



Court of Appeals of Georgia

June 30, 2015

TO: Mr. Alphonso Wooten, GDC408512 M-4, Macon Correctional Institution, Post Office Box 426, Oglethorpe, Georgia 31068

RE: **A15A1269. Alphonso Wooten 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 _____ on _____.

CASE STATUS - PENDING

- The above referenced appeal is pending in your name before this Court. The appeal was docketed in the April 2015 Term and a decision must be rendered by the Court by the end of the September 2015 Term which ends on or about December 16, 2015.**

The documents enclosed in your mailing are not styled properly and therefore, we do not know what you intend the communication to be. I am returning your documents to you.

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.

AISA 1269

The rest of motion in response

MR. waeten, Sorry for delay
But most importantly thank you
for your patient.

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SUBPOENA SERGEANT TRACY MILLER, DEPUTY PRETHENIA CONE, AND DEPUTY LIENHARD OF THE BULLOCH COUNTY SHERIFF'S OFFICE. ALL OF THE AFOREMENTIONED OFFICERS WERE INVOLVED IN INVESTIGATING THE ACCIDENT, HOWEVER, WERE NOT SUMMONED BY MR. BARRS TO TESTIFY AS COMPETENT WITNESSES DURING MR. WOOTEN'S CRIMINAL TRIAL. MOREOVER, MR. BARRS WAS ALSO INEFFECTIVE AND CAUSED INJURY TO HIS CLIENT BY NOT INTERVIEWING AND SUBPOENAINING THE TOWING COMPANY EMPLOYEE FROM ARCHIE'S TOWING SERVICE WHO WAS DISPATCHED TO PULL THE WRECKED VEHICLE FROM THE SCENE OF THE ACCIDENT. ANOTHER COMPETENT WITNESS WHO HAD IMPORTANT AND CRITICAL KNOWLEDGE OF THE PHYSICAL CONDITION AND THE RELEVANT EVIDENCE THE STATE WAS LACKING. FURTHERMORE, THE APPELLEE CLAIMS THAT TROOPER HODGES LOCATED A BRIEFCASE CONTAINING VARIOUS ITEMS SIMILAR TO THE ITEMS DESCRIBED BY MISS BEHERNS AND SEEN ON THE VIDEO OF THE ROBBERY. (SEE STATE'S EXHIBIT (1) THE VIDEO.

THE COURT WILL FIND THAT NONE OF THE PREVIOUSLY MENTIONED ITEMS WERE SHOWN IN THE VIDEO OR DESCRIBED BY THE VICTIM IN HER STATEMENT OR TRIAL TESTIMONY. MOREOVER, THE APPELLEE REFERENCES THE CONVENIENCE STORE "MIGHTY MIKE'S" AS THE LOCATION OF THE ROBBERY OPPOSED TO "TIME SAVER," WHICH ARE SEPERATE ESTABLISHMENTS IN DIFFERENT PHYSICAL LOCATIONS.

APPELLANT'S ARGUMENT: APPELLANT SHOWS THE COURT THAT THE LOCATION OF THE ROBBERY IN QUESTION HAD NOT BEEN DEFINATIVELY ESTABLISHED IN REFERENCE TO THE ALLEGATIONS CHARGED BY APPELLEE. INVESTIGATOR LONG TESTIFIED (II. pg. 21 - LINE 23, 25) THAT AFTER THE ARMED ROBBERY OCCURRED, THEY HAD SEVERAL ARMED ROBBERIES TAKE PLACE WITH OTHER STORES, AND MET WITH THE MANAGERS OF SAID STORES TO INSTRUCT THEM ON INSTALLING SECURITY CAMERAS ABOVE DOORWAYS TO THE STORES' ENTRANCES.

APPELLANT FURTER SHOWS MISS BEHERNS CALLED LAW ENFORCEMENT IMMEDIATELY, SO IT IS STATED IN STATE'S RECORDS. APPELLANT CONTENDS THAT THE STATEMENT IS FALSE. (SEE) pg. 1 of 3 IN THE INCIDENT REPORT. IT IS DOCUMENTED THAT MISS BEHERNS WAS ROBBED BETWEEN 06:44 AM AND 06:48 AM. THE "REPORTING TIME" SHOWS 09:01 AM, MORE THAN TWO (2)

HOURS BEFORE REPORTING THE INCIDENT.

INCIDENT REPORT: WEAPON TYPE - (1) FIREARM,
NO DESCRIPTION.

INCIDENT PREMISE: (3) CONVENIENCE STORE.

PRIMARY LOCATION: 22933 US - 80 EAST.

BUSINESS NAME: TIME SAVER NO. 8

APPELLANTS ARGUMENT IS ALSO THE FACT THAT THE INVESTIGATOR AND STATE USE TWO (2) INDIVIDUAL BUSINESS OPERATIONS DESIGNATED IN TWO (2) SEPERATE PROXIMITIES AS THE PRIMARY LOCATION OF THE ALLEGED ROBBERY IN SAID CASE. APPELLEE, STATE, FAILED TO ESTABLISH VENUE. (SEE) WALKER V. STATE, 258 GA APP 354 (2002), JONES V. STATE, 272 GA 900 (2000), AND TESLOR V. STATE, 295 GA APP 569.

THE VARIOUS LOCATIONS, AND THE LACK OF INTEL AND INFORMATION SPECIFYING A CRIME SCENE, REPORTED BY INVESTIGATORS, POLICE, AND STATE, FAILS TO PROVIDE THE NECESSARY ELEMENTS TO LEGALLY BRING ABOUT ANY CRIMINAL CASE AT ALL AGAINST APPELLANT. ALTHOUGH A ROBBERY OR ROBBERIES MAY HAVE OCCURRED WITHIN THE TIMES AND DATES INDICATED BY OFFICERS IN THE INCIDENT REPORT, THE OVERALL INVESTIGATION WAS IMPROPERLY CONDUCTED AND THEREFORE LACKS MERIT. AS A RESULT, ANYTHING PRODUCED FROM THE INVESTIGATION LACKS MERIT ITSELF, AS WELL AS ANY EVIDENCE ACQUIRED, SUCH AS THREE (3) GUNS WITHIN A BRIEFCASE, REPORTED TO BE FOUND BY TROOPER HODGES PER INVESTIGATOR LONG'S INVESTIGATION REPORT.

APPELLANT'S ARGUMENT: THE APPELLEE'S BRIEF STATES THAT INVESTIGATOR JASON LONG OF THE BULLOCH COUNTY SHERIFF'S DEPARTMENT INITIALLY RESPONDED TO THE SEEN TO INVESTIGATE THE ROBBERY. MISS BEHERNS, IT ALSO STATES, GAVE INVESTIGATOR LONG A PHYSICAL DESCRIPTION OF THE ROBBER AND THE CLOTHING HE WAS WEARING AT THE TIME. INVESTIGATOR LONG, IT FURTHER STATES, WAS ABLE TO RECOVER SURVEILLANCE TAPE/VIDEO OF THE ROBBERY. THE APPELLANT ARGUES THAT SAID SURVEILLANCE TAPE/VIDEO DOES NOT CONTAIN APPELLANT, MR. WOOTEN. NOR DOES IT SHOW ANY OF THE ITEMS DESCRIBED BY MISS BEHERNS IN HER TESTIMONY. (SEE) VIDEO OF THE ROBBERY AT MIGHTY MIKE'S.

