No. 21-5554

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Hugo Gibbs, pro se — PETITIONER
(Your Name)

vs.

State of South Carolina — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

South Carolina Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Hugo Gibbs, # 185709
(Your Name)

4460 Broad River Rd, Marion, # 287
(Address)

Columbia SC. 29210
(City, State, Zip Code)

803-896-2200
(Phone Number)

QUESTIONS PRESENTED

I. Whether the state court Abrogated this courts constitutional holdings, in its application of the legal standard, (...fundamental fairness shocking to universal justice) in Butler V State 397 SE.2d 87,88 (1990), and Dissent of Justice Marshall in Butler 103 S.Ct 242 (1982); When prior court processes were inadequate & unavailable; and this standard is used to substitute harmless error analysis nation wide.?

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II. Whether this court should issue an order of rule "nisi", 28-USC-§1651; authorizing petitioner to move the US District court for Habeas under 28-USC-§2241(c)(d) on issues "Arising Under" laws and constitution; on issues not previously answered by the state, and order addressing merits on 6/2/21.?

jhg/BRCI|7-19-21

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:

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STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A 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 N/A 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 _____.

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

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

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

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

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was June 12 /2021. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, 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

US Constitution, **4'th Amend:** The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5'th Amend: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6'th Amend: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

10'th Amend: The powers not delegated to the united states by the constitution, nor prohibited by it to the states, are reserved to the states respectfully, or to the people.

14'th Amend §1: All persons born or naturalized in the united states, and subject to the jurisdiction thereof, are citizens of the united states and of the state wherein they reside. 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; nor deny to any person the equal protection of the laws.

8'th Amend: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9'th Amend: The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

SC.Constitution; **Art 1 §3:** The privileges and immunities of citizens of this state and of the united states under this constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Artical 1 §11 - - Appendix (F), complaint for habeas, Page 17 fn.3± App.(B) P.28

Art. 1 §22 - - App. (F) complaint for habeas P.17 fn.2.

Art. 1 §15 - - App.(F) P.19: App.(B) p.27

Statutes (SC.Ann. 1976,1991)

§17-19-10 - - Appendix (B) Page 28: App.(F) p.18.

§17-25-10 - - App. (B) P.29.

§22-5-710 - - App. (B) p.26

§17-23-160 - - App.(F) Complaint for habeas, P.19.

§17-15-10 (SC.Ann. 1976, amended 2015 act no. 58 (S3) Pt III, §12, eff 6/4/15) - - Person charged with noncapital offence may be released on his own recognizance; conditions of release, bond hearing for burglary charges: This statute was amended greatly since 1992, see 19 SC. jur. Const. Law §21.2 May 2021) citing Davis Adv Sheet NO.11 May/4/1994, citing State V Hill & Huggins.

____**§14-7-1030** - - All objections to jurors called to try prosecutions, actions, issues, or questions arising out of actions or special proceedings in various courts of this state, if not made before the juror is empaneled for or charged with the trial of the prosecution, action, issue, or question arising out of an action or special proceeding, is Waived, and if made thereafter is of no effect.

28-USC-§1651(a)(b):- - The supreme court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28-USC-§2241(c)(3),(d) - - (a) Writs of habeas corpus may be granted by the supreme court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge....

(c) The writ of habeas corpus shall not extend to a prisoner unless- (3) He is in custody in violation of the constitution or laws or treaties of the united states; or

(d) Where an application for a writ of habeas corpus is made by a person in custody under judgement and sentence of a state court... the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the state court was held which convicted and sentenced him....

28-USC-§2244 - - **(b)(1)** A claim presented in a 2nd or successive habeas corpus application under section §2254 that was presented in a prior application shall be dismissed. **(2)** A claim presented in a second or successive habeas application under §2254 that was not presented in a prior application shall be dismissed unless-

(B)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offence.

(d)(B) the date on which the impediment to filing an application created by state action in violation of the constitution and laws of the united states is removed, if the applicant was prevented from filing by such state action.

STATEMENT OF THE CASE

1· I, the petitioner am an inmate, and was, charged by warrants c734363 on 10/18/91, & c734377 on 11/4/91; and convicted by a jury at the 3/9-11/1992 general sessions court in Jasper County SC, for Murder & Burglary 1'st, and was sentenced to life in the Jasper co dept of public works, for burglary, and life concurrent for murder, upon question the judge stated Or SCDC, **Id** Trial transcripts (tr @207--210). The SCDC reversed the sentence on 3/13/1997 & moved the parole dated to 2011. I plead justification & self defence, but the jury was only allowed to determine if I killed Mr. Brown. I declared victum status on the stand.

2· I filed the instant case in the SC. Supreme Ct, dated 7/30/2020, **id** appendix B (app.B) with affidavit, and paid filing fees. This was in compliance with lower court order dismissing complaint for habeas, "upon original jurisdiction in SC.S.Ct." **id** (app.F). This case challenged mulitple serious legal and constitutional violations, and the inadequate and unavailable lower court process, to include (PCR), on the issues, and lack of adjudication through **Ghost Written** orders; and the Excutive Branch (state) lawyers failure to answer the issues at any stage. Futher that the trial court lacked subject matter jurisdiction in the first instance, (without published indictment), which has been raised at every stage.

)**3**· The SC.S.Ct (app a) denied habeas on the merits of the Butler standard, with out finding a procedural default, against state or myself. I filed the lower court petition (app.F) on 11/7/2012 in case 2012-cp-27--0691, with paid filing fees, and it took until 2018, after many complaints to include office of disciplinary counsel, **id** 17-DE-J-0132, to get any response, and the state filed for summary judgment again without answering any issues or allegations, on facts or law. I moved for alter & amendment of judgment, to correct errors in fact and law, **id** (app.F). The Judicial branch (court) appears to have not reviewed the pleadings

or record.? I filed letter requesting Notice of appeal, **Id** (app.D), since the lower court held a lack of subject matter jurisdiction on habeas, contrary to state law & constitution. The court denied same, with no evidence from the lower court & state finding on facts. I moved for rehearing, also denied, **id** (app. E). I petitioned the SC.S.Ct for certiorari, which was denied, **id** (app. C).

4. I was arrested on 10/20/91 in Arkansas, on my way to police, when I learned Mr Brown was dead: **id** (tr), and transported to Ridgeland SC on 11/3/91, by Sheriff Blackmon, and Detective Scoggins. I gave a **statement** on the plane, in front of attentive audience; and I informed sheriff and dect, at the airport in Savannah Ga, that the statement was greatly **Exaggerated**, for entertainment. They said it didn't matter.

I was taken to the Clerk of court "Ms Bostic" on 11/4/91 for the sheriffs murder warrant, and appointed counsel Mr. Plexico. A short time later the Hardeeville police "Mr. B. Hubbard served me a warrant for Burglary, and the clerk said same applies. I was then taken to Hampton County jail; where I remained until 3/9/1992, when I was taken back for trial, by Mr. Toumey & Mr. Peoples. I seen Mr. Plexico one time @ 1/22/92 with his investigator, after numerous attempts by family & friends to him to get on the job. I informed him I had not been arraingned, or had a preliminary hearing, or bond hearing, and no psychological evaluation had been done, and I had wrote a letter to the president, seeking help. He laughed & said thats the way it was done sometimes. He recorded the meeting. I seen him again on 3/9/92 at the jasper jail. He tried to get a continuance, but was denied, trial next day. I informed the jailors, who transported me that I had never left the jail, and had not seen any judge, or had any hearings. They said the sheriff would look into it. I have a family history of mental illness, although I don't claim same. He said I should plead guilty, on the murder, i asked about the burglary, he didn't know. I thought i was in the right, and had asked my boss for a two week leave of absence to clear the matter up.

5. I never seen an indictment of any kind in 92-gs-27-002, & 92-gs-27-003, dated **3/9/1992**, until 1994, when a copy of the presentment was given me by counsel on fed habeas. The direct appeal record contains no indictments, warrants, or anything but transcripts. The PCR court record filed by appellant defence contains no indictments, warrants, evidence presented, or anything, and only a partial of the PCR application. The trial judge had to write a place on the non truebilled paper signed only by prosecutor for the jury to enter verdicts, **id** (tr). The copy I got from the clerk of court in 2013, has no filing or clock stamp. No indictment was published prior to trial on 3/10/92, and no record exist of such. The state or courts have never adjudicated this claim at any stage, and PCR counsel stated on the record, that they didn't know when I was indicted, **id** (PCR tr).

