IN THE SUPERIOR COURT
OF WARE COUNTY
STATE OF GEORGIA

Michael D. Holloway,
995976 - G.D.C.
PETITIONER

Civil Action No.
OIV-0870

vs.

Tony Howerton, Warden

BRIEF IN SUPPORT OF
APPLICATION FOR
STATE HABEAS CORPUS

CERTIFICATE OF SERVICE

Petitioner swears under threat of penalty of perjury that he has mailed a copy of the attached brief and Exhibits by way of prepaid postage to the Clerk of Court, Judge, W.J. Neville and the Attorney General's office on this the 19th day of May, 2003.

STATE OF THE CASE

Michael D. Holloway, Petitioner was indicted by a Richmond County Grand Jury on September 29, 1998. The offenses were aggravated assault and armed robbery. On November 12, 1998, Petitioner was found guilty of one count of aggravated assault and one count of armed robbery. The Trial Court sentenced Petitioner to twenty years on the aggravated assault charge and life without parole on the armed robbery charge. Petitioner was indicted under the recidivist statute using a 1981 armed robbery from Louisiana.

Appellant filed his motion for acquittal or new trial on December 18, 1998. The Trial Court denied Petitioner's motion for new trial on January 3, 2000. Petitioner filed a timely Notice of Appeal on January 5, 2000.

Appellant/Petitioner's appointed appellate counsel submitted a brief to Georgia Court of Appeals. Appellate counsel filed his brief without ever once communicating with his client. Petitioner attempted to file a supplemental brief. This brief was clocked by the Court of Appeals March 27, 2000, six days after appointed counsel's brief. Petitioner's pro se brief was returned to the Petitioner. The Clerk for the Georgia Court of Appeals returned Petitioner's pro se brief and instructed him that the Petitioner would have to address the court through his assigned counsel. Said counsel took over 40 days to submit the Petitioner's supplemental brief. Counsel never once communicated with the Petitioner.

The Georgia Court of Appeals denied Petitioner's direct appeal and then denied his motion for reconsideration on August, 21, 2000. Petitioner timely filed an application

for writ of certiorari with the Georgia Supreme Court. Petitioner was denied by that court on February 16, 2001.

On or about 7/31/1998, Larekos Ware was accosted. He testified that he was making a bank deposit for his employer at the Nation's Bank on Gordon Highway in Augusta, GA. Mr. Ware testified that a stranger, identified at trial as the Petitioner, asked him if he had dropped a phone card. Mr. Ware said "No.", and proceeded to enter the bank and make the deposit. Upon entering the company van to leave, the stranger attacked Ware from the rear. Mr. Ware testified that he first thought his attacker had a gun but stated on the stand: "it was like a stun gun." (Trial Transcript pg 13). After a momentary tussle the attacker walked away. Mr. Ware suffered no injuries (T.T. 19). He got in the van and returned to work. Mr. Ware's supervisor sent him to the police where an incident report was made to Officer Boykin Jones. In this report, Mr. Ware says his attacker had a gun. Officer Jones full report was not given to the defense. Mr. Ware also looked at photos but identified no one.

Mr. Ware testified that Investigator Jim Gordon showed him five photos that were black and white. He picked photo #5 (T.T. 24). Mr. Ware identified the Petitioner at trial as the attacker.

Isabelle Manor testified that she had gone to Nation's Bank on Gordon Highway to cash a check. She cashed the check and went directly to Thompson's Pharmacy located on Gordon Highway. This occurred at approximately 5:00 PM. Mrs. Manor

testified that after she had parked and was about to exit her car a white male approached her. The man told her that this was a robbery. He pulled a pistol and forced her to her car. Mrs. Manor gave the man some money and he left on foot. The clerk in the pharmacy helped Mrs. Manor to call the police (T.T. 48 - 49). Mrs. Manor was unable to identify the Petitioner as her assailant (T.T. 49).

Lisa Womack was the clerk at Thompson's. On 7/31/1998 she noticed a white male pull into the pharmacy parking lot in a red or brown Honda 2-door Accord. Ms. Womack saw the man exit his car and walk across to Nation's Bank. This made her suspicious. She called out the tag number of this car to her pharmacist in the back of the pharmacy (T.T. 68). This pharmacist is never interviewed by the state or the defense. The written down tag number or the piece of paper it was recorded on was never produced or introduced. Somehow the Petitioner's 4 door, dark blue Hyuandai Excel's tag was the one proffered.

Ms. Womack witnessed the attack on Mrs. Manor. Her viewing was unobstructed and uninterrupted. Ms. Womack picked a photo other than the Petitioner as the man who attacked Mrs. Manor (T.T. 67,72).

Ms. Womack never saw a weapon of any type. (T.T.69). She testified that the assailant leaned on a pick-up truck in the Nation's Bank parking lot. This truck was a repossessed vehicle that was owned by the bank and had been parked there for quite some time. A bank teller confirmed the truck did belong to the bank (T.T. 129).

Jim Gordon was the lead investigator on this case. Investigator Gordon lifted one latent finger/hand print from the truck in the bank's parking lot. In the state's discovery Mr. Gordon states that he took a photo to support the authenticity of this print. This photo is never proffered. The print did match the Petitioner's left palm. Investigator Gordon gave trial testimony that contradicted both the two victims and one witness. Gordon swore he showed all three a six photo array. They swore it was five. Gordon swore he had an affidavit from Mr. Ware that the Petitioner had been picked from a pretrial six photo array, no affidavit was proffered, nor was Ms. Womack's selection of a photo other than the Petitioner (T.T. 67 + 72).