APPELLANT'S ARGUMENT: MISS BEHERN'S STATED DURING HER TRIAL TESTIMONY, THAT SHE NEVER WITNESSED THE PERSON ROBBING HER WITH A GUN OR ANY OTHER OBJECT IN HIS HAND(S), OR IN HIS POSSESSION WHATSOEVER. IN OPPOSITION, APPELLEE STATES INVESTIGATOR LONG NOTICED THAT ITEMS RECOVERED IN THE BRIEFCASE, FOUND FROM THE WRECK, WERE VERY SIMILAR TO THE ITEMS DESCRIBED BY MISS BEHERNS. IN THE APPELLANT'S DISCOVERY PACKET, PHOTOS OF THE CONTENTS WITHIN SAID BRIEFCASE ARE AS FOLLOWS:

- (1.) A BLACK HAT WITH A BILL,
- (2.) A SKI CAP WITH A BILL,
- (3.) A BLACK BAG,
- (4.) A BRASS KNUCKLE GLOVE,
- (5.) A SET OF KEYS,
- (6.) A MACHETE,
- (7.) A SHEETROCK SPATULA

- (8.) BLACK AND WHITE GLOVES,
- (9.) THREE (3) SKI MASKS,
- (10.) A FLASHLIGHT, AND
- (11.) A 45. CALIBER HANDGUN.

IN THE EVENT THE STATE'S WITNESS, MISS BEHERNS, HAS KNOWLEDGE OF ANY EXCULPATORY EVIDENCE REGARDING SAID BRIEFCASE AND/OR ITS CONTENTS THAT WERE ALLEGEDLY PRESENT AT THE SCENE OF THE REPORTED AUTOMOBILE ACCIDENT, AND PRODUCED FROM SUCH, THE ABOVE CIRCUMSTANCE WILL BE FAVORABLE TO APPELLANT IN PROVING HIS DEFENSE OF INNOCENCE. MOREOVER, IN THE EVENT THE AFOREMENTIONED IS IN FACT TRUE, AND THE STATE WAS KNOWLEDGEABLE OF SUCH EXCULPATORY EVIDENCE YET WITHHELD IT WITH THE INTENTION TO LEVERAGE THEIR CASE IN ORDER TO BETTER AND/OR INCREASE THE LIKELIHOOD OF SECURING APPELLANT'S CONVICTION, THENCE APPELLEE IS IN VIOLATION OF BRADY V. MARYLAND, 373 US 83 (83 SC 1194, 10 LE2d 215) (1963). THE DETERMINATION OF A WITNESS' CREDIBILITY, INCLUDING THE ACCURACY OF EYEWITNESS IDENTIFICATION, IS WITHIN THE PROVINCE OF THE JURY. THIS IS IMPROPER BOLSTERING TESTIMONY. BLY V. STATE 286 GA. 453, 660 SE2d. 713. (SEE) BAIER V. STATE 124 GA. APP. 334, 183 SE2d 348 AND (SEE) SUFFICIENCY OF IDENTIFICATION 31-7(D) BARNETT V. STATE 153 GA. APP. 430, 265 SE. 2d. 348. THIS CONVICTION WAS REVERSED, BECAUSE THE STATE'S CASE RELIED ENTIRELY ON FINGERPRINT EVIDENCE. JUST AS IN THE APPELLANT'S CASE, THE STATE'S CASE RELIED ENTIRELY ON THE VICTIM IDENTIFICATION OF MR. WOOTEN. MOREOVER, THE INVESTIGATOR CONDUCTED A ONE-ON-ONE SHOW UP, WHICH TAINTED THE IN-COURT IDENTIFICATION.

MEMORANDUM OF LAW

MR. WOOTEN'S CONVICTION SHOULD BE VACATED DUE TO THE FACT STATE'S COUNSEL IMPROPERLY ARGUED HIS VIEW OF MISS BEHERN'S AND HER CREDIBILITY DURING CLOSING ARGUMENT.

DURING CLOSING ARGUMENT, COUNSEL FOR THE STATE THEREIN ARGUED THAT MISS BEHERNS, THE STATE'S MAIN WITNESS, WAS A CREDIBLE WITNESS BY ASSERTING THAT HE BELIEVED HER. THE ARGUMENT STATED ABOVE WAS IMPERMISSIBLE, BECAUSE NO PERSON MAY BOLSTER THE CREDIBILITY OF A WITNESS AT TRIAL. THE APPELLANT, MR. WOOTEN, WAS HARMED AND INJURED BY THE STATE ATTORNEY'S REFERENCE THUS HIS CONVICTION SHOULD BE VACATED. THE CLOSING ARGUMENT PRESENTED BY COUNSEL FOR THE STATE FOCUSED ON THE STATE'S KEY WITNESS, MISS BEHERNS, THE STORE CLERK WHO WAS ROBBED. COUNSEL FOR THE STATE ARGUED THAT MISS BEHERNS WAS A WITNESS THE JURY SHOULD BELIEVE. WHEN DESCRIBING HER ACCOUNT, HE EXPLAINED THAT "HER TESTIMONY IS BELIEVABLE," AND "THAT'S BELIEVABLE." (TT. PG. 279, LINE 5-9). THIS ISSUE WAS PRESERVED FOR POST-TRIAL REVIEW. BEFORE THIS ARGUMENT WAS BROUGHT FORWARD, THE COURT GRANTED MR. WOOTEN, THE APPELLANT, A CONTINUING OBJECTION TO ANY IMPROPER ARGUMENT MADE BY COUNSEL FOR THE STATE. (TT. 275)

AND SEE (PI. 279, LINE 24.

REFERENCE THE FOLLOWING TRANSCRIPT LINES:

- PI. 266, LINE 21
- PI. 279, LINE 3-9
- PI. 279, LINE 24-50
- PI. 280 LINE 8-9
- PI. 294 LINE 14-15
- PI. LINE 5-9
(290)
- PI. 291, LINE 6-7
- PI. 291, LINE 13-20
- PI. 294, LINE 14-15

THE PROSECUTOR CONTENDS THAT MISS BEHERNS WROTE A VERY GOOD STATEMENT. (SEE) PI. 280, LINE 1-13.

ALSO SEE: THE STATE WITHHELD THE DVD THAT WAS SHOWN TO MR. WOOTEN WHEN HE WAS HERE THE LAST TIME TO GO TO TRIAL. A BRADY VIOLATION HAS BEEN COMMITTED IN THE DEFENDANT'S CASE AS WE SPEAK. BOTH DVD'S ARE COPIES OF THE ORIGINAL VHS TAPE. WHEN MR. WOOTEN DESCRIBED THE COLOR OF THE DVD THAT WAS SHOWN TO HIM, AND ASSERTED THAT COUNSEL WAS PRESENTING A DIFFERENT ONE TO PRESENT TO THE JURY, THE COURT ERRED BY INSTRUCTING MR. WOOTEN TO "HUSH" WHEN HE ATTEMPTED TO EXPLAIN HOW HIS CONSTITUTIONAL RIGHTS WERE BEING VIOLATED. (SEE) LINE 16 OF PAGE 281. THE COURT ASKED MR. BRANNEN, "ARE YOU SHOWING THE ORIGINAL?" IN LINE 18, INSTEAD OF ANSWERING THE QUESTION, COUNSEL STATED, "I'M SHOWING STATE'S EXHIBIT NUMBER 1." THE COURT REPEATED THE QUESTION. THE STATE RESPONDED, "YES, SIR." THE STATE FAILED TO ANSWER THE DIRECT QUESTION ASKED

