NO. 20-6875

IN THE

SUPREME COURT OF THE UNITED STATES



JASON PIERCE,

PETITIONER,

VS.

STATE OF GEORGIA,

RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES ~~[illegible]~~ COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

JASON PIERCE
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P.O. BOX 549
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# QUESTION(S) PRESENTED

1 - Did the United States Court of appeals for the Eleventh Circuit err in failing to issue a Certificate of appealability from the denial of the Petition for Writ of habeas Corpus as concerns;

a) The State trial Court's granting of a "Faretta" motion multiple terms out-of-Court which Vacated a Previous order by a different Judge allowing the Petitioner to withdraw his guilty Pleas on Remand from the Georgia Supreme Court while he was represented by Counsel, thus divesting the Court of Jurisdiction and necessarily creating Structural defect in the Criminal Judicial Process Pursuant to this Court's decision in Brecht v. Abrahamson, 507 US 619 (1993), where the only legal Vehicle or mechanism for such an issue would have been a Petition for Writ of habeas Corpus,

and

b) Newly appointed trial Counsel's Complete failure to Conduct any type of a Pretrial investigation in a death Penalty Case where in the converse, Counsel Submitted a "Faretta" motion without Petitioner's Knowledge, maintaining in the motion that the original hearing Judge did not follow "Faretta" Protocol because the Petitioner orally Stated on the record that he was withdrawing his guilty Pleas and did so "Pro-Se" which is contrary to the facts and the record as the Petitioner was represented by Court-appointed Counsel?

## LIST OF PARTIES

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

[ ] 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:

## RELATED CASES

## TABLE OF CONTENTS



## INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

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

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

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[✓] is unpublished.

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

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

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

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

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

The opinion of the ______ court appears at Appendix ______ to the petition and is

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

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 7-22-2020 ______.

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

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10-02-2020 ______, and a copy of the order denying rehearing appears at Appendix C ___.

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

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

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

The date on which the highest state court decided my case was ______. A copy of that decision appears at Appendix ______.

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

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

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment of the United States Constitution - Right to Double Jeopardy Protections.

6th Amendment of the United States Constitution - Right to Assistance of Counsel for criminal defense.

14th Amendment of the United States Constitution - Right to due Process of law.

# TABLE OF AUTHORITIES CITED

| CASES | PAGE NO. |
|---|---|
| Ricketts v. Adamson, 483 US 1 | 15 |
| State v. McCrary, 253 Ga 747 (1985) | 15, 16 |
| State v. Smith, 185 Ga App 694 (1988) | 10, 16, 18 |
| Strickland v. Washington, 466 US 668 (1984) | 21, 23, 24, 27, 28, 30 |
| US v. Cronic, 466 US 648 (1984) | 23 |
| Wiggins v. Smith, 539 US 510 (2003) | 27, 28, 29 |
| Woodson v. North Carolina, 428 US 153 (1976) | 27 |

## STATUTES AND RULES

### UNITED STATES CODE (U.S.C.)

| | |
|---|---|
| 22 U.S.C. § 2254 (d) | 8, 18 |
| 28 U.S.C. § 1291 | 19 |
| 28 U.S.C. § 2241 | 18 |
| 28 U.S.C. § 2253 (c)(2) | 8 |

### OFFICIAL CODE GEORGIA ANNOTATED

| | |
|---|---|
| (O.C.G.A.) SEC. 5-6-34 (12)(b)(c) | 14 |
| (O.C.G.A.) SEC. 15-6-3 (3) | 13, 16 |
| (O.C.G.A.) SEC. 16-1-7 (b) | 15, 16, 17, 18 |
| (O.C.G.A.) SEC. 16-1-8 (b) | 15, 16, 17, 18 |
| O.C.G.A. SEC. 16-1-8 (d)(2) | 15 |
| O.C.G.A. SEC. 17-7-93 (b) | 14 |

# STATEMENT OF CASE

The record will show in the case at bar that on 28 September, 1999 the Petitioner was indicted on two (2) Counts of murder as concerns two (2) Seperate Victims and a litany of other offenses. The State filed its notice of intent to seek the death Penalty. Before this case was indicted, this Court had long since issued its opinion in both Arizona V. Fulminante, 499 US 279 (1991) and Brecht V. Abrahamson, 507 US 619 (1993), as it concerns Constitutional Structural defects and Constitutional trial Court errors in the Constitution of the trial mechanism, which also defy harmless-error analysis standards and requires automatic reversal of the convictions.

With respect to a criminal trial, the federal Constitutional violations which are not Subject to harmless-error analysis include (1) Certain Categories with respect to which the entire Conduct of the trial from beginning to end is affected, namely (a) a total deprivation of the right to counsel at trial, and as in the case Subjudice - Where Counsel filed an extremely untimely motion to vacate a mere four (4) terms outside the original term of Court and a trial Court grants Same, vacating its own order five (5) court terms after the term expired in which the original order was made while being divested of Jurisdiction i.e., abuse of Jurisdiction and abuse of discretion, i.e., structural defects affecting the framework within which the trial Proceedings in order to illegally circumvent a double Jeopardy claim and help the State Save a conviction it was barred from Prosecuting. Subsequently, the Petitioner entered guilty Pleas on the 18th December 2003, to one (1) Count of murder and Several related offenses; In a Second Portion of the guilty Plea, on the 13th January, 2004 the Petitioner Pled to the second murder and remaining offenses for an aggragate Sentence of two (2) consecutive life Sentences without the Possibility of Parole.

The record would then indicate that on 16th April, 2007 the Petitioner filed a motion to vacate Void and Illegal Sentences in the Superior Court of Fulton County, State of Georgia. After Several years of requests for rulings the trial Court issued an order denying the motion. Accordingly, the Petitioner filed his appeal with the Georgia Supreme Court which reversed the trial Court's decision, i.e., the trial court Judge failed to find on the record the aggravating Circumstances required to Sentence the Petititioner to life without Parole. The Sentences without Parole were Vacated only. See Pierce V. State, 289 Ga 893 (2011). On 16th April 2012, a hearing was held in Fulton County Superior Court as concerns the Vacated Sentences; Attorney August Siemon represented the Petitioner at the hearing. Subsequently, the Petitioner withdrew his guilty Pleas as opposed to resentencing which Judge Dempsey granted as an absolute right.

The State, however, objected to the Judge's Order granting withdrawal as to two (2) of the related Counts and sought to reprosecute them seperately. Thus, the State convinced the trial court Judge to Order that allowing Petitioner to withdraw from counts 1-8 and reprosecute Counts 9 + 10, also setting live Counts 1-8 for death Penalty Trial. The record would then indicate that new counsel Jerilyn Bell was appointed to represent Petitioner for a death Penalty trial on Counts 1-8, appearing in the case on 15th October, 2012. Soon after, counsel on 30th November 2012, without consulting with Petitioner first and explaining its merit, filed a motion to vacate the Order granting the withdrawal of the guilty Pleas under the guise that Judge Dempsey failed to conduct a Faretta v. California inquiry. The motion's caption itself is a nullifier and indicates its untimeliness, as it attempts to vacate an Order from 16th April, 2012 in the November 2012 term of court i.e., four (4) terms outside the court term in which the 16th April, 2012 Order was made. O.C.G.A. § 15-6-3(3). A Brecht v. Abrahamson, 507 US 619 (1993) violation in itself. The motion was extremely untimely and without merit, as it was designed to benefit the State, which also had the affect of creating an Arizona v. Fulminante, 499 US 279 (1991) and Brecht, supra, question, i.e., that in accordance with the Sixth and fourteenth Amendments under the constitution of the United States, a defendant is totally deprived of counsel, Gideon v. Wainwright, 372 US 335 (1963) and other similar structural defects affecting the framework within which the trial proceeds as to constitutional deprivations.