BRIEF IN SUPPORT

Petitioner claims that a miscarriage and a mockery of justice has transpired in his case. Petitioner's appointed trial counsel did absolutely de minimus in this case. The appellate courts of Georgia ruled that counsel was effective because he read the discovery package. Petitioner has searched thousands of cases and he had not found a single case where the trial counsel was ruled effective for merely reading the state's discovery package. At the hearing for the state habeas corpus trial counsel answered: "I don't know;" (Habeas Corpus Trans. 71) when asked if he rested his defense on the State's evidence. Trial counsel testified at the hearing for motion for new trial on page 6 (motion for new trial hearing transcript, MNT) that: "I think I did call one of the victims;" he can't remember which of two people he could have talked to. This is just one of many alarms ringing in this case. For if trial counsel did actually speak with one of the two victims he would have been encouraged to talk with the other victim, as effective and reasonable counsel would.

Investigator Jim Gordon testified at the preliminary hearing and at the trial that the aggravated assault victim, L. Ware, had picked the Petitioner from a six photo array (T.T. 135). Mr. Gordon swore at the preliminary hearing that he had a signed affidavit supporting Gordon's claim that Mr. Ware had picked the Petitioner. No such affidavit exists. Mr. Ware swore at Petitioner's trial that he had only been shown five photos and that he picked #5 (T.T. 24). Petitioner was #4 in Mr. Gordon's six photo array. Therefore trial counsel could not have talked to Mr. Ware. If he talked to Mrs. I. Manor, the robbery victim, trial counsel would have discovered that she didn't identify the Petitioner as her attacker and that the attacker had a pistol, not a stun gun as the State alleged (T.T. 45, 50). Trial counsel's failure to determine either of the two victims' conflicting testimony with the State's discovery package demonstrates the trial counsel's ineffectiveness, irrefragably.

The benchmark case Strickland v Washington, 104 S.Ct. 2052 convincingly supports Petitioner's claim of his trial counsel's ineffectiveness. The two prong test established by Strickland is satisfied numerous times in the case at hand. The first prong - was counsel's performance unreasonable and the second prong - that no competent counsel would have taken the action that Petitioner's counsel did take. Waters v Thomas, 46F3d@1512 (en banc) (11th Circuit, 1995).

Petitioner attempts to extract answers from his trial counsel in regards to the issues Petitioner would have raised at motion for new trial, without a trial transcript Petitioner was unable to do so. On page 27 of the State Habeas Transcript, trial counsel admits that Exhibit 24 is his only notes he accumulated in his representation of the Petitioner. Trial counsel acknowledges that his notes reveal that Investigator K. Lynch claims that the Petitioner made an inculpatory statement. Investigator Lynch is allowed to introduce unchallenged admissions testimony. Trial counsel establishes his ineffectiveness once more. Investigator Lynch reviewed his notes at trial during his testimony, but there was no report from him in the discovery package (T.T. 157).

On page 32 of the Habeas transcript trial counsel states: "…but I think I probably would have reviewed my preliminary hearing notes before the trial." The only notes that he has recorded and he can't say for certain that he reviewed them. Trial counsel states on page 33 of the Habeas Transcript he didn't subject Investigator Lynch to a Jackson - Denno hearing challenge because: "…And, you know, I was trying to show generally that they were after you. That's what I was trying to show." Jackson - Denno would allow the trial court to make that decision, yet trial counsel believes the jury is the better judge. This is not the adversarial process. In the 1992 case Cochran v State, 414 SE-2d at page 212 the court wrote: "…In determining whether the defendant has established that counsel's performance was 'constitutionally deficient', the court should keep in

mind that 'counsel's function…is to make the adversarial testing process work in the particular case.' Id at Strickland v Washington, 104 Sct@2065." Cochran's counsel interviewed no witnesses and spent only an hour with Cochran before his trial, his conviction was reversed.

Aggravated assault victim, L. Ware, testified at trial that he selected photo #5 of a five photo array. Investigator J. Gordon testified at the preliminary hearing that Mr. Ware signed an affidavit indicating that Mr. Ware had selected photo #4 of a six photo array. Investigator Gordon gave the same testimony at trial, and the affidavit is not mentioned, much less produced. Investigator Gordon therefore gave the same testimony to the Richmond County Grand Jury that indicted the Petitioner. Investigator Gordon swore that he showed both the victims and the one witness a six photo array that was color (T.T. 134). Mr. Ware and Ms. Womack testified that they were shown five photos (T.T. 25 + 67).* Trial counsel on page 37 of the Habeas Transcript ducks this issue. Trial counsel is inept. There is no adversarial process here. An indictment obtained via a nonexistent affidavit is tainted and flawed, therefore the conviction becomes unconstitutional. The 1989 case U.S. v Menos, 866F2d @ 1309 the court wrote: "…and the Government knows the witness has testified falsely, the Government has a duty to correct the false statement." Petitioner and this court cannot know whether Investigator Gordon lied about the affidavit to the grand jury without the transcript to those proceedings. What evidence there is goes against him yet trial counsel did not investigate the issue.

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*And these photos were black and white, not colored.

Trial counsel suggests that it was his trial strategy to not contact L. Ware over the affidavit concerning the photo array (HST 41). At HST pg 43 trial counsel admits that this issue is crucial. Trial counsel states that he would not say "seldom" is his practice in interviewing witnesses and victims. He does not deny that this is his normal procedure.

