Chicago Police Officers Lieutenant Cap, Michael O'Donnell and Corey Walker

And with respect to the evidence that was inventoried by Officer Walker and Officer O'Donnell, the government would have you believe that Officer Walker made a mistake when he wrote that he and not Officer O'Donnell found the gun in the van, and that Officer Walker made another mistake when he wrote that he and not Officer O'Donnell found the drugs in the van, and that Officer Walker did not make a mistake when he wrote down the serial number of the gun, and that Lieutenant Cap made a mistake when he melted the gun. (Transc., p. 362).

11. Finn - closing, regarding the fact, that it was his fault by getting evidence admitted of Curtis Smith's July 13, 1979 prior conviction

Mr. Finn bring up issue of the Petitioner Curtis Smith being a sex offender. [Mr. Finn]: Watching Mr. Sussman cross-examine Curtis Smith was a sight to see for sure. It was hard to watch. It was impossible to look away. The stuff about Curtis Smith's criminal convictions for sex offenses was like watching a train wreck, for me anyways. It was like watching the train wreck of a pretty nice-looking train that I help build. It was painfully obvious that Curtis Smith did not want to admit he was a sex offender. He hemmed, he hawed, he lied.(Transc., p. 363). At on point he sat there silently, refusing to answer questions.

And this went on for the majority of Mr. Sussman's cross. But when Mr. Sussman finally got to the facts in this case, do you remember what happened? It was like Mr. Sussman had a square peg and was trying to force it into a round hole. He pushed down, and Curtis Smith said, false. He didn't hem. He didn't ham. He didn't haw. Mr. Sussman would turn the square peg a little bit, push again, and Curtis Smith said, false. In the end Mr. Sussman was successful in showing that Curtis Smith is unlikeable. Mr. Sussman did a very good job of getting into evidence -- getting evidence admitted of Curtis Smith's prior criminal convictions. He even got the very last one from 1979 in. And that was my fault because I asked a question I shouldn't have asked. (Transc., p. 364). Mr. Sussman did not get Curtis Smith to change his facts about what happened on January 30, 2005. Curtis Smith never changed his story about that. He stuck to it. The government prove that Curtis Smith lied about being a sex offender. (Transc., p. 364).

M. Rebuttal argument On Behalf of the Government:By Mr. Sussman. Was there Prosecutorial Deceit committed during Mr. Sussman's closing? Does Prosecutorial Misconduct occur, when Prosecutor raise issue in its closing regarding defendant's prior conviction of sexual abuse?

1. [Mr. Sussman]: Ladies and gentlemen, don't misunderstand myself or Ms. Mecklenburg. Please do not for a second think that you should convict Curtis Smith of carrying a gun or dealing drugs because he is a sex offender. (Transc., p. 365). Remember for a minute, I stood up before you in opening statement. I didn't say word one about this man's criminal past, other than to say you would hear a stipulation, a very bland stipulation, that he had a prior criminal conviction.

It was Curtis Smith that brought up his sex offender past and lied about it, not the government. That was Mr. Smith. And when his lawyer, very admirably, comes to you and says, you know, don't hold it against Mr. Smith that that second conviction came out. That was my fault. I asked a bad question. Remember the question and answer? The question he asked is: Mr. Smith, have you ever sexually assaulted anyone? And remember Mr. Smith's answer? No. The reason that second conviction came out was not because -- because Mr. Finn asked a bad question. It was because Mr. Smith lied. It was because he took the oath and he lied to you. (Transc., p. 366). That's why the second -- that's -- Mr. Smith could very easily have answered that question truthfully and said, well, sir, I have before. But in that particular case of the girl I am going to still maintain I didn't do it. But that wasn't what he said. He continued to lie. And we are at a point at this trial where there is no dispute that this man took the stand under oath and lied repeatedly to you, to his honor, to everyone in this courtroom. (Transc., p. 366).

2. Mr. Sussman - rebuttal. Does Prosecutorial Misconduct occur, when the Prosecutor had repeatedly told the jury,"the Defendant has lied to you?"

And not only that. What he told you in his testimony is that, hey, this isn't the first time he's lied. And that if he needs to and it fits his interest he will lie. It doesn't matter what oath he takes, because what Curtis Smith is thinking about is one thing: Curtis Smith. But now admitting to you he's lied under oath, he and his lawyer have the audacity to come before you and say, the real liars, the real perjurers, in this case are the police officers.(Transc., p. 366).

3. Sussman - rebuttal. Mr. Sussman admitted that the evidence show that Denise Evans was a Prostitute, and she was sitting in Curtis Smith's Chevolet cargo van.

