23-7276

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, DC

ROBERT SMITH — PETITIONER

(Your Name)

vs.

WARDEN, AMY ROBEY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

ROBERT D. SMITH

(Your Name)

LUTHER LUCKETT CORR. COMPLEX P.O. BOX 6

(Address)

LAGRANGE, KENTUCKY 40031

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY PETITIONERS HABEAS CORPUS PETITION BECAUSE OF PROCEDURAL DEFAULT WITHOUT REVIEWING THE RECORD AS WELL AS BASING ITS DECISION ON THE UNITED STATES DISTRICT COURTS FINDINGS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED PETITIONER INEFFECTIVE ASSISTANCE OF COUNSEL PETITION WITHOUT REVIEWING THE RECORD OF THE CASE WHERE PETITIONER WAS CHARGED WITH ROBBERY IN THE FIRST-DEGREE UNDER KENTUCKY REVISED STATUTE (KRS) 515.020. PRIOR TO TRIAL, COUNSEL WAS IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, AND; CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES UNDER THE STRICKLAND STANDARD.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY PETITIONERS HABEAS CORPUS PETITION BECAUSE OF PROCEDURAL DEFAULT WITHOUT REVIEWING THE RECORD AS WELL AS BASING ITS DECISION ON THE UNITED STATES DISTRICT COURTS FINDINGS WITHOUT REVIEW THESE ARGUMENT ON THE MERITS OF THE CASE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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 A to the petition and is

[ ] reported at RE: Case No. 23-5596; 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[ ] is unpublished.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 Civil Action No. 3:20-cv-00430-JHM-LLK; 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 C to the petition and is

[ ] reported at 2011-SC-000285-MR; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Kentucky Court of Appeals court appears at Appendix D to the petition and is

[ ] reported at Smith v. Commonwealth, 2018 Ky. App. Unpub. LEXIS 857; 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 December 14, 2023.

[ ] 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: February 2, 2024, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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 March 22, 2012. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: June 21, 2012, 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amend. V

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.***

Amend. VI

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 which the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; 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 defense (competent counsel).

Amend. 14, Section 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 that will 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 within jurisdiction the Equal Protection of the Law.

STATEMENT OF THE CASE

On the evening of July 26, 2010 the A-Z Grocery Store was robbed. The store was located on Saint Andrew's Church Road in Louisville, Kentucky. Owned and operated by Mr. Said Zeman and Mrs. Gani Abubakar. Police Officer arrived finding Mrs. Abubakar shaken and upset. She gave a statement and description of two suspects who entered the store. The police spoke to witnesses at a nearby bar who stated they witnessed two people run through a parking lot and into an apartment complex carrying a cash register. Officers arrived at Sharon Smith's apartment obtaining consent to search the residence finding Robert Smith and Karmisha Hughes with a cash register. On September 15, 2010, Petitioner, Karmisha Hughes and Sharon Smith were indicted for First-degree Robbery as principle perpetrator's or complicity in commission of First-degree Robbery. Hughes and Sharon Smith were offered plea-agreements to amend the charge to second degree robbery with seven (7) years' probation for their cooperation, testifying against Robert Smith. At trial Smith was found guilty of First-degree robbery and sentenced to Thirty-two (32) years in prison. The Commonwealth sought to prove robbery in the First-degree by proving two separate arguments. The Commonwealth sought to prove "physical injury" to Abubakar during the course of the alleged robbery, arguing Smith hit Abubakar with a "flashlight" during the crime.

Petitioner had a Direct Appeal to the Kentucky Supreme Court **(Smith v. Commonwealth, 366 S.W. 3d 399 (Ky. 2012) (2011-SC-000285-MR) APPENDIX C**; arguing two arguments: (1) **The instructions improperly allowed conviction under a theory not supported by evidence in violation of the unanimous verdict requirement of the Constitution**; (2) **Judge Gibson erred by imposing a fine and costs**. On **March 22, 2012**, the Supreme Court of Kentucky affirmed Petitioner conviction but overturned, fine and costs.

Petitioner later filed a RCr 11.42 on his trial counsel stating several arguments and that his Sixth Amendment right was violated, (1) **Counsel failed to submit and tender lesser included offenses;** (2) **Counsel failed to conduct any investigation and question witnesses;** (3) **Counsel failed to file a motion to suppress evidence correctly;** (4) **Counsel failed to inform client of new evidence.** Petitioner RCr 11.42 was denied by the trial court. Petitioner then appealed to the Court of Appeals of Kentucky **(2017-CA-000638-MR) APPENDIX D (Smith v. Commonwealth, 2018 Ky. App. Unpub. LEXIS 857)**, which was denied on **December 7, 2018** stating that Petitioner arguments was refuted by the record.

