Court of Appeals of Georgia

September 21, 2015

TO: Mr. Daniel A. Spottsville, GDC977050, Coffee Correctional Facility, Post Office Box 650, Nicholls, Georgia 31554

RE: **A15A2253. Daniel Spottsville v. The State**

CHECK RETURN

☐ Your check number in the amount of written on the account of your firm for the filing fee in is enclosed. Please be advised that this Court is returning your check since the filing fee was already paid by .

CASE STATUS - DISPOSED

☑ **The referenced appeal was dismissed on August 12, 2015. The remittitur issued on August 31, 2015, divesting this Court of any further jurisdiction of your case. The case is therefore, final.**

I am returning your documents to you.

CASE STATUS - PENDING

☐ The above referenced appeal is pending in your name before this Court. The appeal was docketed in the Term and a decision must be rendered by the Court by the end of the Term which ends on .

APPLICATION FOR PERMISSION TO APPEAL A PROBATION REVOCATION

☐ To appeal a probation revocation, you will need to file a Discretionary Application with this Court. Rule 31 of the Rules of the Court of Appeals of Georgia describes a Discretionary Application and the items you would need to include with your application.

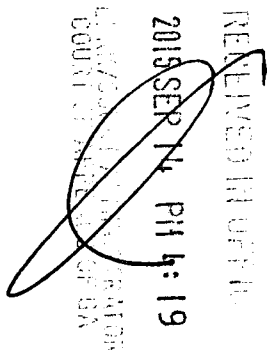
A Discretionary Application must be filed within 30 days of the stamped filed date on the order that you are appealing and the application must be accompanied by a proper Certificate of Service and a pauper's affidavit or the $80.00 filing fee. You must also comply with all the other applicable rules of Court regarding filing with the Court of Appeals of Georgia.

Enclosed, please find a copy of the Rules of the Court of Appeals for your review.

4 Aug. 2015

Court of Appeals of GA.
47th Trinity Ave. Suite 501
Atlanta, GA. 30334

Daniel A. Spottsville c/o #977050
Coffee Correctional [redacted] Facility
PO BOX 650 / 2F
Nicholls, GA. 31554



RE: Case# A15A2253 — NOTICE — 31 AUG. 2015 — Remittitur

Dear Clerk

I receive this notice that the CoA has issued a Remittitur on the 31st of August 2015, but the Court has not issued an order on my "AN AMENDMENT TO APPEAL RECONSIDERATION BRIEF — ENUMERATION OF ERRORS" now the "APPEAL RECONSIDERATION BRIEF FROM APPELLANT (AFFIDAVIT OF SUPPORT)". If the Court has, I do not have a copy of the order denying or allowing my reconsideration motions; which were sent to the CoA on the 25th of August 2015. Of which the motions are timely filed and I sent the "Motion for Reconsideration (AFFIDAVIT OF SUPPORT)" to the CoA on the 20th of August 2015

Where is the Order on this reconsideration motion?? And if the Court is alleging these three (3) motions were not sent or received then I need [redacted] you to affirm it in writting.

Because now I have been denied right to access the Courts and my right to certiorari has been interfered with.

Furthermore, Why did the Court not provide me with proof of filing my motions into the Court's docket? [redacted] Here again, if the Court is not filing my motions than it, Court should send me back all documents/motions not being filed by the Court. They should NOT have gone to [redacted] the trial court on remittitur.

If CoA clerk does not comply with her Oath of Office it is violation and it does deprive me of Due Process and Equal protection of the 14th Amendment.

I do have Constitutional & Statute rights to appeal and to access the Courts. I would like for the Clerk of Court of Appeals, Ga. to respond to this letter with in (10) TEN Working days and provide me with proof of filing my documents stated above and one order [redacted] from the Court on "motion to reconsider" and other documents I have sent to the CoA timely prior to the Remittitur. Please provide me with a docket-sheet.

I await your prompt response & peace be with in you.

Respectfully

N. A. Spotville

Pro se

PS: Clerk, Please provide me with stamped as filed copy of Notice enclosed and copy of Court's docket sheet. OAS

IN THE COURT OF APPEALS FOR THE STATE OF GEORGIA

DANIEL A. SPOTTSVILLE
v.
STATE OF GEORGIA

CASE # A15A2253
[MUSCOGEE CO. # SU98CR1445]

NOTICE OF INTENTION TO PETITION FOR CITIORARI

NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

Now comes the Appellant Daniel A. Spottsville, the Affiant in the above styled motion — to give notice of intention to petition for Certiorari to the Georgia Supreme Court in which Rule 38 does allow; as Affiant did so sent the Court of Appeals on the 20th of August 2015 a Motion for Reconsideration, timely filed. Court of Appeals has not provide Affiant with copy of Order on motion now provide court docket sheet.

Notice is given this 4th day of September 2015
Respectfully w/out Prejudice,
D. A. Spottsville
pro se, Prisoner

CERTIFICATION OF MAILING

I do certify that a copy(s) has been placed into the CCF prison mailing system and sent to this Court of Appeals by way of the US Postage System this 5th day of September 2015.
(copys to CoA & to DA's office Muscogee Co.)
D. A. Spottsville

IN THE COURT OF APPEALS OF GEORGIA

FILED IN OFFICE
AUG 31 2015
COURT CLERK
CLERK COURT OF APPEALS OF GA

DANIEL A. SPOTSWOOD
VS
STATE OF GEORGIA

Case # A15A2253

[MUSCOGEE CO. # SUSBCR1444]

2015 AUG 31 AM 8:41

MOTION FOR RECONSIDERATION
(AFFIDAVIT OF SUPPORT)

[redacted] NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

"Indeed one more than (affidavits) is necessary to make the prima facie case," CAS Vs KLS, 658 F2d 526, 536 (7th Cir 1981); Cert. Denied, 50 US LW 2169, SCt. 22 March 1982; [SEE ALSO] OCGA § 9-11-113.

Now Comes the Appellant, Daniel A. Spotswood, the Affiant herein above styled motion to move this Court of Appeals to reconsider its order to dismiss appeal, as being barred because of Affiant's discretionary appeal application was denied. OCGA § 5-6-33/§ 5-6-34 (Appellate Practice Act, 1965) And OCGA § 5-7-1, do give Affiant solid ground to have Court review his appeal-brief of which court did so grant on the 28th of July 2015 Direct Appeal. (DISMISSED on the 12th of Aug. 2015).

Affiant is layman in law and did so follow this Court's directive, to wit, Court stated Appellant's Brief (including an Enumeration of Errors as Part II) shall be filed within 20 days of the date on this docketed [redacted] notice. Notice is dated 28th of July 2015.

This Court of Appeal should [redacted] not have denied Direct Appeal without first reviewing all the Merits (De Novo Review) presented in Affiant's Appeal Brief dated 10 August 2015 — An Amendment

M.R./Affiant 2017 ORIGINAL

to Appeal Brief — Enumeration of ERRORS (part II) .... accompanied the brief, were both motions were sent to the Court on the 11th of August 2015 and should be deemed filed in the court on that date as Affiant did so place both documents in the the CDF mailing system to be mailed by the US postal system. [SEE] MAIL BOX RULE — Massaline Vs Williams, (2001) 274 Ga 552; Brown Vs QBE Ins Corp, (2009) 297 GaApp 592; Valentine Vs Hammel, 258 Ga 582 (1988) [CITING] Perterson Vs Tayor, 15 Ga 483, 484 (1854)

Furthermore, Since the Court brought up Spotswith Vs St, A03A0007 (4 Feb. 2003) an unpublished (case) opinion; an unbias review by this Court should reveal that Constitution error under Douglas Vs Calif. (1963) 372 US 353 and Robert Vs Caldwell, 230 Ga 223 (1973) it is the duty of the trial court to appoint appellate counsel. Under these decisions a judgment that the appellant was denied appellate counsel is required .... judgement is reversal; [SEE ALSO] Graddy Vs Hopper, 233 Ga 65 (1974); AND Allen Vs Bergman, 201 GaApp 781 (1991), case should be reversed & remanded to trial court, to do so, in order that he not be deprived of his right to appeal contrary to law. § 5-6-33 / §5-6-34 § Pope Vs St 257 Ga 32, 34 (1987).

Is it not a "PLAIN ERROR" for this Court of Appeals to overlook, fail to review DE NOVO Affiant's Case?? Yes it is!! Appeals — rehearing or review from an inferior to a superior court is not limited solely to question of law .... may include question of fact, question of law, or question of both fact & law. The appeal is regarded as an important element of procedural fairness, it has not been held to be an essential requirement within the Due Process

guaranteed of the US Constitution. Doherty Vs Rogers 281 US 362 (1930). Nevertheless, it has been general policy of legislatures to grant to aggrieved parties the right to at least one appeal in actions involving the merits of a case. Since the Court favors the right of appeal an aggrieved party will not be deprived of the right of appeal without just cause. And in this matter Court can not produce just cause where there exist Several PLAIN ERRORS in the Affiant criminal Trial Procedures that merits do so exist in the Affiant's favor in view of any reasonable reviewing Court. Especially where DE NOVO review would demonstrate egregious manifest injustice warranting correction by this Court of Appeals were by an innocent man has been absurdly sentenced to 40 year to some 30 year incarcerated for felonies he did not commit and the jury does not place Affiant Spotsville at the scene of those alleged felonies.

Affiant's Appeal now before this Court is not frivolous where merit does exist in his favor but the Court refuses to review De Novo, there exist clear reversable errors in this matter (case) before this Court of Appeals that has duty to correct all and any errors pursuant the the fundamental elements of justice and equality the "Bill of Rights" and "14th Amendment" and for in this Nation.

[SEE AND COMPARE] Bardberry Vs St, 315 Ga App 434, (2012) denial of timely motion to reduce sentence is subject to direct appeal; Head Vs Grill, 204 Ga 261 (1948) Judge can modify if sentence void; Wade Vs St, 231 Ga 131 (1973);

* Walton Vs' St 207 GaApp 787 (1993) the Superior Court erred in dismissing [redacted] appellants appeal without allowing appellant an opportunity to be heard in contravention of an order of the Court of Appeals, and resulting in the violation of appellant's right to due process.

"Equity denotes the Spirit and Habit of fairness, justice, and right."

"There is no more cruel tyranny than that which is exercised under cover of law, and with the colors of justice"

"Are not all equal under the Law?"

Therefore, the Affiant Spotsville does so move this Court to [redacted] reconsider its dismissal and de novo review Affiant's (case) appeal to correct manifest injustice, miscarriage of justice; where an innocent man has been incarcerated by the State of Georgia since July 1997.

This 20th day of August, 2015.

L.A. Spotsville
pro se/Affiant/Appellant

▶ I do swear, depose, say and claim that the above facts are true, correct, and complete to the best of my belief and knowledge and not meant to mislead but comport justice and equality.

L.A. Spotsville

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 20th DAY OF August, 2015.

NOTARY PUBLIC (SEAL) EXPIRES:

[illegible] Georgia
My Commission Expires Dec. 6 2015

NR/A2015 0815 9385 DANS

Certificate of Service

This is to certify that I have this day a served a true and correct copy of the within and foregoing document(s) upon the party(s) listed below by depositing a copy of the same in the United States mail in a properly addressed enveloped with adequate postage thereon or submitted same to the institutional legal mail system, to bellow addressee(s)

Clerk of Court of Appeals
47 Trinity Ave SW
Suite 501
Atlanta, Ga 30334

Document(s) Included:
1) Motion for Reconsideration

District Atty's Office
Muscogee Co.
P.O. Box 1340
Columbus Ga 31901

This 20th Day of August, 20 2015

Respectfully submitted,

Pro Se

Signature D. A Spottsville

Print: SPOTTSVILLE, DANIEL A.