Ask yourself. We know the reason why Mr. Smith would lie. But ask yourself, what's the reason why these police officers would lie? I mean, here they've just come across the van. And there is no dispute there were a gun -- we may dispute where the gun and where the drugs were found in the van. but there is no dispute. there is a gun. There are drugs in the van. There are two prostitutes and a heroin addict at 9:00, 10:00 o'clock on a Sunday night parked outside a Blockbuster on Ashland. (Transc., p. 367). So I mean, it doesn't take a rocket scientist, even if you were to forget about the informant stuff altogether, to know something is up there. The officers find a gun and drugs. No dispute about that. (Transc., p. 368).

4. Sussman - rebuttal, regarding the reasons why the Government refused to to produce the Confidential Informant before and during trial. Is it a Brady, violation when the Government intentionally refuses to show evidence that a confidential informant even exist, in a case?

Let's talk for a second about the informant and the -- they say there -- well, there were other people there at the scene. Why aren't they here? Let me be perfectly clear. The government has the burden of proof in this case. The defense does not have to call any witnesses or put on any case. Now, here they chose to do that, which is also their right. But, ladies and gentlemen, the defense has subpoena power and they have the power to bring in witnesses just the same way the government does. And you had better believe that if the defense believe that there was anything significant that any other witnesses had to give to you about what happened that night -- Mr. Finn: Objection. Mr. Sussman: -- They'd bring them in here. Mr. Finn: Objection. The Court: Objection will be overruled. Mr. Sussman: Again, the government bears the burden of proof. But that does not mean that they can -- they have power too. It is not just in the government's power. (Transc., p. 371). And let me ask you for a second, what difference would the informant have made here. They just would have said, oh, you are lying. Quite frankly, you can take the confidential informant straight out of this case because it really doesn't matter what the informant has to say.

The government is not basing his case that Curtis Smith was dealing drugs that day on what the informant said. The informant was just explaining to you why the officers were sitting out there at 79th and 80th and Ashland on a Sunday night looking for something. That's the only basis for the informant. (Transc., p. 371). We -- the government is not suggesting to you that you should convict

this man of dealing drugs or possessing drugs because of some unknown person, who's not in this courtroom, say so. (Transc., p. 372).

5. Sussman - rebuttal regarding Non-Disclosure of the chain of custody seized gun. And the Inadvertent destruction of the gun, and its serial number

Now, there was also -- on one hand Mr. Finn told you, well, you know, Curtis smith could have come in, made a big deal about the missing gun. But he decided not to. Then he tells you, well, we're never know. We're missing this important piece of evidence, the gun. Ask yourselves, what does -- What does that gun matter at this point in time? There is no dispute that there was a gun in that car. There is no dispute that if you look at the drawing Mr. Smith.

Well, the serial number. What about the serial number? Remember all the testimony. The officers wrote down the serial number at the scene. (Transc., p. 372).

6. Sussman - rebuttal, regarding Officers from Internal Affairs, having came and double checked the gun and the serial number on the gun. Is it Prosecutorial Misconduct, when the government make a statement of what procedures officers from Internal Affairs did to check the gun, when the government did not call any witnesses from Internal Affairs to testify?

Remember Officer Cap's testimony to you though about the serial number and how that works. He logs in that gun and checks the serial number. They go through the process before that gun is destroyed. Officer -- Officers from Internal Affairs come and they double check that gun and that serial number that's in the box we destroyed. Again, before the gun is actually destroyed, the serial number is checked. The serial number on that gun, ladies and gentlemen, you heard testimony that gun was check numerous times. I would never stand before you and say, people don't make mistakes. People do make mistakes. But here you have the officers telling you different -- different officers having nothing to do with each other, including Internal Affairs, checking that gun over and over and over again. (Transc., p. 373).

7. Sussman - rebuttal, regarding Mr. Sussman bringing up the Defendant's prior conviction of sexual abuse, at the conclusion of his Rebuttal

Ladies and gentlemen, I am going to come back to one thing: The purpose of you hearing about those acts by the defendant, or us even talking about it here today, is because what it tells you about is the defendant's credibility. The way he handle it is the way he's handled everything in this case: Deny, deny, deny, blame it on somebody else. There is no question this man lied to you. He lied to you, at least he acknowledges, several times from the witness stand. And after hearing the evidence and evaluating the credibility of the witnesses, I think, ladies and gentlemen, you'll know that he lied to you about more than just the prior convictions. So I would urge you to focus on the evidence of the case, not on the defendant's background. I will urge you to convict the defendant not because he is a sex offender but because he is guilty of the crimes in this case. (Transc., pp. 374-375).

II. REASONS FOR GRANTING THE PETITION

Argument

A. This is an Extraordinary Case, Under the All Writ Act: 28 U.S.C. § 1651(a). That includes [both] a Writ of Mandamus and a Writ of Prohibition. See, In re: Gee, 941 F.3d 153, 157-158 (5th Cir. 2019).

Under the All Writs Act, federal courts "may issue all writs necessary or appropriate in aid of their respective{2019 U.S. App. LEXIS 5} jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). That includes the writ of mandamus requested here. *See, e.g., Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004). But because mandamus "is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue." *Ibid.* (quotation omitted). The Supreme Court has explained:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.*Id.* at 380-81 (alterations in original) (quotations omitted).