On or about February 20, 2019 Petitioner filed a **Kentucky Rules Civil Procedure (CR) 60.02 (f)** concerning the fact he was denied his Sixth and Fourteenth Amendment right to a Fair Trial, which was later denied by the trial court. On or about August 16, 2019, Petitioner then appealed his CR 60.02 to the Court of Appeals of Kentucky **(2019-CA-001111-MR) APPENDIX E (Smith v. Commonwealth, 2020 Ky. App. Unpub. LEXIS 40).** On January 24, 2020, petitioners appeal was denied so he filed a Discretionary Review to the Kentucky Supreme Court which was denied on **May 20, 2020 (2020-SC-000051-D) APPENDIX F (Smith v. Commonwealth, 2020 Ky. LEXIS 199).**

On or about June 10, 2020, Petitioner filed his Writ of Habeas Corpus **(Smith v. Robey) (3:20-CV-00430-JHM-LLK) APPENDIX B** in the United States District Court for the Western District of Kentucky **28 U.S.C. § 2254** challenging the Robbery in the First-degree conviction by the Jefferson Circuit Court that his right was violated due to Unanimous Verdict Violation **(Direct Appeal)**; His counsel being Ineffective **(RCr 11.42)**; and that his trial court also violated his rights **(CR 60.02).** The United States District Court sent an Order/Judgment on **June 1, 2023**

to Petitioner adopting the Magistrate Judge's Finding and Conclusion as well as denying Petitioners Writ of Habeas, as well as denying his Certificate of Appealability.

On or about October 17, 2023 Petitioner filed a Certificate of Appealability (hereinafter COA) **(Smith v. Robey) (No. 23-5596) APPENDIX A** in the United States Court of Appeals for the Sixth Circuit challenging the denial of his Application for a COA which was denied on **December 14, 2023.** On **December 20, 2023**, Petitioner file a motion asking the Court of Appeals for the Sixth Circuit to reconsider their denial of Petitioners Application for a COA. On or about February 2, 2024, the United States Court of Appeals for the Sixth Circuit denied Petitioner reconsideration stating, Petitioner did not cite any misapprehension of law or fact that would alter their decision. **(Smith v. Robey) (No. 23-5596).**

REASON FOR GRANTING THE PETITION

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DEN PETITIONERS HABEAS CORPUS PETITION BECAUSE OF PROCEDURAL DEFAULT WITHOUT REVIEWING THE RECORD AS WELL AS BASING ITS DECISION ON THE UNITED STATES DISTRICT COURTS FINDINGS IN VIOLATION OF PETITIONER'S EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN VIOLATION OF A UNANIMOUS VERDICT, AND CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES?

On direct appeal, Petitioner argued that the jury instructions were defective because they included an alternative theory of guilt not supported by the evidence which was a unanimous verdict violation. Specifically, the instructions allowed the jury to find Petitioner guilty of first-degree robbery even if it was his co-defendant (**not him**) who used the force.

Because Petitioner did not raise a contemporaneous objection to the instructions at the trial court level, the Kentucky Supreme Court analyzed the claim under the palpable error / manifest-injustice standard of review set forth at **RCr 10.26. Id. at 401.** The Kentucky Supreme Court found no palpable error but reviewed under the merits of the case. The Supreme Court of Kentucky stated; "there is no reasonable possibility that the jury actually relied on the erroneous theory." **Id. at 404** (quoting ***Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000)).**

The Magistrate Judge held in its **Findings of Fact Conclusions and Recommendation** that a claim is procedurally defaulted if a petitioner failed to comply with a state procedural rule, the state actually enforced the rule against the Petitioner, and the rule is an adequate and independent state ground that forecloses review of a federal constitutional claim. ***Bailey v. White*, No. 17-5709, 2017 WL 9684425, a*2 (6th Cir. Dec. 19, 2017)**

(citing *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006)). First off, Petitioner posits, inter alia, that the district court lacked the authority to interject the question of procedural default into this argument sua sponte. **Appendix A**

On March 22, 2012, the Kentucky Supreme Court rejected the Petitioner's direct appeal on the merits. **Appendix C;** During Petitioner's habeas petition, the Respondent raised sua sponte the question of procedural default which was denied by the United States District Court who adopted the Magistrate Judge Findings of Fact Conclusion and Recommendation. Soon after, the Court of Appeals for the Sixth Circuit adopted the United States District Court Findings of Fact Conclusion and Recommendation whom later denied Petitioner's COA.

A Federal Court of Appeals, in reviewing a Federal District Court's habeas corpus decision with respect to a state prisoner's conviction, is not required to raise, on the Court of Appeals' own motion, the issue of the prisoner's state procedural default that is, a critical failure to comply with state procedural law as such a default does not deprive the Court of Appeals of jurisdiction. As far as Petitioner's case, his alleged procedural default was because of Kentucky's contemporaneous objection rule which requirements precludes appellate review of matters which are not objected too, unless manifest injustice results. Petitioner's manifest injustice was when his jury instruction allowed conviction under a theory not supported by evidence in violation of the unanimous verdict requirement of the Constitution.