BY THE COURT. IN ¶. LINE 23, COUNSEL STATED, "I HAVE AN EXTRA COPY." HOWEVER, HE STATED IN TRIAL PROCEEDINGS, "THAT'S JASON'S COPY," WHICH WOULD BE THE ORIGINAL COPY OF THE VHS TAPE. THEREFORE, MR. WOOTEN WAS PREJUDICED WHEN THE COURT ALLOWED COUNSEL TO PLAY EITHER DVD. IN ADDITION, THE TRANSCRIPT HAS BEEN MODIFIED TO THE DEGREE OF HAVING MISQUOTATIONS. THE STATEMENT, "I DON'T CARE WHICH ONE (DVD) YOU SHOW," WAS THE COMMENT MADE BY THE COURT DURING APPELLANT'S TRIAL; HOWEVER, THAT COMMENT HAS BEEN ILLEGALLY REMOVED FROM THE TRANSCRIPT RECORD. THE STATEMENT, "I DON'T CARE WHICH ONE (DVD) YOU SHOW," WAS AN ERROR CONDUCTED AND CARRIED OUT BY THE COURT. (SEE) ¶. 283, LINE 19-20. (SEE) ¶. 284 LINE 12-25. (SEE) ¶. 285, LINE 5 AND 25. THE TRANSCRIPT'S TEXT DOES NOT CONVEY APPELLANT'S STATEMENT DURING TRIAL PERPETUALLY.* (SEE) ¶. 286, LINE 7-8. SAID LINE IN TRANSCRIPT HAS ALSO BEEN MODIFIED. THE ORIGINAL AND TRUE COMMENT THAT SHOULD HAVE BEEN TRANSCRIBED IS AS FOLLOWS:

(THE COURT STATES)

"IF YOU DON'T SHUT UP, I WILL COME OVER THERE AND DUCT TAPE YOUR MOUTH MYSELF" **

* REFERENCE AUDIO RECORDING OF TRIAL PROCEEDINGS TO OBTAIN APPELLANT'S ORIGINAL AND TRUE STATEMENTS.

** (SEE) ¶. 286, LINE 18 AND 19 PRESERVED, (SEE) ¶. 287 LINE 1-12, (SEE) ¶. 290, LINE 3-9.

ON THE AFOREMENTIONED SURVEILLANCE TAPE, THE IMAGE OF THE PERPETRATOR IS UNCLEAR AND IT THEREFORE RAISES QUESTION AND DOUBT REGARDING THE PERPETRATOR'S IDENTITY. AS A RESULT, A JUROR WAS COMPELLED TO ASK THE COURT, FOR THE PURPOSE OF CLARIFICATION, "HOW COME THEY CAN'T TAKE SOMETHING LIKE THAT AND CLEAN IT UP?" SAID RESPONSE BY JUROR AFTER VIEWING STATE'S VIDEO EVIDENCE CLEARLY SIGNIFIES THE JUROR HAD UNDERSTANDABLE DIFFICULTY DIFFERENTIATING BETWEEN THE PERPETRATOR ON VIDEO AND, MR. WOOTEN, THE APPELLANT. (SEE) TT. 290, 3-9. THE STATE'S COUNSEL ERRED WHEN HE STATED TO THE JURY, IN REGARD TO HIS WITNESS, "I SUBMIT TO YOU THAT HER TESTIMONY IS BELIEVABLE." (SEE) TT. 291, LINE 6 AND 7. IN ADDITION, THERE IS A SIGNIFICANT REWORDING AND FABRICATION OF A STATEMENT THAT WAS SAID TO BE MADE BY THE APPELLANT. SAID STATEMENT THAT HAS BEEN REWORDED AND FABRICATED BY STATE AND APPELLEE IS INCORPORATED IN THE APPELLANT'S TRIAL TRANSCRIPT. HOWEVER, SUCH WOULD NOT BE EXSISTENT IN THE TRIAL'S AUDIO RECORDING. THE EDITED AND TAMPERED TEXT TRANSCRIPTION OF THE TRIAL PROCEEDING DOES NOT REFLECT THE AUDIO RECORDING AND DOCUMENTATION, AND WAS MANIPULATED TO INCRIMINATE, MR. WOOTEN, THE APPELLANT BASED ON FALSE EVIDENCE. (SEE) 261, LINE 8-11. THE ABOVE TRANSCRIPT LINE STATES: "I KEEP DIFFERENT TYPES OF STUFF IN THERE JUST LIKE THE EVIDENCE, JUST LIKE THE EVIDENCE FAR AS CONCERNING THE MONEY THAT WAS

TOOK FROM STORE." TAINTING THE EVIDENCE IN, MR. WOOTEN'S, THE APPELLANT'S CASE AND TRIAL CONSTITUTES A BRADY VIOLATION. (SEE) BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194 (1963). FAVORABLE EVIDENCE, WITHHELD BY STATE, WAS NOT ALLOWED TO BE EXAMINED AND CONSIDERED BY JURORS AND, THEREFORE, INJURED THE APPELLANT BECAUSE THE STATE, APPELLEE, DELIBERATELY FAILED TO DISCLOSE SUCH INFORMATION THAT WAS FAVORABLE TO THE APPELLANT'S CASE. HAD SUCH EVIDENCE BEEN DISCLOSED AND STATE UPHELD ITS DUTY TO DO SO, THE APPELLANT'S, MR. WOOTEN'S, CASE AND TRIAL COULD HAVE RESULTED IN A MORE FAVORABLE OUTCOME FOR THE APPELLANT, SUCH AS AN EXONERATION.

DURING APPELLANT'S TRIAL, APPELLANT ARGUED THAT THE APPELLEE, THE STATE, PRESENTED TWO (2) DVDS AS EVIDENCE TO THE JURY, HOWEVER, ONLY ONE (1) OF THE DVDS WAS VIEWED. APPELLANT FURTHER ARGUES THAT THE COURT ERRED BY NOT SHOWING BOTH VIDEO DVDS THAT WERE PRESENTED AS EVIDENCE. MOREOVER, THE COURT STATED, "I'VE NOT SEEN ANY VIDEOS ONE WAY OR THE OTHER." * IN ¶. 10, LINE 21, THE COURT STATED, "THEY'RE BOTH THE SAME." APPELLANT ARGUES THAT THE COURT, IN FACT, DOES NOT HAVE KNOWLEDGE OF THE CONTENT OF THE VIDEO EVIDENCE ENTERED BY STATE, DUE TO THE FACT THAT THE COURT HIMSELF PROCLAIMED HE HAD NOT SEEN ANY VIDEOS ONE WAY OR THE OTHER. IN THIS INSTANCE, THE COURT ALSO ERRED BY COMMENTING ON AND THEORIZING ABOUT EVIDENCE IN WHICH THERE IS NO CERTAIN KNOWLEDGE, AND THEREAFTER DECLARING WHAT EVIDENCE MET THE MIDDLE BURDEN OF PROOF AND WHAT DID NOT.

*(SEE) ¶. 10, LINE 16-21

MR. BARR, THE APPELLANT'S, MR. WOOTEN'S COUNSEL, WAS INEFFECTIVE BY FAILING TO ATTEMPT TO OR SUCCESSFULLY SUPPRESSING OR OBJECTING IRRELEVANT PREJUDICIAL AND INFLAMMATORY EVIDENCE BEFORE AND DURING THE COURSE OF TRIAL. (SEE) BRADY V. MARYLAND 373 U.S. 83 (1963). COUNSEL OF APPELLANT, MR. WOOTEN, WAS ALSO INEFFECTIVE BY NOT REQUESTING A VIDEO TECHNICIAN TO ENHANCE AND RESTORE THE PERPETRATOR'S IMAGE ON DIGITAL VIDEO.