6. In addition to above; I was never arraigned, had a preliminay or bond hearing, and was not held upon an indictment; no pre trial investigation was done by defence counsel, **id** (pcr tr); I plead justification & self defence; I never had any competency or psychological evaluation; The statement I gave was inaccurate & state only read same to jury as their official version, and allowed no cross or examination, **id** (tr), and I was not allowed to testify at Denno hearing; The court harrassed counsel and instructed him how to ask questions in front of jury; I was not allowed witness and he was threatned by the court in front of jury; The prosecutor in addition to other offences told the jury in closing to speak for the people of Jasper co and send a message; The court gave presumptive malice, weak or imaginary doubt, left out ellement of wilfulness offence, among other instruction; and counsel objected to the evidence not supporting the ellements of offence, that was not included by appellant counsel; and is not allowed on PCR. Futher since only ineffective counsel is allowed on PCR, and the court did not adjudicate all the allegations supported by the record; state habeas corpus is the lawfull and constitutional remedie, but the court has rewrote the statutory law, that contains mandatory

language, to deny claims, that I would win on, simply to save face and cause a miscarriage of justice. Just about every one at trial lied, and the victums ellement threatned to burn down the court if I walked.

7· A timely (NOA) was filed, and appllate counsel was appointed and requested by letter all trial and pretrial materials. I had asked for records myself, and received some from trial counsel. Appellate counsel (Mr. R. Dudek) filed an Anders brief, in the SC. Supreme Ct, that did not include preserved issues, in case 92-728. The (ROA) was insufficient; I filed a petition to perfect the appeal. (not answered), and I responded by letter as instructed by the Clerk. The appeal was **Dismissed** and not affirmed, by order 93-MO-111 May/1993.

8· I filed a Rule 60(b) SCRCP motion to the trial judge with the Jasper co clerk of court, which was clock stamped Aug/1993; but never answered or submitted to the judge. Discussed at PCR, and Fed Habeas.

9· I filed a federal §2254 petition in case # 3:93-cv-2921-OBC. The state only filed part of the state trial & direct appeal record; and moved for summary judgment as a mixed petition; without answering the legal & constitution issues. The court dismissed same in Sept/1994, without prejudice, pending state PCR. No appeal was filed.

10· I filed a (PCR) application on 11/4/94, docketed as (94-cp-27-309), x33 pages. Seven general grounds of; Trial Errors, Denial of Due process, Ineffective Trial Counsel, Denial of Access to Courts, Ineffective Appellate Counsel, UnConstitutional Suppression of Evidence, & Prosecutorial Misconduct, was raised: each with **Specific** allegations of legal & factual error. The state moved for summary dismissal of all grounds except trial counsel, as not allowed on PCR; and did not answer the issues raised. Counsel was appointed, then replaced. I informed him of witnesses needed to testify & information. "Mr. Albert Keckley". A hearing was had on 3/20/95. He wanted a continuance, but at least one witness "Dave Cannon" would not be able to return, and he state there was no

telling when the next hearing would be. The state objected to the issues on PCR, to include Denial of Due process;**I objected**, and the court held that only what counsel should have done would be allowed. Witnesses testified, overcoming state claims, and I testified. Counsel testified, and admitted that no investigation was done, and he only wanted to plead it. Appellate counsel did not appear for hearing, and I was only allowed to read the application, **id** (PCR Tr). All of the allegation are supported by record. The judge by letter said he was denying PCR, and ordered the state to write the order addressing all merits of all issues. The order was in plain factual and legal error, and only addressed a few of the issues. The court signed the ghost written order on 4/30/1995, and page 15 of the order was missing, and never included in any post PCR record.

By letter counsel advised the Supreme court, that he did not know how or want to petition for certiorari. The court ruled that he would prepare the petition, and appellate defence would prepare the record, and for cost. Counsel submitted one misplaced issue pursuant to **Anders/Johnson**, and I submitted a **Pro Se Brief/Addendum** (PBA), with Pro Se **Appendix** (PA). The record did not contain any indictments, warrants, statements, evidence, ect, and Page **5A** that was in direct appeal (ROA) was left out on the jury issue, and only 6 pages of the (PCR) was included. The court denied the certiorari on **11/8/1996** and I was not notified or served the order until **Nov/14/1997**, which barred §2254.

11. I moved the US. District court to Toll The statute of Limitations, since the state was at fault, in case # 3:97-cv-3816-10BC, dated 12/2/1997. The court dismissed on summary judgment, without prejudice. No hearing, or appeal was had.

12. Since by state law and constitution, a remedie exist in circuit court on issues not fully and fairly adjudicated on direct appeal or PCR; I moved for state habeas on 10/8/98 in case # 98-cp-27-267, **ie** §17-17-10 et seq, & Art V §11,§20 SC Const. A hearing was set on 3/2/99 before judge Goodstein, and parties did not show (counsels did). The court held that a hearing would be had before her on 6/1/99. The state moved for summary judgment on

3/4/99, and did not answer the issues raised, and sent the motion to Judge Beatty [now cheif justice] in Spartanburg SC, with proposed order. I objected. I was notified of hearing and informed all parties on 5/19/99. By letter dated 5/24/99, the state with the order signed dated 4/21/99, declared the case was dismissed. I moved for Mandamus, signed for by clerk on 6/2/99, and filed an (NOA). the **order** was not filed by the clerk of court until **6/23/99**, holding habeas could only be had in supreme court. A hearing was set before judge Gregory on the mandamus on 8/3/99, but I was denied access, and no order was had. Appellate counsel prepared the appeal, and only the states motion & mandamus petition was included in the record (ROA #9032). The court dismissed same in order 2000-UP-503, holding that PCR was not available, and I had not appealed the PCR.? A rehearing was denied, and Certiorari with appendix, and my pro se pleadings, to the SC. Supreme Court was denied by order on 7/3/2001, and rehearing & injunction was denied on 8/10/2001. No merits addresses.

13. I filed a complaint for habeas, with attached Rule 65(f)(2) SCRCP complaint in the US District court, pursuant to §2241 & §1343, as original matter, on 8/28/01. Docketed as [3:01-cv-3578]. The magistrate construed the Rule 65 complaint into a §1983 action, and docketed as case # 3:01-cv-3645. [t]his case was dismissed as cannot challenge conviction. I appealed, case # 02-6135. The appeal was dismissed without answering questions. The habeas was construed into a §2254 petition. The state moved for summary judgment, without answering the legal and constitutional issues, on statute of limitations, based on PCR, and not state habeas corpus. No hearing was had, and the court dismissed same on statute of limitations, on 10/10/02, rehearing denied on 12/2/02; without applying the states own fault, or adjudication on the facts and law of the allegations of error. Since the issues had still not been fully and fairly found, No appeal was filed. The whole state court record was not filed by state, to include PCR pro se brief/addendum (**PBA & PA**); the records I filed were sealed by court

until end of case id records in fed record center. I returned to state court.

14. I filed a petition for state habeas as original matter in SC Supreme Ct on 1/3/03, docketed as TR # 200325310. Motion for original jurisdiction was denied, and rehearing denied on 2/6/03. No merits addressed.

15. I then filed another state habeas on 5/16/2003, and served parties, signed for on **5/19/03**, with attached Rule 65(f)(2) SCRCP complaint; motions for expungment, for counsel, & for prohibition; docketed as case # 03-cp-27-198. (I) previously filed a notice & intent to seek court action, docketed as case # 03-cp-27-135, on 4/10/03, and served all parties. Counsel for SCDC answered by letter on 4/17/03, refusing to answer pleadings. The state did not answer any legal and constitutional issues or facts raised.

A hearing was set for 7/21/03, but was changed to 8/23/03 at the Ridgeland prison on 7/18/03 by state counsel. A hearing was had on 8/28/03, before judge Gregory, and the notice & intent was merged with habeas corpus, and the court set a hearing at the courthouse for @ 11/10/03 on the merits. On Sept/19/2003 counsel "Mr. Waldon" for 14'th Circuit prosecutor, removed the case to the US District court, claiming he had not been served until 8/21/03?. I showed proof of service. The case was docketed as 3:03-cv-3018-10BC, and the rule 65 complaint was construed as a §1983 action. State moved for summary judgment on prohibition & complaint, but did not file a leave of court motion on the habeas. The court dismissed the §1983 as a challenge to the conviction, and prohibition as not showing harm, and remanded the case back to state court, on 9/24/04, and dismissed constitutional claims sua sponte.

The state filed a motion to dismiss the Rule 65 complaint, and did not answer or address the habeas petition, on 9/24/04, and the case was before judge Piper on 10/8/04. State denied access to court, and Judge Gregory ordered a hearing on 1/5/05, and to have me present. When I got there the Clerk stated that I was not supposed

to be there, and all witnesse had been called, and told not to come. A hearing was held, and I had answered states motion, so an oral motion was made. The court only addressed state Tort claim in personal capacity, and not even subject matter jurisdiction. The habeas and other motions were not addressed in the verbal or written order, dated 1/25/05. Rehearing was denied on 2/19/05. The order was a partial, Rule 56(d) SCRCP ruling. I appealed, and the SCDC would not allow copies to meet the court of appeals requirments, and the case was dismissed by the clerk, on 1/18/06, rehearing was denied on 1/21/07. Certiorari to the SC. Supreme Ct was denied on 6/1/07, rehearing on 6/19/07. Merits of issues & facts not adjudicated.