Trial counsel did not cross examine Officer Chris Langford during the trial. He cross examined the deputy at the Jackson - Denno hearing but has no questions for him for the jury to hear (T.T. 151).

Petitioner was transported from the scene of his arrest to the Richmond County Jail by Deputies C. Langford and Sam Rogers. Deputy Langford had no statement in the State's discovery package. Mr. Langford never identifies Sam Rogers as his partner but Mr. Langford continually and persistently says "We" throughout all of his testimony. Only through the discovery package can one discern that Rogers was Langford's partner. Sam Rogers is on the State's witness list but never testifies. There's no report from Sam Rogers in the discovery. There is nothing to support Deputy Langford's selective memory. Trial counsel's failure to subject either Deputy Langford or Sam Rogers to some pretrial review cannot be deemed effective representation by any case law. To allow Deputy Langford to go unchallenged defies any trial strategy that could be labeled adversarial. In the case of Crisp v Duckworth, 743 F2d 580, the conviction was reversed because the attorney failed to interview readily available witnesses. The attorney claimed his omission fell within his trial strategy, the ruling court would have none of this rationale.

Trial counsel testifies at the Habeas hearing on page 63 to the issue of the character of the weapon. He states: "Well there are flaws, and there are fatal flaws. I don't think that would be a fatal flaw, no." Again trial counsel's ignorance of the law and therefore his ineffectiveness is illustrated and demonstrated. The case law is ocean deep, a defendant can only be convicted for the charge that he is indicted for, see Stanford v Stewart, 554 SE2d 480; Todd v Turpin, 493SE2d 900; Elnod v State, 517 SE2d 805. A case that strongly supports Petitioner is Talley v State, 224SE2d 455 from 1976. The Georgia court ruled: "When a weapon is not per se a deadly weapon within the meaning of this section, it is incumbent upon the State to show the circumstance of its use which made it a deadly weapon." On page 60 of the Petitioner's trial transcript the prosecutor and the trial judge affirm that Mrs. Manor's robber had a pistol - not a stun gun. It's apparent that trial counsel has been listening to other lawyers (SHT 71) and not reading law.

A crucial issue is the weapon in this case. A stun gun has its own statute under Georgia law, O.G.G.A. 11-16-106 (a): "For the purpose of this code section, the term 'firearm' shall include stun guns and tasers. A stun gun or taser is any device that is powered by electrical charging units such as batteries and emits an electrical charge in excess of 20,000 volts or is otherwise capable of incapacitating a person by an electrical charge." The only evidence introduced to establish a stun gun was L. Ware on page 13 of the trial transcript, he states: "…it was like a stun gun." In the case of Talbot v State of Georgia, 402 SE 366 the defendant was indicted for armed robbery with a knife. The victim testified that there was something shiny in the defendant's hand. No weapon was introduced. The conviction was reversed. The court cited Depalma v State, 169 SE2d 801: "To permit the prosecution to prove that a crime was committed in a wholly different manner than that specifically alleged in the indictment would subject the accused to unfair surprise at trial and constitute a fatal variance under the standards enunciated." Another short coming by trial counsel.

Trial counsel admits on page 66 of the Habeas Transcript that not calling for a medical expert was a "slight oversight." Petitioner's Exhibits 25, 26, and 27 are some of Petitioner's medical records in regards to his condition in 1997-1998.

Trial counsel's legal philosophy is illustrated by his statement at line 22-24 on page 71 of the Habeas Transcript: "…when you talk to the witness, you can many times give away your cross examination strategy…". In Turpin v Christenson, 497 SE2d 216, the defendant won a reversal. Justice Thompson wrote at page 227: "…An attorney is not ineffective because he fails to follow every evidentiary lead, but an attorney's strategic decision is not reasonable 'when the attorney has failed to investigate his options and make a reasonable choice between them.' Baxter v Thomas, 45F3d 1501, 1513 (11th Cir., 1995); quoting Horton v Zant, 941F2d 1449, 1462 (11th Cir., 1991)." Trial counsel's beliefs that interviewing witnesses would give his case away, then may be that's the reason he's only tried 80 cases out of the approximate 1,000 felonies that he has handled. This is what he stated on pages 4-5 on the motion for new trial hearing transcript.

Trial counsel failed to move the trial court to sever the cases against the Petitioner. Two Georgia cases regarding severance are Stone v State, 271SE2d 22. This case relies upon Dingler v State, 211SE2d 752. The Dingler court wrote: "When two or more crimes are charged in separate counts in a single indictment, though committed at times and places involving transactions with different persons, and are of the same general nature or species, and the mode of the trial is the same, it is mandatory that the trial judge, upon motion of the defendant, order separate trials for each of the crimes charged?" The Georgia Supreme Court answered in the affirmative. This is one more issue that exposes trial counsel's ineffectiveness.

Trial counsel never interviewed the Petitioner before the trial. This is demonstrated by counsel's assumption that the Petitioner was administered morphine shots three times a day (T.T. 91). Petitioner takes/took morphine pills (T.T. 101); see Exhibits 25, 26, and 27. Trial counsel's representation is problematic once more.