IN MISS BEHERNS' TESTIMONY, IT WAS STATED THAT SHE WAS WORKING IN TIMESAVER CONVENIENCE STORE AT THE TIME SHE WAS ROBBED. (SEE) TI. LINE 3-6. DURING THE COURSE OF TRIAL, THE NAME(S) OF THE BUSINESS (CONVENIENCE STORE) THAT WAS SAID TO BE ROBBED HAS NEVER BEEN DEFINITELY ESTABLISHED. WHEN ASKED ABOUT THE LOCATION(S), THE WITNESS STATED: "GROVE LAKE AREA." THERE IS A CONFLICT REGARDING THE WIDE RANGE OF HWY 80 EAST. THERE ARE SEVERAL CONVENIENCE STORES IN THAT AREA RANGE. IN THE INCIDENT REPORT, WITNESS AND VICTIM, MISS BEHERNS, STATED THE ROBBERY TOOK PLACE AT 22933 U.S. HWY 80 EAST. HOWEVER, SHE, MISS BEHERNS, DID NOT GIVE AN EXACT ADDRESS OF WHERE THE ROBBERY OCCURRED DURING TRIAL TESTIMONY. ALTHOUGH THE GENERAL AREA OF THE ROBBERY WAS BROUGHT TO THE COURT AND PUT ON RECORD, APPELLANT CONTENDS THAT VENUE WAS NEVER ESTABLISHED IN HIS CASE AND TRIAL HEARING. (SEE) TI. 13, LINE 19-21. ACCORDING TO TI. PAGES 11-20, THE TRIAL JUDGE ASKED A TOTAL OF TWENTY-EIGHT (28) QUESTIONS CONCERNING THE VIDEO AND THE SURVEILLANCE SYSTEM ITSELF. THE COURT EXCESSIVELY PURSUED QUESTIONS ON ONE SUBJECT DURING THE TRIAL THAT SHOULD HAVE

BEEN CONDUCTED BY MR. WOOTEN'S COUNSEL, AND THE FACT IS SUPPORTED BY THE CIRCUMSTANCE OF THE COURT'S STATEMENT... "THE COURT DOESN'T REPRESENT MR. WOOTEN EITHER." (SEE) Tt. 287, LINE 16. THE COURT WAS INEFFECTIVELY TAKING AN ACTIVE PART IN THE TRIAL BY CONTINUOUSLY ASKING QUESTIONS GEARED TO THE WITNESS INSTEAD OF LETTING MR. WOOTEN'S, THE APPELLANT'S, COUNSEL PERFORM HIS DUTIES BY QUESTIONING THE WITNESS. (SEE) Tt. pg. 19, LINE 12-14 AND LINES 17 AND 19. WHERE THE WITNESS STATES THERE'S SUPPOSED TO BE ONE (1) MORE CAMERA, BUT THE CAMERA NEVER SHOWED IT. (SEE) Tt. 13, LINE 2. THERE WAS THREE (3) TO MY KNOWLEDGE. THE COURT STATES: "IF THERE WERE ANOTHER ONE, IT WOULD HAVE BEEN ON HERE." THE COURT ERRED AGAIN BY COMMENTING ONCE MORE ON THE VIDEO EVIDENCE, AND STATING WHAT WAS THERE ON VIDEO AND WHAT WOULD BE THERE ON VIDEO. THE COURT ACTUALLY FORCED THE WITNESS TO AGREE WITH HIS STATEMENT (17-3).

THE JUDGE RULES 3.2 OF THE UNIFORM RULES OF SUPERIOR COURT (ECA-24-3303) THE JUDGE HAS THE RESPONSIBILITY OF BEING IMPARTIAL AND INSURING THAT THE DEFENDANT AND THE STATE GET A FAIR TRIAL WITH NO INTERFERENCE FROM EITHER PARTY OR OTHER INDIVIDUALS. IN ORDER TO PERFORM HIS DUTY, THE TRIAL JUDGE MUST BE PRESENT AT ALL TIMES OR STAGES, SO AS TO BE AWARE OF ANY SITUATION HE'S NEEDED. IN THE APPELLANT'S CASE, THE JUDGE WAS NOT PRESENT WHEN THE DEFENDANT WAS SHOWN THE VIDEO (AFOREMENTIONED DVD) IN THE COURTROOM. SUCH CONDUCT IS ERRONEOUS. THE COURT MAY NOT EXPRESS AN OPINION AS TO FACTS WHICH HAVE NOT BEEN PROVEN.

ALSO, THE TRIAL JUDGE "MAY ADDRESS A LEADING QUESTION TO A WITNESS IN ORDER TO ELICIT THE TRUTH OR CLARIFY AN ISSUE." CONSIDERING ALL OF THE ISSUES STATED WITHIN, IT IS EVIDENT THAT THE APPELLANT, MR. WOOTEN, WAS DEPRIVED OF A FAIR TRIAL. IT HAS ALSO BEEN HELD THAT A DEFENDANT IS DEPRIVED OF A FAIR TRIAL WHEN THE COURT ASKED A VOLUMINOUS NUMBER OF QUESTIONS TO THE WITNESS. (SEE) TT. pages 11 - 20. THE COURT ASKED THE WITNESS, MISS BEHERNS, 28 QUESTIONS IN MR. WOOTEN'S DIRECT EXAMINATION. IN RECROSS EXAMINATION BY MR. BARR, THE COURT ASKED SIX (6) QUESTIONS OF THE WITNESS. TT. pg. 96, 97 AND 98. THE DEFENSE'S COUNSEL ASKED FOUR (4) QUESTIONS DUE TO THE CONSTANT INTERFERENCE IN THE APPELLANT'S, MR. WOOTEN'S, TRIAL. THE COURT ASKED MORE QUESTIONS THAN THE DEFENDANT'S COUNSEL IN CROSS EXAMINATION, AND IN DIRECT EXAMINATION BY THE DEFENDANT OF MR. RHODESWERTH. THE COURT ASKED TWENTY-SEVEN (27) QUESTIONS OF THE DEFENDANT'S ALIBI WITNESS WHO TESTIFIED ON MR. WOOTEN'S BEHALF. THE COURT ACTED AS A SECOND PROSECUTOR IN MR. WOOTEN'S TRIAL AND WAS PRO STATE IN HIS POSITION. DEFENDANT'S COUNSEL WAS INEFFECTIVE TO THE POINT THAT HE DID NOT AND FAILED TO TENDER IN THE APPELLANT'S DISCOVERY EVIDENCE IN HIS CLIENT'S, MR. WOOTEN'S, CASE. COUNSEL PROVIDED NO FOUNDATION FOR HIS CLIENT, MR. WOOTEN, TO STRUCTURE AN EFFECTIVE AND SUBSTANTIAL DEFENSE. (SEE) PAGE 3 UNDER EXHIBITS. ALSO, COUNSEL HARMED HIS CLIENT, MR. WOOTEN, BY NOT OBJECTING WHEN THE COURT TOLD MISS

BEHERNS SHE WAS FREE TO GO WITHOUT ALLOWING DEFENSE COUNSEL THE OPPORTUNITY TO RECROSS THE WITNESS MISS BEHERNS. THE COURT FURTHER ERRED BY NOT ALLOWING THE DEFENDANT, MR. WOOTEN, THE OPPORTUNITY TO CONFRONT HIS ACCUSER BY RECROSSING THE WITNESS, MISS BEHERNS. MOREOVER, APPELLANT'S DEFENSE COUNSEL, MR. BARR, WAS INEFFECTIVE AND FAILED CLIENT BY NOT RECROSSING THE WITNESS, MISS BEHERNS.

(SEE) PAGE 2 OF TRANSCRIPT OF JURY TRIAL HEARING - UNDER CONTENTS AND STATE'S WITNESSES.