16. On 6/28/2007, I moved the circuit court to hear the habeas corpus, and expungment issues raised in 03-cp-27-198, but not adjudicated at all, under Rule 56(d) SCRCP, and to reinstate the case. Counsel for state "Mr. Waldon" answered the motion, and I filed a reply. No futher response was made, or hearing had. i filed a complaint with Judge C. Mullen 14'Cir Judge. No answer. I had recourse with Jasper County counsel in case # 08-cp-27-472, and request to take judicial notice, about pending motions. No response. I filed numerous complaints. To this day no answers or holdings on habeas or pending expungment, or legal issues have been made.

17. I petitioned the SC Supreme Ct for original jurisdiction on Declaratory Judgment & Decree dated 6/30/10 with affidavit, docketed as TR # 2010165487, on inadequate and unavailable court actions. The court denied original jurisdiction on 7/21/10. Rehearing denied on 8/20/10.

I petitioned this US Supreme Ct for certiorari dated 11/7/10. Docketed as **10-8461**. Dismissed certiorari on 3/28/11. Merits not addressed.

18. I then filed a motion in the US Court of Appeals for 4'th Circuit, pursuant to 28-USC-§2244, along with a 28-USC-§2254 petition, docketed as **11-234**; to allow successive petition; since the no full and fair hearing on the merits have been had, and a miscarriage of justice was done. The court denied motion, on 8/9/2011 without reason.

19· The offence date was October/18'th/1991, @ 7:30 am: I had spent time earlier at the crack shack, getting high & drinking beer with the Browns & friend, which was not a first. The shack was not a residence, but a place of business. When I left I was pistol whipped & robbed in the yard. I left and got a shotgun, and returned a short time later, and when I approached the porch the door was opened for me. I got to the door and loudly demanded the return of my money, and to keep hands where I could see them. Mr. Brown was on an old mattress on the floor to the left in front of the fireplace, and Fred & Sammy were on chairs, and Hermain was standing across the room. Sammy jumped up & ran to the back, Mr. Brown jumped up and went into a turn reaching into his jacket. I fired instinctively without aiming, and the shot struck in an upward pattern on the right side. I thought it was in the leg. Fred jumped up and grabed the gun, & I ran. I thought I was legal and in the right, and there was never any intent or thought to commit a crime or murder, and no burglary took place, as everyone in there was part of any crime, & I just wanted what was mine. At autopsy, about $250.00 and crack was found in his underwear. This was not shown to the jury. There was no door knob, most of the flooring had been used in the fireplace, the yard was overgrown, and the shack was burnt down a short time later.

The gun was signed for by a deputy from a neighbor, and no prints were on it. By police on testimony no investigation was done. The Hardeeville police was the first responders, and they did not testify at trial. There was no unlawful entry, I was a common guest, as was the EMT, who said the gun was on the mattress.?

20· Even though I have excercised **due diligence** at every stage; the judicial & executive branch in the state has failed to remedie, the denial of a fair and impartial trial by a court of competent jurisdiction, causing the effect of a miscarriage of justice, on vested & fundamental rights. There was no murder or burglary. In hind sight, I was wrong, and should never have been part of the events in any case, and I am ashamed of my part and actions, which led to the loss of life. **end**

REASONS FOR GRANTING THE PETITION

I. I RESPECTFULLY SUBMIT, THERE IS COMPELLING REASONS SO STATED, TO GRANT THE WRIT & VACATE THE LOWER COURT ORDER ACROSS THE BOARD BECAUSE; THE STATE COURTS APPLICATION OF THE LEGAL STANDARD OF, ..."FUNDAMENTAL FAIRNESS SHOCKING TO A UNIVERSAL SENCE OF JUSTICE...." IN ITS ORDER (APP A), UNDER BUTLER V STATE 397 SE.2D 87,88 [Head Note 2] (1990); SEE DISSENT OF JUSTICE MARSHALL IN BUTLER 103 S.CT 242 (1982); WAS AN ABUSE OF DISCRETION AND CONTRARY TO THE PURPOSE AND INTENT OF THAT DOCTRINE, ON THE FACTS AND LAW OF THE INSTANT CASE; AND ABROGATED THIS COURTS CONSTITUTIONAL HOLDINGS ON VESTED AND FUNDAMENTAL RIGHTS OF A FAIR AND IMPARTIAL TRIAL WITH DUE PROCESS AND EQUAL PROTECTION OF LAW AND CONSTITUTIONAL RIGHTS; WHEN THE STATES POST TRIAL REMEDIE PROCESSES WERE INADEQUATE AND UNAVAILABLE, TO PROTECT AGAINST UNLAWFULL RESTRAINT OF LIBERTY, AS A MATTER OF **PRIVATE** AND **PUBLIC INTERST.** THE MISCARRIAGE OF JUSTICE CAUSED IS ARBITRARY & CAPRICIOUS, AND JUDICIARY FAILED TO RESOLVE CONTROVERSY BETWEEN MYSELF AND STATE, OR HOLD EXCUTIVE BRANCH ATTORNEYS ACCOUNTABLE.

1= The trial judges reasonable doubt charges on law and fact, was an abuse of discretion, and structural trial errors, that went unobjected to, by counsel or state:

a] The courts definition of reasonable doubt, Tr 193 ln 22-194 ln 1;

> Now, by reasonable doubt I don't mean a Weak or a Whimsical, or an Imaginary doubt. A reasonable doubt, ladies and gentlemen, is a doubt arising out of the testimony or lack of testimony for which a person would hesitate in reaching a conclusion.

This type of instruction has been found by this court to raise the reasonable standard to impermissible levels, shifting the burden of proof, and denying due process. **id** Cage v Louisiana 439 US 39 (1990), and again in Sullivan V Louisiana 503 US 275, 113 S.Ct 2078 (1993), which was made retroactive to Cage in 1994. The charge in this case is combined with numerous mal charges, that are not

overcome by harmless error, or Butler Supra; even though this court applied a reasonable liklyhood standard in Estelle V Mcgyire 502 US 62, 72 @ft.n 4 (1991), and the SC Supreme Court gave an analysis of Cage in State V Johnson 410 SE.2d 547 (1991), and it was visited again in Victor V Nebraska 511 US 1, @6 (1994) [whetehr reasonable doubt charge offends due process]; I submit and challenge any misconception that, it dose not offend due process when the charge is given this way; and this was not a sentencing phase on death penalty, but guilt innocence phase. Cage was adopted by SC in Manning 409 Se.2d 372 (1991), my trial was March/1992, and this was sound constitutional law, see also Winship 397 US 358 (1970.

2= The court gave a presumptive malice charge, TR 199 ln 15--200 ln 18, 201 ln 7--10; that malice can be Inferred and Implied from the use of a deadly weapon, and that presumption was Rebuttal, and court changed implied malice, to inferred malice, without charging the plea of justification & self defence, or circumstancial evidence.

> ...,that is either by positive evidence or by inference. Expressed malice is where one person kills another with a sedate, deliberate mind and formed design being evidenced by the external circumstances disclosing the inward intentions,....
>
> Now malice is inferred or implied from willful deliberate or intentional doing of an unlawfull act without just cause or excuse. But if facts proven are sufficient to raise an inference of malice, such is of course Rebuttal. It is for the jury to determine from all the evidence whether or not malice has been proven beyond a reasonable doubt.
>
> I charge you futher ladies and gentlemen, that malice may be inferred from--- when one intentionally kills another with a deadly weapon, the inference of malice may arise, if facts proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfication, this inference would simply be an evidentuary fact to be taken into consideration by you, along with other evidence in this case, and you would give it such weight as you determine it should use.

3= The court also went on to charge the jury could use the way I looked or acted, or demeanor, as evidence on Credibility, TR 194 ln 14--195 ln 9. I argued this at PCR to no avail even with other charges, and plea of justification.