Trial counsel was deficient when he failed to move the trial court to order all the case's proceedings recorded and transcribed; see Exhibit 31. This shortcoming reflects back on the trial court and its responsibilities as well. In Hardy v U.S., 375 U.S. 277, 84 S. ct. 424, 11 L.Ed2d 331 (1964), the U.S. Supreme Court ruled that a defendant was under no burden to show specific prejudice in order to obtain relief for violation of the Court Reporter Act. In US v Selva, 559 F2d 1303 the court was thorough when it addressed the issue and addressed irrefragable criticalness of a case's proceedings being recorded. At page 1306 of Selva, supra at Footnote 5 the court opined: "…Here, we are confronted with the absence of all arguments made to the jury. Other cases upon which we rely involved similarly significant omissions. US v Gregory, 472 F2d 484 (5th Cir., 1973) (missing voine dire and opening statements); US v Garcia-Bonifescio, 443 F2d 914 (5th Cir., 1971) (missing the government's closing argument); US v Upshaw, 448 F2d 1218, 1223 (5th Cir., 1971) (missing defense arguments); US v Rosa, 434 F2d 964 (5th Cir., 1970); Stephens v US, 289 F2d 308 (5th Cir., 1961) (missing voine dire and closing arguments)." In 1986, the 11th Circuit case of U.S. v Stephan, 784 F2d 1093 the court wrote at page 1102: "…where the defendant is represented by new counsel on appeal, all that need be shown is a significant and substantial omission in the transcript. Selva, 559 F2d at 1303, 1305.…New trials have been ordered pursuant to the Court Reporter's Act where the record lacked voine dire, opening statements, the government's closing argument, or the entire trial." At juncture after juncture trial counsel has failed miserably.

Another illustration of trial counsel's failure to subject the prosecution to the adversarial process is the trial counsel's failure to object to the prosecutor's planting of facts in the jurors' minds, the leading questions, and the shifting of the burden of proof. On page 36 of the trial transcript the trial counsel sat mute while the prosecutor lead the witness and planted facts that were not in evidence. Victim L. Ware never establishes that he picked the Petitioner's photo pretrial. The prosecutor carries on - unchallenged as if he has authenticated proof. Petitioner has established that Mr. Ware's pre-trial identification was flawed and tainted, trial counsel offers no objection. On page 68 of the trial transcript the prosecutor plants facts: "…you were looking at the defendant standing on the Mitsubishi truck." This is the statement of Lisa Womack who testifies that she picked a photo other than Petitioner (T.T. 67). Trial counsel lets this go unchallenged. On page 69 of the trial transcript the prosecutor does it again, yet no challenge from the defense. On pages 135-136 of the trial transcript the prosecutor leads Investigator Jim Gordon. Investigator Gordon introduces evidence in conflict to Mr. Ware's testimony and Gordon introduces evidence of a crime not charged by the court or indicted by the Grand Jury, robbery. Trial counsel is inept once more. The trial court's charge to the jury was unconstitutional. On page 191 of the trial transcript: "A person commits the offense of aggravated assault when that person assaults another person with intent to murder, rape or rob or with a deadly weapon, or with any object, device or instrument, which when used offensively against a person is likely to or actually does result in serious bodily injury." This charge does not fit the crime alleged or indicted but once more trial counsel fails to challenge the unconstitutional proceedings that his client is being subjected. Presiding Judge McMurray in the case Harwell v State, 497 SE2d 672 wrote this: "It is error to instruct the jury that an offense may be committed in more than one manner where only one manner is alleged and no remedial instructions are given to limit the jury's consideration to that particular manner. Dukes v State, 457 SE2d 556. See Griffin v State, 449 SE2d 341."

At no point in this case can trial counsel be shown to be reasonable or effective. It is doubtful that trial counsel read the discovery package, if he did, that should have been the starting point not the climax and conclusion to his pretrial preparation.

In the 2000 case U.S. v Russell, 221 F3d 615 the Fourth Circuit Court of Appeals vacated and remanded due to ineffective assistance of trial counsel. The Fourth Circuit quoted Strickland v Washington, 466 U.S. at 668: "The first prong of the test is satisfied if counsel's performance 'fell below an objective standard of reasonableness.' Id at 688. If 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable,' then the second prong is also satisfied. Id at 687."

Petitioner will address the performance of his appointed appellate counsel.

Petitioner's appointed appellate was as deplorable, unreasonable and ineffective as the trial counsel. Petitioner communicated with the trial court on numerous occasions, Exhibit 1, 2, 6, 7, 9, 13 and 20. The trial court's law clerk advised the Petitioner that the trial court would not hear the Petitioner's motions, Exhibit 13.

Appellate counsel's letter of 11/2/99 informs the Petitioner that the counsel will make "every effort to discuss any and all possible points of appeal you have set forth." This counsel never discusses anything with the Petitioner as he admits to this at the motion for new trial hearing (MNT 3). Petitioner's letter of 10/28/99 (Exhibit 10) to his appellate counsel raises many issues that were never addressed or developed. Appellate counsel's failure to discuss these issues has denied Petitioner the right to effective assistance of legal representation. There was no semblance of any assistance.