On 4 January 2013, newly appointed Judge Kelly Lee Ellerbe granted counsel's untimely and thus illegal "Faretta" motion to vacate the 16th April 2012 Order allowing Petitioner to withdraw his guilty Pleas, without proper jurisdiction. This January 2013 Order vacating its previous 16th April 2012 order is untimely and was made five (5) court terms outside the term of court and the untimely filing essentially divested the trial court's jurisdiction and discretion over the subject-matter. In other words the January 2013 order is a nullity and an abuse of both jurisdiction and discretion as the "Faretta" claim was deemed waived due to its untimeliness. The over all intent and purpose of the "Faretta" motion was specifically designed to illegally and unethically motion the trial court to circumvent a double jeopardy claim that was pending as to counts 1-8 and to help the State save a conviction on same it otherwise was prohibited from prosecuting. Thus, counsel and the trial court used an illegal and extremely untimely motion to vacate an otherwise constitutionally binding Order, which was both filed and granted outside the 16th April 2012 term of court, consequently creating a structural defect error in the trial mechanism and causing a viable Fulminante and Brecht, supras, question for this court. The State did make an earnest attempt to oppose the "Faretta" motion, which questioned the merits as it was baselessly claiming Petitioner was without counsel during the withdrawal of the Pleas, as the State was present and the record belies same. Furthermore, the State requested the trial Judge to have a hearing on the motion to "specifically" inquire as to whether it was Petitioner's desire to file the motion or simply that of counsel. The State also conceded the fact that Petitioner had a right to withdraw and that counsel was present thus counsel's false "Faretta" claim was meritless and waived. The State had stated in its brief objecting to the "Faretta" motion that the death penalty had been withdrawn at the time and that being the case Faretta v. California inquiry did not apply. Essentially the State did not need the defense counsel doing its bidding for it since it fully intended to prosecute Counts 9+10 and then reprosecute Counts 1-8 as a death penalty trial as it did in violation of Petitioner's double jeopardy rights. Lastly, the State requested that all relief be denied and that the trial court proceed in a death penalty prosecution on Counts 1-8, still after it reprosecuted Counts 9+10 from the same Indictment in accordance with the 16th April 2012 Order made by the former Judge. Judge Ellerbe denied all the State's requests in favor of defense counsel and granted the "Faretta" motion that it was divested from due to its extremely untimeliness i.e., filing outside the original term of court by five (5) terms.

After the Petitioner was unsuccessful on direct review in Pierce v. State, S140053 (March 3, 2014 Decided), the Petitioner applied for habeas corpus relief in the Superior Court of Telfair County, State of Georgia, where Petitioner reasserted trial court error concerning its granting an untimely "Faretta" motion to vacate it was otherwise divested from entertaining. The State habeas court denied relief holding that counsel testified that timeliness of the filing does not affect the Judge's jurisdiction or discretion to grant same although this is contrary to state statute. Upon appeal to the Supreme Court of Georgia, Pierce v. State S17H1601 (2017) (unpublished opinion) also denied relief. The record then indicates Petitioner sought habeas corpus relief in the United States District Court for the Northern District of Georgia. The District Court denied relief adopting both the magistrate's and the State Supreme Court's position and further explaining Petitioner is not entitled to relief on the matter of trial court error in granting counsel's untimely motion to vacate Petitioner's withdrawn guilty pleas "because the motion was filed outside the term of court "because that claim does not raise a constitutional violation and is thus not cognizable under § 2254."

The Petitioner then timely appealed to the 11th Circuit Court of Appeals. The 11th Circuit denied relief without an opinion holding only that "Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 USC § 2253 (c)(2)." The 11th Circuit also denied reconsideration holding "... upon review, Pierce's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. See Appendix A attached hereto.

Now on Certiorary, to the Supreme Court of the United States, for purposes of determining whether federal habeas corpus relief must be granted to a Petitioner on ground of a federal constitutional "trial error" that is, and that occured in the

Constitution of the criminal trial mechanism -- Such as a trial court granting an untimely motion to vacate outside the original term of court without proper jurisdiction while the issue was deemed waived and deprivation of the right to counsel in total. Abrahamson, Fulminante, Supras; Gideon v. Wainwright, 372 US 335 (1963). The Petitioner now brings this Petition for writ of certiorari presenting the question to the court as to the constitutional application of Brecht v. Abrahamson in the context of a trial court being divested of jurisdiction to vacate its own order outside the original term of court in which the order was made and in the context of being totally deprived of counsel during the trial process. See P. i of the instant Petition, "Question Presented."

## REASONS FOR GRANTING THE WRIT

As to Petitioner's first ground the Petitioner argues that the trial court granted Counsel's "Faretta" motion outside the term of court during the January-2013 term i.e., in which the 16th April 2012 Order granting withdrawal as the court did not have jurisdiction nor discretion to do so. Thus, the trial court erred constitutionally abusing both jurisdiction and its discretion.

The trial court's January 4, 2013 Order granting counsel's "Faretta" motion to vacate which was filed outside the term of court and necessarily divested itself of having jurisdiction over the subject-matter, i.e. Counsel's motion was extremely late and four (4) terms out of time. Brecht, Fulminante, Supras. The record clearly shows in the case at bar that in Pierce v State, 289 Ga 893 (2011), The GA Supreme Court reversed Counts 1-8 as the trial court failed to find aggravating factors on the record. Subsequently, on 16th April 2012, a hearing on the remand was held before Honorable Alfred Dempsey, Judge, with original trial counsel August Siemon, representing Petitioner. At this juncture, the Petitioner orally withdrew his guilty pleas with the court's response being as follows;

(S.H.R. 998-99)[1];

The Court; "Okay all right. He is asking to withdraw it and this was a negotiated plea so there is nothing I can do... I have to grant the motion," [this a constitutionally tendered order in exercise of Dempsey's discretion]. Further argument was held concerning Counts 9 + 10 which were not affected by the reversal while Siemon continued representing Petitioner as follows;

(S.H.R. 989-12); Mr. Siemon, "... If I could suggest, I think the State might want to consider whether or not they want to pursue, since the case is going to come back as opposed to Mr. Pierce doing an appeal on two (2) of the counts ... If he wins

1 S.H.R. - State Habeas Record

On appeal -- that could affect the whole retrial process. The State may want a day or two to think about it ..."

The record will then indicate that after the hearing Siemon withdrew as attorney of record and Jerilyn Bell was appointed to represent the Petitioner on October 15th, 2012. The record then indicates, that the reasons which are painfully obvious, Bell on 30th November, 2012 filed a, "motion to Vacate the Hon. Judge Dempsey's 16th April, 2012 Order allowing the Withdrawal of Jason Pierce's Guilty Plea", this motion was filed several terms out-of-Court. The gist of the motion was simply put, to return the case back to its original status upon remand from the Georgia Supreme Court, portraying the case as if the withdrawal of the guilty pleas never occurred and then convinced Petitioner to be resentenced on grounds his double jeopardy issue was without merit. As this court can surmise, the case at bar due to the withdrawal of guilty pleas there were several collateral issues created i.e., a double jeopardy claim. Note, once the State convinced the Judge to accept pleas and sentenced Petitioner to 25 years as to Counts 9+10 and place counts 1-8 on a death penalty trial calendar, without a doubt double jeopardy attached pursuant to Menna v. NY, 423 US 61 (1975) and State v. Smith, 185 Ga App 694 (1988). However, the Petitioner's constitutional rights took a "back-seat" to the state's interests. During the State habeas hearing the following took place with Petitioner conducting direct on Bell;
(S.H.R. 11-12).

Q, "Is it true that your main objective in the case, once appointed, was to have Judge Dempsey's order granting withdrawal of the guilty plea vacated?"