NOT ONLY DID MR. BARR, DEFENDANT'S COUNSEL, FAIL TO PROVIDE HIS CLIENT A DEFENSE, DEFENDANT'S CLIENT FURTHER FAILED CLIENT BY NOT UTILIZING PERTINENT MATERIAL EVIDENCE THAT HIS CLIENT, MR. WOOTEN, PRESENTED AND REVEALED TO MR. BARR THAT WAS FOUND IN APPELLANT'S DISCOVERY. HAD MR. BARR INCORPORATED A CONFLICT IN THE EVIDENCE CONCERNING THE FIREARMS, THE OUTCOME OF THE TRIAL COULD HAVE RESULTED IN MR. WOOTEN'S, THE APPELLANT'S FAVOR AND/OR EXONERATION.

MR. WOOTEN REVEALED TO HIS COUNSEL, MR. BARR, THAT THE FIREARMS PROVIDED AS EVIDENCE ARE DIFFERENT ITEMS. ONE (1) PHOTO SHOWS A 45. CALIBER HANDGUN. THE SAME HANDGUN INVESTIGATORS ALLEGED DEFENDANT USED DURING A COMMISSION OF A CRIME. (SEE) PHOTO EXHIBIT 7 AND 8.

WHEN CLOSELY VIEWED, THE PHOTO THAT DISPLAYS THE BRIEFCASE WITH THE WEAPON BESIDE IT, YOU WILL NOTICE THE FACT THAT SAID WEAPON (HANDGUN) IS A PULL TRIGGER, WHERE YOU CAN SEE THE SPACE BEHIND THE TRIGGER. THE 45. CALIBER TRIGGER SLIDES INTO THE HANDLE OF THE WEAPON. WHEN

DEFENSE COUNSEL REALIZED THE CONFLICT PERTAINING THE DIFFERENCE IN THE TWO (2) HANDGUNS, HE BEGAN CONSULTING WITH THE PROSECUTOR INSTEAD OF BRINGING THE DISCREPANCY TO THE ATTENTION OF THE COURT AND JURORS. WHEN DEFENSE COUNSEL, MR. BARR, RETURNED TO THE DEFENDANT'S TABLE, HE RELAYED TO HIS CLIENT, MR. WOOTEN, "IT'S (THE DISCREPANCY REGARDING THE TWO (2) DIFFERENT HANDGUNS) OKAY, THEIR LAB TECHNICIAN JUST PULLED THE WRONG GUN OUT OF THE EVIDENCE ROOM." (SEE) TT. PG. 158, LINE 11 AND 16; TT. PG. 97, LINE 1-25; TT. PG. 98, LINE 1-7.

AFTER APPELLANT, MR. WOOTEN'S, PERSISTENT PLEAS TO HIS COUNSEL, MR. BARR, TO ARGUE AND CONTEST THE STATE'S PRESENTATION OF INSUFFICIENT EVIDENCE IN RELATION TO THE HANDGUNS, DEFENSE COUNSEL BARR SUCCUMBED TO MR. WOOTEN'S PLEA AND QUESTIONED WITNESS TROOPER HODGES ABOUT WHETHER OR NOT HE COULD DIFFERENTIATE BETWEEN THE TWO (2) HANDGUNS. IN RESPONSE TO THE QUESTION PROPOSED BY DEFENSE COUNSEL, MR. BARR, TROOPER HODGES REPLIED, "NO, SIR, I DO NOT. I'LL BE HONEST WITH YOU." DEFENSE COUNSEL, MR. BARR, FAILED HIS CLIENT, MR. WOOTEN, AS WELL AS THE JUDICIAL SYSTEM, BY REPRESENTING HIM TO A MINIMUM STANDARD WHEN QUESTIONING TROOPER HODGES IN A PASSIVE AND INEFFECTIVE MANNER. MR. BARR'S INEFFECTIVENESS DURING TROOPER HODGES' TESTIMONY AIDED THE STATE WITH ITS CONVICTION OF THE APPELLANT, MR. WOOTEN, BY NOT CHALLENGING HANDGUN EVIDENCE AND TROOPER HODGES INABILITY TO DECIPHER STATE'S HANDGUN EVIDENCE. TO AVOID FURTHER INEFFECTIVENESS AND INJURY TO THE POSTURE OF APPELLANT'S CASE, CAUSED BY

DEFENSE ATTORNEY, MR. BARR, APPELLANT MOVED THE COURT TO RELIEVE MR. BARR AS DEFENSE COUNSEL IN ORDER TO APPOINT APPELLANT WITH EFFECTIVE COUNSEL. FURTHER CONFLICTING INTEREST BETWEEN APPELLANT, MR. WOOTEN, AND DEFENSE COUNSEL, MR. BARR, INITIATED AT THE TIME DEFENSE ATTORNEY CONSPIRED TO PROMPT THE APPELLANT, MR. WOOTEN, TO COMMIT PERJURY BY HAVING HIM STATE THE TRUCK INVOLVED IN THE HIGHWAY COLLISION DID NOT BELONG TO HIM. (SEE) TT. pg. 125, LINE 7-17.

THE APPELLANT ALSO ARGUES AND ASSERTS PROSECUTORIAL MISCONDUCT IN TT. 215, LINE 5-9. THIS CONSTITUTES AN AN IMPROPER ATTEMPT TO IMPUGN THE WITNESS' CHARACTER AND ESTABLISH HIS GUILT BY ASSOCIATION, REQUIRING REVERSAL OF CONVICTION.

HILL V. STATE 176, GA. APP. 509, 336 S.E. 2d. 276 (1985).

MR. WOOTEN'S, THE APPELLANT'S, COUNSEL WAS INEFFECTIVE BY NOT ARGUING THAT THE STATE'S WITNESS, MISS BEHERNS, WEARS PRESCRIPTION EYEGLASSES, HOWEVER, DID NOT WEAR THEM DURING THE CONVENIENCE STORE ROBBERY. THE FAILURE OF THE DEFENSE COUNSEL ALSO OPTING TO NOT SUMMONS AND SUBPOENA THE EYE DOCTOR OF WITNESS, MISS BEHERNS, TO INFORM THE COURT AND JURY OF THE WITNESS' OVERALL VISUAL CONDITION, IN ORDER TO DETERMINE WHETHER OR NOT WITNESS IS DEPENDANT ON PRESCRIPTION EYEGLASSES FOR CLEAR VISION. THIS ELEMENT IN APPELLANT'S CASE WAS CRITICAL IN DETERMINING THE WITNESS' ABILITY TO MAKE A POSITIVE IDENTIFICATION, AS STATE'S EYEWITNESS, OF THE PERPETRATOR. DEFENSE COUNSEL'S FAILURE TO CALL A MEDICAL EXPERT WITNESS, AN OPTOMETRIST, TO TESTIFY ON APPELLANT'S BE-

HALF WAS A FATAL DEFECT IN APPELLANT'S TRIAL, AND HIS COUNSEL'S REPRESENTATION. EYEWITNESS IDENTIFICATION OF MR. WOOTEN, THE APPELLANT, WAS A KEY ELEMENT OF THE STATE'S CASE, AND THERE IS NO SUBSTANTIAL EVIDENCE OR SUBSTANTIAL CORROBORATION OF THAT IDENTIFICATION BY ANY OTHER EVIDENCE.