GDC#: 977050

Address: Coffee Correctional Facility
P.O. Box 650, 2F
Nicholls, GA 31554

MR/A2015 0877385 DAVIS

IN THE COURT OF APPEALS STATE OF GEORGIA

DANIEL A. SPOTTSVILLE
VS
STATE OF GEORGIA

CASE # A15A2253

[MUSCOGEE CO. #SU98CR1445]

APPEAL RECONSIDERATION BRIEF
FROM APPELLANT
(AFFIDAVIT OF SUPPORT)

"Indeed, no more than (Affidavit) is necessary to make the prima facie case," US VS KIS, 658 F2d 526, 536 (7th Cir 1981); Cert. Denied, US 50 LW 2169, SCt. 22 March 1982; [SEE ALSO] OCGA § 9-10-113.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

Now Comes the ~~Appellant~~, David A. ~~Spottsville~~, as the Affiant herein styled motion above to appeal the lower court's ruling dated 6th of April 2015, to-wit Affiant has filed a Notice to Appeal & filed Application for Discretionary Appeal on the 24th of June 2015 presenting Court with twelve enumerations of errors clearly warranting Affiant's request to be granted.

This Court does have jurisdiction to render decision on the matters herein now before it pursuant OCGA §§5-6-35/-33/-34.

I. STATEMENT OF FACTS & CITATIONS

Affiant does move this Court to De Novo review pursuant to ST VS Hammons 325 GaApp 815 (2014) and note the fact that Affiant has twice sent into the Superior Court of Muscogee County his "Motion to Set Aside Judgment as Void" and "Motion to Modify Sentence" to-wit, the same was sent to the District Attorney's Office, record will show.

For that the Affiant did so provide a 2d original "Motion to Set Aside Judgment as Void" to the Muscogee Co. Superior Court on the 20th of April 2010. Sent by the US Postage system with a valid NOTARY PUBLIC SEAL from an officer of a Court. which was filed into the courts office 7 June 2010. [SEE] EXHIBITS = ABA. Affiant did so send the Original motion to the Court on the 22nd of October 2009 and copy sent to the District Attorney's office. And that the Affiant did so provide the Superior Court with original "Motion to Modify Sentence" sent by the US Postage System on the 19th of September 2012, and copy to the District Attorney's office, again with official "NOTARY Public Seal" by Court official. [SEE] EXHIBITS = ABA. Affiant requested but never received a stamped as being filed into the court's office copy from the Court. Affiant did so on the 26 of December 2012 Send a copy of his "Motion to Modify Sentence" a 2d time on the 26th of December 2012. [SEE] EXHIBITS = ABA.

Affiant can not be held accountable for the actions of the GDC mailing system nor the US Postal mailing system if his documents sent to the Court were never delivered but if they were, the Court of Clerk has failed to preform here duties as Clerk, pursuant to OCGA §15-6-61 / §15-6-62 and again Affiant can not be held at fault.

But surely this Court of Appeals can review the Courts Docket Sheet in which the Court releases to provide Affiant with a copy of his docket sheet in this case (#SU98CR1445). [SEE] EXHIBITS = ABA What does the Superior Court not wish Affiant to discover on his docket sheet?

III. The Affiant's enumeration of errors:

1) The trial court erred in failure to allow Affiant to amend to demonstrate record exist on prior motion to modify sentence.

The Superior Court should have allowed the Affiant to send the Court again, proof that he did provide the Court and the district attorney's office with a valid notarized copy of his motion to modify sentence and did so sent second copy to the Court. As Affiant has so provide undisputed, tangible evidence [EXHIBITS=ABA] now before this court that such motion does exist. And the lower court * has erred pursuant to Nunnally vs St (2011) 310 Ga App 183, 185(2), De novo review when facts undisputed. [See] EXHIBITS=ABA where the Affiant places tangible undisputed evidence that there does exist proof Affiant has provide the Superior Court with copies of his motions and court erred in not allowing Affiant to amend & demonstrate record does exist of motion to modify sentence.

2) The trial court erred in failing to recognize OCGA § 9-2-63 is right and filed timely.

The did so erred because of the specific language found in OCGA § 9-2-63 that clearly states:

"When any action is dismissed or discontinued and the plaintiff desires to recommence his action, if he will make and file with his complaint, summons, or other proceedings an affidavit in writing stating that he is advised and believes that he has good cause for recommencing his action and that because of his indigence he is unable to pay

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the costs that have accrued in the case, he shall have the right to renew the action without payment of the cost as aforesaid.

Surely this Court can see that the Statute does give Affiant, who is indigent incarcerated prisoner the right to renew his action where the Superior court has erred not to allow access to court and due process of the law. But has failed to show cause to dispute OCGAS 9-2-63 does not apply to Affiant's case. No where on record has the State (or District Attorney) dispute Affiant's indigent status as a prisoner. Court has sua sponte dismissed and denied Affiants motion to renew, is error.

3) The trial court erred in failure to provide true fact that this case had sentence given on the 9th of December 1998, Court concealing the truth.

The truth seems to be far from the lower courts agenda when it comes to this case (#SU98CR1445). Wherein court, the sentence was handed out contrary to well established procedures. Court demonstrate no legal discretion in sentence Affiant just minutes after jury rendered illegal verdict contrary to OCGA§5-5-20 / §5-5-21, and Jackson Vs Virginia 443 US 307 (1979). The evidence was contrary to law and the principles of justice and equity and was decidedly and strongly against the weight of the evidence. Evidence was not overwhelming nor was it legally sufficient to support the jury's verdict. Affiant was found not Guilty of Rape and Burglary — alleging all felonies occurred at the same time, event, place,

being within an alleged victims apartment the scene of the felonies pursuant to an indictment construded by the prosecution. Court did sentence Affiant to 40 years to serve 30 years incarcerated, with 10 years on probation to all run concurrent to sentence from related case in Marion County (#SU98CR 033) on the 9th of December 1998. Not the 17th of December 1998. {SEE} EXHIBITS = ABA

4) The trial court erred in failure to recognize the existence of several 'PLAIN ERRORS' in violation of Due Process and Equal Protection Clause (14th Amend.).

Beside the courts plain error to recognize OCGA§ 9-2-63 is statutory Right, timely filed by the Affiant. The court does not recognize US Supreme Court (STARE DECISIS) Standard in Jackson Vs Virginia, Supra, nor State Statutes OCGA§ 5-5-20/§ 5-5-21. Evidence had been legally insufficient for the jury to convict Affiant of Aggravated Assault and Child Molestation without first placing Affiant at the scene of the alleged felonies; see the Prosecution's narrowly and specificly construded indictment. Affiant, by the jury was found not guilty/acquitted of Burglary — and Rape. Legally not placing the Affiant at the scene of alleged assault where no rape was committed to warrent a conviction of guilt for aggravated assault nor child molestation. OCGA§ 16-7-1 (Burglary) is clearly established in Statute and so is OCGA§ 16-5-21 (Aggravated Assault) There is/was no physical evidence corroborating the alleged victims various accounts of events which contained inconsistencies. Moreover, the court did not issue any

curative instruction or take other corrective actions to overcome plain Errors in Affiant's case. The 14th Amendment's Due Process and Equal protection
* Clause has been violated. Brinson, 272 Ga 345 (2000) Court said the trial court had duty to accurately, completely and correctly inform the jury of the law. [SEE & COMPARE ALSO]
* Warner Vs St 277 Ga App 421 (2006) the Court ruled that the error was reversible because there was a reasonable probability that the jury's verdict would have been different had the error not occurred. There was no physical evidence of the rape itself, and the case otherwise boiled down to the credibility question between the victim and Warner.
* Parker Vs St 226 Ga App 462 (1997) Burglary is a felony crime which involves the criminal necessity. placing himself within some building or other structure named in statute. State did not present sufficient evidence to prove Burglary, rape, aggravated assult.
* Parker Vs St 238 Ga 725 (1977) State, therefore failed to prove that the dwelling was entered without authority of the owner.
* Bell Vs St, 287 Ga 670 (2010) Evidence was insufficient to establish that defendant entered victim's home without authority, thus precluding burglary conviction; there was no indication for example, that defendant forced his way in or that victim denied defendant permission to enter. [SEE ALSO] OCGA § 16-7-1;
** Luke Vs St 171 Ga App 201, 202 (1984); Higgins Vs St, 148 Ga App
** 375 (1978); Chitwood Vs St, 170 Ga App 599 (1984); Well
* Vs St 151 Ga App 416 (1979); Williamson Vs St 134 Ga App 583 (1975).

"Due process clause are designed to protect the individual against arbitrary gourment action," Wolff Vs McDonnell, 418 US 539, 558 (1974).

"Due process clause requires a fair trial in a fair tribunal before a judge with no actual bias against the defendent or interest in the outcome of his particular case," Bracy Vs Gramley, 520 US 899, 904-05 (1997).

"Due process requires that a convicted person not be sentenced on materially untrue assumptions or misinformation," US Vs Miller, 263 F3d 1 (2d Cir 2001).

"If officers use false evidence, including false testimony, to secure a conviction, the defendent's due process rights are violated," Phillips Vs Woodford, 267 F3d 966 (9th Cir 2001); Wilson Vs Lawrence Co., 260 F3d 946 (8th Cir 2001).

"Defendent's conviction must be reversed on due process grounds when the government knowingly elects, or fails to correct, materially false statements from its witnesses," Daniels Vs Lee, 316 F3d 477 (4th Cir 2003); US Vs Hasse, 162 F3d 359 (5th Cir 1998)

"The Equal Protection Clause requires that 'all persons' similarly situated should be treated alike," City of Cleburne, Tx Vs Cleburne Living Center, 433 US 432, 439 (1985).

"Equal protection clause forbids state to treat one group, including group of prisoners, arbitrarily worse than another," Anderson Vs Romero, 72 F3d 518 (7th Cir 1995)

"To comport with the Equal Protection Clause, the law cannot be administered with an evil eye and an uneven hand," Eckert Vs Town of Libertyville, 258 F3d 1147 (10th Cir 2001).

* [SEE ALSO] Chase Vs St 277 Ga 636 (2004) "The Supreme Court reversed the conviction, holding that the trial court had erred in its instruction to the jury as to the elements of assault."

Basic component of a fair trial is that the trial court's instruction to the jury are lawful.

"Because the trial court gave an erroneous charge on a basic component of a fair trial.... a fundamental liberty secured by 14th Amendment..... permitted the jury to determine guilt from factors other than proof adduced at trial, thereby offending the accused's constitutional right to be judged solely on that basis.... we conclude there was a probability of a different outcome sufficient to undermine confidence in the outcome of appellant's trial. Taylor Vs Kentucky, 436 US 478 (1978); Estelle Vs William, 425 US 501 (1976); Longlands, 280 Ga 799 (2006); Mayers 275 Ga 709 (2002); Stanford Vs Stanford 274 Ga 468 (2001).