4= The court did not charge all the ellements of the offence, **id** §16-3-10 (1991), as charged in the presentment of indictment by prosecutor, of **Wilfulness**, Tr 199 ln 5--14, and gave a minimul aforethought charge:

> Now ladies and gentlemen, you will recall I said there must be malice aforethought, and you will observe from that the malice aforthought, while the law dose not require that malice exist for any appreciative length of time before commission of the act, there must be aforthought. There must be a combination of the evil intent and the act producing the fatal result.

b] Then the court went on to combine this charge on the cooling period, TR 200--202 ln 9, and manslaughter, §16-3-50 (1991); on the ellements of law, on murder and voluntary manslaughter, combining the two:

> Now manslaughter is the unlawful killing of another without malice, expressed or implied. You will notice that the absence of malice is what distinguishes murder from manslaughter. Now voluntary manslaughter is the taking of life of another in sudden heat of passion upon sufficient legal provaction.... ...,I will say that when an assult is made with violence or circumstances of indignity upon a mans person or by slapping him or spitting in his face, and the party kills the aggressor, the crime would be reduced to manslaughter. if it appears the assault was resented immediately and the aggressor was killed in the sudden heat of passion or in the heat of blood.... If the person in fact, cooled or there was cooled, the killing would not be contributed to heat of passion, but to malice. The sufficiently of the cooling time would, of course depend on whether there was time, all circumstances being considered, for a man of ordinary reason and prudence to have cooled down.

5= The courts burglary charge, TR 196--197, was minimul on **Intent**, but did state that intent must be proven at entry; The court primarily read the statutes, but did not charge that §16-11-311(2) "excludes a participant of the crime", and it was proven that all present was engaged in a crime. Counsel did not object, or offer written charges;

> Now intent to commit a crime, either in a dwelling or a building must exist at the time of the entering, regardless of whether or not the crime is actually committed.

c] It was proven that this was a shack (building) and not a dwelling. In 1992 only life could be sentenced for burglary 1'st, and the SC Supreme ct, determined in Chubb V State 401 SE.2d 159

(1991), that counsel should request mercy to the jury, and it was ineffective counsel not to.

d] The above charges were also found to be unconstitutional, and a violation of fundamental rights, 5'th, 6'th, 14'th§1 Amend US Const, and due process violation, in Yates V Evatt 474 US 896 (1985), 484 US 211, 500 US 391, citing Mullaney v Wilbur 95 S.Ct 1881, see also 391 Se. 2d 530 (1989) and 134 F.3rd 235 @ 241 [10] (4'th cir 1995), quoting Yates and Sullivan.

These types of charges also violate Art. V §21 SC Constitution, and was found so in State V Belcher op.26729 decided 10/12/09; but the court did not cite Yates supra, and held that it cannot be raised on (PCR) or retroactive, even though they were illegal The (PR) court, only made one minute holding under ineffective counsel on a part of the record under Sandstrom 442 US 510 (1979), and did not address or allow the whole record, or trial errors. In Arizona V Fulminante 499 US 279, 285 (1991), that harmless error, [is] no excuse. Winship Supra, on its own negates the above charges, especially combined in the same setting, as below errors.

These issues are constitutional and statutory violations, imposing involuntary servitude, without being **duly** convicted, §17-25-10 (SC 1992), and contrary to prohibition of restraint on liberty, 14'th 4'th Amend, and is not subjected to the exception of Butler and related cases.

That the courts have held that implying inference **as** fact shifts the burden of proof, and abuse of discretion is had when judge charges fact; **id;**

> American Heritage dictionary, 4'th ed at P.710
> The act or process of deriving logical conclusions from the premise known or assumed to be true; Infer; 3 ...Socrates argued that a statute inferred the existence of a sculpter.

The act or process of deriving logical conclusions from the premise known or assumed to be true; Infer; 3 ...Socrates argued that a statute inferred the existence of a sculpter.

Here I was not charged with weapon violation, nor was a plea of self defence or justification allowed, and a presumption of malice by use of a gun charge was made. The court did not apply the charge in State V Mannis 59 SE.2d 370 (1949 SC). The court did not give a State v Cooney 463 SE.2d 597 charge under §17-13-20 (SC 1991), and violated Francis V Franklin 471 US 307.

At least one court in Jones v Delo 56 F.3rd 878, 883 (8'th Cir) held that [when an ellement of the offence is not charged or proven, then actual innocence and miscarriage of justice is had], and in Holland V US 348 US 121, 139 [20-21] "**wilfulness** must be charged. In US v Jones 425 F.2d 1048 [it is presumed that a jury follows the instructions of the court].

****

6= The court denied me the right to put up witness, and evidence for defence, as an adversary to state, in violation of the 6'th & 14'th Amend US Const, & Art 1 §3, §14 SC Const, and §17-23-60 (SC 1991); and no curative instructions were given:

a] Counsel called witnesses for defence, TR 144 ln 10--145 ln 18, about evidence of another gun, and bullet holes in car, & the state objected; court would not allow witness to testify, and threatened him in front of jury;

(Dave Cannon, Direct by Plexico)
Q: So you owned the car that Mr Gibbs was driving that night ---
Solicitor: Your honor I object to the question as being leading, sir this is his witness.
Court: This is your witness.
Plexico: Thank you your honor.
Q: Do you know anything about the car that Mr Gibbs drives.
A: Yes I sold Mr Gibbs that car and ---
Solicitor: Your honor please that question has been answered already.
A: I can answer ---
Solicitor: You wait a minute sir.
Court: No, Mr. Cannon, you wait until I get through now, both of you. This has been asked and answered. If your fixing to go back into prior testimony, I'm not going to allow it.
Plexico: Okay thats exactly what --- the damage to the car, your honor.
Court: Alright you can step down.
(whereupon Mr. cannon walks by the solicitor, he says something that was inaudible to the court reporter, [or anyone])
Court: Alright whats his name.?

Solicitor: Mr. Cannon, sir.
Court: Mr. Cannon do you want to stay over in SC for about six months.?
Cannon: No sir.
Court: Well, you had better not speak to any of the attorneys or any officer of this court, do you understand me.?
Cannon: Yes sir.
Court: All right sir, go ahead.

In prior testimony, Plexico **preserved** cross examination of this witness, TR 17 ln 17--21, and when state put up this witness again at TR 61--64 there was only a brief mention of a bullet mark, and no cross was had, so testimony was not even proffered. This witnesses did testify at (PCR). **id** PCR TR 66--68 and Ms. Clements about same at PCR TR 69--71; on matters that jury should have heard. Since there was no pre trial process or investigation, Counsel never spoke to any of the witnesses prior to trial.

The sheriff and detective both testified that they saw no bullet marks, TR 128--131; when they had no pictures, or any evidence, and never looked. Counsel did not object, and state & court would allow no adversary testing.

b] The cumulative exclusion of proffered evidence has been held unconstitutional in, Gardner V Fla 430 US 349, Eddings V OK 455 US 104, Lockett V Ohio 438 US 586, cited in Skipper v State 476 US 1, and on confrontation clause, Crawford V Washington 539 US 914: especially in light of other violations above and below.

7= The court would not allow defence to put up evidence and testimony of Mr. Browns criminal record of "Pointing A Firearm", TR 142 ln 2--18:

(Hermain Brown, Direct by Plexico)
Q: Marion Brown was your brother?
A: Yes sir.
Q: From some information about your family, could you tell the court if on 3/13/1991, he plead guilty to pointing a firearm.?
A: Excuse me?
q: Could you tell me if on 3/13/91 ---
Solicitor: Your honor please, that isn't proper.
A: No sir, I have not, no.
Solicitor: I object sir.
A: No
Court: Thats not a crime of moral turpitude, it wouldn't be admissable.
Plexico: Thank you your honor.

c] This contradicted state witnesses own testimony at TR 141; And state accused me of **pointing a firearm** in closeing, to establish intent out of justification.

d] The court again interfered in a biased manner, when counsel showed criminal file, to rebut prior testimony, TR 139 ln 23--140 ln 6, of same witness.

> (Hermain, Plexico hands witness a document)
> Solicitor: Judge I don't know what he's having her look over, but the proper procedure is to ask her a question first ---
> Court: Why don't you ask her a question and if the answer is consistent, sit down, if its not, then you show her the document.
> Plexico: Thank you your honor.
> Q: On 3/12/91, did you plead guilty to distribution of unlawful drugs, crack cocain?
> A. Yes I did.

Here the witness had previously denied such behavior, and Plexico admitted at (PCR), that he had represented these witnesses before: and operated in a conflict of interest.

e] Again when counsel questioned Detective Taylor about criminal activity; (to show the crack shack was a business and not dwelling), and he had objected to Exhibit # 8, **id** TR 153; The court intervened in a biased manner, TR 60 ln 5--61 ln 10, as a structural error:

> (cross by Plexico, Mr. Taylor)
> Q: ....Okay do you know anything about any drugs?
> A: Not at that particular time I didn't.
> Q: What have you learned since then?
> Solicitor: There's a way to do that and I would be glad to even stipulate it, but this isn't proper sir, if he doesn't know anything about it, other than hearsay.
> Court: It would be hearsay unless you can lay some kind of foundation.
> Q: All right, sir, do you have any personal information about any drugs?
> A: I don't understand the question sir.
> Q: Is that a known crack house?
> Court: Why don't you start at the beginning, and try to take it a step at a time and see what you can come up with. But if you don't know the answer, I would suggest you not asking the question. Your supposed to know the answer, before you ask the question....