A, "That was my first objective, yes,"

Q, "Do you recall filing a document entitled motion to vacate the Honorable Judge Dempsey's April 16th, 2012 Order, allowing the withdrawal of Jason Pierce's guilty plea, on November 30th, 2012?"

A, "Yes, I do."

At this juncture its clear that Bell put the State's interests before that of her own client. The very nature of the motion was prosecutorial and detrimental to Petitioner as it caused severe prejudice and consequences. Now Counsel Bell knew or should have known that the caption of the motion itself clearly indicated that the motion to vacate being filed on November 30th, 2012 in order to vacate the April 16th 2012 Dempsey Order, was out-of-term of court, thus waived and illegal to pursue. As the Petitioner legally and timely withdrew and thus the trial court granted withdrawal as to Counts 1-8 but resentenced Petitioner on Counts 9+10 exercising its discretion at behest of the State during the hearing on April 16th, 2012. If there was a "Faretta" issue both during the hearing or prior to ~~the~~ term's expiration the State had opportunity to bid for itself

Which it freely did i.e., reprosecuted Counts 9+10 and sought death penalty trial on Counts 1-8; Thus, at the close of the term which was the first monday of may 2012, the State waived the issue of "Faretta". The State, however, did not raise "Faretta" on its own behalf as it knew Faretta v. California did not apply and was without merit. In fact, the State actually opposed all relief on the motion and requested a hearing to specifically inquire as to whether it was Petitioner's wishes or simply that of his counsel all conceded in its motion. The State further conceded the fact that Faretta v. California did not apply also because the death penalty had been withdrawn and that Petitioner was represented by counsel. Lastly, the State desired that the trial court adopt the April 16th, 2012 original order and position of the case where Petitioner had been prosecuted under counts 9+10 and sentenced to 25 years and pending a death penalty trial on counts 1-8 NOT THE GRANT OF AN UNTIMELY AND FRADULENT "FARETTA" MOTION. As noted, Bell on November 30th, 2012 filed her "Faretta" motion urging the trial court Judge to illegally "Void" Judge Dempsey's April 16th, 2012 order allowing the Petitioner to withdraw his guilty pleas; This filing was at least four (4) full court terms out of court which necessarily by operation of law, divested the Court's jurisdiction over the subject-matter which for all intent and purposes made the ~~[illegible]~~ January 4th, 2013 court's order granting Bell's "Faretta" motion "Void" as a matter of law. See Cody v. State, 278 Ga 779 and Platt v. State, 200 Ga App 784 (1991). In Cody, supra, the Georgia Supreme Court held that the trial court erred reversibly in granting the State's motion to strike the testimony of a newly discovered witness who had invoked his right against self-incrimination. Because the State failed to move to strike the testimony during the motion for new trial hearing, or in post-hearing briefs, but chose to wait until after the trial court had granted a new trial and issued a scheduling order, the State waived the issue. And although a trial court has authority to set aside a grant of a new trial out of term when proceedings are initiated within the same term, the trial court must still act upon a meritorious reason. Thus, in the case subjudice the same legal precedent must apply, Bell waited until November 30th, 2012 to file "Faretta" i.e., 4 terms later otherwise such would be without precedent. As concerns an out-of-term "defense motion to vacate" in contrast to Cody, Platt, supras, the same legal principles /rules of law must ultimately apply. The record clearly demonstrates that 1) Petitioner withdrew his pleas on April 16th, 2012, during the march-April 2012 term of court; ~~the term expired on the first monday in may leaving only 2 weeks and 4 days or a total of 18 days to file any objections to Dempsey's order before the term expired /closed~~ 2) the trial court granted the State's request to reprosecute counts 9+10 sentencing Petitioner to 25 years and placing counts 1-8 on the death penalty trial calendar, also during the march-April 2012 term, the term expired on the first monday in may leaving only 2 weeks and 4 days or a total of 18 days to file any objections to Dempsey's order before the term expired /closed; 3) counsel was appointed on October 15th, 2012 [3 court terms after expiration of the march-April 2012 term]; 4) Counsel filed her untimely, illegal and waived "Faretta" motion to vacate on

November 30th, 2012 [exactly 4 court terms late]; 5) on January 4th, 2013 [5 court terms later] the trial court erroneously granted the motion to vacate without proper jurisdiction to do so. Its clear that the "Faretta" motion to vacate was not filed during the same march term of court in which the April 16th, 2012 order granting withdrawal of guilty pleas; reprosecution on counts 9+10 and setting counts 1-8 on the death penalty calendar, thus the issue is deemed waived and thus the trial court abused its discretion and its jurisdiction. Bell nor the trial court followed procedure by either filing on time or reconsidering its own order at anytime during the hearing prior to the term's expiration. Hence, "Faretta" did not apply in any way, shape or form, thus any subsequent ruling to the contrary, such as here, would be MOOT AND OF A CERTAINTY WITHOUT PRECEDENT.

Judge Ellerbe's January 4th, 2013 order granting defense counsel's untimely "Faretta" motion to vacate the April 16th, 2012 order allowing petitioner to withdraw, could not alter nor vacate same after expiration of the march-April 2012 term of court which expired the first monday of may 2012. On the contrary, defense counsel's "Faretta" motion vacating the April 16th, 2012 order being filed on November 30th, 2012 i.e., 4 terms too late could not vacate same after expiration of the term. Thus, the trial court's January 4th, 2013 order granting "Faretta" is court error and untimely. (1) Because Bell failed to move to vacate the Dempsey order from April 16, 2012 during the hearing or prior to the term's closure which was may 2012, but filed long after its expiration (i.e., march-April 2012 term) i.e., November 30th, 2012, in which the court issued the April 16th 2012 order granting Petitioner's withdrawal of pleas; accepting guilty pleas and sentencing on counts 9+10 and placing counts 1-8 on the death penalty trial calendar, Bell waived this issue, i.e., "Faretta". (2) Because the trial court granted the "Faretta" motion to vacate which she had been divested of jurisdiction and discretion, the trial court abused its discretion and erred granting the motion to vacate. Brecht, Fulminante, Cody, Platt, supras, As such January 4, 2013 order is both untimely and a nullity or illegal.

The fact of the matter remains that the events taken place after the April 16th, 2012 hearing is a nullity and should be reversed as counsel's untimely "Faretta" motion to vacate as well as the Judge's January 4th, 2013 order granting same are both untimely, illegal and void. With closer scrutiny of both the untimely filing and the court's grant of same combined together compounds the prejudice Petitioner suffered i.e., "Faretta" motion was solely designed to illegally circumvent a via double jeopardy issue that was pending at the time of the hearing, resulting in helping the State save a conviction it was barred from prosecuting as to counts 1-8. In essence the petitioner was deprived of counsel in total.

Gideon, Brecht, Fulminante, Supras. Furthermore, the trial court's error granting same has infected the constitution of the trial mechanism as it abused its jurisdiction and discretion. Brecht, Fulminante, Supras.