UNITED STATES V. WADE STATES: "IT ALWAYS HAS BEEN TRUE THAT THE IDENTITY OF A DEFENDANT AS THE GUILTY PARTY MAY BE SHOWN BY CIRCUMSTANTIAL EVIDENCE AS WELL AS DIRECT EVIDENCE." BUT IF THE EVIDENCE IS ENTIRELY CIRCUMSTANTIAL, IT MAY BE INSUFFICIENT TO SUPPORT A CONVICTION. IN WADE'S CASE, THE COURT STATED THAT EYEWITNESS IDENTIFICATION BY THE VICTIM OR WITNESS IS PECULIARLY RIDDLED WITH DANGER WHICH MAY PREVENT A FAIR TRIAL AND A MAJOR CAUSE OF MISCARRIAGE OF JUSTICE RESULTING FROM MISTAKEN IDENTITY. JUST AS IN MR. WOOTEN'S CASE, DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT MOVING A JUDGEMENT OF ACQUITTAL OR ALTERNATIVELY STRIKING THE COURTROOM IDENTIFICATION ON THE GROUND THAT THE PHOTO LINEUP WAS WITHOUT NOTICE TO, AND IN THE ABSENCE OF DEFENSE COUNSEL, VIOLATED THE SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL AS WELL AS THE FIFTH AMENDMENT RIGHT. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT REVERSED AND ORDERED A NEW TRIAL AT WHICH THE IN-COURT IDENTIFICATION EVIDENCE WAS TO BE EXCLUDED BECAUSE OF THE SIXTH AMENDMENT VIOLATION... AND THE COURT CONCLUDED THAT NO FIFTH AMENDMENT RIGHT HAD BEEN VIOLATED. MOREOVER, THE SUPREME COURT POINTED OUT THAT A DEFENDANT IS ENTITLED TO THE PRESENCE OF COUNSEL AT ANY STAGE OF THE PROSECUTION, FORMAL OR INFORMAL,

IN COURT OR OUT OF COURT, WHERE COUNSEL'S ABSENCE MIGHT DEROGATE FROM THE ACCUSED'S RIGHT TO A FAIR TRIAL.

COUNSEL ASKED THE WITNESS, MISS BEHERNS, TO STATE THE DATE TO THE JURY. MISS BEHERNS ANSWERED: 02/19/07. DEFENSE COUNSEL ASKED MISS BEHERNS, "IS THIS ACCURATE?" THE WITNESS, MISS BEHERNS ANSWERED, "YES, IT IS."

DEFENSE COUNSEL REPLIED, "FEBRUARY 19th?" AGAIN, MISS BEHERNS ANSWERED, "YES, SIR."

THE WITNESS, MISS BEHERNS, WAS COERCED BY THE STATE TO ANSWER AFFIRMATIVELY TO QUESTIONS THAT WOULD POSTURE THE APPELLANT, MR. WOOTEN, AS THE PERPETRATOR TO ENSURE THE JURY'S GUILTY VERDICT. THE RECORD REFLECTS SUCH COERCION. (SEE) TT. pg. 114, LINE 22-23.

THE DEFENSE COUNSEL ASKED THE WITNESS, MISS BEHERNS, (TT. pg. 115, LINE 7-10) "WOULD YOU AGREE THAT BASED ON THAT STATEMENT THAT I JUST READ, THE ONLY DESCRIPTION THAT WE HAVE OF YOUR GIVING OF THE ROBBER WAS A 'SMALL DARK-SKINNED BLACK MALE'?"

THE WITNESS, MISS BEHERNS, ANSWERED, "YES."

(1982) SPROUSE V. STATE 250 GA. APP. 174, 296 S.E. 2d. 504

A WITNESS FOR THE STATE TESTIFIED THAT SHE COULD NOT REMEMBER IF SHE HAD PREVIOUSLY MADE A STATEMENT THAT WAS INCONSISTENT WITH HER TRIAL TESTIMONY. SUCH TESTIMONY WAS A SUFFICIENT FOUNDATION TO INTRODUCE THE PRIOR INCONSISTENT MATTERS THROUGHOUT SAID CASE, AND THE EXCLUSION OF THE EVIDENCE WAS REVERSIBLE ERROR. DUE TO THE FACT THERE ARE INCONSISTENCIES AND CONFLICTING TESTIMONIES, STATEMENTS, AND OVERALL EVIDENCE IN GENERAL, IN APPELLANT'S CASE AND TRIAL MADE BY STATE'S WITNESSES, THE APPELLANT, MR. WOOTEN, IS REQUIRED

A REVERSAL WITH THE EXCLUSION OF THE EVIDENCE IS REVERSIBLE. APPELLANT ARGUES THAT THE PHOTO ARRAY LINE UP CONSIST OF SIX (6) PICTURES, WHICH INCLUDED MR. WOOTEN. FOUR (4) OF THE ABOVE-MENTIONED PICTURES CONTAIN A LINE BEHIND THE SUSPECTS' HEADS, WHICH LEAVES ONLY TWO (2) PICTURES TO CHOOSE FROM. ONE (1) OF THE TWO (2) OF THE PICTURES IS THAT OF MR. WOOTEN, THE APPELLANT. IN ADDITION TO THAT, THERE IS A STRIP OF PAPER PLACED OVER THE APPELLANT'S, MR. WOOTEN'S, HEAD, WHICH POINTS DIRECTLY AT MR. WOOTEN. SUCH MANIPULATED EVIDENCE INDICATES MR. WOOTEN IS THE PERPETRATOR, WHICH IS A VIOLATION OF DUE PROCESS. MOREOVER, DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT DETERMINE THAT THE EVIDENCE IN PRE-TRIAL IDENTIFICATION SHOULD BE EXCLUDED, BECAUSE THERE WAS A ONE-ON-ONE MEETING WITH THE VICTIM, MISS BEHERNS, AND INVESTIGATOR LONG. DURING SAID ONE-ON-ONE MEETING BETWEEN THE VICTIM AND THE INVESTIGATOR, INVESTIGATOR LONG PRESENTED A SIX (6) PERSON PHOTO ARRAY TO THE VICTIM, WHICH INCLUDED THE APPELLANT, MR. WOOTEN. THE INVESTIGATOR'S PRESENTATION OF THE SIX (6) PERSON PHOTO ARRAY, WHICH INCLUDED MR. WOOTEN, TO THE VICTIM, MISS BEHERNS, WAS IMPROPER AND LIKELY SUGGESTIVE. AT THE VERY LEAST, IT WAS A VIOLATION OF DUE PROCESS AGAINST THE APPELLANT. DEFENDANT'S COUNSEL, MR. BARR, SHOULD HAVE PERFORMED HIS DUTY AND ARGUED THE INVALIDITY AND THE FAULTINESS OF THE ONE-ON-ONE PRESENTATION OF THE PHOTO ARRAY BY INVESTIGATOR LONG, WHICH HE DID NOT. COUNSEL SHOULD HAVE ALSO REQUESTED A PHYSICAL LINE UP, BEING THAT THE VICTIM, MISS BEHERNS, WAS THE ONLY PERSON WHO IDENTIFIED MR. WOOTEN AS THE PERPETRATOR.

(SEE) BRODES V. STATE 2004 GA. APP. LEXIS 1047
(GA. CT. APP. AUG. 5, 2004)

THE RIGHT TO COUNSEL AT IDENTIFICATION APPLIES AT ANY STAGE OF A PROSECUTION, NOT MERELY WHEN A SUSPECT IS ARRESTED * IN AFFIRMING THE CONVICTION, THE COURT POINTED OUT THAT DUE PROCESS ADEQUATELY PROTECTS A PERSON WHO HAS NOT BEEN FORMERLY CHARGED FROM SUGGESTIVE IDENTIFICATION AND POINTED OUT THE INTEREST OF SOCIETY IN THE PROMPT INVESTIGATION OF UNSOLVED CRIMES. THERE WAS NO DESCRIPTION, NARRATED BY THE VICTIM, OF ANY KIND OF THE PERPETRATOR.