Here the court not only intervened, but told counsel what and how to ask, and chastised him on knowing the answer, before the question. This is a violation of substancial and procedural due

process, 6'th & 14'th Amend and Art 1 §3, §14 SC Const. Jury was not corrected, and objections not made.

f] I took the stand in my own defence, TR 165 ln 20--166 ln 17; and again the court and state interrupted with counsel in a manner to prevent defence & prejudice the jury;

> (Gibbs, Redirect by Plexico)
> Q: Did you break the law that night, aside from that little girl?
> Solicitor: Your honor please I object to that question sir.
> A: I did not break ---
> Court: Well hold on just a second, I'm going to let him ask it, he's got to ask something, go ahead and ask him.
> Q: Beside the incident about the little girl, did you break any law that night?
> A: No sir, I did not break the **supreme law** of the US of A.
> Q: Did you break any --- did you intend to break any law?
> A: No sir, I did not.
> Q: Did you go over there intending to kill him?
> Solicitor: Your honor please, I -- thats all been asked, sir and I object to it being improper anyhow.
> Court: Do you have any recross?
> Solicitor: No sir.
> Court: Step down, call your next witness.
> Plexico: Defence rest your honor.

g] Here, not only did the court infer that counsel had to ask something; but had me step down before i or counsel was through; and counsel even prejudiced the jury with some "little girl" which never existed, and was a false implication in states official version. State did not want me contradicting there case, or the statement, or questions of fact.

In Brown v Ruane 630 f.2d 62 (1'st Cir) the court heald that [whether rooted in due process of the 14'th amend, or compulsory process of the 6'th, the constitution guarantees the the right to a complete defence], see also Winship supra, and ; was counsel so ineffective, as to warrant the intervention from the court? inviolation of Strickland V Washington 466 US 668, 692--94, and US V Cronic 466 US 648, and High V State 386 SE.2d 463 (1989).

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8= The court erred, and abused discretion, in denying counsels motion to suppress the statement, TR 79 ln 4--101 ln 9 at

Denno hearing, and intervene in a suggestive manner; and counsel did not allow me to testify, or object to falsity of the statement.

(Denno Hearing, Plexico, Tr P. 98 ln 18---)
Solicitor: ...your honor please, that would conclude testimony on the Denno hearing.
Court: Do you have any testimony, Mr. Plexico?
Plexico: I do have a motion, your honor, then my **client** may wish to **testify.** Your honor I don't think ---
Court: Hold on a second, In regard to the Jackson hearing, do you have any testimony?
Plexico: No, your honor.
Court: All right I'll be glad to hear you in regard to the Jackson V Denno hearing.

Plexico: ...I move to suppress the statement on that grounds your honor.
Court: ...well, I disagree. ...,the statements are admitted into evidence.

Here I was going to testify, but not allowed to, and I told police at airport, that the statement was exaggerated and false due to audience, then i just done what I was told, and didn't see counsel until several months later. The state **read the statement** to the jury, then rested.

(Solicitor Read Statement, Tr 131 -- 137)
Solicitor: ...,I would like to publish the statement, states exhibit # 16.
Court: All right sir.
Plexico: ...I have an objection based on my earlier objetions, your honor.
Court: All right, it's overuled.
Solicitor: ---, yall will have this in the jury room with you. ...your honor please, with that the state rest.

a] The court, nor state would allow confrontation and rebuttal of the statement, denying substantive & procedural due process; and this court in Douglas V Ala 380 US 415, 420 [held that reading statement to jury and not allowing cross, or rebuttal, was unconstitutional], cited in Simmons 215 Se.2d 883 [H.N 2] also see dissent of Justice Ness, on inadequate PCR. Futher this was in violation of Strickland Supra, & Cronic Supra, State V Craig 277 SE.2d 306, and US V Olliverre 378 F.3rd 412 (4'th Cir 2004).

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9= The court erred and abused discretion in denying counsels

motion to direct verdict on Burglary & Murder, TR 137 ln 21--139 ln 7, on **insufficient evidence** to establish **ellements** on the charges; and his renewed motion at TR 167 ln 18--21.

a] That the court erred in fact & law, in denying counsels motions to charge trespass, involuntary manslaughter, & self defence, TR 167 ln 22---170 ln 13; and made an inference finding of fact, contrary to the evidence presented, and mitigating circumstances.

b] That court erred as a matter of law & due process, in denying POST trial motion for new trial, TR 207 ln 4--7; without any written motions, or hearing: **id**

(TR ln 23--138 ln 8)
Plexico: Your honor, I have a motion for directed verdict on the charge of murder, --- and for directed verdict on charge burglary 1'st, in that the state has failed to prove or show the ellements on all of each crime.
Court: All right, I think there's ample evidence in the record to sustain a conviction ...so I'm going to deny your motions. Anything futher?

(TR 167 ln 17--168 ln 15)
Plexico: Yes I would renew my motion for a directed verdict, tour honor.
Court: All right the ruling would be the same. Any futher motions?
Plexico: Yes your honor, request for charges, do you want those do you want those in the morning or ---
Court: ---
Plexico: I would ask his honor to charge trespass, and to charge manslaughter.
Court: Trespass?
Plexico: Yes sir, entry without consent, ...---
Court: You can submit written charges on that, but I'm not totally convinced that it would be proper, and i'll look at it in the morning. I will charge voluntary manslaughter.
Plexico: Okay, thank you --- and involuntary manslaughter,....
Court: I don't see involuntary manslaughter.

(TR 168 ln 21--170 ln 13)
Court: Have you got the charges prepared?
Plexico: Your honor, I'm asking that you charge Burglary 2nd, & 3rd, in case they find it was a crack house, or place that business was conducted, and it was entered in the **daytime** which would be burglary 3rd. Manslaughter & Self defence your honor.
Court: All right sir, i'll charge burglary 1'st, 2'nd 3'rd, and i'll charge voluntary manslaughter, but i've giving it some thought, and I'm not going to charge self defence.---

(TR 206 ln 25---207 ln 8)
Plexico: Yes your honor, I have a motion to renew my motions for directed

verdict, your honor.
Court: All right sir, well based on my rulings in the trial, i deny that motion.
Plexico: I also have a motion for a new trial your honor.
Court: For the same reasons, i deny that motion. have the defendant approach the bench.

c] Here the court erred in law & fact, by denying all counsels motions, especially on evidence, **id** Grace v State 200 SE.2d 248, @256, citing Spieser V Randall 357 US 513, and State V Law 244 SE.2d 302, and State V Morgan 319 SE.2d 135; in that The states official version of the statement was false, and they knew this, thats why it was presented in the NARRATIVE, without confrontation, see also Jackson V VA 433 US 307, and appellate counsel, did not raise any of this in it's Anders 92-728 direct appeal. And the court acted in an adverse manner toward counsel, State V Lewis 179 SE.2d 616, 619.

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10= The court did err in allowing a **Juror** to be sworn in, that was related to the Deputy Sheriff investigator, "Mr. Ben Riley"; and it was later learned that another juror was a neighbor to victums mother; that could have denied me an impartial jury especially in light of other errors:

Court: Is there any member of the jury panel, related by blood or connected by marriage with any of the following possible witnesses....
(whereupon a juror stands)
Court: All right you are related to who?
Juror: Benjamine Riley.
Court: How close kin?
Juror: Cousin.
Court: All right, would you be able to put aside that relationship and decide this case base strictly on the evidence presented in this court room.
Juror: Yes.
Court: Thank you name your name is for information?
Juror: Julia Burns

Court: Thank you Ms Burns. All right the jury panel is qualified. The clerk will give us a jury.
(whereupon a jury was duly empaneled and sworn)

Plexico: Defence would request that the jury be polled.

Court: Al right, the clerk will poll the jury
(whereupon the jury was polled individually and all jurors answered in the affirmative)
Court: The jury has been polled, and verdict stands.

a] At the jury selection, TR 8 ln 7--9 ln 5, the juror was sworn in and sat on the jury. At the poll, TR 206 ln 15--22, the jury answered: Yet the poll and part of the selection process was omitted from the Transcripts, even though an Anders 386 US 738, ROA was filed, and along with other documents, are not part of the state record, **id** Cullen V Penholster 563 US 170.