"These hurdles, however demanding, are not insuperable." *Id.* at 381. They simply reserve the writ "for really extraordinary causes." *Id.* at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947)). And in extraordinary cases, mandamus petitions "serve as useful 'safety valve[s]' for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (alteration in original).

"The{2019 U.S. App. LEXIS 6} clearest traditional office of mandamus and prohibition has been to control jurisdictional excesses, whether the lower court has acted without power or has refused to act when it had no power to refuse." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3933.1 (3d ed.) [hereinafter Wright & Miller]. That was true at common law. *See* 3 William Blackstone, Commentaries *112 (explaining the writ of prohibition issued to "any inferior court, commanding them to cease" a case that did "not belong to that jurisdiction"). And it's true today.

Because the Court of Appeals for the Seventh Circuit have adopted divergent interpretations of Calderon v. Thompson, 523 U.S. 538, 550, 558, 118 S. Ct. 1489, 140 L.Ed.2d 728 (1998)(mandate "shall not be recalled except to prevent injustice"). (Id., at APPENDIX D, p.10). There is evidence in the record that show, on May 4, 2009, the Seventh Circuit denied, both of In re: Smith's motion("s") for the court of appeals to withdraw ineffective appellate counsel from his direct appeal case. Because appellate counsel had raised only one ground for relief in his appellate brief. And appellate counsel had ["refused to investigate"] the evidence preserved in the record, or to advance his argumentation regarding "fraud on the court claim." In re: Smith wanted appellate counsel Kister withdrawn from his direct appeal case, because Kister, only raised one claim in his appellate brief, which was United States v. Grimm, 170 F.3d 760 (7th Cir. 1999). Which did not have any merits. (Id. at APPENDIX D., pp.3-4; 7-8). At direct appeal, appellate counsel presented a different-unrelated-not-on-the-record-claim-challenge.

B. Recall is justified in this instance to Prevent Injustice.

The authority to recall a mandate is limited to those situations in which the recall is needed to prevent an injustice. Calderon v. Thompson, 523 U.S. 538, 550, 558 (1998)(Mandate "shall not be recalled except to prevent injustice"). Other courts have concluded in similar circumstances, that these circumstances are a sufficient injustice to order recall of a defective mandate that fails to instruct as to interest, as required by Appellate Rule 37(b). See, e.g., Dunn v. Hovis, 13 F.3d 58, 60 (3d Cir. 1993)(recall appropriate when mandate omitted postjudgment interest); Masinter v. Tenneco Oil Co.,934 F.2d 67,68 (5th Cir.1991)(mandate recalled to prevent injustice); United States v. DiLapi, 651 F.2d 140, 144 n.2 (2d Cir. 1981).

In the alternative, In re: Smith requests a new trial on the grounds that the jury's verdict is against the **"overwhelming"** weight of the evidence. A new trial on the grounds that a verdict is against the weight of the evidence will only be granted to prevent a miscarriage of justice. See **Dunn v. Hovic**,1 F.3d 1362, 1364 (3d Cir.1993),**modified on other grounds,**13 F.3d 58, 1993 U.S. Dist. LEXIS 18355, 1993 WL 492289 (3d Cir. Nov.26, 1993), cert. denied, 126 L.Ed.2d 608, 114 S. Ct. 650, 62 U.S.L.W. 3409 (U.S. Dec.13, 1993); Klein v. Hollings,992 F.2d 1285, 1290 (3d Cir.1993).

C. Federal Rule of Civil Procedure 50(b) reads, in pertinent part:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the**{1992 U.S. Dist. LEXIS 4}** renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.Fed. R. Civ. P. 50(b). 4

Standard of Review In making a determination under Rule 50(b), a court must "view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner." ***Dunn v. Hovic***, 1992 U.S. App. LEXIS 22749, Slip Opinion, (E.D. Pa, September 18, 1992) (quoting *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992)(internal quotations**{1992 U.S. Dist. LEXIS 5}** omitted)). The court must also "determine whether 'the record contains the minimum quantum of evidence from which a jury might reasonably afford relief.'" *Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743, 745 (3d cir. 1990) (quoting *Smollett v. Skayting Dev. Corp.*, 793 F.2d 547, 548 (3d Cir. 1986)(internal quotations omitted)); *see Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (same); *see also* 5A Moore et al., P 50.07 ("Where there is sufficient conflicting evidence, or insufficient evidence to conclusively establish the movant's case, judgment as a matter of law should not be awarded.") Judgment as a matter of law after the verdict should not be granted unless "the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Dunn*, at 3 (quoting *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980) (internal quotations omitted)), *cert. denied*, 450 U.S. 959 (1981).

Conclusion

For all of the reasons stated, In re: Smith, respectfully requests that this motion be granted.

February 10, 2020

Curtis Lee Smith

Curtis Lee Smith