A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures. When the prisoner has failed to do so, and the state court would dismiss the claim on that basis, the claim is "procedural defaulted." To overcome procedural default, the prisoner must demonstrate "cause"

to excuse the procedural defect and "actual prejudice" if the federal court were to decline to hear his claim. ***Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).** However, the Court of Appeals for the Sixth Circuit erroneously used *Coleman v. Thompson* which actually state; For a claim to be procedurally barred, the petitioner must have actually violated a state procedural rule, see ***Wells v. Mass*, 28 F.3d 1005, 1008 (9th Cir. 1994)**, and the highest state court to consider the claim must have actually relied on the procedural default to deny the claim. See ***Harris v. Reed*, 489 U.S. 255, 261-62(1989); *Zapata v. Vasquez*, 788 F.3d 1106, 1112(9th Cir. 2015).** To be "adequate to support the judgment," **Coleman, 501 U.S. at 729**, the rule must be "firmly established and regularly followed' at the time of the purported default. ***Beard v. Kindler*, 558 U.S. 53, 60 (2009)** (quoting ***Lee v. Kemna*, 534 U.S. 362, 376 (2002)).**

State procedural default is not an independent and adequate state ground barring subsequent federal review unless the state rule was firmly established and regularly followed at the time it was applied. ***Edwards v. Carpenter*, 529 U.S. 446 (2000).** When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. When a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is "nil" "because" a later state decision based upon ineligibility for further state review neither rests upon procedural fault nor lifts a pre-existing procedural default." When a state court refuses to re-adjudicate a claim on the ground that it has previously determined, the court's decision does not indicate that the claim has been procedural defaulted. To the contrary, it provides strong

evidence that the claim has already been full consideration by the state court and thus is *ripe* for federal adjudication. ***Cone v. Bell*, 556 U.S. 449 (2009).**

Generally speaking, a habeas corpus petitioner must exhaust state-court remedies before bringing a federal petition. ***Lovins v. Parker*, 712 F. 3d 283, 294 (6th Cir. 2013).** The state court exhaustion and procedural default rules are premised on the premise that state courts should have "an opportunity to address those claims in the first instance." ***Coleman*, 501 U.S. at 732.** A claim may be procedural defaulted in two distinct circumstances: **First,** a petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court (**which petitioner did**). If, due to the petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue (**which the state court did as well, reached their decision on the merits**), and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedural defaulted. **Second,** a petitioner may procedurally default a claim by failing to raise a claim in state court, and pursue that claim through the state's "ordinary appellate review procedures." (**Petitioner followed all the states rules**). If at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted. ***Williams v. Anderson*, 460 F. 3d 789, 806 (6th Cir. 2006).**

As far as this case, Petitioner did not procedurally default his claim on the erroneous jury instruction in state court, because petitioner counsel brought this issue to the Kentucky Supreme Court who analyzed the claim under the palpable error / manifest-injustice standard of review set forth at **RCr 10.26.** The Kentucky Supreme Court found no palpable error because "there is no reasonable possibility that the jury actually relied on the erroneous theory." Since the Kentucky Supreme Court heard the issue under **RCr 10.26** the issue was exhausted by the highest state

court and Petitioner has not procedurally defaulted on this claim. Moreover, there's a big conflict with the **Sixth Circuit and the Ninth Circuit,** the Sixth Circuit stated that the procedural rule was actually enforced on petitioner when the state court actually reviewed his case on the merits so procedural default was not enforced. However, the Ninth Circuit stated, for a claim to be procedurally barred, the petitioner must have actually violated a state procedural rule and according to the rule, Petitioner followed each step.

Petitioner's case is no different than *Hockenbury* which states; Kentucky courts reached the merits of Hockenbury claims, it also states, in spite of Hockenbury's failure to object to the matter at trial, the state courts reached the merits of Hockenbury claim instead of denying direct review of the claim on procedural grounds which is a conflict in the same circuit. ***Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Cook v. Bordenkircher*, F. 2d 117, 119 (6th Cir. 1979); *Hockenbury v. Sowders*, 620 F. 2d 111 (6th Cir. 1980).** As far as Petitioner argument in his Direct Appeal, he argued that he was convicted on a theory unsupported by evidence which is a violation of Due Process when the trial court instructed the jury on two different theories and one of the theories was unsupported by the evidence which was a violation of the ***Fifth*** and ***Fourteenth*** to the United States Constitution.

However, the Court of Appeals for the Sixth Circuit gave misleading information in their Order when stating that the Kentucky Supreme Court enforced Kentucky's contemporaneous-objection rule by reviewing only for palpable error, that statement along is misleading. However, the Kentucky Supreme Court stated in their Order; ***Before we address the issue, a caveat is in order to clarify a matter that was argued in the parties' briefs respecting this Court's role in reviewing unpreserved error. Although he acknowledged the erroneous instruction issue was not raised at trial, in his opening brief, Smith did not specifically request palpable error***

review. Therefore, citing to Shepherd v. Commonwealth, 251 S.W.3d 309, 316 (Ky. 2008), the Commonwealth argued in its response brief that we should not address the issue at all. Shepherd holds that, absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request was made and briefed by the appellant. Smith did, at least, brief the issue, and we accordingly opt to address the matter on the merits. Nevertheless, the lower courts denied Mr. Smith COA on frivolous information and conflict with its own circuits.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED PETITIONER INEFFECTIVE ASSISTANCE OF COUNSEL PETITION WITHOUT REVIEWING THE RECORD OF THE CASE WHERE PETITIONER WAS CHARGED WITH ROBBERY IN THE FIRST-DEGREE UNDER KENTUCKY REVISED STATUTE (KRS) 515.020. PRIOR TO TRIAL, COUNSEL WAS IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES IN STRICKLAND.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court may not grant a petition for a writ of habeas corpus unless a state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." **28 U.S.C.S § 2254 (d)(1).** A decision is contrary to clearly established law if the state court "applies a rule that contradicts the governing law set forth in **[Supreme Court]** cases." ***Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Opinion for the Court by O'Conner, J.).** See also ***Lafler v. Cooper*, 132 S. Ct. 1376, 1390, 182 L. Ed. 2d 398, 2012 U.S. LEXIS 2322 (2012).**