In U.S. v Hardy, 84 S. Ct. 424 (1964) Justice wrote at page 427: "The duty of counsel on appeal, as we noted in Ellis v US, 785, Ct. 974, 975, is not to serve as amicus to the Court of Appeals but as advocate for the appellant." Appellate counsel establishes his bias when he testified at the State Habeas Corpus hearing. On page 96 of habeas transcript counsel answers the Petitioner's question: "Did you put a motion in to withdraw from the case?" Counsel replies: "No, the judge told me he was not letting me out of the case." Appellate counsel has the trial court's interest before the Petitioner's best interests. On page 97 of the habeas transcript appellate counsel exposes the flawed thinking of the Superior Court judges in Richmond County and his thinking as well. Exhibit 15(a) is a copy of the Petitioner's letter to the trial judge dated 12/02/99. This letter, as all of Petitioner's letters, is perspicuous and unequivocal in its meaning and language. In the case of Myers v Collins, 8F3d 249 (5th Circuit, 1993) the court opined on page 252: "Whether at trial or appeal, a defendant is not required to accept unwanted counsel." In the case of Williams v Turpin, 87F3d 1204 (a Richmond County, Georgia case) the conviction was reversed due to appellate counsel's ineffectiveness. At footnote 5 on page 1210 the court wrote: "We therefore hold, and Georgia's Attorney General concedes, that a criminal defendant has a constitutional right to effective representation by counsel at the motion for new trial stage of Georgia's Unified Appeal Procedure."

On page 91 of the Habeas transcript appellate counsel demonstrates his friendship with the court rather than his duty to represent his client. Appellate counsel would have the Habeas court believe that local superior court rules erase the rights guaranteed by the constitutions of Georgia and the United States. In part one of the State Bar of Georgia's Canon of Ethics, appellate counsel has violated Rules 1.1 Competence, 1.2 Scope of Representation, and 1.3 Diligence. Appellate counsel violated Rule 1.1 when he did not research the issue of Petitioner's alibi witnesses. The witness addresses and phone numbers were provided to appellate counsel in Petitioner's letters (Exhibit 5).

Counsel failed in his Scope of Representation when he failed/refused to incorporate the Petitioner in the preparation and development of Petitioner's direct appeal. On page 89 of the Habeas transcript appellate counsel admits that he cannot show where he communicated with the Petitioner, no Diligence. Petitioner does not have page 88 of the Habeas transcript.

On page 92 of the Habeas transcript the appellate counsel states: "…you don't get to choose another appointed attorney - just go through the list until you get someone you like." These words alone reverse Petitioner's conviction at some point. Petitioner directs this Honorable Court to review Exhibits 9, 10 and 12.These three exhibits establish, irrefragably, that the Petitioner was demanding to proceed - pro se. Appellate counsel would have this Court believe that the Petitioner was fishing for another attorney. Appellate counsel has fallen below ineffectiveness and unreasonable, he is negligent and derelict.

Appellate counsel exposes his failure to communicate on pages 93 and 94 of the Habeas transcript. Counsel states on page 93: "I think I showed up maybe an hour or earlier." Then on page 103 of the Habeas transcript he states: "…I mean, I did not sit down and have a legal discussion, you know, with you;". Petitioner's Exhibits clearly demonstrate that he had an indepth and working knowledge of the issues in his case. Appellant counsel's communication was non-existent, the same as his representation.

Appellant counsel claims on page 103 of the Habeas transcript that he could not find a case that said a taser/stun gun could not be used to commit an armed robbery. The Petitioner without the benefit of a fully stocked law library, Shephard's, the internet or a paralegal's assistance found the case Harwell v State, 497 SE2d 672.

In Harwell the weapon charged was stun gun. The weapon was in evidence, an expert testified to authenticate the weapon's characteristics making it a lethal weapon and the victim testified that he was "shocked" several times, knocking him to the floor. Aggravated assault victim L. Ware's statement on page 13 of the trial transcript is no proof, he states: "…it was like a stun gun." Presiding Judge McMurray writes in his dissent: "Neither the majority's holding nor the fact that defendant mercilessly 'stunned … or shocked' the victim with a stun gun cures the irreparable fact that the State indicted defendant for the wrong offense." Judge Eldridge wrote in his dissent in Harwell: "There was no evidence that the stun gun is an 'object or device likely to cause serious injury' so as to support a conviction of the un-indicted form of aggravated assault." This case is excellent for Petitioner and his claim of variance, but it is only one case that resulted from the ruling in the case Ex parte Bain, 121 U.S. 1, 7SCt 781, 30 Led 849 (1887). For more than a century the United States Supreme Court has held that after an indictment has been returned its charges they may not be broadened through amendment except by the grand jury itself. Appellate counsel could not have "looked" at this issue as he claims on page 95 of the Habeas transcript. In the Georgia case of Pittway v State, 420 SE2d 619 (1992) the defendant was indicted for armed robbery by use of knife. The trial court instructed the jury that armed robbery could be committed by offensive weapon or replica having appearance of such weapon, the Georgia appellate reversed. The Petitioner's trial court charged the jury in the exact same way on pages 190 and 191 of the trial transcript. Petitioner will address this issue in greater detail under trial court error.

Appellate counsel committed numerous unreasonable omissions in the Petitioner's case. When counsel failed to provide Petitioner with a copy of the trial transcript after multiple requests, failed to discuss the case's issues with his client (see page 103 SHT), failed to interview local alibi witnesses, failed to research all of the issues (see page 87 SHT), failed to correct the Petitioner's supplemental brief thereby enabling the Georgia Court of Appeals to be biased in its review, failed to file a motion to remove counsel from Petitioner's case [See Flanagan v U.S., 104 S. Ct. at 1056; Farretta v CA, 95 S Ct. 2525 (1975)], and counsel's total failure to communicate and incorporate the Petitioner in his direct appeal - then counsel has failed to effectively and reasonably represent the Petitioner. Appellate counsel's shortcomings denied the Petitioner his right to a fair and full direct appeal.