"Plain Error" Court is to apply a 4-prong test: (1) there must be a deviation from a legal rule that the appellant didn't intentionally relinquish; (2) the legal error must be obvious, and not subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights; (4) the reviewing court should exercise its discretion to remedy the error if it seriously affects the fairness, integrity, or public reputation of judicial proceeding.

Court has duty to correct Constitutional errors and reverse convictions where there is/are true miscarriage of justice, and an innocent person suffers injustice. The Affiant has been wrongfully incarcerated by State.

On De Novo review of this case the Court of Appeals must confirm that Affiants 14th Amendment Rights have been violated by the State and the Prosecution's actions during the pretrial-trial-sentencing phases of this case. And the Court of Appeals should duly note that the below enumerated errors are also "Plain Errors", to wit, Affiants 14th Amendment have been violated by State Court and the prosecution during trial phases.

5) The trial court erred in failure to recognize "Fatal Varience" exist in this case Vs Inconsistent Verdict rule.

Clearly the Court of Appeals knows that Fatal Varience is what exist in Affiant's case is classic matter and not inconsistent verdict rule. The rule no longer exist in the State of Georgia, Milam, 203 Ga App 359 (1986). Georgia does not recognize it, Masood, 313 Ga App 549 (2012). So that argument in Section # 6 of the Court's order is "MOOT". However, a fatal varience exist, "when the defendant is charged by a narrowly drawn indictment with a specific crime it is not the power of the judge or jury to interpet the facts as presented at trial to support an alternative, seperate offense." Watson Vs St 293 Ga 817 (2013); St Vs Hightower, 252 Ga 220 (1984). [SEE ALSO]

"If the indictment sets out the offense as done in a particular way, the proof must show it so or there will be a variance." Stephen Vs St (2013) 323 Ga App 699 (Citing) Ross Vs St 195 Ga App 624, 625 (1990). "Averment must be proven as laid or the failure to prove the same as laid will a-mount to variance." Stephen, supra.

Affiant has stated above that the jury has acquitted, found Affiant not guilty of Burglary and

Rape [SEE EXHIBITS - ABA], to wit, there is no tangible evidence placing Affiant at the scene of the charged felonies in the prosecution's narrowly constructed indictment with specific felonies laid out as occurring at one location, same time, same event, same evidence. If there is an acquittal on rape, there can be no aggravated assault where rape is the aggravate offense alleged in the indictment. And an acquittal on burglary then there can be no child molestation for the jury does not place Affiant at the scene, within the dwelling place, home, of the alleged victim. Affiant did not commit burglary therefore no rape occurred and no aggravated assault and no child molestation occurred as laid out in the prosecution's indictment. [SEE & COMPARE] Well established is "Fatal Variance" in the State of Georgia as a Due Process violation, to wit, has occurred in Affiant's case.

* Harwell Vs St. 270 Ga 765 (1999) "A criminal defendent's rights to due process may be endangered when an indictment charged the defendent with committing a charge in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment."

* (Citing) Depalma Vs St, 225 Ga 465 469 (1969).

"Where the indictment charges a defendant committed an offense by one method, it is reversable error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instructions." Mikell Vs St, 286 Ga 772 (2010); Clark Vs St 298 GA App 281 (2009).

"Averments in an indictment as to specific

manner in which a crime was committed are not mere surplusage - it must be proven as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's rights to due process." Strapp Vs St (2014) 326 Ga App 264; Quiroz Vs St, 291 Ga App 423 (2008).

"Where an indictment charges a defendant with committing an offense by one specific method, the defendant cannot be convicted of the offense based on a totally different, unspecified method, because to do so violates a defendant's rights under the Due Process Clause." Petty Vs Smith, 279 Ga 273 (2005); [ALSO] New Vs St, (2014) 327 Ga App 87.

In Milner Vs St, 297 Ga App 859 (2009), acquitted of rape, the Court of Appeals reverse his terroristic threats conviction based on the crime being committed in a manner not alleged in the indictment. Court finds that the jury was not given a limited instruction to ensure that Milner could be convicted of committing the crime only "in the specific manner charged ..." It is probable that the jury found him guilty of committing the act of terroristic threats in a manner not charged in the indictment and his right to due process was violated due to a fatal variance between the proof at trial and the indictment. [ALSO] Hall Vs Wheeling, 282 Ga 86 (2007); Hopkins Vs St, 255 Ga App 202 (2002).

"The court also finds that, because the jury instruction was 'plain error' which affected Milner's substantial rights," [ALSO] Talton Vs St 254 Ga App 111 (2002).

"If there is a reasonable possibility that the jury convicted the defendant of the commission of a crime in a manner not charged in the indictment, then the con-

viction is defective because of a fatal variance between the proof at trial and the indictment returned by the grand jury." Skillern Vs St 204 Ga App 34 (1999).

The Court of Appeals in its De Novo review of Affiant's case must reverse conviction where "Due process" have been violate and "plain Error" of "Fatal Variance" exist whereby Affiant's conviction is void judgment. This Court must correct error herein case, Without proof of entry a conviction of assault and molestation cannot stand, entery cannot be inferred. OCGA § 16-7-1 [COMPARE] Well Vs St, 151 Ga App 416 (1979); Luke Vs St 171 Ga App 201, 202 (1984). "Burglary is placing [accused] himself within the dwelling of another." Williamson Vs St, 134 Ga App 583 (1975). "State had failed to prove an essential element — asportation — of the crime which it had charged him.... The Court of Appeals agrees and reverses his conviction." Heard Vs St, 317 Ga App 663 (2012).

State in Affiant's case failed to prove charges as laid out in the indictment constructed by the prosecution. Court of Appeals must also reverse Affiant's [case] conviction, "Fatal Variance" is Due Process violation warranting reversal of Affiant's conviction and sentence.

6) The trial court erred in failure to recognize "insufficient evidence" exist in this case to warrant maximum sentence, or conviction. The trial Court truely should not have allowed verdicts of guilt to stand when the prosecution failed to place the Affiant in the dwelling place at the Scene of the alleged rape, assault, molestation; all to which the prosecution's evidence and indictment laid out to have occurred. [SEE RECORD OF THE COURT] [SEE & COMPARE] Parker Vs St 226 Ga App 462, Supra;

* St Vs Bolman, 222 Ga App 534 (1996). "Aggravated assault has two essential elements: (1) attempt to commit a violent injury; (2) act that places another in reasonable apprehension thereof, and that the assault was aggravated be either intention to murder or rape or * use of deadly weapon." (STATE (W) Smith Vs Hardrick, 266 Ga 54 (1995) (OCGA § 16-5-21).

Since there was no Burglary there there can be no aggravated assault because Affiant was not at the scene to place any alleged victim in reasonable apprehention of being harmed. Especially where there was no evidence of a rape to cause intention of an aggravated assault. The same intention does not exist for child molestation where there has been no assault, no rape and no burglary to place the Affiant at the scene of the alleged victims home, within the dwelling of another without authority. The prosecution did not prove a crime, any crime was proven in the manner he laid out in his specifically narrow indictment. Without a verdict of Guilt of Burglary, the jury has established that prosecution has failed to, that Affiant had any entent which would be productive of any felony violence likely to have resulted in reasonable apprehention of alleged victim receiving immediate violent injury or harm; Affiant was never at the scene with in the dwelling place, home. (OCGA § 16-7-1 / § 16-5-21) [COMPARE ALSO]

** Smith Vs St, 31 Ga App 170 (2011); In re CS (2001) 251 Ga App 411; "Court merged the Child Molestation with * the rape count;" Wofford Vs St 226 Ga App 487 (1997); "When same underlying facts are used to prove both * offenses, convictions merges," O'Neal Vs St, 228 Ga App

* 162 (1997); Taylor Vs St, 219 Ga App 475 (1995); "The Burglary statute prohibits specific types of entery on the property of another without permission and with intent to commit a felony ..... OCGA § 16-7-1(a). .... Under the indictment as drawn, the aggravated assault conviction must merge with the robbery .... Since the facts adduced to support the aggravated assault charges were the same facts used to support the robbery charges, the aggravated assault charges must be considered an
* offense included with the robbery charges." Luke Vs St
* 171 Ga App 201, 202 (1984); Hizine, 148 Ga App 375 (1978);
* Chitwood, 170 Ga App 599 (1984).

Without proof of entery, any charge(s) that are included, requiring proof of entery can not stand, moreover, entery can not be inferred. [SEE ALSO]
** St Vs Lamb, 147 Ga App 435 (1978) and Harris Vs St 193 Ga 109 (1941), "the offenses charged in the two indictments arose out of the same transaction and because of the specificity with which the burglary indictment was drawn, it was absolutely necessary for the jury to consider all the evidence of rape in reaching its verdict on burglary charges.... Since it undisputably appears that the defendant could not be guilty of the present charge of rape without also being guilty of the crime of which he had been tried and acquited, Burglary.

In Allen's case compare the molestation charge that requires entery onto the scene of alleged felonies within alleged victim's home. "Intent to
* conduct is specific must be proven," Kelly Vs St, 201 Ga App 343 (1991). "Entery, an element of the offense
* of Burglary cannot be inferred," Wells Vs St 151 Ga App 416 (1979).

The prosecution did so fail to prove that

alleged dwelling was entered without authority of owner; nor place Affiant within the dwelling place as laid out in his specifically narrow indictment; of which all evidence was insufficient to establish that Affiant entered the alleged victim's home. [COMPARE & SEE]

* Bell Vs St 287 Ga 670 (2010) "Evidence was insufficient to establish that defendant entered victim's home without authority, thus precluding burglary conviction; there was no indication, for example, the defendant forced his way in or that victim denied defendant permission
* to enter." In Heard Vs St, supra, Court of Appeals reversed conviction because State prosecution failed to prove essential asportation element(s) is the same type of failure to prove in Affiant's case. And this Court of Appeals should review Affiant's case under
* Jackson Vs Virginia "standard of insufficient evidence.
* Jackson, standard of review is whether the evidence was legally sufficient to support the jury's verdict." And when it comes to Affiant's aggravated assault (§ 16-5-21) and child molestation (§ 16-6-5), evidence is not overwhelming and is insufficient without first conforming, proving a burglary occurred as laid out in the prosecution's specifically narrow indictment. [SEE COURT RECORD] [SEE &
* COMPARE] Walker Vs St (2015), 297 Ga 262, "The evidence was contrary to law and the principles of justice and equity," and was "decidedly and strongly against the weight
* of the evidence," OCGA § 5-5-20 / § 5-5-21. "Citing Mills, 188 Ga 616 (1939), the Court says that the law effectively charges the trial Court 'to let no verdict stand unless your conscience approves it, although there might be some slight evidence to support it.' By simply ap-
* plying the Jackson Vs Virginia standard, the trial Court had not complied with its duty to exercise its

discretion and weigh the evidence." In Jackson Vs Virginia, supra, "relief if it is found that upon the record evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." [At trial proof was insufficient to convict Alliant Spotsville of burglary and rape, therein conviction of assault and molestation must be reversed.]