Page **5A** (jury strike list) in the Direct appeal ROA, shows 11 jurors and one alternate, and this was raised at PCR, but page **5A** was left out of the **ROA** on certiorari, prepared by appellate defence. Counsel did not object, pursuant to §14-7-1030 which forecloses this issue, and establishes deficient & prejudice, for ineffective counsel. Strickland supra.

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11= The state and the court, erred and abused discretion, in allowing the prosecutor to have the last say; **id** TR 170 ln 14--16;

Solicitor: Okay Sir, State would waive opening, if your honor pleases.
Court: Okay sir, bring the jury out.

Here I was denied the right to address the states summary of their evidence argued to the jury; especially in light of the below accusations of crimes not charged, and instructions of law to jury, and above errors of fact and law. 4'th, 6'th, 14'th Amend US Const, and counsel did not object, Cronic Supra, and Art 1 §3, §14 SC Const. State law in SC gives defence final closing argument.

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12= That I was denied the right to a fair trial, and was the victum of **prosecutorial misconduct**; as a result of the following false accusations, and impermissible latitude, in violation of substantive & procedural due process, and abuse of discretion:

a] The state, repeatedly bombarded the jury with assumptions & charges of the court:

His honor will charge you, TR 11 ln 24.

"his honor will give you an explanation, his honor will charge you. TR 180 ln 5,22.
his honor will also tell you, his honor will tell you in that regard. TR 181
his honor will also charge you, he will tell you, lets assume, lets assume. TR 182.
lets assume, lets assume, lets assume, and lets assume. TR 183.
assuming, TR 184.
lets assume, I don't assume. TR 187.
but assuming, assuming, lets assume. TR 190 ln 25--191 ln 2.

The stacking of assumptions, and what others will stay, could have shifted the burden of proof, counsel nor court objected or corrected.

b] The state went on to charge the jury with law, in his opening statement, **id** TR 11--12 ln 18: and again in his closeing argument; TR 184 ln 15--24, 185 ln 14--24, 186 ln 14--19, 188 ln 24--190 ln 2. This went un corrected.

c] Futher in the opening statement, a factually false implication was made, TR 13 ln 7--16;

...that he knocked on the door, that hermain Brown came to the front door, and he had some words with her. She attempted to slam the door back shut, and he knocked it open, knocking her all the was across the room into the fireplace....

This is not even possible as the fireplace is on the same wall as the door, and the states own pictures and evidence disproves, yet these are not part of the appellate state record.

d] The prosecutor made repeated accusations during cross examination of me, that was uncharged, or supported by direct examination, TR 153 ln 16--165 ln 13; that was rebutted:

Q: but you didn't prevent it, you brought it on. didn't you? you went there to steal money from that fellow.
A: No sir.
Q: And that is flat out armed robbery anyway you figure it, isn't it?
A: No sir.
Q: Why not sir?
A: Because it was already my property, I was the one robbed.
Q: You know that one of the reasons they have a law against robbing people is to prevent people like you from killing the victums, don't you know that sir?
A: Yes.
Q: But in spite of knowing that, in spite of knowing its the law and that

you were breaking the law, you went into that house that night with a shotgun to rob that man of money, didn't you?
A: No sir.
Q: Isn't that what you told the jury sir?
A: No sir, **you** said I went to rob that man. I went to get my property back.
Q: ---to at gun point....
A: **I** was the **victum** sir, not the robber.
Q: He's dead isn't he sir.
A: Yes sir.
Q: He's more of a victum than you were?
A: yes, sir, No sir, were both victums.

This line of questioning which was highly prejudicial, without just reason, was probably based on inadequate investigation by state and counsel.

e] The prosecutor went on to accuse me of crimes and wrongs, that I was not charged with, TR 180 ln--191, in his closing argument:

Solicitor: Ladies and gentlemen, "pointing a firearm", if nothing else, is a crime. ...If I were to point a gun at you, that is a crime in SC.
So when he went in that house with intention, and he said he was going to point it at him because he knew --- do you remember this --- he had to get the drop onhim first,.... And there is no question he went in with the intent to commit a crime, and that crime being Arm Robbery, to get his money back, or grand larceny, or what ever, or murder.
Well ladies and gentlemen of the jury, I tell ya'll when you go in with a gun to take money from somebody, that is Arm Robbery.
...Had joseph gibbs been a law abiding citizen, and had he not wanted to go get crack, as he says, in exchange for sex. He says that he doesn't break the law but god knows, he told ya'll that when that women told him she would give him a little bit, if he would give her a little bit, there was no question he was going to break the law then.
Plexico: I object your honor, this is improper.
Solicitor: I mean he had no problem with breaking the law. But yet he would tell you, that on things that matter, such as taking a life, he certainly had no intention.

At know time did i tell the jury i never broke the law, in fact when asked, i said that everyone who drove over 55 getting there broke the law. (left out of TR). The state accused me of pointing a firearm to show intent, when they would not allow the jury to hear the victums record for same. I was accused of Grand larceny, or whatever. There was no trading sex for crack, that is the states official version in the statement, they promoted. Mr Plexico did

object, and appellate defence did not raise same.

f] The state made commits on my assertion of rights and legalities, as I thought them to be; in order to turn same into intent, and malice, TR 154 ln 23--155 ln 3, during Cross:

> Q: You mean your going back to the days of the 1800's to the wild west, the man that rules the fastest gun is the one that is the best man, thats what your telling me.? You don't have any respect for the law, do you sir?
> A: Yes, sir I do.
>
> (And again in Closing Argument)
> Now, I told ya'll that lets assume for a minute, now, I'm going to tell yall I dont assume, I don't think thats what happened. But what I think makes no difference.... Mr. Gibbs, had to go back to do this, I had to go back to the 1800's to the wild west and take the law into my own hands, and you see what kind of situation it creates when you do that. You got a dead man and nothing else.
> The facts that you have before you are that Marion brown stole from Joseph gibbs, monies.
> TR 187 ln 25--188 ln 5, ...had he done what was required of him by law, instead of taking the law into his own hands, I would be trying Marion brown, for Arm Robbery, and we would not have a dead man, we would not be waiting this courts time with a murder charge, and with a burglary charge.

Here the state argued against assertion of justification, contrary to facts and law & testimony, and even told the jury, TR 182--184 they could tell by the way a person looks, as evidence, and defence was not allowed to contest.

g] The prosecutor went on to charge the jury with law, and argued against self defence, TR 180 ln 11--191; that the court would not charge, TR 190 ln 18--191 ln 16, and I did not bring it on, and was legally armed at the time I was, and only acted when threatened:

> ...Joseph Gibbs got mad with Bozo brown for some reason, and what reason, I do not know. That he went to his house with intent to kill him, that he burglarized it, and that he did in fact kill him. No where have you heard about a gun except from joseph gibbs himself. Not one other place have you heard mention of a gun.
> But assuming that he did have a gun, again assuming something I dont think is true. But lets assume that Bozo did have a gun in that house, you cannot consider self defence in this case. And why cant you consider self defence in this case? If Bozo was going to pull out a gun and shoot him, why cant you consider self defence? Because ladies and gentlemen the law says that you cannot be the person that brought on the trouble, and then claim self defence. in other words....
> Had joseph gibbs come into that house, and had he said, Mr Brown, I

> want my money, and Mr. Brown pulled out a gun, and had joseph gibbs at that point shot him, and killed him, it would not be murder.

Here the state contradicted himself, and prejudiced the jury, as in the last paragraph, i did demand my money, and self defence only took place when the threat was made: There was an inadequate investigation, and evidence of other gun was not allowed; and the prosecutor substituted his opinion for my credibility, and testimony, TR 182 ln 22--183 ln 6, 184 ln 12--14, 187 --188; and this was not corrected by court or counsel.

h] That the prosecutor did knowingly present false evidence to the jury, by just reading the statement, and not allowing any confrontation, or correction, TR 132 ln 1--137 ln 17. This violated the 6'th Amend, confrontation clause, and 14'th amend due process clause, and caused an biased jury.

I] The prosecutor asked and pleaded the jury to speak for others, and send a message to jasper county, TR 191 ln 21--25, in his closing argument:

> You do what is right. The family of Marion Brown. The people of Jasper County, we will be waiting on your decision and whatever it be, let it speak the truth and send a message to the people of Jasper County as to whats right and whats wrong!

Here the state asked the jury to send a message to others, and excluded the evidence on the ellements of law, and since state got the last say, it went un corrected, and counsel did not object. The prosecutor and defence counsel was ineffective, to a degree that warrants the vacating of the conviction, on this issue, and above & below combinations.

j] I submit that the prosecutor as an elected official, and officer of the court, did exceed permissible latitude to the point of misconduct, that has caused a miscarriage of justice, contrary to, Berger V US 295 US 78, Mullaney 95 S.Ct 1881, and State v Craig 277 Se.2d 305, & State V Parris 161 SE.2d 496. Also the states actions, and inactions, were contrary to Donnelly V DeCristoford 416 US 637, & US V Young 470 US 1, @11-12 (1985).