Petitioner will address his claim of prosecutorial misconduct.

Petitioner's prosecutor committed multiple errors during the trial including the prosecutor's closing argument that the court reporter failed to record, much less transcribe. In the case of U.S. v Stephan, 784F2d 1093 (11th Circuit, 1986) citing U.S. v Selva, 559 F2d at 1305: "…Litigants are under no burden to show prejudice in order to obtain relief for violation of the Court Reporter Act, 28 USCA 753 (b) (1970)." The prosecutor repeatedly shifted the burden during his closing statements: "Mr. Holloway would have us believe," was the phrase used. In the 11th Circuit case of U.S. v Martinez, 96 F3d 473, 476 (1996) the court wrote: "Argument to the jury must be solely based on the evidence at trial."

The prosecutor planted facts in the juror's minds on pages 15, 19, 36, 68, 69 and 135 of the trial transcript. In Davis v Zant, 36 F3d 1538, 1548 n. 15 (11th Cir., 1994) the court wrote: "It is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation. (noting prosecutor's 'special duty of integrity in the arguments.')

The planting of facts that never come out through the prosecutor's witnesses' statements: In the case of U.S. v Crutchfield, 26F3d 1098, 1103 the conviction was reversed as a result of the prosecutor's misconduct that undermined the fairness of the trial.

The prosecution's witness on pages 45, 46 and 50 introduces testimony that the character of the weapon is not the particularized character that was specified in the State's indictment. Mrs. I. Manor, the armed robbery victim, is unwavering in her testimony, her robber had a pistol (T.T. 45,46, 50 + 60). The Incident Report completed in connection with Mrs. Manor authenticates her testimony. The Incident Report reveals that "gun" is the weapon used by her robber. (Exhibit 28). There was no statement prepared by Mrs. Manor in the State's discovery. Officer Simmons prepared the Incident Report and he clearly writes "pistol". Mr. Ware's Incident Report generated by Officer B. Jones designates "gun" as the weapon in this case (Exhibit 28). The prosecutor, a.k.a. the State, could have easily avoided the issue by leaving the indictment's wording general yet he chose to be overly specific thereby establishing a fact that he must prove. The prosecutor proffered varying evidence in regards to the charge of armed robbery with a stun gun. The State's specifically phrased indictment demands specific proof. In the case of U.S. v Cancelliere, 69F3d 116 (11th Cir., 1995) the conviction was reversed.

The court wrote at page 1121: "…Per se reversible error occurs 'when the essential elements of the offense are altered to broaden possible bases for conviction beyond what is contained in the indictment.' U.S. v Keller, 916F2d at 634 (11th Cir., 1990)." The prosecutor broadened the bases, irrefragably.

The prosecutor withheld exculpatory evidence from the Petitioner. There was nothing in the State's discovery to reveal that L. Womack did not identify the Petitioner as the attacker, in fact from Investigator J. Gordon's trial testimony a reader would be inclined to believe that she had identified the Petitioner when in fact she selected a photo other than the Petitioner (T.T. 72). Only the front pages of the Incident Reports were in discovery. There were no statements/reports in discovery from Officer C. Langford, Investigator K. Lynch or an affidavit that Investigator Gordon swore to at the preliminary hearing. Investigator Gordon stated in his report that he took photos to authenticate the palm print that he swore was lifted off of the truck in the bank parking lot, no photos are proffered. The defense was not informed that witness Lisa Womack did select a photo of the robber pre-trial (T.T. 72). The defense was not provided with the complete Incident Reports produced by the first officers on the scene (Exhibit 28). It is easy to adduce that Investigator Gordon swore to the Grand Jury that L. Ware had identified the Petitioner from a six photo array. Someone is not telling the truth. In the 1995 case Kyles v Whitley, 514U.S.419, 433 n.7, 115 S. Ct., 1555, 131LED2d 342 the U.S. Supreme Court ruled the following: "The knowing use of perjured testimony constitutes a due process violation when 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' (quoting U.S. v Agurs 93 S. Ct. 2392)." In the case Boyd v French, 147F3d 319 the conviction was reversed as a result of false testimony.

The court wrote at page 329: "…This is true regardless of whether the prosecution solicited testimony it knew to be false or simply allowed such testimony to pass uncorrected. See Giglio v US, 405 US 150, 153, 92 S. Ct. 763, 31LEd2d 104 (1972); Napue v Illinois, 360 US at 269, 79 S. Ct. 1173. And knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution."

Petitioner contends that the prosecutor's comments, questions, arguments and exculpatory evidence omissions violate the plain error doctrine. In the case United States v Young, 470 U.S.1, 15-16 (1985) the Court wrote: "plain error rule allows courts to consider those errors that seriously affect fairness, integrity or public reputation of the judicial proceeding or would cause a miscarriage of justice, despite the absence of an objection at trial." In Brecht v Abrahamson, 113 S.Ct. 1710, 1722 n. 9 the Court wrote: "a pattern of prosecutorial misconduct may infect the integrity of the proceedings and warrant the grant of habeas relief even if it did not substantially affect the jury's verdict."

Petitioner will address his claim of trial court errors.