In re Winship 397 US 358 (1970), previously the court held that due process clause of the 14th Amendment "protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged." In Jackson, court explained that In re Winship, presuppose as an essential of the due process guaranteed by the 14th Amend. that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Following In re Winship the court in Jackson held: that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury instructions was proper, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." [SEE ALSO] McDaniel Vs Brown, 130 S Ct 665, 673 (2010) referring Jackson Standard. Jackson Vs Virginia, rejecting the rule that a conviction be affirmed if "some evidence" in the record supports the jury's finding of guilt. In Wells Vs St, 151 Ga App 416 (1979) court stated "entry, an element of the offense of burglary cannot be inferred." And because "State therefore failed to prove that

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the dwelling was entered without authority of the owner;"
* Murphy Vs St, 238 Ga 725 (1977). [Affiant's conviction of intent to assault and molest must be void sentence and must be corrected.] "Intent to conduct is specific
* must be proven," Kelly Vs St, 201 GaApp 343 (1991). [SEE
** ALSO] Hulet Vs St (2014) 296 Ga 49, 54. ; Nazario VSt 293 Ga 480, at 486(2b) explaining that a judgment of sentence is void where it imposes an illegal sentence, ie, a sentence that the law does not allow, and that the illegality of such a judgment is not a
* waivable issue; Robbins Vs St, 326 GaApp 812 (2014) ;
** Griffin Vs St, 172 GaApp 184 (1984) ; Marshall Vs St, 294 GaApp 282-83 (2008). [Countered-evidence is/was insufficient.]

7) The trial court erred in failure to recognize court's "jury instructions" did not cure prosecution's errors.

Here the trial court did not give jury instructions that were sufficient enough to allow jury to make clear and rational decision to weigh all the facts as laid out in the prosecution's specifically narrow indictment. [SEE & COMPARE]
* Harwell Vs St, 270 Ga 765 (1999) a criminal defendant's right to due process may be endangered when an indictment charges the defendant with committing a charge in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. A verbatim reading of the indictment does not cure the due process ailment brought about by instructing the jury on a unindicted manner
* of committing the crime charged; Dukes Vs St, Due Process requires that trial court's jury charge correspond to language of indictment.

In Affiant's case, the Record on review will

clearly demonstrate that the trial court did not give necessary jury charges/instructions as to limit how the jury is to view the facts/evidence as presented at trial in relationship to the prosecution's specific indictment, as the charges were laid out to have occurred. [SEE ALSO] Clark Vs St (2009) 298 Ga App 281, If the trial court gives a jury charge on an entire code section the specifics, that a crime may be committed by more than one method, and if the indictment alleges that the defendant committed the crime by only one method, the deviation violates due process, unless: (a) a limiting instruction is given; or (b) under the evidence, there is no reasonable possibility that the jury convictioned the defendant of the commission of the crime in a manner not charged in the indictment; "It's fundamental that a jury must understand the essential elements of the crime so it can determine whether the State met its burden of proof beyond a reasonable doubt," Coney Vs St 290 Ga App. 364 (2008); Williams Vs St, 248 Ga App 316 (2001).

Clearly in Affiant's case the jury did not receive instructions to cure nor understand that state have to met burden of proof beyond a reasonable doubt on every charge as laid out in the prosecution's specifically narrow indictment. As the above enumerate errors demonstrate jury did not understand the necessary elements of Burglary (§16-7-1) in relation to alleged assault, molestation (and rape). Court did so fail to recognize its jury instruction did not cure due process violation, allowing jury to find guilt where evidence is clearly insufficient to support guilty verdicts. [COMPARE] Jackson Vs Virginia, supra; Bell Vs St 287 Ga 670 (2010), supra; Watson Vs St, 293 Ga 817 (2013), supra.

8) The trial court erred in failure to recognize it did not possess proper "jurisdiction nor Venue" to try, Convict, sentence incarcerate active duty Service member without waiver.

Historically throughout the United States Armed Forces, servicemembers have always fallen under the Uniform Code of Military Justice (UCMJ) when it comes to any form of punishment to be received for infraction of the statutes, laws, rules and regulations of the United States of the Military. And in this case, (SA98CR1445) the Affiant, Mr. Spotteville, prior to his wrongful arrest in July of 1997 and throughout out his trial and appeal phases and his incarceration at Smith State Prison in 1999 was an Active Duty Service Member of the US Army. [SEE] EXHIBITS=ABA. Affiant Spotteville did not receive his discharge from the US Army until the 19th of September 2001. As a Soldier on active duty Affiant did so have Constitutional Rights to UCMJ action of Court Martial or Right to move case to a federal Court. Right to a federal form for trial is found under 28USCA§ 1442(a)(1) (that states in part) "Member of Armed Forces sued or prosecuted .... in a court of a State of the U.S. or account of an act done under color of his office or status or in respect to which he claims any right, title or authority under law of the U.S. respecting the Armed Forces, thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the U.S. for the district where it is pending in manner prescribed by law and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced

therein and shall have full power to hear and determine the cause. [SEE ALSO] Centa Vs Stone, 755 F Supp 197 (ND Ohio 1991).

As for the right to UCMJ action as a Soldier, the law is well established and clear by the US. Supreme Court that UCMJ - Court Martial jurisdiction of an "Active Duty Service Member" solely depends on the Status of the accused at time of arrest and trial phases. Affiant was denied his rights to UCMJ Action. [SEE] Kinsella Vs US ex rel Singleton, 361 US 234, 240-41 (1960) "The test for jurisdiction .... is one of status, namely whether the accused in the courtmartial proceeding is a person who can be regarded as falling within the term 'land and naval forces'" .... (10 USCA § 802(a), 800, 930, 934) "..... without contradiction, the materials .... show that military jurisdiction has always been based on the 'Status' of the accused, rather than the nature of the offense." ; Jurisdiction of courtmartial depends solely on the accused's status as a member of the Armed Forces and not on 'Service connection" of offense charged." Solorio Vs US, 483 US 435 (1987) And Schelsinger Vs Conedmon, 420 US 730 (1975); "The jurisdiction of court-martial shall not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offense that by Statute or by the law of war may be tried by such .... commission (10 USC § 821); Councilman, 420 US 783 (1975) ... as a Service member, he was subject to court-martial jurisdiction.

As a service member the Affiant was not given his right to court-martial jurisdiction, to face jury of his peers, other military service members; is violation of his due process rights and equal protection. [COMPARE] Clifford Vs United States, 120 Fed App 355 (2005), on 3 December 1997, Sheriff in Kanawha County West Virginia,

brought sexual assault charges with 2d degree sexual assault after a criminal investigation. On the 8th of January 1998 the Army's CID stepped in adding adultery charge taking over the case of SFC Clifford, whom now faced only UCMJ jurisdiction - Clifford did not have to face civilian court, and exercised his rights under UCMJ not to proceed under court-martial trial but under Article 15 of UCMJ. Non-judicial punishment was rendered and Clifford never faced civilian trial or prison. [COMPARE & SEE] New Vs Cohen 327 US App DC 147 / 129 F3d 639 (CA DC 1997) "First, military discipline and therefore the efficient operation of the Armed Forces are best served in their military judicial system, acts without regular interference from civilian courts.

Affiant Spottsville, was a US Army service-member until his discharge in September of 2001 and was never afforded to exercise his rights to UCMJ to face a fair, non-bias tribunal, a jury of his peers. Of which is required of the 14th Amendment's Due Process and Equal Protection Clause. "Due Process requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case," Bracy Vs Gramley, 520 US 899, 904-05 (1997); City of Cleburne Vs Cleburne Living Center, 473 US 432, 439 (1985) "The Equal Protection Clause requires that 'all persons' similarly situated should be treated alike."

Affiant was denied 14th Amendment rights and the rights to UCMJ jurisdiction as an active duty service-member from July 1997 to September 2001. State Court and Prosecution did not establish, afford proper jurisdiction or venue for proper jurisdiction and venue for Affiant Spottsville should have been in a federal forum, court-martial, not state court.

* [SEE & COMPARE] "Court Martial § 6-7 Jurisdiction—military status of member service connected of offense court martial jurisdict attaches when action with a
* view to trial takes place", Allen Vs Steel, 759 F2d 1469, 1471 (9th cir 1985); "Service member is subject to UCMJ until such person's active duty has been terminated by the Secretary concerned. § 1168—a service member is not released from 'Active Duty' until he
* received his discharge papers." Garrell Vs US, 625 F2d 712-13 (5th cir 1980) (citing 10 USCA § 1168); "As distinguished for 'military government' and 'martial law' proper, military jurisdiction under military law, which is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces, obtains and is to be exercised in time of peace as well as of war". "whether one is subject to Military jurisdiction under military law depends on whether he is a member of the land or naval forces and Congress has subjected him to
* such law. Ex parte Jochen, 50 Tex (1919) 257 F 200; "Under Selective Service Act, § 2, 50 USCA § 226 note, declaring all persons drafted into the Service to be subject to the laws governing the regular army, and Articles of War, Art 2, 10 USCA § 1473, making persons lawfully called to duty or for training in the military service subject to military law, a person ordered by the district draft board to enter in for an encampment for induction in to the military service is subject to military law, and liable to punish-
* ment by a military court....." Ex parte Thiret, 268 F 472 (C CA 6 (Ohio) 1920); "The jurisdiction of Court-Martial shall not be construed as depriving military commissions.... of concurrent jurisdiction in

respect of offenders or offense that by statute or by the law of war may be tried by such .... commission" (10 USC
* § 821), Hamdan Vs Rumsfeld, 548 US 557 (2006); "If the person is subject to military law, a regis trant under that act (Selective Service Act-V § 6) who has been inducted into the service in accordence with its provisions and thereby has become subject to military law must be tried for an offense against
* act by the military authorities;" US Vs Bullard, 290 F 707 (C CA 2 (NY) 1923); "Military justice — military courts has jurisdiction only over offenses made punishable by the UCMJ committed by members of the regular component of the armed forces — when those offenses are Service connected." (10 USC § 802) And "Service connected is based on the status of the accused, rather than the nat-
** ure of the offense;" Kinsell, supra (1960) And Relford Vs Seymore, 494 2d 1001 (CA 5 Fla 1974).

Undisputed by the State & prosecution is the fact that Affiant Spottsville was from time of unlawful arrest in July 1997 through his trial and his prison incarceration in 1999 at Smith State Prison was an active duty service member of the US Army until his discharge in September of 2001. And this Court of Appeals should note that his case was not final until July 2003 (#A03A007). Of which the Affiant has claimed State court did not possess clear legal jurisdiction nor venue to take to trial and seek conviction and sentence Affiant, who was at that time, an SPC in the US Army on Active Duty Status. [SEE EXHIBITS= #BA] Formwell established are the rights of a Soldier to be tried in a federal forum or under Military UCMJ Court-Martial, [as the above cites (statutes/laws declare].

At no time did Affiant Spotsville before the State Court waive his military rights to UCMJ nor did the Court inform Affiant of his UCMJ rights pursuant the 14th Amendment. The State Court never made clear its jurisdiction nor its venue on record at any time. However, in Schlesinger Vs Seamens, 401 US 487 (1971) the US Supreme Court, "We held: that while an active duty serviceman is such a status. might be in military custody." And "This Court has recognized that a person on active duty with the armed forces is sufficiently in custody"; Eagles Vs US ex rel Samuels, 329 US 304 (1964); Parisi Vs Davidson 405 US 34 1972; "Custodian of a serviceman on active duty is deemed to be the serviceman's commanding officer, that is the person with in the military who has control over the serviceman," O'Neal Vs Secetary of the Navy, 76 F Supp 2d 641 (WD Pa 1999); Congress granted military courts jurisdiction over common law felonies committed by servicemembers," Coleman Vs Tennessee, 97 US 509 (1879); Men and women in the Armed Forces do not leave Constitutional safeguards and judicial protection behind when they enter military service," Doe Vs US 132 F3d 1430 (Fed cir 1997); Augenblick Vs US, 509 F2d 1157 (Ct Cl 1975) "Act with an enlisted man was "service connected" within the meaning of O'Callahan rule, that is for an offense to be under military jurisdiction it must be service connected." (10 USCA §§ 925/934); "Service connected" depends on the accused's "status" as a member of the armed forces;" Solorio supra.