* KIRBY V. ILLINOIS

FURTHERMORE, IT HAS BEEN POINTED OUT THAT A PHOTO ARRAY IS A LESS RELIABLE MEANS OF IDENTIFICATION AS A FACTOR WHICH MAY BE USED IN DETERMINING WHETHER AN IDENTIFICATION WAS RELIABLE. (SEE) PRE-TRIAL IDENTIFICATION SCOPE (6-2). IN SOME OF THESE INCIDENTS, THE EVIDENCE HAS BEEN EXTREMELY WEAK. IT HAS BEEN STATED THAT ERRONEOUS IDENTIFICATION OF THE ACCUSED CONSTITUTES THE MAJOR CAUSE OF KNOWN WRONGFUL CONVICTION. REVERSABLE ERROR CHARGES INSTRUMENTS BY TWO (2) OR MORE WAYS WHEN THE INDICTMENT CHARGES IT WAS COMMITTED BY ONE (1) SPECIFIC METHOD. IF THERE IS A REASONABLE POSSIBILITY THAT THE JURY CONVICTED THE APPELLANT OF THE CONVICTION OF A CRIME IN A MANNER NOT CHARGED IN THE INDICTMENT, THEN THE CONVICTION IS DEFECTIVE BECAUSE OF A FATAL VARIANCE BETWEEN THE PROOF AT TRIAL AND THE INDICTMENT RETURNED BY THE GRAND JURY.

REFERENCE TI. pg. 19, LINE 17-19 WHERE THE COURT STATES TO THE WITNESS, MISS BEHERNS, IN REGARD TO HER KNOWLEDGE AND STATEMENT OF THERE BEING THREE (3) CAMERAS IN THE CONVENIENCE STORE WHEN AND WHERE THE ROBBERY OCCURED, "BUT IF THERE WERE ANOTHER ONE (CAMERA), IT

WOULD HAVE BEEN ON HERE. IS THAT CORRECT, WITNESS?" THE WITNESS, MISS BEHERNS, STATED: "YES, SIR." AT A LATER POINT, THE DEFENDANT ASKED THE WITNESS, MR. RHODESWERTH, IF DEFENDANT HAD MISSED ANY DAYS FROM WORK, WHICH WOULD IMPLY DEFENDANT, MR. WOOTEN, WAS ON THE JOB SITE. MR. RHODESWERTH, THE WITNESS, WAS THE DEFENDANT'S, MR. WOOTEN'S, EMPLOYER AT THE TIME OF THE ROBBERY IN DEFENDANT'S CASE.

MR. WOOTEN, THE DEFENDANT, WAS ATTEMPTING TO ESTABLISH HIS ALIBI BY ALLOWING THE WITNESS, MR. RHODESWERTH, TO SHOW THE COURT AND THE JURY THAT THE DEFENDANT, MR. WOOTEN, WAS IN A LOCATION OTHER THAN THE SCENE OF THE CRIME AT THE RELEVANT TIME. (SEE) II. pg. 219, LINE 8-15. SUBSEQUENTLY, THE COURT INJECTED AND STATED TO THE DEFENDANT: "THAT'S ASKED AND ANSWERED, AND THAT'S AN ARGUMENT."

AT THIS JUNCTURE, THE COURT EXERCISED PREJUDICE TOWARD THE DEFENDANT, MR. WOOTEN, BY NOT ALLOWING THE DEFENDANT TO BUILD HIS DEFENSE WITH THE WITNESS' CRITICAL TESTIMONY. THE COURT'S APPLICATION OF THE SAME STYLE OF QUESTIONING AND ANSWERING WAS EXECUTED WHEN THE COURT STATED, "IF THERE WERE ANOTHER ONE, IT WOULD HAVE BEEN ON HERE." THE COURT MAY NOT COMMENT ON THE EVIDENCE THAT YET HAVE BEEN PROVEN, OR WHAT WAS ADDED OR WHAT WAS TAKEN. IN II. pg. 224, LINE 13-19, THE COURT DENIED MR. WOOTEN OF PLAYING THE VIDEO (DVD) EVIDENCE AS THE PROSECUTOR WAS PERMITTED. SUCH CONDUCT BY THE COURT DISPLAYED PREJUDICE AND BIAS ON THE COURT'S BEHALF. ALSO, THE DEFENDANT WAS FURTHER HARMED BY THE COURT NOT ALLOWING THE DEFENSE WITNESS TO TESTIFY THAT THE PERSON IN THE VIDEO IS NOT THE DEFENDANT, MR. WOOTEN, BECAUSE OF THE VARIOUS DIFFERENCES IN PHYSICAL TRAITS, I.E., THE PERPETRATOR BEING BOWLEGGED AND THE PLAINLY VISIBLE SCAR ON MR. WOOTEN'S

RIGHT ARM. THIS WAS VERY CRITICAL IN APPELLANT'S TRIAL. MOREOVER, DEFENDANT REPRESENTED HIMSELF, PRO SE, AND SHOULD HAVE BEEN GRANTED THE SAME RIGHTS AND ACCESS AS ACTING AND/OR STANDBY COUNSEL. IN MR. WOOTEN'S CASE, THE APPELLANT, MR. WOOTEN, MOVED THE COURT TO CHALLENGE THE INDICTMENT. (SEE) T. 227, LINE 12-16. IN T. 227, LINE 23-25, THE COURT RESPONDED: "IF YOU CONTEND THAT THERE'S SOME TECHNICAL DEFECT IN THE INDICTMENT...

THE DEFENDANT REPLIED, "YES, SIR."
(SEE) T. 228, LINE 1 AND 2

THE COURT CONTINUES... "THAT HAS BEEN WAIVED BECAUSE WE ARE NOW HERE AT TRIAL."

THE DEFENDANT ANSWERED THE COURT BY STATING, "THAT COMES FROM NOT BEING REPRESENTED BY COUNSEL." SO THE COURT PRESERVED THAT ON ANY APPEAL TO THE COURT OF APPEALS, THE SUPREME COURT, THE U.S. DISTRICT COURT AND SO FORTH. ALSO, MR. WOOTEN ASSERTS WHERE EVIDENCE PRODUCED AT TRIAL VARIES FROM WHAT IS ALLEGED IN THE INDICTMENT, THEREFORE VARIANCE HAS OCCURED AND THE DEFENDANT, MR. WOOTEN, IS REQUIRED TO SHOW THAT HIS RIGHTS WERE SUBSTANTIALLY PREJUDICED IN ORDER TO BE ENTITLED TO A REVERSAL. U.S.C.A. CONSTITUTIONAL AMENDMENT 5-1d - AN AMENDMENT TO AN INDICTMENT OCCURS WHEN THE ESSENTIAL ELEMENT OF THE OFFENSE CONTAINED IN THE INDICTMENT ARE ALTERED TO BROADEN THE POSSIBLE BASIS FOR CONVICTION BEYOND WHAT IS CONTAINED IN THE INDICTMENT, AND A VARIANCE OCCURS WHEN FACTS PROVED AT TRIAL DEVIATE FROM FACTS CONTAINED IN THE INDICTMENT BUT ESSENTIAL ELEMENTS OF OFFENSE ARE THE SAME.