The "range of reasonable application" of the *Strickland* standard "is substantial "so under 2254 (d), the "question is not whether counsel's actions were reasonable. The question is whether there is any reasonable that counsel satisfied *Strickland's* deferential standard. ***Harrington v. Richter*, 562 U.S. 86, 101 (2011).**

In ***Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984); *Wiggins v. Smith*, 539 U.S. 510, 522, 156 L. Ed. 2d 471 (2003); *Bobby v. Van Hook*, 558 U.S. 175 L. Ed. 2d 255, 259 (2009),** this Court said, "Counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." American Bar Association standards used as a guide in assessing whether attorney's failure to investigate was reasonable. However, reversing a finding of deficient performance where the lower court treated the ABA's standards as "inexorable commands" that attorneys must "fully comply with."

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. ***United States v. Morrison*, 449 U.S. 361, 364-365 (1981).**

The Sixth Circuit is in conflict with this court's ruling when it states; Courts have not hesitated to find ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client. Such as in *Wiggins v. Smith*, this Court held that the petitioner was

entitled to a writ of habeas corpus because his counsel had failed to conduct a reasonable investigation into potentially mitigating evidence with respect to sentencing. ***539 U.S.* at 524-29.**

First IAC claim, Counsel failed to ask the trial court for Lesser Included Offenses in Jury instructions. An instruction on offenses that have been determined to be lesser included offenses of the charged crime are available to defendants when the evidence supports them, in capital and noncapital cases alike. ***Hopkins v. Reeves*, 524 U.S. 88 (1998).**

A defendant who requests a jury instruction on a lesser offense under ***Fed. R. Crim. P. 31 (c)*** must demonstrate that the elements of lesser offenses are a subset of the elements of the charged offense. By "lesser offense," means, in terms of magnitude of punishment. When the elements of such a "lesser offense" are a subset of the elements of the charged offense, the "lesser offense" attains the status of a "lesser included offense." A defendant must also satisfy the "independent prerequisite. . .that the evidence at trial. . .but such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." ***United States v. Colon*, 268 F. 3d 367; *Schmuck v. United States*, 489 U.S. 705 (1989)** (citing ***Keeble v. U.S.*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973)).** Providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard. If a defendant asks for a lesser included offenses instruction, it is generally reversible error. ***Simpson v. Florida*, 403 U.S. 384; *Beck v. Alabama*, 447 U.S. 625, 634, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980).**

The Federal Rules of Criminal Procedure deal with lesser included offense, see ***Rule 31(c)*** and the defendant's right to such an instruction has been recognized in numerous decisions of this Court. See, *e.g.*, ***Sansone v. United States*, 380 U.S. 343, 349 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *Stevenson v. United States*, 162 U.S. 313 (1896).**

The refusal to give a lesser-included offense instruction is a constitutional violation only if the petitioner was entitled to the instruction as a matter of state law—that is, that the instruction was "warranted" under state law, ***Hopper v. Evans*, 456 U.S. 605, 611-12, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982); *Ferrazza v. Mintzes*, 735 F. 2d 967-968 (6th Cir. 1984).**

The Court of Appeals for the Sixth Circuit stated that counsel did not act unreasonable by not requesting a lesser included offense of Theft because Petitioner told the police that he robbed the store and attacked the clerk and counsel is not required to seek an instruction unsupported by the evidence; they also stated that theft is not a lesser included offense of robbery. However, theft by unlawful taking is a lesser-included offense of both first- and second- degree robbery. Robbery is ordinarily thought of as a theft combined with assault. Specifically, second-degree robbery is theft plus using or threaten[ing] the immediate use of physical force to accomplish the theft, ***Ky. R. Stat. Ann. § 515.030 (1)(a)***, and first-degree robbery is second-degree robbery plus one of those possible aggravating factors, ***Ky. R. Stat. Ann. § 515.020 (1)(a).*** Consequently, a defendant would be entitled to a lesser included offense instruction only if the jury could reasonably conclude that he committed theft without any physical force, as the use of force would elevate the crime to at least second-degree robbery. "A lesser-included offense instruction is available only when supported by the evidence," and "[t]he jury is required to decide a criminal case on the evidence as presented or reasonably deducible therefore, not an imaginary scenario." ***Oakes v. Commonwealth*, 320 S.W. 3d 50 (Ky. 2010).**

To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel. ***Faretta*, 422 U.S., at 819-820, 95 S. Ct. 2525, 45 L. Ed. 2d 562;** see ***Gannett Co. v. Depasquale*, 443 U.S. 368, 382, n. 10, 99 S. Ct. 2898, 61 L. Ed. 2d**