The Affiant's "status" at time of arrest, trial, conviction and imprisonment (1997 through 2001) has not been disputed by the State/Prosecution

at any time on record, and the record does exist clearing demonstrating Affiant was any active duty servicemember of the US Army. [SEE] EXHIBITS= ABA. Therefore state court lack the official jurisdiction or venue to try and convict active duty servicemen and erred in this case where Affiant never waived his rights to UCMJ— court-martial or federal judicial forum.

[NOTE] [COMPARE]

"There can be no Supreme Court (of America) precedent to be contradicted or unreasonably applied." If there is no Supreme Court precedent on point or the court has declined to decide the issue.... The law is "clearly established" only where the Supreme Court's decisions "provide a controlling legal standard".

* Virsnicks Vs Smith, 521 F3d 707, 716 (7th Cir 2008).

9) The trial court erred in failure to recognize its sentence is a "Void" sentence and may be attacked at anytime. OCGA § 9-11-60(d) / § 9-11-12(h) / § 17-9-4.

Clear and well established in Georgia law is that a void sentence may be attacked at any time. It is not only established in OCGA § 9-11-60(d) and § 9-11-12(h) but backed by case law and cites. [SEE & COMPARE]

** Wade Vs St, 231 Ga 131 (1973) And Sledge Vs St, 245 GaApp (2000) void sentence or modify sentence

* may be corrected at any time. In Fowler Vs St (2007) 285 GaApp 63, this Court said, "A void sentence may be corrected at anytime, even though statutory time for modifying a sentence has passed."

"Where sentence is void, court may resentence defendant at anytime, and Sentence is "void" if court imposes

punishment that the law does not allow. OCGAS
* 17-10-1, Crumberly Vs St (1991) 261 Ga 614;
* Robbin Vs St, 326 GaApp 812 (2014), when sentencing
Court has imposed a sentence of imprisonment, it's
jurisdiction to later modify or vacate that sentence is
limited. However, a sentencing court retains juris-
diction to correct a void sentence at any time. OCGAS
* 17-10-1(f); Griffin Vs St 172 GaApp 184 (1984) (SAME);
* And Marshall Vs St, 294 GaApp 282-283 (2008), where
a sentence is void, the court may resentence the
defendant at any time. A sentence is "void" if
the court imposes punishment the law does not allow.

In Affiant's case, herein the court can clearly discern that his sentence is a "void" sentence where Due Process is violated; where jurisdiction & venue have not been established by State on record; where Fatal Variance exist; where evidence is insufficient to warrant guilty verdict pursuant to Jackson Vs Virginia, supra; where jury instruct did not cure Court's charge.
* [SEE ALSO] Hulet Vs St (2014)
* Nazario Vs St, 293 Ga 480, 486(3)(b) (2013), explaining that a judgment of sentence is void, where it imposes an illegal sentence, ie, a sentence that the law does not allow, and that the illegality of such a judg-
* ment is not a waivable issue; Lenard Vs St (2014), A trial court may only modify a void sentence. A Sentence is void if the court imposes punishment that the law does not allow. To support a motion for modification filed outside the Statutory time period, therefore, a defendant must affirmatively demonstrate that the sentence imposed punishment not allowed.

In Affiant's case herein Affidavit has clearly

provide this Court of Appeals that the lower court, Superior Court of Muscogee County has erred in dismissing and denying that right to renewal does exist where there is a clearly established void sentence amounting to a manifest injustice.

* [SEE & COMPARE ALSO] Wallace Vs St, (2008) 284 Ga 429, a motion that alleges grounds upon which the judgment of conviction can be declared void is filed pursuant to statute declaring judgment in cases where court had no personal or subject matter jurisdiction is null and void. Denying of a motion to vacate judgment of conviction as void is directly appealable; [SAME IN] Barker Vs St (1999) 240 Ga App 156; Brown Vs St, (2009) 297 Ga App 738; (§ 17-9-4)

Court of Appeals must review DENOVO and Grant relief where court has erred not to recognize sentence is void in this case. [Sentence is void where court has imposed illegal sentence as shown below:]

10) The trial court erred in failure to recognize that OCGA§ 17-10-6.2(b) can be raised and applied retroactively/redressability matter warranting fundamental rights of liberty, equality, justice and fairness; and does so met Teague Vs Lane.

Affiant does so move to demonstrate that OCGA§ 17-10-6.2(b) is reviewable in this matter as to apply retroactively and redressability of violation not to apply "new rule" would violate fundamental rights of the Affiant. [SEE]

* Danforth Vs Minnesota, 552 US 264, 271 (2008). "What we are actually determining when we assess the retroactivity of a new rule is not the temporal scope of a newly announced right, but whether a violation

of the right occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

In Georgia, OCGA § 17-10-6.2(b), the Statute enacted in 2006, provides that any person convicted of a sexual offense shall be sentenced to a "split sentence" plainly and unambiguously requires that the sentence imposed include at least the mandatory minimum period of imprisonment and at least one year of probation. [SEE] Clark Vs St A14A0692 (2014)

Affiant was convicted and sentenced to 40 years to serve 30 years with 10 years on probation contrary to § 16-6-4(b)(1) / § 17-10-6.2(b), in which he was sentenced twenty years for each child molestation charge [SEE EXHIBITS] and was given 10 years probation on the split sentence.

Affiant does contend that court did not exercise its discretion to consider whether he was eligible for a deviation from the minimum term of imprisonment (§ 17-10-6.2(b)). And Court should note that § 17-10-6.2(b) does not state in the statute that it can not apply to Affiant Spotsville, and the statute states: "any person" convicted of a sexual offense shall be sentence to a split sentence..." [Affiant's Sentence needs correcting.]

As for a "new rule" § 17-10-6.2(b) does so meet the Teague Vs Lane 489 US 288 (1989) a new standard for retroactivity analysis. And the New Rule principle does apply to both State and Federal inmates. When the Supreme Court established a new rule of law, notion of fairness mandates that the rule be applied not only to the inmate in the case before the court, but also to other inmates, "who are similarly situated,"

** Teague, supra. As the Court explained in Griffin Vs Kentucky, 479 US 314, 322 (1987), the "failure to apply a newly declared constitution rule to criminal cases pending on direct review violate basic norms of Constitutional adjudication.

As new rule, §17-10-6.2(b) does place certain kinds of primary, private individual conduct beyond the power of the Criminal law-making authority to proscribe, or prohibiting a certain category of punishment for a class of defendants because of their status or offense. And as for the watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, §17-10-6.2(b) is applied to "any person" as Statute States it comports fundamental fairness. And court should compare the case * Ceker Vs Ga 433 US 584, 592 (1977) cruel and unusual punishment to impose death penalty as punishment for rape of adult woman. 8th Amendment does so prohibit punishment that is "grossly out of proportion to the severity of the crime." (See ALSO) * Penry, 492 US at 330 (1989), Teague exception also covers rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense;" * Hoffman Vs Arave, 236 F3d 523, 548 (9th Cir 2001) new rule that facts authorized increase in maximum prison sentence must be proven by jury beyond reasonable doubt satisfies watershed rule exception; * Gaines Vs Kelly 202 F3d 598, 605 (2d Cir 2000) new rule finding due process violation from deficient reasonable doubt instruction satisfies 2d Teague exception; * Gall Vs Parker 231 F3d 265, 323 (6th Cir 2000) rule that resentencing required by

jury was precluded from considering mitigation factors satisfied watershed rule exception.

OCGA§ 17-10-6.2(b) does meet both of Teague's exception does prohibit a certain category of punishment for a class of defendants [sex offenders] because of their status or offense. And as a watershed rule(s) OCGA§ 17-10-6-2(b) in criminal procedure does implicate a fundamental fairness and accuracy of criminal proceeding: for it (1) does relate to the accuracy of the conviction and (2) it does alter our understanding of the bedrock procedural elements essential to the fundamental fairness of a proceeding.

In Alliant's case the trial court was in error in concluding his sentence was not illegal or void under OCGA§ 16-6-4(b)(1) and§17-10-6.2(b). Court was not allowed to sentence Alliant Spottville to 20 years on each account charged. Alliant's Sentence is a Void sentence!!

Court of Appeal must De Novo review on appeal, and [SEE] St Vs Hammons, 325 GaApp 815, 755 SE2d 214 (2014) "The interpretation of a statute is a question of law, which is renewed de novo on appeal. Because the trial Court's ruling on a legal question is not due any deference, we apply the plain legal error standard of review. [SEE ALSO & COMPARE] Clark Vs St (2014) 761 SE2d 826, A14A0692, when court required split sentence for sex offense and Void sentence may be corrected at any time and Court of Appeals must de novo review question of law.

Court of Appeals held: Sentence of 20 years in prison without probation was not a "split sentence" and was thus unauthorized and Void and the trial court

was required to exercise its discretion to consider whether defendant was eligible for a deviation from the minimum term of imprisonment. In Bowen Vs St, 307 Ga App 204 205 (2) (2010) in which Court of Appeals ruled that, OCGA § 17-10-6.2(b) "Mandates a split sentence for sexual offenders that includes at least the minimum term of imprisonment. [Correction necessary herein case.]

The Statute OCGA 17-10-6.2(b) does not undertake to define each of the words contained therein, so if the ordinary signification shall be applied to all words, except words of arts, or words connected with a particular trade or subject matter. The Statute's words of ["any person" convicted of a "sexual offense" "shall" be "sentence to a "split sentence"] does so apply to Alliant Spotwille's conviction and he too should have has same mandatory minimum split sentence as Clark, despite Alliant's conviction was in 1998. "Teague Rule" does so apply as to comport Due Process and Equal Protection Clauses of the 14th Amendment as it would violate the 8th Amend. Clause of Cruel and Unusual punishment not to apply OCGA § 17-10-6.2(b) to Alliant's conviction and sentence.

[SEE ALSO / COMPARE] Hammond 325 Ga App at 817, 755 SE2d 214, "It is an elementary rule of statutory construction that, absent clear evidence to the contrary, words should be assigned their ordinary, logical, and common meaning."

Furthermore, this is a "New Substantive Rule" that places particular conduct or persons covered by the Statute beyond the State's power to punish. [SEE] Schriro Vs Summerlin 542 US 348, 351-52 (2004). A rule is substantive if it alters the range of

Conduct or the class of persons that the law punishes,
** Schriro Supra (citing); Saffle Vs Parks, 494 US 484, 495 (1990) noting that rules that, "decriminalize a class of conduct or prohibit the imposition of certain punishment on a particular class of persons" are substantive in nature.