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13= That evidence favorable to defence was unconstitutionally suppressed, by state, court, and counsel:

a] In addition to above stated witnesses and evidence; The car or at least pictures of same, to show the bullet marks & holes, TR 161 ln 1--17, that witnesses Dave Cannon, and Dee Clement testified about at the PCR hearing **id** Appendix PCR Certiorari, at P. 175 ln 6--176 ln 14; that would determine another gun was present, and establish an exculpatory defence.

b] The drugs and money found in Mr. Browns underwear, would have shown illegal activity, and participant in crime, App. PCR Cert, 175 ln 1-6, 178 ln 22-25.

c] The SLED report, that showed, there were no prints on the shot gun, PCR. Pro se Appendix, (PCR.PA) @ p.84

The signed receipt for the shotgun from neighbor [Omar Smith] 2 hr after the crime, by deputy Ben Riley, PCR. PA @ 75: When states witnesse testified that gun was on the floor, and scene was secure, App. PCR. 44 ln 6--15, 45 ln 12-23, 47 ln 18--48 ln 6; which would have shown the scene was cleaned up, and inadequate investigation done. Hardeeville police were first on scene, and they did not testify.

d] Mr. Browns prior arrest sheet. PCR. PA. @ 74, or testimony to same, App. PCR. 142 ln 1--14, which is public record: That showed Mr. brown had plead guilty several months prior to pointing a firearm, which the court would not allow; And Plexico's investigator went to the clerks office and got it during trial.

e] The autopsy report, or testimony on same, that showed no trauma was present, and the shot pattern and location, was more to the side, and upward, showing an offencive position, **id** threat, that caused the self defence.

f] I submit that the evidence suppressed by court, state, & defence counsel; would have been exculpatory, as I claimed justification, **id** 1-ALR-3rd 571 4.5. "evidence of victums reputation and character; and 2-ALR 3rd 1292 "to lesser degree", and 64-ALR 1039 §5 "particular traits of character are admissable", see State V Jones 188 SE.2d 178, State v Jackson 87 SC 407, and Brady V

Maryland 83 S.Ct 1194 (1964); shows that the suppression was unconstitutional, and harmless error not applied by state, would be no excuse.

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14= That the prosecutor, nor counsel, or court, ordered a **psychological evaluation** or **competency hearing** prior to trial; contrary to (SC Ann. Code 1991) §44-23-410 et seq (1990 act No.419 §1 and 431 §1).

I was kept in the Hampton County jail from 11/4/1991 until I was brought back to Jasper County jail for trial on 3/9/1992; and never left or seen anyone, but counsel, and that was @ 1/22/92.

a] I submit that the denial of any psychological evaluation or competency hearing pursuant to statutory law, and case law, was a denial of due process, 6'th & 14'th Amend; when Murder & Burglary 1'st was the charge, and I claimed justification & self defence; as mitigating circumstances of a state of mind: Particularly when state attacked credibility, and intentions, and acts of constitutional rights, and wilfulness was not charged. This violated Pate V Robison 388 US 375, Dusky V US 632 US 402, Guthrie V Warden 683 F.2d 820,824-25 (4'th cir 1982), & Coles V Peyton 389 F.2d 224 (4'th Cir 1986), & Davenport V State 389 SE.2d 649.

There exist a family history of mental illness, and no pretrial investigation was done.

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15= That I was denied a fair and impartial trial, with due process of law, as a result of **ineffective trial counsel**; contrary to the 6'th Amend US Const, & Art 1 §14 SC Const; for reasons so stated in the record, below and above:

a] Counsel "Mr.Plexico" failed to conduct any pretrial investigation, for factual or legal defence; or contact me in a timely manner.

I did raise this issue at PCR, **id** App.PCR. 249 ln 11--271 ln 14, 198--301, but was stopped by the court, 241 ln 23. He did not even know who Joe Gibbs was at trial, App.PCR 310 ln 9--10; and counsels

own testimony confirms he never conducted an investigation, App. 312--313 ln 19, 316 ln 13--18. Counsel conceded he thought I was guilty so he made no defence, App. PCR. 312 ln 15-21, 322--325;

Counsel stated on the stand, that, I would have been convicted with nothing more than a death certificate. **id** App.PCR 319 ln 22-23

b] That counsel never contacted any of the states witnesses, or defence witnesses, even though some tried to contact him prior to trial, and record is silent), no psychological or competency hearing, App PCR 306 ln 9--19, 309--311 ln 6:

c] That counsel made no legal or factual defence, as shown by courts constant rebuking of counsel in front of jury.

d] Counsel failed to submit to jury, suppressed evidence, to include, Receipt for gun, crack & dope in underwear, proof that the shack was a crack house, object to states charges of law, & crimes not charged, or states plea for jury to speak for others;

e] Counsel did not direct examin me in a manner, to confront the statement read to the jury by the state, when same was false information & fact in part; and counsel failed to ask for the final argument to confront states summary of evidence, and new charges.

f] That counsel made hupothetical & unjust question & statement, before the jury, PA.PCR p.17(j), about buying dope for some little girl, App. PCR 266 ln 22--267 ln 17, 343--344; that was untrue and soley conjecture, and that joe made a mistake that night going to get crack for some little girl, App. PCR, 176 ln 15--16, 178 ln 16--19. This is a restatement of **non** existing fact used to imply intent on charges.

g] That counsel failed to make or submit any "Written Motions", during trial, or post Trial, and to ensure that the court had subject matter, and provide me with copy of indictments. Counsel did not provide Appellate Counsel "Mr. Dudek" with requested documents so an effective direct appeal could be filed, PA PCR p.86 and appellate counsel failed to provide a meaningful direct appeal.

h] I submit that counsle was extremely ineffective, even under Strickland 466 US 668, 692--94 (1984); and that it actually

amounted to having no counsel at all under, Cronic 466 US 648, as a default. No adversarial testing was done, and the record as a whole warrants the vacating of the conviction.

An analysis of ineffective counsel, that equates to this case, **id** Glass V Vaughn 860 F.supp. 201, Reys-Vasquez V US 965 F.supp. 1539, citing Cronic and High V State 386 SE.2d 463 (1989).

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16= That defence counsel was ineffective, along with officers of the court, Excutive & Judicial, in denying me any pre trial Due Process, normally afforded by law & constitution in SC, in the form of **Arraingment, Preliminary & Bond Hearings** and a miscarriage of justice and denial of fair trial resulted, which is not harmless:

a] That there was no **arraignment** of any kind, before any judge, magistrate of circuit, after arrest, and before trial;Pursuant to SC. ann. 1976,1991) §22-5-710; through no fault of my own:

I was never taken to a magistrate for the process of arraignment, and the (**ROA**) is silent on the transmittal sheets, transcripts, ect.

Since murder & burglary are infamous crimes, **id** §14-7-1110 in which such is required. And in Crain V US 16 S.Ct 952, 162 US 625, (overuled in Part, by Garland V Washington 232 US 642,646, relying on dissent of Justice Peckham; record of no arraignment not made until review of court); and under Gerstine V Pugh,420 US 103 & US V Webb 90 S.Ct 854 (1975), holds that 4'thAmend requires probable cause hearing before netural magistrate, and I was not held upon an indictment. Art.1 §10 SC Const, forbids restraint of liberty without due process.

b] I was denied any form of **preliminary** hearing, before any magistrate or circuit judge; contrary to (SC Ann. 1976. 1991) §17-23-160; and I was not held upon an indictment.

I was held in Hampton County jail from 11/4/91--3/9/92, and told counsel of this @ 1/22/92, and he stated they done it that way sometimes. He did request a hearing along with other clients before magistrate Rawls, on 11/18/91 **ID** App.F, Exhibit A @p.009 and appeal

2018-002271. PCR @ p.8(b),13(c) : **but none was ever had, and record is silent. He stated at PCR, that he would have had one.** [subjunctive tense], dismissed at App.PCR 341. I was not allowed to present legal argument, App.PCR. 251, 274 ln 13--17, 294 ln 16-296. My cousin "Andy Perryman" went to the Magistrate "Judge Grayson" in Hardeeville, but was told he was ordered to stay out of it.?

It is well established that preliminary hearings, as probable cause, is a critical stage, **ie** Coleman V Ala 399 US 1 @7-10 (1970), and state law requires it, as a form is issued at arraignment to apply for one. See also Stincer 482 US 740, 744-745 fn.17, & Cooper V Dyke 814 F.2d 941 (4'th cir.1987). Although State V Keenan 296 SE.2d 676 (1982) did repeal some of the statutes, in this case §22-5-710 is ministerial by language & nature.

c] That I was denied any form of **Bond** hearing, before any judge or magistrate; pursuant to (SC. Ann. 1976,1991) §17-15-10 et seq, & SC Const. Art. 1 §15 (1991), and the 8'th & 14'th Amend US Const.