608 (1979). The Sixth Amendment "contemplate[es] a norm in which the accused, and not a lawyer, is master of his own defense." Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as **"what argument to pursue, what evidentiary objection to raise,** and **what agreements to conclude regarding the admission of evidence."** ***Gonzalez v. United States*****, 553 U.S. 242, 248, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008).** However, there are some decisions reserved for the client – notably, **whether to plead guilty, waive the right to a jury trial, testify in one's own behalf,** and **forgo an appeal.**

Petitioner has shown that counsel performance was unreasonable by not asking for a lesser offense besides the ones that were giving. The Court of Appeals for the Sixth Circuit even agreed that no lesser offense was mentioned and that counsel did not have to seek lesser included offense not supported by the evidence. If that's the case, then was theft even supported, what is well know is that, physical injury was not supported for Petitioner to be convicted of Robbery in the First-degree. The Federal District Court and Court of Appeals for the Sixth Circuit inadequately and incorrectly resolved these Ineffective Assistance of Counsel claims, both courts failed to follow the two prong test under ***Strickland v. Washington*****, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);** ***Wiggins v. Smith*****, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).**

Petitioner has also shown that Theft is a lesser-included offense of first and second-degree robbery so there's a conflict within the law. With that been said, this shows that trial counsel performance was unreasonable and for that reason she was defiantly Ineffective for not asking for Theft inside Petitioner's jury instructions.

Second IAC claim, Counsel performed no mitigation investigation, overlooking vast tranches of mitigating evidence. Due to counsel's failure to investigate compelling mitigating

evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case and counsel did that a lot. More so, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

Petitioner's counsel was constitutionally ineffective for failing to conduct an investigation which is one of the main prongs in *Strickland*, counsel should had investigated into certain physical evidence that would have undermined the prosecution's theory that a weapon was used. Counsel did not interview the sole witness to the crime, which gave her enough time to change her statement. Counsel did not pursue a vigorous defense with respect to the circumstance of the crime. Defense Counsel did not interview the police officers about the alleged weapon since it was testified to that Petitioner was arrested with the alleged weapon which the Commonwealth used to convict the petitioner of first-degree robbery.

When a jury can reach a verdict based on differing version of how a crime was committed, due process has been violated. There's a lot of questions that Petitioner would not been convicted if counsel would had provided enough to not convict under 515.020. There was witness credibility that could had been challenged and there was a vast chance that cross examination of the 911 call would reveal a weakness in the Commonwealth's case.

An investigation and interview of the Commonwealth's prosecuting witness would have allowed the jury to believe that the prosecuting witness was not telling the truth. Clearly, from the testimony of the prosecuting witness at the time of the incident, she stated to the 911 dispatch

that she didn't know if the assailant had a weapon." See victims statement to 911 dispatch as follows:

> **The clerk called 911 and reported that A & Z Grocery had been robbed; the 911 operator asked what your emergency? Please help, they took my money, please, they took your money (Inaudible), my register too, and do you own the store? Yes (Inaudible) ok, and did they have a weapon, did they have a gun? (Inaudible) I don't know. See, 911 operator's report.**

To show that more that Petitioner's claim to investigate, interview witnesses, and to disclose the 911 call to the jury, Defense Counsel had a duty to investigate the 911 call, which includes having the 911 call subpoena to trial to prove her client's innocence of first degree robbery. Further, the Judge in this case, informed the prosecution ***"the question I have is that if we don't have an ID on the weapon when you propose blunt instrument I don't think I have something specific enough to say it was a dangerous instrument- my thought is that you have to go with the meg-light are you don't get that one on just a blunt instrument. Looking at this, my first concern was the linking of the meg-light to the crime itself, the investigators for the commonwealth in going through that apartment made that connection in fact, that she said a black metal object and this particular object was recovered there, I think this give the appropriate nexus we hope the court of appeals finds the same way."*** **VR, 2/24/11; 10:58:58 A.M; 11:01:12 A.M.**

Trial Counsel was more focus on Petitioner and the plea agreement, her statement to the court is proof that she wasn't advocating for her client when she stood before the court to put on record, the plea deal that was offered, ***Counsel told the court that Petitioner could not beat the deal because if his case gets back in court he would be in the same predicament as before.***

Trial counsel fails to investigate, interview, and not be prepared, so she wanted Petitioner to plead guilty to make her job easier not because he was guilty but because she failed to do what the ***Sixth Amendment of United States*** as well as ***Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984)** gives her the responsibility to do. To sum up this part of petitioner's argument to show that counsel was not advocating for her client; during a bench conference, the judge stated the defense counsel and the prosecution; ***is there a way you all can come up with a better deal that want hurt his appeal because there want be much to appeal. VR; 2/22/2011; 11:57:35 – 11:57:47.***

The duty to investigate "includes the obligation to question witnesses who may have information concerning his or her client's guilt or innocence." ***Beasley v. United States*, 491 F. 2d 687, 696 (6th Cir. 1974); *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993).** Counsel's failure to do so, also violates Petitioners Fourteenth Amendment of the United States Constitution. The Fourth Circuit states that, counsel must ordinarily "investigate possible methods for impeaching prosecution witnesses." ***Hoots v. Allsbrook*, 785 F. 2d 1214, 1221 (4th Cir. 1986)**; next we have the Fifth Circuit stating; at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. ***Nealy v. Cabana*, 764 F. 2d 1173, 1177 (5th Cir. 1985).** The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions. ***Wiggins v. Smith*, 539 U.S. 510.**

The lower court stated that Petitioner allegation is conclusory, on the other hand, what more can be stated or shown by petitioner to prove his case.