Again, generally speaking, the power of the trial court to alter or vacate an order granting a new trial or in this case grant of a guilty plea withdrawal expires at the end of the term in which the order is entered. Thus the "Faretta" motion would have had to have been filed in the March-April 2012 term of court rather than the November-December 2012 term of court i.e., at least 4 terms late. Such circumstances renders the January 4th, 2013 order granting same untimely, null and void and unconstitutional. O.C.G.A. § 15-6-3 (3); The timing of Bell's motion to vacate and thus the trial court's order granting of same is material since the trial court did not have inherent jurisdiction to reconsider the grant of the April 16th, 2012 order allowing Petitioner to withdraw his guilty pleas and, in abusing the exercise of that jurisdiction to vacate its original order which it had been divested from entertaining. Cody, Platt, Brecht, Supras. The trial court only had power of discretion to DISMISS the motion as untimely and had no discretion to so rule otherwise. Humphrey v. State, 299 Ga 197 (2016); Parker v. Leeuwenburg, 300 Ga 789 (2017); Hammond v. State, 292 Ga 237 (2012)(The untimely motion is a "defect that limits the trial court's authority to grant the motion." Lay v. State, 289 Ga 210 (2011). The abuse of discretion and jurisdiction in this case over the matter of "Faretta" gave rise to a clear structural defect error pursuant to Fulminante, Brecht, Supras. Note, once Judge Dempsey made his order which granted the State's wishes to reprosecute Counts 9 & 10 and sentenced Petitioner to 25 years and then setting live counts of 1-8 to a death penalty trial (hence a second prosecution), at this very point placed Petitioner in jeopardy or raised the bar to double jeopardy on counts 1-8. Double jeopardy does not depend upon the result of the trial but the fact of the trial. Green v. US, 355 US 184. Thus, double jeopardy attached during the April 16th, 2012 withdrawal hearing and prior to the expiration of the March-April 2012 court term, which essentially bars any new attempts to vacate or alter by counsel's Bell's November 30th, 2012 "Faretta" motion and the trial court's January 4, 2013 order vacating the Dempsey order.

With respect to the Second Question the Petitioner asserts total deprivation of Counsel Pursuant to Arizona v. Fulminante, 499 US 279 (1991) and Brecht v. Abrahamson, 507 US 619 (1993) and Gideon v. Wainwright; 372 US 335 (1963) in two (2) Key aspects where a Structural defect error ultimately resulted and infecting the entire trial Proceeding as the entire conduct of the trial mechanism from beginning to end is obviously affected by the absence of counsel for Petitioner. In relation to the first instance of total deprivation of counsel - this a death Penalty case, Where newly appointed trial counsel Completely failed to adequately investigate, research and Present a meritorious double Jeopardy claim. O.C.G.A. § 5-6-34(12)(b)(c). The record evidence will show that on 17 October, 2011, the Georgia Supreme court in Pierce v. State 289 Ga 893 (2011), Vacated Petitioner's sentences of life without Parole and remanded the case to the trial court for resentencing. Accordingly, on 16th April, 2012 the trial court (Fulton Superior Court) [during the during the march - April 2012 term of Court] held a resentencing hearing. Prior to resentencing, however, the Petitioner elected to withdraw his guilty Pleas with respect to all ten (10) counts of the Indictment as it was a negotiated Plea deal. In this regard, the trial court Judge ruled as follows to wit: "okay. All right. He is asking to withdraw it, and this was a negotiated Plea so there is nothing I can do... I have to grant the motion." (S.H.T. 998-99). At this Juncture its axiomatic that Petitioner was legally entitled to withdraw the guilty Pleas Prior to resentencing and he was represented by counsel when he did. Kaiser v. State; 285 Ga App 646 (2007); cert. denied (Sept. 24, 2007); O.C.G.A. § 17-7-93(b). It would further appear that the trial court Judge was granting the motion to withdraw as to all ten (10) counts as it was a "negotiated Plea" Package; a contract as it were. Puckett v. US, 556 US 129 (2009) and Clue v. State, 615 SE 2d 800 (2005).

In response to the withdrawal of the guilty Plea and the above-stated ruling or Order, the assistant D.A. Mr. Quinn interjected as follows: "Count 9, he was sentenced to 20 years consecutive. The Supreme Court did not vacate that sentence, therefore, he is still under sentence. He is out of term of court and does not enjoy the right to withdraw that guilty Plea...
(S.H.T. 989-12)... "And then on Count 10, Possession of a firearm by a convicted felon, he was sentenced to five consecutive there as well... So Mr. Pierce is still under sentence for 25 years [on counts 9 and 10]...

The other Counts [1 through 8] the State is Standing here ready for trial."

In lieu of assistant D.A. Quinn's above interjection, the trial Judge modified his earlier ruling by Stating thusly: "One little technicality. I'm going to deny the motion insofar as it relates to counts 9 and 10." With the above stated the Prosecutor essentially split the case in two by standing pat on 9+10 being reprosecuted. In Summation, the trial court Judge's earlier Order granted Petitioner's Withdrawal of his guilty Pleas with respect to all ten (10) counts of the Indictment, whereas, the Judge's subsequent, modified ruling at behest of the State, granted Petitioner's withdrawal of his guilty Pleas only with respect to Counts One (1) through eight (8) of the indictment and resentenced Petitioner on nine (9) and ten (10).

Pursuant to O.C.G.A. § 16-1-7(b); 16-1-8(b); McCannon v. State, 252 Ga 515 (1984); State v. McCrary, 253 Ga 747 (1985) and Menna v. NY, 423 US 61 (1975), the Judge's order automatically raised the bar to double jeopardy as to counts 1-8 of the indictment by virtue of the fact the Judge reversed himself and formed two Prosecutions that arose out of a single transaction in granting the Withdrawal of Petitioner's guilty Pleas for Counts 1-8 of the indictment but resentencing Petitioner to 25 years for counts 9 and 10. In response, Petitioner on 7 August, 2012 filed a double jeopardy motion for Plea in bar due to a breach of Plea agreement by the State. Puckett and Clue, Supras. Compare Ricketts v. Adamson, 483 US 1. Also in lieu of existing case law and tenants of the fifth amendment of the United States Constitution and corresponding Sections of the Georgia Constitution (1983), the Petitioner Shows that counts 9 and 10 would be deemed one Prosecution because the State knew of the existence of all ten (10) counts of the Indictment. Inexplicably, the State opts to reprosecute Petitioner on Counts 9 and 10, Seperately, and Proceed on with Counts One (1) through eight (8) as a Second Prosecution. Such action as enunciated in O.C.G.A. § 16-1-7(b), effectively eliminates the single Prosecution of all known offenses arising out of a single or same transaction. Therefore, any reprosecution or a second Prosecution i.e., whether a second Plea or trial of Petitioner on counts 1-8 must be barred under O.C.G.A. § 16-1-8(b)(1); 16-1-8(d)(2). Nicely v. State, 699 SE2d 774 (2012); and Clue, Supra. Menna, Supra. The facts of this case closely resembles those of McCrary, Supra; where the trial Judge accepted defendant's Plea of guilty and imposed Sentence as well. Thus, there can be no doubt that Petitioner had been duly Placed in jeopardy and Convicted on two (2) offenses to which he had been Sentenced to 25 years, as the acceptance of State's Proffer to Judge was an act tantamount to conviction. Accordingly, a Plea of guilty to an indictment or complaint with its entry on the record and acceptance by the trial Judge constitutes Jeopardy for Purposes of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). The transcript of the April 16, 2012 withdrawal hearing unequivocally reflects that Jeopardy attached at the hearing in this case. Suffice it to say that the case had Progressed to a death Penalty trial with Pre-trial Proceedings on counts 1-8 [hence the October 15th, 2012 appointment of Counsel Jerilyn Bell of the GA Capital Defender office] and that Jeopardy has attached for Purposes of determining whether a "Previous Prosecution" has occured under §§ 16-1-7(b) and 16-1-8(b). State v. Smith, 185 Ga App 694 (1988). The State divided one case into two by severing Counts 9+10 from Counts 1-8, thereby, causing a double Jeopardy claim to arise, that it, the State should be held account to, not Petitioner. McCannon v. State, 315 SE2d 413 (1984); McCrary v. State, 320 SE2d 567 (1984). This case sharply illustrates the consequences of the government's too speedy and overzealousness to reprosecute without running afoul of double Jeopardy as to counts 9+10. And its a perfect example of what the double Jeopardy Clause was created to Prevent: giving the government another bite of the apple. The government and the Judge allowed double Jeopardy to attach even after being forewarned to take a day to consider Prosecuting the Counts in Piece-meal. Green v. US, Supa.