Petitioner contends that the trial court erred when it took on a prosecutorial role throughout the Petitioner's trial. On numerous occasions, the trial judge sheds his robe of impartiality and taints the trial by assisting the prosecutor's case. Defense counsel on page 32 and 33 of the trial transcript attempts to establish that victim L. Ware is incorrect about taking two minutes to walk 50 feet from the Bank's door to Mr. Ware's van. The trial court interrupts and interferes with the trial attorney's cross examination. The trial court answers for Mr. Ware on page 33: "…He told you the best he can." In the case of Crawford v State, 228SE2d 371 (1976) the court wrote: "…it's a violation of statute prohibiting a judge of Superior Court from expressing or intimating his opinion as to what has or has not been proven or as to guilt of accused is mandatory for new trial. O.C.G.A. 18-8-57, it is error to violate even the spirit of this section.

On page 51 of the trial transcript the defense counsel is attempting to establish that victim I. Manor did or did not identify the Petitioner as her robber. The trial court continues to interrupt, interfere and answer for the witness. The trial court's interruption of defense counsel on page 51 is crucial to the answer that defense counsel was seeking. The trial court prevents the witness from answering, leaving the question open to the juror's minds. The after leading defense counsel on 52 and 53 of the trial transcript, the prosecutor and the trial court interrupt defense counsel and tell the jury that Mrs. Manor says her robber had a gun. This is variance, both the prosecutor and the trial court have established an element of the charged offense, the character of the weapon. The Petitioner was indicted for a stun gun. In the case of Depalma v State, 169SE2d 801 the Georgia Court wrote: "its reversible error, per se, to permit the State to prove that a crime was committed in a wholly different manner than that specifically alleged in the indictment." See also Ross v State, 394SE2d 418, Talbot v State, 402SE2d 366, and US v Leichtam, 948F2d 370. The trial court and the prosecutor on page 60 of the trial transcript compound their error when they answer in unison. In the case of U.S. v Behety, 32F3d 503 the court wrote on page 503: "Modification of an essential element not charged by grand jury so as to present reversible error as to conviction based on modification, may occur either by actions of the court or actions of the prosecutor." (11th Circuit, 1994). The court in Behety goes on to write at page 509: "…The danger that we are concerned with is that a defendant may have been convicted on a ground not alleged by the grand jury's indictment. .Peel, 837F2d at 979 (quoting U.S. v Lignarolo, 770F2d 971, 980 n. 15 (11th Cir., 1985)."

On page 81 of the trial transcript the trial court instructs the jurors that they can stay or go for the Jackson-Denno hearing. The trial court then begins the hearing. In Schneider v State, 202 SE2d 238 (1973), it was stated that where the state wishes to offer a statement in evidence, the court must offer the defendant a hearing outside the presence of the jury, see also Pierce v State, 231SE2d 744 (1977).

On page 97 of the trial transcript Deputy C. Langford testifies that he can only remember a short utterance allegedly made by the Petitioner. Deputy Langford cannot recall anything else that was said. His partner, Sam Rogers, doesn't testify to corroborate Langford and a copy of Langford's allegations are not offered to the defense pre-trial. Investigator M. Bowen alleges that the Petitioner made an utterance to him while in the immediate presence of Sgt. Wayne Pinkston - yet Pinkston does not corroborate Bowen. Investigator Bowen testifies that the Petitioner did not request an attorney, Petitioner contends just the opposite. The four arresting officers corroborate nothing. The trial court on page 108 of the trial transcript rules: "I'll let the statements in." The trial court commits a reversible error here. In Parker v State, 336SE2d 242 at page 243 the Georgia Supreme Court (Justice Weltner) wrote: "After a hearing, the trial court, without explanation, simply denied the motion." This case was reversed and remanded. On page 126 the trial court seems to realize that the Petitioner's version of his arrest is more probable than that of Investigator Bowen. The trial court at the end of Investigator Bowen's testimony asks: "…You said he searched his car. He gave you verbal permission to search his car?" Bowen: "Verbal and a written signed permission." The trial court: "He did give you written permission?" Bowen: "Yes, sir."

Petitioner contends that the signed consent form supports him in his version of the events surrounding his arrest. Petitioner swore/swears that he demanded a lawyer as soon as the cuffs were placed on him. It wasn't until the Petitioner is at the jail that he's offered an attorney waiver form, two and a half hours after his initial arrest.

In the case of Berry v State, 326SE2d 748 (1985) Judge Hill wrote on page 752 at footnote 6: "The Criminal Benchbook, Georgia Superior Courts, pg 93 (1981), recommends that trial judges expressly find a preponderance of the evidence that the defendant was advised of each of his Miranda rights and that his statement was made freely and voluntarily. We would proffer more complete findings of fact, if the evidence

warrants them, substantially as follows: I find from a preponderance of the evidence that the defendant was advised of each of his Miranda rights, that he understood them, that he voluntarily waived them, and that he thereafter gave his statement freely and voluntarily without any hope of benefit or fear of injury. (If the defendant denies having been advised of any one of his Miranda rights or says that he requested an attorney, specific findings as to the point in controversy should also be made.)" In the benchmark case of Sims v Georgia, 87S. Ct. 639 the Supreme Court wrote at page 642: "…The Supreme Court of Georgia reasoned, however, that Jackson was not applicable because of safeguards that Georgia's laws erect around the use of confessions. It pointed out that under Georgia law, before a confession may be admitted it must be corroborated and a showing made that it was freely and voluntarily given. In addition, the trial judge has the power to set aside the verdict of the jury and grant a new trial if, in his opinion, the jury was in error." And at page 643 the Court wrote: "…Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." In the case of U.S. v Morris, 491F.Supp 226 (S.D. GA) (1980) the court wrote on page 226: "On defendant's motion to suppress oral admissions made by him to law enforcement officers, the District Court, Bowen, J., held that totality of circumstances established that defendant's confession was the result of voluntary decision; nevertheless, this finding of voluntariness did not render the confession admissible, since defendant did not make a knowing and intelligent waiver of his constitutional privileges set forth in Miranda warnings;…" See also Jordan v State, 429 SE2d 97 (Ct. of App. '93); Hicks v State, 340 SE2d 604 (1985). The Petitioner's rights have been trounced. In no way does the Petitioner's Jackson-Denno hearing meet the tests and standards established by Georgia Courts or the United States Supreme Court. This is another meritorious issue that warrants the Petitioner's convictions' reversal.