Georgia's OCGA § 17-10-6.2(b) is such a new statute that does fall under this new rule / substantive rule that should be applied retroactively because it does so necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment * that the law cannot impose upon him. Schriro * Supra. [SEE ALSO] Welch Vs US, 604 F3d 408, 414-15, * (7th Cir 2010); US Vs Shipp, 589 F3d 1084, 1089-91 (10th Cir 2009). For this Court of Appeals not to do novo review and not grant relief from Affiant's void and illegal sentence would and does deprive Affiant of fundamental protected rights of the US Constitution (8th / 14th Amends). Whereby, it is the duty of any state court to correct errors made by any court to comport justice, equity and fairness, not to allow a manifest of injustice stand. [SEE & COMPARE]
** Clark Vs St, Supra; Tindell Vs St 314 Ga App 91 (2012);
** Hedden Vs St, 288 Ga 871 (2010); Bowen Vs St, 307
* Ga App 204 (2010); Miller Vs St 291 Ga App 478 (2008).
** Holland Vs St, 310 Ga App 623, 629-30(5) (2011); Haynes Vs
* St, 317 Ga App 400 (2012); Hatcher Vs St, 314 Ga App
836, 839(2) (2012). All these above case citing are relevent in Affiant's case to warrent the application of OCGA § 17-10-6.2(b) to his case that court does have necessity to correct error(s)

of the superior court, where it was not authorized to construe this statute (OCGA § 17-10-6.2(b)) could not be applied in Affiant's request to modify and correct a void sentence. Statute is clear in its meaning and language and does so qualify as new rule under Teague that should be applied retroactively. [SEE] Anagawa Vs Fayette Co. 291 Ga 713, 718(2) (2012) when a statutory provision is clear and susceptible of only one meaning, "judicial construction is both unnecessary and unauthorized." "The use of plain and unequivocal language in a legislative enactment obviates any necessity for judicial construction," Evans Vs Employees Ret. Sys. of Ga. 264 Ga 729, 731(1)(1994).

Surely the Affiant should be afforded the same, equal treatment in his sentencing where the conviction is "void" for the reasons stated herein petition/motion. Court of Appeals does have duty to correct lower courts errors to comport Constitutional protected Rights of the Affiant or not to allow a manifest injusted stand.

OCGA § 17-10-6.2(b) should be applied herein case b/c Affiant's 40 years and 10 years on probation in light of the new rule/statute does so shock the senses of a rational person.

[SEE] Gee Vs St. 255 Ga 669, 676(7)(1969) we first note that, "penal statutes are always construed strictly against the State and liberally in favor of human liberty."

11) The trial court erred in failure to recognize that Honorable John D. Allen did not conduct pre-sentence hearing in full compliance with OCGA § 17-10-2(a).

~~A08A2015 07-18-2015 DAVIS~~

OCGA § 17-10-2(a) establishes that a trial judge is to provide a pre-sentencing hearing where the judge, who is deemed an impartial participant, weighs the aggravating and mitigating elements of each case in the balance and the heftier pile of elements determines the disposition. In Affiant's trial, on the 9th of December 20~~01~~ the jury rendered its verdict and the judge did so sentence Affiant shortly thereafter not allowing Affiant nor his Counsel to prepare defense on any mitigating highlights nor at least, balance the aggravating thrusts of the case. Especially where Affiant was not able to raise direct verdic of acquittal because the prosecution/State did not prove beyond a reasonable doubt that the Affiant was at the scene of the alleged victim's home to have committed any felony within the dwelling of another. (§ 16-7-1) Affiant was found not guilty of Burglary and Rape. The judge simply gave Sentence of 20 years on each count not adhering to § 17-10-2(a). No mitigating information concerning Affiant's personal background, character, etc and offense conduct was entered on record to offset the sentence to be imposed. No (PSI) investigation nor preparatory work in preparing for sentencing hearing was given by Affiant's Counsel. Affiant was still in the US Army on active duty, to wit, an alternative to incarceration to the 40 years given by the judge could have been presented. Sentence imposed the same day as the jury verdict was given contradicts fundamental fairness and equality. Sentence handed down by the judge was harsh when State's evidence

was far from overwhelming and no evidence placed Affiant at the alleged scene of the home where prosecution's indictment laid out all the felonies occurred. Truely the verdict of guilty on assault and molestation are insupportable as a matter of law.

In OCGA § 17-10-2(a) the Statute does use the word "SHALL" and as a mandatory language the court did not and, fail to conduct a presentence hearing; failed to hear additional evidence in extenuation, mitigation, and aggravation of punishment; failed to hear argument by Affiant's Counsel, as provide by law, regarding Affiant's punishment to be imposed. Nor did the judge fix the sentence as prescribed in OCGA § 16-6-5 nor OCGA § 16-5-21.

The trial court/judge did so err in not complying with § 17-10-2(a) and due process and equal protection clause of the 14th Amendment was violated where judge simply sentenced Affiant to 40 years. (20 years each account.)

12) The trial court erred in failure to recognize that the Affiant is pro se indigent incarcerated prisoner and is a layman in law, and the court should review Affiant's motion less stringent than those drafted by an attorney.

Affiant is doing the best that he can to demonstrate that his sentence violate the fundament fairness and is a miscarriage justice.

Affiant's does move this Court of Appeals to note, review de novo where he have several clearly established errors that warrent correction of

his sentence which is void an illegal sentence that the law does not allow, to wit, is appealable as a matter of right. [SEE] Jones V. St, 282 Ga 568 (2007). Affiant does so have right to challenge a void conviction at any time. [SEE] Chester V. St, 284 Ga 162 (2008); (OCGA § 9-11-60(d)(f) / § 9-12-16 / § 17-9-4 / § 9-11-12(h)(3); Thomas V. St, 293 Ga 569 (2013).

IV. Therefore this Court should GRANT RELIEF in this matter now before the Court of Appeals, as to correct error(s) by the lower Court complying with well established law; Court should Remand and/or Reverse the Affiant's illegal & void sentence/conviction.

MAXIM OF LAW: (1) ALL ARE EQUAL UNDER THE LAW.
(2) IN LAW TRUTH IS SOVEREIGN.
(3) TRUTH IS EXPRESSED IN THE FORM OF AN AFFIDAVIT.
(4) AN UNREBUTTED AFFIDAVIT STANDS AS THE TRUTH IN LAW.
(5) AN UNREBUTTED AFFIDAVIT BECOMES THE JUDGMENT IN LAW.

I do swear, depose, say and claim that the above herein facts are true, complete and correct to the best of my belief and knowledge and not meant to mislead but comport justice and equality.

This 10th day of August, 2015

Respectfully Submitted w/o Prejudice,

[signature]
PROSE, AFFIANT, APPELLANT

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 10th DAY OF August, 2015.

[signature] (SEAL)
NOTARY PUBLIC EXPIRES:

Notary Public, Coffee County, Georgia
My Commission Expires Dec. 8, 2015

ABM/A2015071893B5 DANS

EXHIBITS = ABA

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5 June 2015

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Criminal Case No. SU98CR1445
v.	*	
	*	
DANIEL A. SPOTTSVILLE, Defendant.	*	

ORDER

Pending before this Court is the Defendant's pro se Renewal of Motion to Modify Sentence and to Correct a Void Judgment filed on April 6, 2015, claiming error in the sentence pronounced on December 17, 1998. Upon review and consideration of the motion and record, this Court finds as follows:

1.

Although styled as a "renewed" motion to modify, the record is devoid of any previous filing by this Defendant seeking a sentence modification. Consequently, this "renewal" motion, filed almost seventeen (17) years after sentence was pronounced, is untimely filed and subject to dismissal on this ground pursuant to O.C.G.A. 17-10-1(f).

2.

Defendant also claims that his sentence is void because (1) the trial court did not sentence him pursuant to O.C.G.A. 17-10-6.2; (2) the trial court did not conduct a pre-sentence hearing under O.C.G.A. 17-10-2(a); (3) the narrowly drawn indictment resulted in a "fatal variance" and an inconsistent verdict; (4) the trial court lacked jurisdiction over his prosecution; and (5) the evidence at trial and jury instructions were insufficient.

3.

This Defendant was found guilty of Aggravated Assault and two counts of Child Molestation following a two-day jury trial concluding on December 17, 1998. He was acquitted of the offenses of Rape and Burglary. He received concurrent twenty (20) year prison sentences for the Aggravated Assault and one count of Child Molestation and a consecutive sentence of twenty (20) years with the first ten (10) years to serve in confinement on the remaining Child Molestation charge. Defendant's conviction was affirmed on direct appeal under docketing number #A03A007, with the Remittitur filed herein on July 23, 2003.

4.

Defendant incorrectly contends that O.C.G.A. 17-10-6.2 required the trial court to impose split sentences for the two sexual offenses. Although the sentencing judge exercised his discretion and imposed a split sentence for one count of Child Molestation, he was not compelled to do so for either sexual conviction as this code section did not exist when these crimes occurred.[1]

[1] Persons who commit crimes are to be convicted and sentenced under the laws existing when the crimes were committed. *Fleming v. State, 271 Ga. 587 (1999).* O.C.G.A. 17-10-6.2 was enacted in 2006 under Ga. Laws 2006, p.379, Section 21. It has no retroactive application since it represents neither a watershed rule of criminal procedure nor a change in substantive criminal law. *State v. Sosa, 291 Ga. 734 (2012).*

5.

Contrary to the Defendant's assertion, the presiding judge, Hon. John D. Allen, conducted a pre-sentence hearing in full compliance with O.C.G.A.17-10-2(a). Even so, the failure to hold a pre-sentence hearing in a non-capital case does not compel a finding of a void sentence where, as here, the trial court imposed sentences falling within the statutory range of punishment allowable by law. *Williams v. State, 271 Ga. 686 (1999).*

6.

Defendant also questions the jury's split verdict. The inconsistent verdict rule, however, was abolished in criminal cases in Georgia in *Milam v. State, 255 Ga. 560 (1986).* A jury is entitled to believe part of the testimony of a witness and disbelieve other parts and such is sufficient to sustain its verdict. *Allen v. State, 203 Ga. App. 359 (1992).* Defendant's additional contention that a "fatal variance" resulted from the State's failure to allege the essential elements of the charged offenses in the indictment is not supported by the record. Furthermore, this claim is not cognizable in a motion to void sentence but must be timely asserted in a motion in arrest of judgment filed within the same term of court that the judgment was entered. *Gholston v. State, 327 Ga. App. 790 (2014).* Accordingly, this contention is also groundless.

8.

Defendant inaccurately maintains that the trial court lacked jurisdiction in this matter inasmuch as he was serving on active duty in the military when arrested. Section IV of Article VI of the Georgia Constitution expressly provides that venue lay in the county where the crime was committed. Additionally, the superior courts of this state have exclusive subject matter jurisdiction of all felony trials pursuant to O.C.G.A. 15-6-8. The indictment alleged and the State, in fact, offered proof at trial that the Defendant committed said offenses in Muscogee County, Georgia, where this prosecution took place. (Trial transcript, pgs. 145, 159, 164, 226-227). Thus, jurisdiction over this prosecution and the Defendant's person was properly conferred in the above-named case. *Goodrum v. State, 259 Ga. App. 704 (2003).*

9.

Defendant's remaining contentions, including attacks upon the sufficiency of the evidence and the propriety of certain jury instructions, are not properly remedied through a motion to void sentence since they challenge the conviction itself rather than the sentence imposed. Challenges as to procedure and fairness are not cognizable in a motion to void sentence. *Collins v. State, 277 Ga. 586 (2004); Jones v. State, 322 Ga. App. 269 (2014).*

ACCORDINGLY, the Court finds that the Defendant's pro se Renewal of Motion to Modify Sentence and Correct a Void Judgment is (1) HEREBY DISMISSED for lack of jurisdiction as to his untimely request to modify sentence and those claims not cognizable in a motion to void sentence; and (2) is HEREBY DENIED on all remaining grounds.