From the April 16th, 2012 withdraw hearing, again the Judge's Order and Sentencing of Petitioner to 25 Years as to counts 9 + 10 had effectively raised the bar to double Jeopardy and barred any further Prosecution on counts 1-8 of the indictment. Menna Supra; Brown v. Ohio, 97 S.Ct. 2221; Smith, Supra. However, no trial or Plea could be held on Counts 1-8, hence Bell's "Faretta" motion to vacate Pursuit i.e., to void, rather to circumvent double Jeopardy at all costs, even illegally and unconstitutionally. This Order that is the crux of the matter had been made during the March-April 2012 Court term and it ended on the first Monday of May 2012. See O.C.G.A. § 15-6-3(3). Once the term of Court expired no moving Party can alter or vacate the April 16th, 2012 Order as the issue would be waived, untimely and the trial court divested of Subject-matter Jurisdiction. See Cody v. State, 278 Ga 779 (2004) and Platt v. State, 200 Ga App 784 (1991). Thus, whenever a trial court is faced with an extremely untimely "Faretta" motion to vacate as in this case, the trial court must DISMISS the motion as untimely; issue being waived and due to lack of Jurisdiction. Hammond v. State, 292 Ga 237 (2012); Humphrey v. State, 299 Ga 197 (2016). Otherwise, in the event a trial court should erroneously grant said motion as it erroneously did in the case subjudice, under these circumstances abuses its discretion and jurisdiction and a manifest injustice results i.e., structural defect error pursuant to Brecht, Fulminante, Sullas, and a reviewing court should reverse.

On October 15th, 2012, new counsel Bell was appointed to represent the case at trial for counts 1-8 in a death penalty trial. This appointment only occured 3 1/2 court terms after expiration of the march-April 2012 term had expired. The record then reflects that new counsel was well aware that counts 1-8 were pending a death penalty trial while counts 9+10 stood as convictions, hence her appointment to the case. Counsel also adopted Petitioner's then pending double jeopardy - plea in bar motion as it concerned a second trial on counts 1-8, because as the case stood Petitioner faced two (2) seperate cases i.e., one pending while the other as convicted and sentenced to 25 years which all stemmed from a single transaction. Counsel was clearly aware of the Dempsey order granting withdrawal as to counts 1-8 but resentencing Petitioner to 25 years on counts 9+10 at the State's proffering during the march-April 2012 term of court. Put another way, Judge Dempsey accepted the State's demand to reprosecute counts 9+10, imposed a 25 year sentence, and set counts 1-8 on the death penalty trial calendar. However, there can be no doubt that Petitioner has been duly convicted of two offenses to which he pled guilty and the State prosecuted, as the acceptance of such by the Judge was an act tantamount to conviction. Accordingly, a plea of guilty and sentencing on an indictment with its entry on the record, and acceptance by the trial Judge constitutes Jeopardy for purposes of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). The transcript of the April 16th, 2012 withdrawal hearing unequivocally reflects that jeopardy attached in this case and at that hearing. Suffice it to say that the case has progressed to a death penalty trial and that jeopardy has attached for purposes of determining whether a "previous prosecution" has occured under O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). No matter what the State stood to benefit from Petitioner being duly convicted on counts 9+10 while facing a death penalty trial on counts 1-8 simultaneously, all at the expense of Petitioner being seriously placed at a disadvantage. Its just unconstitutional for Petitioner or anyone else to be under conviction of two counts and facing trial of death on other remaining counts arising from the same transaction or part of the same indictment, despite the unusualness of the circumstances found in this case.

The burden was on the State to Properly draw the 9+10 Counts and Prosecute them Simultaneously with the 1-8 Counts. O.C.G.A. § 16-1-7(b). Clearly all Counts were Known to the district Attorney at the time of the first Prosecution. They were within the Jurisdiction of a Single Court. They arose out of the same Conduct or transaction. Thus, they come within the Provisions of O.C.G.A. § 16-1-7(b). Further, the Second Prosecution i.e., Counts 1-8 are Constitutionally barred by O.C.G.A. § 16-1-8(b)(1)... The Second Prosecution for [a crime] which should have been brought in the first Prosecution because O.C.G.A. § 16-1-7(b) requires it. McCannon, Smith, Supras. The April 16th, 2012 Dempsey Order i.e., acceptance of Pleas or acceptance of the State's reprosecution on counts 9+10, its Sentencing, and submitting Counts 1-8 to a death Penalty trial - RAISED THE BAR TO DOUBLE JEOPARDY. Mensa; Brown; McCannon, Smith, Supras. See also Green, Supra.

Counsel in this regard failed to investigate and present a viable double Jeopardy argument to the trial court. Rather than Pursue and Vigerously Challenge a Second Prosecution, the Petitioner was essentially left without counsel as she Pursued an untimely and thus illegal filing of a "Faretta" motion to Vacate. Counsel Knew or should have Known the "Faretta" motion was extremely untimely and therefore a nullity by statute; would be highly Prejudicial and Prosecutorial to Petitioner; that it would ultimately and unethically circumvent double Jeopardy; and that it would aid the State by saving a conviction it was Constitutionally barred from Prosecuting; also it would aid the State to both gain a strategic advantage over Petitioner and gain a second bite of the apple. Counsel should have but completely failed to seek Federal Habeas Corpus relief under § 2241 which is available to State Pretrial defendants to Challenge Petitioner's custody on the basis that it was in Violation of the US Constitution, as Petitioner was a Pretrial detainee at the time i.e., being under both conviction on counts 9+10 while simultaneously facing a death Penalty trial on counts 1-8 which ultimately stemmed from the same transaction. A hybred situation. This remedy is the exclusive federal remedy for State Pretrial defendants because the well-known remedy for State Prisoners under § 2254 is only available for Prisoners "in custody Pursuant to the Judgment of a State court." § 2254 (d). Under double Jeopardy clause of the fifth Amendment to the U.S. Constitution ~~rights of Petitioner nor did~~ (applicable to the States via the fourteenth Amendment), the government is Prohibited from subjecting a Person to trial twice for the same crime. Crist v. Bretz, 437 US 28 (1978). Counsel Bell did absolutely nothing to protect Petitioner's double jeopardy rights nor did she seek finality of the jeopardy issue prior to proceeding on filing her "Faretta" motion or proceeding to trial in the case. Of a certainty, she had no legal right nor merit to pursue an untimely and illegal "Faretta" motion to vacate. Counsel in this very instance was absent and ineffective. Gideon v. Wainwright; Fulminante, Brecht, Supras.

Alternatively, counsel should have pursuant to and in accordance with the ABA guidelines; Patterson v. State, 248 Ga 875 (1982); and Abney v. US., 431 US 651 (1977) (holding, the U.S. Supreme Court held that the denial of a plea of double jeopardy is an appealable order under 28 USC §1291 "which grants the federal courts of appeals jurisdiction to review 'all final decisions of the district courts,' both civil and criminal."), sought relief or ruling on the merits of the adopted plea in bar motion first and then in the event of denial sought appellate review prior to proceeding on a "Faretta" i.e., which she did not have legal right to pursue, as perfectly stated in Patterson, Supra, "the rights conferred on a criminally accused by the double jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were post-poned until after conviction and sentence. To be sure the double jeopardy clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on the appeal following final judgment... However, [it]... protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense... Obviously, [this aspect] of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; ... [If] a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." Counsel in the case at bar did not seek appellate review and finality of Petitioner's double jeopardy claim [in order to discover its merits] prior to pursuing an illegal and untimely filed "Faretta" motion to vacate, hence, a total deprivation of counsel resulted. Fulminante, Brecht, Gideon, Supras. Neither did counsel pursue an appeal of the court's denial of Petitioner's double jeopardy claim after resentencing because the intent of her "Faretta" motion was to again unethically and illegally undermine same which it ultimately did by forcing an illegal waiver, and a second prosecution of Petitioner which double jeopardy should have protected him from.