ACCORDING TO MR. WOOTEN'S INDICTMENT, COUNT 1

DOES NOT INCLUDE THE HANDGUN AS STATED IN CT. 2, 3, AND CT. 4. IT USES THE LANGUAGE "APPEAR." THE INDICTMENT SHOULD SET OUT THE ALLEGED OFFENSE WITH AN OPPORTUNITY TO PREPARE A DEFENSE.

THEREFORE, ACCORDING TO THE STATUTE RE WINSHIP: UNDER THE STATE AND FEDERAL LAW, THE STATE DID NOT MEET ITS BURDEN OF PROOF AS STATED IN THE INDICTMENT. IN MR. WOOTEN'S, THE APPELLANT'S, CASE, THE STATE DID NOT PROVE THERE WAS A GUN OR THAT APPELLANT WAS IN POSSESSION OF ONE AND POINTED SAID GUN AT THE VICTIM, MISS BEHERNS. THE INVALID INDICTMENT IN APPELLANT'S CASE SHOULD HAVE BEEN QUASHED. (4) UNDER DUE PROCESS LAWS OF FIFTH AMENDMENT, THE STATE IS REQUIRED TO PROVE, BEYOND A REASONABLE DOUBT, EVERY ELEMENT OF THE CRIME WHICH A DEFENDANT IS CHARGED.

U.S. V. ALLEN, 385 F. 3d. 644, 649 (7th CIR. 2004) - PROSECUTION'S FAILURE TO PROVE BEYOND REASONABLE DOUBT, FELON STATUS OF DEFENDANT REQUIRES A REVERSAL OF CONVICTION FOR ASSAULT WITH INTENT TO MURDER. MR. WOOTEN, THE APPELLANT, SHOULD BE ACQUITTED OF THIS CHARGE: ABBRAVATED ASSAULT. THE REASON FOR SUCH IS THAT THERE IS NO WEAPON FOR THE ASSAULT WITH INTENT TO MURDER.

HENSLEY V. STATE, CITE 186, SE. 2d. 729 CODE: 26-1802 (a) 26-1812, 26, 1901, 26, 1902. REVERSED.

"FAILURE TO CHARGE THE JURY ON THE LESSER INCLUDING OFFENSE OF ROBBERY BY INTIMIDATION AND THEFT BY TAKING... THE COURT FAILED TO RECOGNIZE AND ULTIMATELY CONSIDER ITS VAST DISCRETION WHEN THE JURY ACQUITTED MR. WOOTEN, THE APPELLANT, IN COUNT 3 (CT. 3): POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME(S).

"[T]HE FAILURE TO EXERCISE DISCRETION WHEN THE LAW VESTS DISCRETION IN A JUDGE IS REVERSIBLE ERROR." GRESHAM V. STATE, 281 GA. APP. 116, 117, 635 S.E.

2d. 316, (2006).

(SEE) U.S. VS. CARTWRIGHT, 6E. 3d. 294 (5th 1993) - JURY CHARGE MUST BE BOTH LEGALLY ACCURATE AND FACTUALLY SUPPORTABLE, COURT MAY NOT INSTRUCT THE JURY ON CHARGE THAT IS NOT SUPPORTED BY EVIDENCE. IN MR. WOOTEN'S, THE APPELLANT'S, CASE, AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT, ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE DEFENDANT INNOCENT WITH THE ESSENTIAL ELEMENTS BEING ACQUITTED OF THE HANDGUN BEYOND A REASONABLE DOUBT. THERE WAS NO EVIDENCE IN APPELLANT'S TRIAL TO SUPPORT THE STATE'S CHARGES AND IT FAILED TO LEGALLY MEET ITS BURDEN OF PROOF IN THE INDICTMENT BEYOND REASONABLE DOUBT, AND BEING THAT THE APPELLANT, MR. WOOTEN, WAS DISSATISFIED WITH THE VERDICT JUDGEMENT, AND SENTENCE IMPOSED IN HIS CASE. HOWEVER, A CODE SECTION STATES THAT AN OFFENSE MAY BE COMMITTED IN MORE THAN ONE (1) WAY, AND AN INDICTMENT CHARGE THAT THE OFFENSE WAS COMMITTED IN ONE (1) WAY, THE CHARGE OF THE CODE SECTION MUST BE FOLLOWED BY A CHARGE THAT THE JURY IS NOT AUTHORIZED TO CONVICT UNLESS THE JURY FINDS THAT THE OFFENSE WAS COMMITTED IN THE MANNER CHARGED IN THE INDICTMENT.

THUS, IT IS REVERSIBLE ERROR TO CHARGE THAT A CRIME MAY BE COMMITTED BY EITHER OF TWO (2) METHODS WHEN THE INDICTMENT CHARGES IT WAS COMMITTED BY ONE (1) SPECIFIC METHOD AND THEN CHARGE THE JURY THAT THEY MAY CONVICT THE DEFENDANT IF THEY FIND HE COMMITTED THE OFFENSE BY A METHOD OTHER THAN THE SPECIFIC TYPE CHARGED IN THE INDICTMENT.

APPELLANT HEREBY MOVES THE APPELLATE COURT TO VACATE SENTENCE IMPOSED IN THIS CASE BASED UPON THE FOLLOWING GROUNDS:

- 1) THE VERDICT IS CONTRARY TO EVIDENCE AND WITHOUT EVIDENCE TO SUPPORT IT.

- 2.) THE VERDICT IS DECIDEDLY AND STRONGLY AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.
- 3.) THE VERDICT IS CONTRARY TO LAW AND CONTRARY TO PRINCIPLES OF JUSTICE AND EQUITY.
- 4.) CONSTITUTIONAL LAW 266 (7) FIFTH AND FOURTEENTH AMENDMENTS GUARANTEE OF DUE PROCESS OF LAW PROTECTS ACCUSED AGAINST CONVICTION EXCEPTION UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE CRIME WITH WHICH HE IS CHARGED.
- 5.) CRIMINAL LAW 561 (1) PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT DEFENDANT'S GUILT OF EVERY ELEMENT OF CHARGED OFFENSE.
- 6.) CRIMINAL LAW 753.3 JUDGE MAY NOT DIRECT A VERDICT OF GUILTY NO MATTER HOW CONCLUSIVE THE EVIDENCE.

CONCLUSION

MR. WOOTEN'S, THE APPELLANT'S, CONVICTION SHOULD BE VACATED. COUNSEL FOR THE STATE IMPROPERLY ARGUED HIS PERSONAL BELIEF THAT MISS BEHERNS WAS A CREDIBLE WITNESS, A FACTOR WHICH CHIEFLY CONTRIBUTED TO THE RETURNED VERDICTS IN APPELLANT'S CASE. MR. WOOTEN'S CONVICTIONS SHOULD ALSO BE VACATED BECAUSE THE COURT ERRED IN FORCING AND PERMITTING THE APPELLANT, MR. WOOTEN, TO PROCEED PRO-SE THROUGHOUT HIS TRIAL. ALTERNATIVELY, THE SENTENCES IMPOSED IN THIS CASE SHOULD BE VACATED. THE COURT ERRED IN IMPOSING THE RECIDIVIST SENTENCE IN THIS CASE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED COUNSEL FOR ALL PARTIES A COPY OF THE FOREGOING MOTION OF RESPONSE BY DEPOSITING A COPY IN THE U.S. MAIL WITH ADEQUATE POSTAGE TO ENSURE DELIVERY, AS FOLLOWS, TO:

RICHARD A. MALLARD
DISTRICT ATTORNEY
OGEECHEE JUDICIAL CIRCUIT
STATE BAR NO. 467350

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Alphonso Wooten

DATE: 6/22/15

THIS 22 DAY OF JUNE 2015

Adrian D. Nelson

6-22-15