SO ORDERED, this 27th day of May, 2015.

Ron Mullins, Judge
Muscogee County Superior Court

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Order in Case No. #SU98CR1445, by depositing the same in the United States Mail in an envelope with the requisite postage paid and affixed thereto and properly mailed and addressed to:

Hon. George Lipscomb
District Attorney's Office
PO Box 1340
Columbus, GA 31901

Daniel Spottsville, GDC#977050
Coffee State Prison
PO Box 650
Nicholls, GA 31554

This 27th day of May, 2015.

Martha Dicus, Law Clerk
Superior Courts, Chattahoochee Judicial Circuit

8 June 2013

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA
VS
DANIEL A. SPOTTSVILLE
PRO SE

Case # SU98CR1443

NOTICE OF APPEAL

NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

Notice is hereby given that I, Daniel A. Spottsville, defendant above named, hereby appeals to the Court of Appeals from the judgment/order entered on the 2nd of June 2013, in which Honorable R. Mullins, Judge "Dismissed" for lack of jurisdiction as untimely ..... and "Denied" on all remaining grounds.

Notice of Appeal has been sent to be filed on this 8th day of June 2013

Respectfully w/out Prejudice

D. A. Spottsville

Pro Se

EXHIBITS = ABA

2nd ORIGINAL HAND COPY

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

DANIEL A. SPOTSVILLE ©
Vs
STATE OF GEORGIA

CASE # SU98CR1445

COPY

FILED IN OFFICE
2010 JUN -7 PM 4:
LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

MOTION TO SET ASIDE JUDGMENT AS VOID

AFFIDAVIT OF SUPPORT

"Indeed, no more than (affidavits) is necessary to make the prima facie case," US Vs Cir, 658 F2d 526, 536, (5th Cir. 1981); Cert. Denied, 50 US 2169; Sct. 22 March 1982; [SEE ALSO] OCGA § 9-10-113!

Now Comes the above party, the Affiant, Daniel A. Spotsville, a living breathing soul, a sovereign man of flesh & blood, before this Court to set aside judgment rendered on the 9th of December 1998, in this Superior Court of Muscogee County, Columbus, Georgia, as void, pursuant to OCGA § 9-11-60(d)(3) [SEE TO COMPARE] Fed. Rules Civ. P. 60(b). A judgment void because of lack of jurisdiction of person or subject matter may be attacked at anytime.

1) THAT, Affiant does so claim that judgment rendered by this Court deprived and denied Due Process and Equal Protection, and was (is) misapplication of the statute, Constitutional impermissible application of statute and law, fraud, fraud of scienter, and otherwise; lack of jurisdiction over person and subject matter.

2) THAT, Affiant, with GOOD FAITH and CLEAN HANDS, asserts that the judgment is "VOID" and should be set aside for the following reasons below enumerated:

(i) Court, nor Prosecutor established proper jurisdiction over subject matter in case of DANIEL ANDREW SPOTSVILLE ©;
(ii) Court, nor prosecutor established proper jurisdiction over person known as DANIEL ANDREW SPOTSVILLE ©;
(iii) Court, nor prosecutor intered into valid contract with DANIEL ANDREW SPOTSVILLE © to establish jurisdiction;
(iv) Court, allow Dupreention, and prosecutor's prosecution caused a breach of Contract between DANIEL ANDREW SPOTSVILLE © and a third party, to exist, valid contract existed from 1982 to 2001;

(v) Court, prosecutor allowed violation of Due Process/Equal Protection of the 14th Amendment to occur in violation of their "Oath of Office";
(vi) Court, prosecutor allowed, mis-application of Statute to allow jury finding of guilt, is also violation of their "Oath of Office"; and
(vii) Court, prosecutor allowed Constitutional impermissible application of Statute and law, also violation of "Oath of office";
(viii) Court, prosecutor allowed conviction by jury by fraud, fraud of scienter, and allowance, and also in violation of "Oath of Office"; &
(ix) Court, prosecutor allowed jury to find guilt despite non-amendable defects, which, appear on the face of the record, is also violation of "Oath of Office".

3) THAT, Affiant does so name the prosecutor as being the party George Lipscomb and names the Court (Judge) as being the party Honorable John D. Allen; otherwise known as Person GEORGE LIPSCOMB and person JOHN D. ALLEN, of the State of Georgia, [STATE OF GEORGIA].

4) THAT, Affiant, Daniel A. Spotsville is competent to State the matters included in this Affidavit, has knowledge of facts, and says and declare and depose to the best of his knowledge and belief, the statements made in this Affidavit are true, correct, and not meant to mislead.

5) THAT Affiant Daniel A. Spotsville is the flesh & blood, sovereign man, attorney-in-fact, authorized representative on behalf of DANIEL ANDREW SPOTSVILLE ©, DEBTOR, ENS LEGIS.

6) THAT, Affiant does so say the parties/persons herein above named, hereafter known as Respondents in this matter did so violate their "Oath of Office" and Rights of the Affiant.

7) THAT, Affiant, does so move this Court to set aside judgment as "VOID", the judgement (conviction) of DANIEL ANDREW SPOTSVILLE ©, DEBTOR, ENS LEGIS rendered on the [redacted] day of December 1998 in the Superior Court of Muscogee, [redacted] Columbus, Georgia, by Party(s) of the State of Georgia [STATE OF GEORGIA]; and [redacted] presents the following facts to support this motion to set aside judgment as void:

STATEMENT OF FACTS

A judgment rendered by a court that lacks

jurisdiction, is universally characterized as "VOID". [See 11 Wright & Miller, Federal Practice and Procedure sec 2862, And there is no time limit for attacking a VOID judgment, Eggl Vs Fleetguard, Inc, 583 NW 2d 812 (1998 ND. 166). VOID judgments are those rendered by a court which lacks jurisdiction, either of the subject matter or the parties, Milliken Vs Meyer, 311 US 457 (1940). A judgment is VOID . . . . only if the court that rendered judgment lacked jurisdiction or in circumstance in which the court's action amount to a plain usurpation of power constituting a violation of due process, US Vs Boch Oldsmobile, Inc, 909 F2d 657, cert (1st cir 1990). jurisdiction can be challenged at any time, Basic Vs Utah Power & Light Co, 495 F2d 906, 910 ( ).

In the State of Georgia, Venue is jurisdictional fact that must be proven as part of the general case. If venue is not proved the judgment is VOID. Jones Vs St, 238 Ga App 523 (1999); And in Jones Vs St, 272 Ga 900 (2000), Venue is a jurisdiction of fact and is an essential element in proving that one is guilty of the crime charged. State must establish venue of the alleged offense beyond a reasonable doubt. Toland Vs St, 115 Ga App 788 (1967); Murph Vs St, 121 Ga 142, (1904). In criminal case proof of venue is a jurisdictional fact, Patterson Vs St, 156 Ga App 233 (1981); which must be proven as part of the district attorney's case in chief, Dampsey Vs St, 52 Ga App 35 (1935). Where venue is not established by the State, any ensuing judgment is VOID, Jorden Vs St 242 Ga App 408 (2000). In all criminal cases, the State is required by its Constitution to establish venue, Thompkins Vs St, 278 Ga 857 (2005) [STATE DID NOT IN THIS CASE, #SU98CE 1445-6]

With the above facts in mind, Affiant states Claim that Court nor Prosecutor established proper jurisdiction, venue over his Person, DANIEL ANDREW SPOTSVILLE ©, DEBTOR, ENS LEGIS, when at time of arrest in July of 1997 through trial(s), and [redacted] incarceration after conviction did not have jurisdiction nor venue to render judgment, because DANIEL ANDREW SPOTSVILLE ©, Debtor, Ens legis have contract with US Army, See a valid contract the Court did not possess, valid contract or any agreement nor did the court or Prosecutor present any evidence of contract as a third party that has authority by law, statute or

EXHIBIT 5 Contract with US Army (1)

Constitution to breach contract between DANIEL A SPOTSVILLE © and the US Army. Contract between Affiant and the State do not exist as to this matter. The law of the land is well established as to the binding power of a valid contract between two parties, and that a third party cannot enter into contract without proper agreement, authority of both contract parties. [STATE DID BREACH VALID CONTRACT, CAUSE OF]

Furthermore, well established in law of the land and with historical tradition dictates that members of the US Armed Services are party to the US Government and subject to UCMJ (Uniform Code of Military Justice), and that any alleged crimes conducted by a member of the Armed Services of the United States. [SEE US Supreme Court's "STARE DECISIS"], Kinsella vs US ex rel Singleton, 361 US 234, 240-41, 243 (1960), The last two jurisdiction.... is one of status namely whether the [redacted] accused in the court.... proceeding is a person who can be regarded as falling within the term "land and naval forces".... 10 USA §§ 825(c), 880, 930, 934.... without contradiction, the material.... show that military jurisdiction has always been based on the "status" of the accused rather than on the nature of the offense.

Historical military jurisdiction has been based on the Status of the accused, "rather than the nature of the offense and military jurisdiction can properly be defined in terms of status. US Const. Art. I § 8, cl. 14 [SEE ALSO] Solorio vs US, 483 US 435 (1987) jurisdiction of court-martial depends solely on accused's status as a member of armed forces and not on "service connection" of offense charged. [SEE TO COMPARE] O'Neil vs Secretary of Navy, 76 F Supp 2d 641 (WD PA 1999), jurisdiction purposes, "custodian" of a [service member] man on active duty is deemed to be the serviceman's Commanding Officer, that is the person within the military who has control over the service man; [ALSO] US vs Colby, 416 F3d 890 (8th Cir 2005), As between States and Federal sovereigns, primary jurisdiction over person is generally determined by which on first obtained custody of.... person.

Well established is the FACT there exist a valid contract between US Armed, DANIEL ANDREW SPOTSVILLE ©, Ens legis and Affiant, flesh & blood party herein. There is no contract, agreement between State of Georgia [STATE OF GEORGIA] and Affiant, or DANIEL ANDREW SPOTSVILLE ©, Ens legis or the US Army to give, hand over custody, slip of jurisdiction of, venue of, any authority or judicial matter.

State Court or State Prosecutor cannot produce contract or agreement and both did not seek to ensure

proper venue or jurisdiction existed prior to judicial Proceeding in the State forum.

Affiant ~~and~~ DANIEL A. SPOTSVILLE ©, Ens legis were brought before the State of Georgia [STATE OF GEORGIA] in a Court of Criminal law and is act by the State of Georgia, [STATE OF GEORGIA] and parties, judge Allen, and District Attorney, Lipscomb, behavior is not simply bad but egregious and contrary to statutes/law and Constitution... Because of the acts/actions of the State, judge, District Attorney; Affiant ~~and~~ DANIEL A. Spotsville ©, Ens legis, has suffered private injury, harm that cannot be repaired.... conviction and incarceration is injury, harm to private party Daniel A. Spotsville, Affiant, and Public injury and harm to DANIEL A. SPOTSVILLE © Ens legis.