The record further shows that once counsel appeared in the case long after the march-April 2012 court term expired i.e., 3 terms later - October 15, 2012, she recognized Petitioner was both under conviction for counts 9+10 and sentenced to 25 years and facing a death penalty trial on counts 1-8, coupled with her adoption of Petitioner's double Jeopardy motion. Counsel failed to pursue appellate review or federal habeas corpus prior to proceeding on the "Faretta" motion to vacate which she filed on November 30th, 2012 at least 4 terms after expiration of the march 2012 term of court in which the April 16, 2012 Dempsey Order had been made. Counsel also pursued "Faretta" in total disregard of Petitioner's requested demands which he detailed in his numerous communications with counsel via written letters. These letters are part of the trial court record ~~and attached to this brief~~, which clearly demonstrate Petitioner wanted counsel to first pursue relief pursuant to Patterson, supra as enunciated by the ABA Guidelines. The "Faretta" motion's sole intent was to save a conviction on counts 1-8 for the state and to help it gain a second bite of the apple which double Jeopardy was designed to bar. In other words, the strategy of trial counsel was to force a waiver of Petitioner's double Jeopardy claim and what apparently occured at the April 16th, 2012 hearing by some illegal and contrived means. All to make the double Jeopardy claim disappear as if it never happened, hence, the "Faretta" issue was contrived and born. In this instance Bell became a prosecutor in the case against her own client and his best interests, switching roles if you will, thus, totally depriving Petitioner of counsel during the trial process. Gideon, Fulminante, supra. Then in the matter of sequence of events at the January 4th, 2013 hearing, Bell successfully argued the "Faretta" motion first and prior to seeking finality by appellate review and arguing double Jeopardy which ultimately but erroneously was supposed to render the double Jeopardy claim moot. However, Jeopardy clearly attached at the April 16th, 2012 withdraw hearing immediately upon the Judge's Order and thus cannot be constitutionally waived or defaulted by the trial court's January 4th, 2013 Order vacating its April 16, 2012 Order 5 terms outside the term of court. In this instance the trial court erred and abused its Jurisdiction and discretion as it was divested of Jurisdiction over the subject-matter and should have dismissed it. Counsel Bell had the responsibility of rendering effective and meaningful assistance to Petitioner by way of vigorously challenging Petitioner's pretrial status via 28 USC § 2241 Petition and or Patterson, supra, appeal, which she failed to do. Essentially counsel abandoned the Petitioner and abandoned her duty to defend his constitutional rights guaranteeing

Protections from being twice Subjected to trial on Counts 1-8. A Structural defect error as it were. Strickland v. Washington, 466 US 668 (1984); Hill v Lockhart, 474 US 52 (1985); Fulminante, Brecht, Gideon, Supras. ~~the there~~

In a second instance concerning counsel's Ineffectiveness as it relates to the "Faretta" motion, that must be duly noted, is Bell filed the motion multiple terms outside the term of court on November 30th, 2012 which necessarily created a second Structural defect error which ultimately led to Petitioner illegally and unconstitutionally losing his double jeopardy rights and Protections. There were meritorious investigative avenues that should have been explored as explained above which could have easily been taken in order to protect Petitioner from being twice Prosecuted for the same crime. Instead counsel Pursued a "Faretta" motion to vacate 4 terms after expiration of the March-April 2012 term had long since expired to essentially circumvent a viable double jeopardy claim. There can be no doubt that counsel acted as a State agent when she pursued "Faretta" motion as it was beneficial for the State. As it stands, the Petitioner's right to due Process under the 6th and 14th Amendments were wholly violated and the current status of the case rests upon a decision rendered by a trial court that did not have jurisdiction to so rule due to a defense counsel "Faretta" motion filing that lacked any merit whatsoever. A Structural defect as it were in the Proceedings. Brecht, Fulminante, Supras. See also Cody, Platt, Supras. Voiding the withdrawal of the Pleas and Sentences on counts 1-8 was Paramount to and in Bell's Strategy. Thus, she was not in position to operate as counsel described in Gideon, Strickland, Hill, Fulminante, Supras.

Subsequently, the record would indicate, that for reasons which are painfully obvious, Bell on November 30th, 2012 filed a "Motion to Vacate the Honorable Judge Dempsey's April 16th, 2012 Order allowing the withdrawal of Jason Pierce's Guilty Plea." This motion was filed several terms out of court. The gist of this motion was to return the case back to its original status upon remand from the Georgia Supreme Court, portraying the case as if the withdrawal never occurred and then convinced the Petitioner to be resentenced under pretense that the double jeopardy claim was without merit. The following two (2) questions and answers at the State habeas corpus hearing with Petitioner conducting direct of Bell should fully convey the Petitioner's Position on the issue of ultimately, illegally filed "Faretta" motion to vacate:

(S.H.T 11):

Q, "Is it true that your main objective in the case, once appointed, was to have Judge Dempsey's Order Granting Withdrawal of the Guilty Pleas Vacated?"

A, "That was my first objective, yes."

(S.H.T. 18-19)

Q, "Ms. Bell would it be impossible for you to have filed this motion within the same term of court if, in fact, you were not appointed to this case until long after expiration of the march term of court?

A, "I would not have filed the motion prior to being appointed to the case?"

Q, "You can't file a motion until you're appointed to the case?"

A, "Correct."

Q, "So, if Judge Dempsey granted the motion to withdraw in the April ~~term~~ term of court and an attorney does not file a motion to, in this case, vacate the order long after the expiration of that march term of court; can you move on that April or that march term of court action?"

A, "Its a complicated question..."

To this fact the record lays bear that new counsel was appointed on October 15, 2012 exactly 3 full court terms after the expiration of the march-April 2012 court term in which Judge Dempsey's April 16th, 2012 order granting withdrawal and i.e., resentencing on counts 9 + 10, setting counts 1-8 to death penalty trial was filed, and the term expired on the first monday of may 2012. See O.C.G.A. § 15-6-3 (3) Court terms for Further County Superior court / Atlanta Judicial Circuit. Bell's motion was filed on November 30th, 2012 which was nearly 4 terms out of court. The motion as well as the trial court's January 4th, 2013 grant order of same, both being extremely untimely is a nullity and can only be viewed as an attempt to illegally undermine the authority of Dempsey's Court to rule in accordance with its discretion and to ultimately undermine double jeopardy claim of Petitioner - A structural defect error as the trial court did not have constitutional jurisdiction nor discretion to do the Brecht, Fulminante, supras. Furthermore, the untimely "Faretta" motion and the order granting same emphatically demonstrates a Structural defect error because it reinstated Petitioner's Convictions, Circumventing his double jeopardy claim thus saving the State a conviction on counts 1-8 all but illegally, i.e., Successive Prosecution it was barred from. Such conduct by counsel and the trial court Prejudiced the Petitioner and violates his 6th and 14th amendment rights to counsel. Gideon, Fulminante, Brecht, Supras. In doing so violated Petitioner's right to due process and fundamental fairness when she filed an untimely-motion to vacate and persuading the trial court to grant same without proper jurisdiction and to nullify a trial court's correct ruling or order and flout its legal authority and appellate review. On the contrary, had Petitioner moved to withdraw pleas in an untimely manner i.e., outside the term of court, the trial court would DISMISS the motion for being untimely filed, waived and for lack of jurisdiction; A motion to vacate and "reinstate the guilty pleas" would also seem to apply as well. Cody, Platt, Supras. See also Foskey v. State, 232 Ga App 303 (1998). Thus, in this instance, Counsel's violations of the provisions of Gideon, Strickland, and Hill, Supras, was a structural defect error not amenable to harmless error analysis under Brecht and Fulminante, Supras. Its obviously clear that Bell placed the State's interests above that of her own client. Here, in the case at bar, the "Faretta v. California, 422 US 806 (1975), issue was fradulent at best and thus demonstrates a complete breakdown in counsel's representation of Petitioner and a structural defect in the constitution of the trial mechanism; which started and ended with Bell's untimely "Faretta" motion to vacate and the trial court's untimely order granting same without proper jurisdiction. US v. Cronic, 466 US 648 (1984); Gideon and Brecht, Supras. Further demonstration of Bell's unpreparedness and failure to investigate the double jeopardy issue and competently present same to the trial court. Simply put her argument was merely an appeasement for the alleged benefit of Petitioner, as it clearly missed the mark in establishing a double jeopardy claim. (January 4th, 2013, H.T. pp 35-39). However, it was defense counsel who completely failed to research and present Petitioner's double jeopardy claim in a competent manner based upon the readily available facts and testimony she could have easily gleaned from the court hearing transcript conducted in this case on April 16th, 2012; thereby severely prejudicing Petitioner by subjecting him to double punishment and prosecutions for incidents arising out of a single transaction. Brecht, Fulminante, Supras. Again, Counsel understood that pursuing "Faretta" prior to arguing double jeopardy would ultimately force a fraudulent waiver of the double jeopardy claim and render it moot, in spite of the fact that Petitioner wrote counsel numerous letters requesting that she seek Patterson v. State relief first - all to no avail.