Third IAC claim, Counsel failed to file a merit suppression motion. Petitioner contends the Court should have excluded any evidence of a Mag-lite, flashlight being used in the commission of the offense; Petitioner claim in the form of a Motion to suppress evidence correctly.

Counsel failed to properly present or file this Motion creating a prejudicial outcome during trial. In order to succeed on a claim of ineffective assistance of counsel in this context, Petitioner must show that his suppression claim was "meritorious and that there is a reasonable probability that the [result] would have been different absent the excludable evidence." ***Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)**; this court has also recognized this argument in, ***William v. Taylor*, 529 U.S. 362 (2000)**; also ***Lance v. Sellers*, 139 S. Ct. 511, 202 L. Ed. 2d 621, 2019 U.S. LEXIS 10**.

The conduct of trial counsel, in failing to file a merit motion to suppress evidence concerning the mag-lite flashlight allegedly seized in violation of the **Fourth Amendment,** is constitutionally deficient under the **Sixth Amendment** where (1) this failure was not due to strategic considerations but because Petitioner filed a motion to remove counsel on the fact that counsel failed to file motions on his behalf. Before and on the day of trial, counsel was aware that the prosecution's intention to introduce the mag-lite flashlight into evidence. (2) Counsel had been unapprised by the evidence being admitted because the Prosecution informed her weeks before Petitioner's trial. This was not counsel strategy; she was unaware when evidence, such as the flashlight was gathered.

On Tuesday, February 22, 2011, trial counsel filed an improper motion to suppress evidence because of an illegal search. The reasons for this motion being improper was because the search was not illegal and there was a consent to search form signed by petitioner's co-defendant

Sharon Smith (the owner of the apartment); who gave consent after the verification from her spouse; not only was the motion to suppress improper, it also stated any evidence observed or seized during the search.

Under Rule CR 903; Motion to suppress must be in writing, state the specific in detail, and shall be submitted no later than forty-five (45) days after the first Pre-Trial Conference. In accordance with **CR 820** and **827,** failure to comply with this rule, unless for good cause, shall bar such motion; the first Pre-trial Conference was on **October 28, 2010**. The Motion to Suppress was filed **February 3, 2011** but was not presented until the day of trial February 22, 2011.

Trial Counsel knew there was no merit to the suppression motion that was filed on Petitioner's behalf; if counsel would have filed a motion to suppress the mag-lite flashlight because of lack of evidence that Petitioner came in contact with this mag-light flashlight, it would have had merit because no weapon was seized during the search and or Petitioner's arrest, no weapon was mentioned by the alleged victim and mainly; no weapon was mentioned of any kind in Petitioner's Indictment except a handgun when it stated a weapon of choice which was a conflict with the Commonwealth's evidence.

The state prisoner's ineffective assistance of counsel claim was allowed under this Court's decision because counsel should have moved to suppress the firearms and ammunition because there was a chance that a motion would have succeeded and there was a clear conflict in the evidence, See; ***Premo v. Moore,*** **562 U.S. 115;** ***Sexton v. Beaudreaux,*** **138 S. Ct. 2555 (2018).**

Petitioner's case is no different because a handgun was alleged to be the weapon of choice, but during the grand jury testimony, the lead detective testified under oath, they arrested

Petitioner with the alleged flashlight and at trial a flashlight was presented and put into evidence without any proof and after there was testimony that Petitioner's prints were not on this alleged weapon. Petitioner has shown that counsel performance was unreasonable for failure to properly file a motion to suppress correctly.

Fourth IAC claim, Counsel failed to inform Petitioner of the new evidence that would be used against him if he went to trial. "Reasonable communication between the Lawyer and client is necessary for the client of effectively participate in the representation". Rule 1.4 Communication (Comment 1), ***Missouri v. Frye*, 566 U.S. 134**: (a) a lawyer should keep a client reasonably informed about the status of a matter and promptly complies with reasonable requests for information. (b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Petitioner's counsel failed to properly inform him of new potentially damaging evidence the Prosecution was introducing which would provoke a guilty verdict. Even though counsel stood before trial, court and put on record the reasoning to take a plea deal; while stating this on record, counsel knew of the damaging evidence such as the mag-light flashlight which petitioner knew nothing about because his Motion of Discovery disclosed a handgun.