It is privacy wrong and breach of Contract caused by state, judge, and prosecutor (DA) whom caused injury, harm by seeking and achieving conviction and incarceration, without proper jurisdiction or venue. Well established in both State and Federal statutes/law and Constitution are jurisdiction and venue matters. Affiant is in custody in violation of the Constitution, * laws/statutes of the United States. [SEE] Reed vs Farley, 512 US 339 (1994) (quoting Hill vs US, 368 US 424, 428 (1962) State proceedings in Affiant's case is fundamental unfairness and consequently violated Affiant, the private party's 14th Amendment rights to due process * and equal protection. [SEE] Brecht vs Abrahamson, * 507 US 619 (1993); Kyles vs Whitley, 514 US 419 (1995)

In Brecht, court recognized that, "in an unusual case a deliberate and especially egregious Constitutional error.... might so infect the integrity of the proceeding...."; and in Kyles government suppression of evidence favorable to the defense...." substantial or injurious effect or influence in determining the jury, verdict."

Surely prosecutor (and the judge should have known that Affiant had established contract with the US Army and as an active duty service member, UCMJ (Uniform Code of Military justice) Court martial had clear jurisdiction and venue to try Affiant, not the State Court.

Especially where contract exist between Affiant and DANIEL A. SPOTSVILLE ©, Ens legis, and the US Army. There is no Contract between Affiant and the State of Georgia.

"Plain Error" exist where Affiant, Daniel A. Spotsville has never waived rights to UCMJ, * (Court martial/Art. 15) [SEE] Johnson vs US, 520 US 461, 465 (1977); US vs Olano, 507 US 725, 23-33 (1993) "Deviation from a legal rule is 'error' unless the rule has been waived."

In the State of Georgia, the Affiant Daniel A Spottsville and DANIEL A. SPOTTSVILLE © Ens legis are both non-resident Parties having Contract with the US Army [SEE EXHIBIT= JV] [redacted] since 1982 through 2001. Well established is the jurisdiction of the US Armed Forces over its members to be punished under UCMJ and not State Court. [SEE TO COMPARE] 10 USCA §§ 82 5(a)/881/930/934, ... with out contradiction, the materials .... show that military jurisdiction has always been based on the "STATUS" of the accused, rather than on the nature of the offense. [SEE ALSO] * * Kinsella Vs US ex rel Singleton, 361 US 234 (1960); O'Neal * Vs Secy of Navy, 76 F Supp 2d 641 (WD Pa 1999); New Vs Cohen, 327 US App DC 147/129 F3d 639 (CA DC 1997) .... military discipline and therefore the effectent operation of the Armed Forces are best served in their military [jurisdiction] judicial system, acts without * regular interference from civilian courts; Coleman Silman, 420 US 783 ( ) .... as a service member, he was subject to court-martial jurisdiction; * Fricke Vs Secy of the Navy, (2006) US District LEXIS 36054, (citing) Solorio Vs US, 483 US 435 (1987) jurisdiction of court martial depends on accused's status as a member of the Armed Forces; 10 USCA * § 802 (a) (§ 1168 (AMD COMPARE] Clifford Vs US, 120 Fed App 355 (2005) civilian charges in December 1997 but was allowed military jurisdiction of venue for UCMJ.

* In Coleman Vs Tennessee, 97 US 509 (1876), the US Supreme Court stated; Tennessee State Court lacked jurisdiction to try Union Soldier for murder "allegedly committed while in Tennessee ....; Supreme Court .... held that a conviction which is unconstitutional because the State statute creating the crime violates the US Constitution is void for lack of subject matter jurisdiction.

"A State conviction may be void because of the effects of the federal statutory provisions relating to the [redacted] removal of state criminal proceedings into federal courts." [SEE] 28 USCA § 1442(a) ; [redacted] 10 USC § 825

Georgia Code OCGA § 17-9-4 is well established and clear when it states in part; "The judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity, and may be held in any court..." And there is nothing in the Georgia code to have allowed State to try / prosecute, and convict, and incarcerate an Active Duty Service Member, the Affiant [redacted] or DANIEL A. SPOTTSVILLE ©, Ens legis.

OCGA §9-10-93, states in part: "the action against the non-resident defendant shall not abate but shall be transferred to a court in a county where venue is proper." Proper venue to try, an Active Duty Service Member in federal court or UCMJ Court-martial. Clearly State of Georgia did not possess venue, nor jurisdiction to try/convict/incarcerate Affiant, whom at time of alleged felony(s) arrest was member of the US Army, stationed at Ft. Benning, Ga. as a non-resident of the State of Georgia. [SEE] [EXHIBITS = W]. [NOTE ALSO THAT] Affiant, Mr. Spotsville and MR. SPOTSVILLE ©, Esq legis are residents of the State of California, and has at no time waived such jurisdiction of citizen of California, nor contract with the US Army.

Affiant, Mr. Spotsville does so move the Respondents here in to provide Proof of claim that jurisdiction (venue) were properly established for the State to proceed with judicial process in this case (#SU98CR1445 and related case # SU98CR0033). And that Respondents did not act in Good faith nor with Clean Hands as they did violate Affiants Rights in seeking wrongful conviction and incarceration of a United States Armed Forces Service Member on Active Duty, the Affiant, Mr. Daniel A. Spotsville, whom was under valid contract with the US Army. [SEE] [redacted] "as a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions." Townsend Vs Burke, * 334 US 736, 740. 741 (1948); In re McCowan, * 177 c. 93, 170 P 110 C (1917); "Ignorance of the law does not excuse one conduct in anyone, least of all in a Sworn Officer of the law."

BURDEN OF PROOF "the proponent of a rule or order bears the burden of proof." The Supreme Court has stated that if any tribunal (court) finds absence of proof of jurisdiction over person and subject matter, * the case must be dismissed." [SEE] Louisville RR Vs Motley, 211 US 149 ( )

Affiant has an expectation of Good faith on the Part of the Respondents as Agents/employees on behalf of Companies, Corporations, government corporations or officers and judges of the court to answer this instrument, the inquiries, to give proof, to produce documents and evidence as to provide proof(s) of claim Respondents have not violated Affiant's protected rights as private citizen and member of the US Army from 1997-2001.

Affiant, the Undersigned herein has the right to seek remedy(s) via this Motion to Set Aside Judgment as Void, Affidavit of Support, to wit stipulates injury and harm caused by violations of Oath of Office (to Supreme Law of the Land) violation of Due Process of Law, Misapplication of Statute and law, fraud, fraud of Scienter, and otherwise.

Affiant may have made mistakes in the past and not knowing the proper remedy(s) or right(s) to assert, but has now understood his mistakes and seeks to exhaust all remedy(s) to include but not limited to administrative remedy process in this commercial matter, I, the Affiant now request 6 Proof(s) of Claim, that Respondents did not violate Rights in this matter.

Failure or Pretexual to provide Proof(s) of claim will constute Respondents dishonor and admission and confession of injury, harm and damages as caused against Affiant, Mr. Daniel A. Spottsville (and DANIEL A. SPOTTSVILLE ©, Ens legis) Respondents will by dishonor, fail to state claim which relief can be granted. Therein Presumption will be taken in regard to Respondents dishonor, admission, confession, injury, harm, damage and failure to state a claim that Respondents are given premission for a lien to be filed against Respondents, to become tort feasor.

"Silence can only equate to fraud where there is a legal or moral duty to respond or where an inquiry left unanswered would be intentionally misleading." US vs Prudden, 424 F2d 102 (1970).

This 20th day of April 2010.

Further the Affiant Sayth Not.

Respectfully, Without Prejudice,

D. A. Spottsville

Affiant, Prose, Sovereign man of flesh & blood, Authorized Attorney-in-fact on behalf of DANIEL A. SPOTTSVILLE ©, Ens legis

WITNESSES:

1) Robert L Graham (WITNESS)
2) Benjamin Gilbert (WITNESS)
3) Judith Greer (WITNESS)

SUBSCRIBED TO, ~~SWORN~~ Before Me this ___ day of ___ 2010.

(SEAL)

~~NOTARY PUBLIC~~ EXPIRES:

PRISON'S NOTARY PUBLIC REFUSES TO PROVIDE NOTARY SERVICE TO AFFIANT. DAS

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

DANIEL A. SPOTSVILLE ©
Vs
STATE OF GEORGIA

CASE # SUPBCR1446

MOTION RULE NISI

The foregoing motion having been read and considered let the same be filed and let the named Respondents appear before me in _____ in the Muscogee County Courthouse, in Columbus, Georgia on the __ day of _____, 2010, at ____ O'clock __.M., then and there to show cause why Motion To Set Aside ~~Judgment As~~ Void, absolute should not be granted relief to party herein and such other relief as the ~~facts~~ of this matter may warrant. Pursuant to OCGA § 17-9-4 and U.C.C

It is further Ordered that Respondents be served as soon as practicable within this term of Court.

This __ day of _____, 2010

_____
Judge, Superior Court for
Muscogee County, Georgia

NSAV/A2010 0420 9385 DANS

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

SU98CR1445

I declare (or certify, verify, or state) under penalty of perjury that the foregoing statements made in this Inmate Form for Civil Action are true and correct.

Executed on 20 Apr 2010
Date

Signature of Plaintiff

Sworn to and subscribed before me this
20 day of April, 2010.

Notary Public or Other Person Authorized to Administer Oaths

CERTIFICATION OF MAILING

I do certify that a copy (HAND COPY) has been placed into the GSP mailing system, Motion to Set Aside Judgment as void, Affidavit of Support (ITEM # MSJV/A2010 0420 9385 DANS), to be mailed to this Court by the US Postal system with adequate stamps this 20th day of April, 2010

EN: MOTION TO SETASIDE...
MOTION RULE NISI
EXHIBIT 2 JV

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Criminal Case No. SU98CR1445
v.	*	
	*	
DANIEL SPOTTSVILLE,	*	
Defendant.	*	

ORDER

Pending before this Court is the Defendant's pro se Motion to Set Aside Judgment as Void filed on June 7, 2010. Said motion, however, lacks any indication that a copy has been furnished to opposing counsel in accordance with O.C.G.A. 17-1-1. "This State's rules of criminal procedure require the service of every written motion on each party absent authority for an ex parte hearing." *Prater v. State, 222 Ga. App. 486 (1996).*

Failure to serve motions and hence give notice and an opportunity for the opposing party to respond prevents a ruling and would render any resulting order of no effect. *Owens v. State, 258 Ga. App. 647 (2002).* Therefore, before this Court can consider the Defendant's motion, the Defendant must conform to the dictates of O.C.G.A. 17-1-1(a). Until this has been accomplished, no further ruling will be issued in this matter.

Accordingly, the Defendant's motion is **HEREBY DISMISSED.**

SO ORDERED, this 26th day of July, 2010.

John D. Allen, Chief Judge
Muscogee County Superior Court

FILED IN OFFICE
2010 JUL 27 AM 11:49
ALICIA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

CERTIFICATE OF SERVICE

I, Martha Dicus, Law Clerk to Judge John D. Allen, hereby certify that I have this day mailed one (1) copy of the foregoing **Order,** Case No. SU98CR1445, by depositing said copy in the USPS Mail in an envelope postage paid and properly addressed to:

Hon. Julia Slater
Office of the District Attorney
Government Center, 3rd floor
Columbus, Ga. 31902

Daniel Spottsville, #9977050
Georgia State Prison
300 First Avenue South
Reidsville, GA 30499

This 26th day of July, 2010.

Martha Dicus,
Law Clerk to the Hon. John D. Allen
Superior Courts, Chattahoochee Judicial Circuit