I did raise this issue at every stage, & PCR. PA. 10(f), **id** App.PCR 251 ln 22-25, 265 ln 10-19, 276 ln 5-10, 294; and counsel did not deny claim, 323, but the court never ruled on it.

d] I submit that because there was no Bond hearing, or other pretrial hearings & process, that is normally afforded in this state, **ie** Baker V McCollin 413 US 137, 145 (1979): that I was denied substancial and procedural due process & equal protection of the law; that exceeds harmless error defaults, and the state has made no sufficient rulings on the above issues, contrary to Gerstine Supra, Bell V Wolfish 441 US 520, 535 fn.16 (1978), Douglas V Hall 93 SE.2d 847, Hunter V State 447 SE.2d 203, and Rules 2 & 3 SCCrmP. I have excercised due diligence, but not **duly** convicted to satisfy involuntary servitude, §17-25-10 13'th Amend.

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17= I submit and argue that the circuit court lacked **subject matter jurisdiction**, and I was not given due notice, or tried upon True Billed indictments, 92-gs-27-002,& 003; These were not published nor clock stamped and filed by the clerk of court;

contrary to (SC. Ann. 1976,1991) §17-19-10 et seq & the 5'th, 10'th, 14'th Amend US Const, & Art 1 §11 SC Const.

a] I complained before trial about being not indicted or anything, but was told to keep quite. At trial the judge held up two pieces of plain paper, and stated:

> (TR 202 ln 15--17, ln 23 -24, 203 ln 8--11)
> ...I would you to ask on the place for verdict on the back of the indictment,...,
> ...on the back of the indictment.
> ...And again, sign your name as forlady to the bottom of the indictment. **I'll write** these forms of verdicts down for you simply as a guide for you to place on the indictments.

Here I did not see these until 1994, when state filed summary judgment on Gibbs V Davis a §2254 petition. I did not see the cover form for the indictments until June/2013, when I finally got the clerk to send me copies, and these do not contain the judges writings, nor or they clock stamped & filed. These show the arrest date as 11/18/91 which is in error; and most important, the dates on the presentments are March/9/1992. Non exist in state court records filed by counsel, to include those in fedral records center.

b] The lower courts have not adjudicated this issue at all, and the Fedral question has not been answered of: This court has held that the 14'th amend dose not apply the only portion of the 5'th left: But I say the 10'th amend dose apply the 5'th amend, and under the 9'th amend it is enumerated, and imposes a ministerial duty to get indictment on US Citizens.?

This court held in Rose V Mitchell 443 US 545, 557 [that states that employ grand juries must comply with the 14'th amend.] At PCR. TR ln 6--9, the states attorney stated;

> Mr. Deloach: Your honor, by way of procedural background, Mr. Gibbs was indicted for murder and burglary 1'st degree. The return doesn't indicate when he was indicted; however I would note he proceeded to trial on 3/10/92.

The Judge nor the order addressed this issue, and page 15 of the PCR order is omitted from all records.

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18= I submit that the **Cummalitive** effect of all the trial errors and constitutional violations above, warrant this vacating the conviction, and **compelling** reasons are state and shown for this courts attention.

a] On the fraudulent indictment; I requested an investigation from the SCDC, & SC Attorney General, dated 6/2/13, referred to the SC.Aty.Gen on 9/16/13 by General Counsel. No response since. The jury forelady, "Ms. Zenith Ingram" signature on the indictment cover sheet, is **Exactly** the same as that on the jury strike list @ P.**5A** (**ROA**), 92-728, which was written by counsel. And it dose not contain the judges writings, or filing stamp. Evidence supports this issue.

b] The state process in this case has been inadequate, and unavailable; and the use of the Butler v State supra legal standard, to deny habeas corpus, when the constitutional and legal violations are clearly shown, is contrary to O'Sullivan V Boerckel 119 S.Ct. 1728, 1734, 1742 (1999), see dissent of Justice Stevens, Ginsburg, & Breyer, "when the state is unavailable"; and as shown the Courts abuse of this standard, abrogated on a national level, this courts many holdings, on what warrants vacating the conviction proper, and the Butler Standard, should not be a substitute for a harmless error analysis review. These are public important & compelling reasons to adjudicate the issue. TheO'Sullivan court left open the question of South Carolina's habeas statute, in exaustion doctrin, 321 SC. 563.

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II. I SUBMIT THAT THERE ARE COMPELLING REASONS FOR THIS COURT TO ISSUE AND ORDER UNDER "RULE NISI" 28-USC-§1651(A)(B) AUTHORIZING ME TO MOVE THE US DISTRICT COURT FOR HABEAS CORPUS UNDER 28-USC-§2241(c)(d); SHOULD THE CONTROVERSY NOT OTHERWISE BE RESOLVED; ON THE ABOVE STATED CONSTITUTIONAL & LEGAL VIOLATIONS, THAT HAS CAUSED A MISCARRIAGE OF JUSTICE, AND I

HAVE BEEN DULY DILIGENT IN SEEKING REMEDIE, SO STATED BELOW.!

19= I submit & argue that 28-USC-§2241(c)(3),(d) is not foreclosed and excluded from the courts jurisdiction under the AEDPA ; as This act Does Not specify or even mention §2241 petitions, and it does specify §2254. If congress had intended for it to apply across the board it would have included §2241 in written law. Futher the AEDPA applies only to Terrorism and the Death penalty, of which this case is neither: And federal law mandates that each law be of "one subject" with specific ellements, and is subjective and not objective. Federal Habeas Manuel 11.21, 11.80 confirms that the courts are split on whether §2241 is as restricted, and cannot remedie illegal & unconstitutional restraints on liberty by states, on 14'th Amend citizens.

a] That the state supreme court did, "although ambiguous" address the merits of the legal & constitutional claims, by applying the Butler standard, thereby reactivating the tolling period from 6/2/21; and again the state lawyers have not answered any of the legal and constitution caims supported by record; and the pleadings challenged the inadequate and unavailable due process & equal protection of the law.

b] The US.District courts in SC, have not made full and fair findings of fact and law, in Gibbs V Davis, as only part of the state record was filed by state, with no answer to issues, and the court dismissed without prejudice, as mixed petition, in 1994. In Gibbs V Maynard I filed the state Records with the petition, but the magistrate ordered them sealed until case ended; and again state only filed a portion of the court records; and State court records were silent, outside of transcripts as noted. The state was soley responsible for not notifying me of dismissal of certiorari from (PCR) on 11/8/96, until 11/8/1997, invoaking the AEDPA, and dismissed same as untimely, with no answer from state on issues. I did move the (4'th Cir Ct.App) under 28-USC-§2244 in Gibbs V Byars NO.11-234, but same was dismissed without reason, and if prior petition was dismissed as untimely, then even authorization is moot.

I did move the US court, for tolling in Gibbs V SC. Attorney General, when state failed to give me timely notice, yet it was dismissed without prejudice pending filing of writ.

c] The states process is inadequate as shown in the records, and (PCR) is unavailable[2] on trial errors, denial of due process, prosecutorial misconduct, and any ground except ineffective counsel, and the order only made plain error findings on part of the issues. By default, this court has held that if its defaulted in PCR, its not allowed on §2254. I have used every means available by law, which has been futil, and arbitrary denied remedies. If the state and courts had ruled on my issues, and showed me the error, i would have layed down and shut up decades ago; as it is the judgment of the trial court is not final, and ripe for adjudication.

d] The legal maxim; **Quidquid ab initio vitiosus est, non protest tractu temporis convelescere**, should apply;

> Whatever is invalid from the outset, cannot be made valid by the passage of time.

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[2] On inadequate and unavailable state process, this courts opinion in Martinez 132 S.Ct 1309, 1315-16, (2012), citing Coleman 501 US 755 ,756, and the dissent of Justice Blackmun, Marshall, Stevens, (unfair obstruction of constitutional law), citing Federalist Paper # 51, #44, and I submit that Federalist # 80 p.474 (5) ...to all those in which state tribunals cannot be supposed to be impartial and unbiased." should apply, and #81 on judiciary.

20= Unlike Post Conviction Relief Statutes, which is an independent cause of action; Habeas Corpus, is a remedie for an action already caused; and should remain poten and available, to stay illegal and unconstitutional convictions and imprisoment, which can be the result of political correct and popular opinions that blow with the wind. XXXX END XXXX

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Hugo Miller

Date: July/19/2021

jhg/BRCI|7-19-21