Petitioner was not made aware of new evidence (flashlight) filed against him on February 9, 2011. However, Petitioner was not aware of the 911 call to dispatched until after his trial and Direct Appeal, it was nowhere in his Motion of Discovery. New statement from the prosecuting witness was being discussed by the Commonwealth and Lead Detective. Petitioner could not knowingly and intelligently make a decision of entering a guilty plea or proceed to trial without knowledge of this new statement and evidence against him. More so, the 911 call was never presented for the jury or Petitioner himself to hear.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY PETITIONERS HABEAS CORPUS PETITION BECAUSE OF PROCEDURAL DEFAULT WITHOUT REVIEWING THE RECORD AS WELL AS BASING ITS DECISION ON THE UNITED STATES DISTRICT COURTS FINDINGS IN VIOLATION OF PETITIONER'S EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES?

The Court of Appeals for the Sixth Circuit is trying to mislead this court when it states that Petitioner did not state his federal constitutional right where violated. Under CR 60.02 (f), Petitioner filed three (3) legitimate argument that explain, not only were his state constitution rights were being violated but his federal constitutional rights were also being violated.

First let's address the Procedural Default aspect of Petitioner's arguments; Petitioner brought these arguments under **CR 60.02 (f)** which is an extraordinary remedy and only available to correct a miscarriage of justice. Petitioner understands that CR 60.02 is not a substitute for a direct appeal but it is a catch-all remedy.

It was counsel's (Trial and Post-Conviction) ignorance not Petitioners; in an opinion by Justice O'Conner, this Court rejected the Fourth Circuit attempt to create a distinction between the procedural default arising for attorney ignorance. ***Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).**

Ky. CR 60.02 is generally comparable to Fed. R. Civ. P. 60 (b), although with important differences. The specific terms of the rule are not in issue here. This is not a case in which the Petitioner neglected to "fairly present" an issue to the state courts; this is a case in which the state courts refused to consider an issue actually presented. See ***Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).**

The Court of Appeals for the Sixth Circuit erroneously denied Petitioners argument when he addressed that the trial court erred by not allowing the jury to examine the lead detective's official written report. At Petitioners' trial, after the close of all the evidence, during deliberation, the jury sent a note out asking to see the lead Detectives official written report and the trial court denied this request and stated "it can't be provided and it's not in evidence." **VR; 2/24/11 1:45:20 - 1:45:28.**

This written report was crucial to Petitioner's defense because the alleged victim's testimony differed from the statement she gave Detective Arnold the night of the alleged robbery which "didn't mentioned a medal object nor a weapon of any kind" and at trial she testified that a metal object was used during the crime. It was highly prejudicial to Petitioners defense for the court to deny the jury this request which in turn denied him the only defense he had to the first-degree robbery offense. The denial by the trial court to not allow the jury to view the detectives written report denied Petitioner a fair trial under the Fifth Amendment. The Court of Appeals for the Sixth Circuit stated that Petitioner does not contends that this argument violated federal constitutional rights which are false.

It was explained to all lower courts that Petitioners rights were violated under the Fifth and Fourteenth Amendment. If the court would have granted the jury request to see Detective Arnold's official write up report (investigative report), it would have shown a weapon was never mentioned in any form (flashlight or medal object). Petitioners guilty verdict would have been a lesser charge. By the trial judge stating that the official written report was not in evidence and cannot be provided, that was material in favor of Petitioner's guilt and punishment, it would also have created a reasonable doubt as to guilt which would not otherwise have existed without evidence. See; ***U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct 2392, 49 L. Ed. 2d 342 (1976)**. If the

official report was not available, means; Petitioner did not receive his whole discovery and that was a *Brady* violation. In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of this case.

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for examination.

When the 'reliability of a given witness may well be determinative of guilt or innocence,'" nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady*]. The court does not automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . ..' A finding of materiality of the evidence is required under *Brady*. .. .. A new trial is required if 'the false testimony could. . ..in any reasonable likelihood have affected the judgment of the jury. . .."" See; ***Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct 1197, 10 L. Ed. 2d 215**; ***Giglio v. United States*, 405 U.S. 150 (1972).**

A defendant in a criminal trial is entitled to the production by the government of documents containing statements of a witness, where, by proper cross-examination, it has been shown that the documents are in existence, are in possession of the government, were made by

the government witness under examination, are contradictory of his/her present testimony, and that the contradiction is as to relevant, important, and material matters which directly bear on the participation of the accused in the crime, and where the government does not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise. ***Gordon v. United States*, 344 U.S. 414**; The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. **This right is a fundamental element of due process of law.** *See;* ***Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1023 (1967).**

As far as the second argument, the Commonwealth admitted evidence of Petitioner's co-defendant's guilty pleas. This issue is a precedent issue that should had been followed. Equity is only a supplement of the law for when there is no remedy at law. But it is simple tenet that if there is a statute or case precedent or rule going a certain way, a trial court may not depart from it's on the basis of equity; law trumps equity. This court has cautioned the Sixth Circuit two terms ago, a lower court may not "consul[t] its own precedent, rather than those of this court." ***Parker v. Matthews*, 567 U.S. 37, 48, 132 S. Ct. 2148, 183 L. Ed. 2d 32, 41 (2012).**

It has long been the rule in this Commonwealth that it is improper to show that co-indictee has already been convicted under the indictment. To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper, this is a precedent law that has never been overturned. See ***Tipton v. Commonwealth*,**