The trial court committed variance and constructive amendment. The Petitioner was indicted in a specific manner that narrowed the element and ways in which the Petitioner could be convicted.

On pages 182 and 183 the trial court read the Petitioner's indicted charges to the jury. The trial court stated: "The indictment reads as follows: In the name and behalf of the citizens of Georgia charge and accuse Michael David Holloway with the offense of aggravated assault, for that said accused, in the County of Richmond, State of Georgia, on 31st day of July, 1998, did make an assault among the person of Larekos Ware with a stun gun, an object or device which when used offensively against a person is likely to result in serious bodily injury by striking Larekos Ware with said stun gun about the body, contrary to the laws of this state, the good order, peace and dignity thereof.

And in count two, the same grand jury further charged Mr. Holloway with the offense of armed robbery that in Richmond County on July 31st, 1998, with intent to commit theft, to take United States currency, the property of Isabelle Manor, from the immediate presence of Isabelle Manor by use of a stun gun, an offensive weapon, contrary to the laws of this state, the good order, peace and dignity thereof."

Both counts are limiting and specific in their wording and nature. The State never proffers any evidence to prove a stun gun or a way in which it can be used to result in serious bodily injury. Mr. Ware is never injured nor is he ever afraid. Mr. Ware never sees a stun gun. A gun is the weapon proven in the armed robbery charge, the trial court and the prosecutor confirm this on page 60 of the trial transcript.

The trial court broadens the character of the weapon in both counts on pages 190 and 191, the trial court states: "…offensive weapon or replica or device having the appearance of such weapon." In the case US v Leichtman, 948 F2d 370 the conviction was reversed. This case is similar to Petitioner's case. On page 379 the Court wrote: "Leichtman was indicted for having 'knowingly use[d] and carr[ied] a firearm: to wit, a Mossberg rifle…' Yet that may not be what he was convicted of. The grand jury charged him, in count two, with having used one particular gun, the Mossberg. But the trial jury was shown three guns, not just the Mossberg, and then received instruction, tendered by the government, that it could convict on count two if convinced that Leichtman had used a 'firearm' - in effect, any one of the three. The introduction of the two handguns in addition to the Mossberg, combined with the instruction on count two, plainly told the trial jury that a conviction could rest on proof that Leichtman had used or carried a 'firearm', whether or not it was the Mossberg specified in the indictment, and made it possible for the trial jury to convict Leichtman on charges which the grand jury never made against him. In the context of the entire jury charge and the entire trial, the introduction of three guns, where only one had been charged, together with the faulty instruction on count two, destroyed Leichtman's fifth amendment right to be tried on the charges contained in his indictment.

Obviously, the government could easily have drawn up Leichtman's indictment to charge simply having used or carried a 'firearm'. But it did not do so, and the description it gave of the gun in the indictment, 'to wit a Mossberg rifle, Model 250CA with no serial number, ' was not merely surplusage. That is true as a matter of law. By the way the government chose to frame Leichtman's indictment, it made the Mossberg an essential part of the charge and limited the bases for possible conviction to the Mossberg.'

The government's decision to limit the indictment to the Mossberg (and no other guns) was furthermore, a deliberate one."

In the aggravated assault charge, Investigator Gordon testifies that the victim was assaulted with intent to rob. The State has broadened the bases upon which the jury could convict. Mr. Ware, the assault victim, never utters a syllable in regards to his attacker's intent. The prosecutor has committed variance in both charges while the trial court committed variance in the robbery case and constructive amendment in its charges of the aggravated assault charge and the armed robbery charge.

Judge McMurray addressed this issue in the case of Robertson v State, 437 SE2d 817. On page 819 he wrote: "If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be variance… (N)o averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed.

…All such averments must be proved as laid, or the failure to prove the same as laid will amount to a variance. (Cits.)…To permit the prosecution to prove that a crime was committed in a wholly different manner than that specifically alleged in the indictment would subject the accused to unfair surprise at trial and constitute a fatal variance…(Cits.)." In the case of Griffin v State, 449 SE2d 341 (1994) Judge McMurray wrote at page 343: "[I]t is reversible error to instruct the jury that an offense may be committed in more than one manner where only one manner is alleged in the indictment and no remedial instructions are given to limit the jury's consideration to that particular manner."

Conclusion

Petitioner prays that his numerous meritorious issues be reviewed and considered by this Honorable Court. The State of Georgia has recently fanned the flames of rhetoric in addressing the atrocious representation that indigent defendants receive in the state's criminal justice system. Petitioner has never had his "fair" day in court and he prays this Court orders his conviction reversed and a new trial granted.