Counsel rendered ineffective assistance for her complete failure to review discovery or conduct any type of investigation prior to advising the Petitioner to agree to her filing an untimely/illegal "Faretta" motion and resentencing[1]; i.e., failed to investigate a viable mitigation defense; failure to investigate and obtain Brady materials which were deliberately suppressed by the State and failure to interview relevant witnesses for the defense which led to an uninformed and involuntary agreement to be resentenced and to not withdraw the guilty pleas thus denying Petitioner his sixth and fourteenth amendment rights under the U.S. Constitution. In Hill v. Lockhart, 474 US 52 (1985), the US Supreme Court established a two-part test to be used in determining ineffective assistance of counsel claims using the criteria from Strickland v. Washington, 466 US 66 (1984), which is as follows;

i) Did counsel fail to properly investigate the case prior to advising the defendant to enter a plea of guilty, and

ii) But for counsel's errors, is there a reasonable probability that the defendant would not have entered a plea of guilty and would have insisted on going to trial?

## COUNSEL'S FAILURE TO INVESTIGATE BRADY MATERIALS AND SUPPRESSED BRADY EVIDENCE BY THE STATE[2]

The State record will clearly illustrate that appointed counsel Jerilyn Bell failed to conduct what would amount to any type of pretrial and/or plea investigation prior to advising the Petitioner to agree to resentencing via filing of an untimely "Faretta" motion after the Georgia Supreme Court reversed and remanded the case in Pierce v. State, 289 Ga 893 (2011) and after the Petitioner's successful withdrawal of guilty pleas at the April 16th, 2012 remand hearing.

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[1] Petitioner wrote Bell letters to litigate his double jeopardy claim first. It's also important to note, the "Faretta" motion, cannot be attributed to Petitioner as done by the State Supreme court and the District Court as Petitioner cannot agree to an untimely/illegal motion. Simply put counsel cannot use an illegal motion and thus a second illegal order to vacate a constitutionally tendered order by Dempsey.

[2] Petitioner wrote Bell a letter titled Brady v. Maryland advising her of potential Brady statements being suppressed by the State and requesting that she specifically demand same. A copy of that letter is attached.

As concerns the initial prong of the Brady issue, numerous statements of a surviving victim in the case, Shunae Allen, had apparently been suppressed by the State Government which were exculpatory in nature, i.e., would strongly support a mitigation defense. The record would reflect that the Petitioner's family retained the services of Kevin Flynn of the Interstate Investigation Firm in Massachusetts. In 2012, Flynn's investigative reports indicate that statements provided to law enforcement by Allen reflect that she observed that weeks leading up to the tragic homicides, the Petitioner was under extreme mental duress, acting out of character and overly paranoid; these exculpatory recorded interviews of Allen were not turned over in discovery during the trial process, only the inculpatory statements were submitted to the defense. In addition, Kevin Flynn personally interviewed Shunae Allen, who affirmed that she had provided law enforcement and/or District Attorney's office with the exculpatory statements in question. (That interview report is attached to this brief).

Petitioner gave counsel Bell the four-page "Interview Report", upon reading the report, Bell recognized a viable mitigation defense for Petitioner based upon Allen's pretrial statements to law enforcements describing Petitioner's excessively paranoid behavior at the time of the incident. During the State habeas hearing this issue was covered extensively which is illustrated in the following excerpts from same with the Petitioner conducting direct on Bell;

(S.H.R. 21-26);[3]

Q, "After receiving this letter, what did you do in the way of an investigation?[4]

A, "we discussed the issue with you... we did file motions that would've covered the discovery issues and we also filed a Brady motion with -- as part of the motions we filed."

Q, "may I ask; did you specifically request statements that I believed were missing that were exculpatory in nature that were made by the State's witness?

A, "we did, we specifically asked for any statements made by any State witness, not just one State witness..."

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[4] The Petitioner sent a post to Bell explaining Flynn's investigation, Allen's exculpatory statements and the State's suppression of same. See Attached Brady v. Maryland titled letter.

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[3] The Petitioner will cite from the State habeas record as "S.H.R." followed by the appropriate page number.

Q, "So, ms. Allen's Statements Pertaining to her observations of my mental State at the time of the incident, she described those and You are aware that those Statements were not Part of the discovery; Correct?"

A, "Yes."

Q, "ms. Bell, do You recall receiving a Copy of a Private Investigator Report by Kevin Flynn, from InterState Investigation Agency, Who interviewed Shunae Allen?"

A, "I do."

Q, "Did You Contact ms. Allen as to What she described to my father as it related to my behavior Prior to the incident?"

A, "No, I did not."

Q, "Did You Contact my father as far as the statements she made to my dad?"

A, "I did not speak to Your father..."

Q, "Did You Contact mr. Flynn who did the interview of ms. Shunae Allen?"

A, "No."...

Q, "Was it Your Professional Strategy to not request these detailed Statements from the State?"

A, "I did not request the detailed Statements from the State..."

Q, "ms. Bell, did You Contact the Investigator, SGT. Gorman?"

A, "No."

Q, "So it was never revealed to You through his investigation that ms. Shunae Allen admitted to him that there was, a verbal dispute the morning of the incident?"

A, "I was aware of that."

At this Point, its self-evident that upon general Perusal of the record, Bell, despite being informed of the suppressed information regarding Shunae Allen made no effort to investigate this viable Brady material. And despite the filing of Brady motions for statements, the record shows none were ever turned over and Counsel failed to continue to pursue the statements from the state. Thus, Bell could not be effective without Proper investigation or discovery of all the facts and evidence. Suppression of Brady evidence renders counsel ineffective automatically. A Second tier of the Brady issue would be the Dedham House of Correction County Jail records where the Petitioner was incarcerated in massachusetts Prior to extradition to Georgia. The Petitioner was observed and interviewed by the

In-House Head Clinical Psychologist during this Period where it was noted that he was afraid and visibly shaken, and extremely paranoid that people were out to kill him and that he believed people were trying to set him up. The mental state of mind of the Petitioner both leading up to the homicide and after are exceeding relevant to a mitigation defense in the case at bar during both phases of a death penalty trial. Petitioner advised counsel that the state was suppressing Dedham Jail records pertaining to his mental state. It's axiomatic that these records were sent to Fulton County along with Petitioner when he was extradicted and that the District Attorney's office obtained copies of same; A general Brady motion filed by defense counsel included a specific demand for copies of all medical records which would have included psychological and/or psychiatric evaluations. A review of the record shows that none of this information was ever turned over in discovery or through Brady; In any instance counsel failed to specifically request these records and or investigate same and in addition, failed to interview the psychologist. The significance of these mental health records resides in the fact that this information coincided or comborated the initial Brady issue as concerns Shunae Allen, i.e., Allen maintained in her suppressed statements and the State's initial investigation that the Petitioner's state of mind leading up to the homicides was one of paranoia, fear of people out to get him, etc., All of which supported the Dedham County Jail records. All of this information could have been utilized in either or both aspects of a bifurcated trial, i.e., guilt or innocence - sentencing phases. However, as the state record shows, Bell wholly failed to investigate any aspect of the suppressed statements of Shunae Allen, the investigative reports of Kevin Flynn or the Dedham County Jail mental health records; this failure by Bell occured despite the fact the Petitioner had made her aware of the existence of this information. See Wiggins v. Smith, 539 US 510 (2003); Ohio v. Lockett, 438 US 586 (1978). See also Eddings v. Oklahoma, 455 US 104 (1982); Woodson v. North Carolina, 428 US 153 (1976).