640 S.W. 2d. 818 (1982). More so, this rule is further than State law, it's also law in North Carolina which states; the potential prejudice of a co-defendant's guilty plea in the presence of a jury midway through trial is obvious and has long been recognized by the courts of North Carolina. ***Hudson v. North Carolina*, 363 U.S. 697.**

Under **Ky., Sup. Ct. 1. 040 (5)** binds the courts to follow established **Precedent;** such as ***Tipton Supra*** that has not been overruled; *Tipton* is a **Stare Decisis** case in Kentucky that the Supreme Court failed to follow. The Court and all district courts in this circuit are limited in their decision-making abilities by the doctrine of stare decisis, the venerable that a prior published decision remains controlling unless overturned by an inconsistent decision of the United States Supreme Court or by the Sixth Circuit sitting en banc. See; ***Ramos v. Louisiana*, 140 S. Ct. 1390.**

Since the guilty plea by Petitioner's co-defendants was clearly not admissible as evidence against him, defense counsel failure to object or to ask for cautionary instructions is surprising. ***Freije v. United States, 1967, 1 Cir., 386 F. 2d 408.*** However, counsel did ask the trial court to abolition regarding convicted felony. The Court disclosed to the jury by stating, ***this witness or any other witness is a convicted felon to be used by you only to determine the credibility of that person. VR; 2-23-2011; 02:04:10 – 02:04:26PM.***

On the other hand, the well-developed rule governing federal criminal trials permits the jury to be apprised of a co-defendant's guilty plea, either through the co-defendant's testimony or through remarks by the trial judge or even as the result of witnessing the plea in open court, *provide* the court instructs the jury that the plea cannot from the basis of any inference as to the guilt of the remaining defendant.

Accordingly, the court reversed the trial court's judgment of conviction and a new trial was ordered; [S]tare decisis carries enhanced force when [we]...interpret a statute...[W]e apply statutory stare decisis even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. All our interpretive decision, in whatever way reasoned, effectively become part of the statutory scheme [.] ***Kimble,*** **135 S. Ct. at 2409**; see ***Patterson v. McLean Credit Union,*** **491 U.S. 164, 172-73, 109 S. Ct. 2363 (1989);** also ***Kisor v. Wilkie,*** **139 S. Ct. 2400 (2019).**

The Supreme Court does not reverse course from statutory stare decisis without "special justification," which requires more than "the belief that the precedent was wrongly decided." ***Kimble,*** **135 S. Ct. at 2409** (quoting ***Halliburton Co. v. Erica P. John Fund, Inc.,*** **134 S. Ct 2398, 2407 (2014));** ***Hurst v. Florida,*** **136 S. Ct. 616 (2016).** In this case, the Prosecutor repeatedly elicited testimony regarding a co-indictee's guilty plea in an attempt to prove the guilt of Petitioner, the one then on trial. Both Co-defendant's stated on direct examination, Hughes stated," ***did you plead guilty to amended charge to Robbery in the second degree... yes sir... and are you now a convicted felon... yes sir... Mrs. Hughes how many years was the sentence on the case... Seven years... am I the prosecutor that recommended that number of years...yes sir...what was my stand on probation...No stand...what does that mean to you...It's up to the judge...Who decision was it if you would be in prison or on probation... Mrs. Susan Gibson... And what happened...She gave me five years' probation...And was truthful testimony a part of your probation...Yes sir...Who determine whether or not if you been truthful her today...Mrs. Gibson...If the judge believe you lying today what will happen to you...I'll go to jail for Seven years...You told the truth today...Yes sir. Id.at. 2-23-11 (2:03:07 P.M.) end at. 2-23-11 (2:04:04 P.M.).***

Next, Sharon Smith provided testimony that stated; ***did you plead guilty to amended charge to Robbery in the second degree... yes sir... and are you now a convicted felon... yes sir... Mrs. Smith how many years was the sentence on the case... Seven years... Am I the prosecutor that recommended that number of years...yes sir...what was my stand on probation...No stand...what do that mean to you...It's up to the judge...Who decision was it if you would be in prison or on probation... Mrs. Susan Gibson... And what happened...She gave me five years' probation...And was truthful testimony a part of your probation...Yes sir...Who determine whether or not if you been truthful her today...Mrs. Gibson...If the judge believe you lying today what will happen to you...I'll go to jail for Seven years...You told the truth today...Yes sir. Id at 2-23-11 (2:12:09 P.M.) to (2:13:22 P.M.).***

To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his/her testimony implicates the defendant on trial. However, the Prosecutor did not appear concerned with Petitioner's co-defendant's credibility because in large part they said exactly what the Prosecution wanted the jury to hear and that was, the inference that both co-defendant's were guilty. Petitioner's right to a fair trial was seriously prejudiced wherein such pleas where mentioned at trial indicating that since Petitioner's co-defendant's plead guilty, Petitioner was guilty.

CONCLUSION

For the reason stated above, Petitioner asks this Court to grant certiorari and reverse his conviction for Robbery in the First-degree for a new trial, because he was convicted of an offense that was lack of evidence and Ineffective Assistance of Counsel, which he was actually

innocent of Robbery in the First-degree. For these reason, the petition for certiorari should be granted.

Respectfully Submitted,

Robert Smith

Date: 4-3-2024