As noted, this omitted information was applicable to viable mitigation or insanity defense. At this juncture, it can be stated that due to counsel's inactions it would have been virtually impossible for the Petitioner to have made a competent decision as to whether he should agree to be resentenced after the trial court had granted Bell's fradulent and untimely "Faretta" motion, which made the original withdrawal of the guilty pleas void. Strickland and Hill, supras.

The above-stated is an ongoing theme of inactions of defense counsel is synonymous with the ongoing theme of the case at bar i.e., Bell's complete and utterly disregard for her sixth amendment responsibilities to the Petitioner which is and was to provide meaningful assistance in what amounted to the most serious of situations with that being a death penalty case. Bell failed to conduct any type of pretrial investigation as to the plethora of information provided by Petitioner for a strong mitigation defense at trial and for sentencing if necessary. Interestingly enough is also the fact that as the trial commenced and again Bell was made aware of the state's deliberate suppression of Brady evidence in at least two (2) incidents i.e., Key-witness statements related to Petitioner's severely paranoid state; Dedham mental health records and the failure to interview witnesses pertaining to these issues. Furthermore, Bell could have pursued other viable defense options (which were never pursued) due to the State's continued suppression of Brady evidence including motioning the trial court for plea in bar to prevent the State from seeking death and motion to recuse the entire Fulton County DA's office from prosecuting the case both on grounds the state is withholding evidence and has committed acts of "forensic misconduct" in violation of Brady v. Maryland and Wiggins v. Smith supra, i.e., suppression of favorable exculpatory and mitigation evidence. Both counsel's inactions and the State's suppression of Brady evidence was egregious and together deprived Petitioner of meaningful and effective counsel. Bell's only concern in this case was as follows;

(S.H.R. 11-12)

Q, "Is it true that your main objective in this case once appointed, was to have Judge Dempsey's order granting withdrawal of the guilty plea vacated,"

A, "That was my first objective, yes."

Its axiomatic that the above-stated question and answer trumped all other concerns as far as Bell went, i.e., an adequate pretrial investigation or otherwise was not going to occur as voiding the withdrawal of the guilty pleas was the only goal, tunnel vision as it were the record plainly illustrates a situation where the Petitioner was unable to make even a modicum of decision in this case as Bell had no advice to offer of the complete variety as she had not investigated the case, thus she was not in a position to operate as counsel described in Strickland, Gideon, Brecht, supra. Counsel failed to challenge the State's case whatsoever knowing that they did not turn over Brady materials after numerous Brady requests were made. Brady violations automatically renders counsel ineffective.

Again, rather than thoroughly investigate the suppressed Brady materials and present a viable defense of mitigation and move for plea in bar as to the death penalty and DA's recusal, counsel instead pursued an untimely/illegal "Faretta" motion to vacate the April 16th 2012 Order allowing Petitioner to withdraw his guilty pleas outside the original term of Court (i.e., November-December 2012 term). Counsel knew or should have known that the "Faretta" motion would ultimately and unethically: undermine a Judge's discretion and illegally flout appellate review; circumvent Petitioner's double jeopardy claim and would extremely untimely and the issue waived; that it would be highly prejudicial and detrimental to Petitioner, and aid the State three fold by saving a conviction it was barred from prosecuting; help State gain or regain a strategic advantage over the Petitioner and help it gain a second bite of the apple which double jeopardy barred. Access to meaningful assistance in evaluating, preparing and presenting a viable defense that Lockett and Wiggins, supras, requires would have mattered. Counsel denied Petitioner meaningful assistance guranteed by Wiggins and Lockett, supras. Brecht, Fulminante, supras, errors are structural defect errors that are not subject to harmless error analysis. For example, denial of the right to counsel is a structural defect error not amenable to harmless error analysis because there is no way to know what type of assistance counsel would have provided, i.e., how would she have investigated the charges, developed a defense, selected jurors, presented and examined witnesses, or even whether she would have advised Petitioner going to trial at all. It is even doubly ineffective or a deprivation of counsel to advise Petitioner to agree to an untimely and thus illegal "Faretta" motion to vacate. Since a structural error defies analysis, prejudice is presumed, requiring automatic reversal. Brecht, supra. In the instant case, the assistance the suppressed Brady evidence and thus proper investigation would have provided counsel in evaluating, preparing and presenting the defense that Wiggins and Lockett, Hill, supras, requires was unknown and can not be quantitatively assessed in the context of the evidence presented to the trial court or lack thereof.

Here, in the case at bar, a perfect judicial storm has occured through a series of routine rulings, failures of the Superior Court in Fulton County to stay within the parameters of enacted law by the State legislature and established caselaw as opined by this Court, an embarassing remand by the Georgia Supreme Court in a death penalty case where the trial

Court failed to State on the record during the Guilty Plea hearing the aggravating Circumstances necessary to Sentence the Petitioner to life without the Possibility of Parole, a withdrawal of the Guilty Pleas by the Petitioner While he was represented by Court-appointed Counsel, withdrawal of Counsel Six (6) months Later and appointment of new Counsel. A Subsequent "Faretta" motion filed by new Counsel alleging that the trial Court did not follow "Faretta" Protocol when the Petitioner Withdrew his guilty Pleas. A ruling by a new Judge which Vacated the original Order allowing the Petitioner to withdraw his Guilty Plea and Eight (8) briefs from the Georgia Supreme Court through the eleventh Circuit Court of appeals arguing that this Court's decision in Faretta, Strickland, Edmonson, Brecht and Wainwright, Supras, as well as numerous State Court decisions based on the above-Stated Precedent cases have been Circumvented, bastardized, and cannibalized by the State all for the Sake of avoiding embarassment. In this instance, the Court Should approach this Petition with trepidation as the Petitioner Simply exercised his inherent constitutional rights by originally filing with Fulton County a "Pro Se" motion as concerns a Void Sentence, i.e., the trial Judge failed to State the aggravating factors on the record to warrant life without Parole. The record from this Point forward leaves little room for imagination as Judicial Items in a criminal case Such as competent Jurisdiction, assistance of Counsel in a death Penalty Case (not even effective) and the recognizable ~~difference~~ difference between being represented by an attorney Vis-a-Vis Pro Se became obselete and rated concepts as of 16 April, 2012 When the Petitioner Withdrew his Guilty Pleas in a legal and lawful manner While represented by Counsel. A defense lawyer filing a "Faretta" motion multiple terms out of court in a death Penalty case, without conducting even a modicum of an investigation into the case in an attempted to eviscerate the 16th April, 2012 hearing from the record Speaks Volumes and Should Suffice to alert this Court to Grant the Writ, as Petitioner is currently Serving Sentences and convictions on counts 1-8 which are constitutionally Illegal and Void due to double Jeopardy Violations.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jason Pierce

Jason Pierce – Petitioner Pro Se

Date: DECEMBER 21, 2020