IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CECIL JUNIOR PRUITT — APPELLANT

VS. — NUMBER 2010-CA-00230-COA

STATE OF MISSISSIPPI — APPELLEE

APPEAL
FROM
THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

James A. Williams
MSB # [redacted]
Attorney for Appellant
Post Office Box 5002
Meridian, Mississippi 39302
Telephone: (601) 693-3881
Facsimile: (601) 693-3873

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant certifies the following listed persons have an interest in the outcome of the case. This representation is made in order that the Judges of this Honorable Court may evaluate possible disqualifications or recusals:

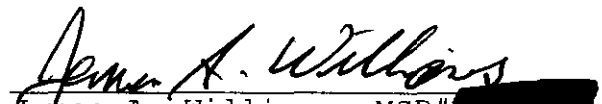
Bilbo Mitchell, District Attorney

Jim Hood, Attorney General

James A. Williams, Appellant's Attorney

Hon. Lester F. Williamson, Jr. Judge

Cecil Junior Pruitt, Appellant



James A. Williams, MSB#[redacted]
Attorney for Appellant

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STATEMENT OF THE CASE

Proceedings Below

The Motions and Exhibits

Pruitt's initial handwritten PCCR challenge to the Revocation Hearing had the following claims:

a. No disclosure of the evidence against him;

b. No opportunity to present witnesses or documentary evidence (because of having no advance notice of the hearing and evidence relied on and opportunity to prepare a defense);

c. No 'neutral and detached' hearing body (the judge in this case presided over the criminal cause which resulted in the revocation);

d. No written statement by the fact finders of the evidence relied on.

In paragraph 13, Pruitt cited **Grayson v. State**, 648 So.2d 1129 (Miss. 1994), where the circuit judge after a mistrial or hung jury on a new criminal indictment simply brought the Petitioner before the bench and proceeded to revoke his Post Release Supervision. Pruitt interpreted the failure to try the new cocaine sale charge showed lack of evidence to revoke. The reason for not having the trial was revealed, first in the Nolle Prosequi Order on the new charge, Number 633-07, which said the CI was not available and second, implicating notice on the revocation, is the circuit judge's initial order denying the PCCR, which reveals, post-revocation, some ex parte discussion between the District Attorney and the circuit judge to jointly elect to go for revocation instead of a trial, all unbeknownst to Pruitt or his Attorney. Pruitt called the sudden substitution of the revocation hearing

for a trial as "an ambush", denying due process of law and fundamental fairness.

In March 2009, his retained attorney filed an *Amended Petition* whose contents start with then Paragraph 15, CP 14, RE 24, and raised new claims or supplemented Pruitt's handwritten challenge to the Revocation paraphrased as follows:

15. Pruitt's PCCR counsel stated the un-noticed, revocation by ambush caught Pruitt by surprise, not prepared to confront the Drug Task Force Agent Merchant, the CI Shannon Tension(strangely available for revocation, but not trial). Pruitt stated that the difference of a convicted drug felon testifying in front of a jury on the new charge and testifying at a revocation hearing without a jury and the fact that he did not testify at the revocation hearing was caused by the ambush and the record showed no knowing and intelligent waiver of the right to testify.

16. He stated that whether to testify was chilled and right to testify denied by the fact that the State held the prospect of trial in number 633-07 over Pruitt's head while the Revocation Hearing was conducted. The Court at T4 said: "And as I understand it, the State is not pursuing that today." (Pruitt thus argues the prospect of still facing trial on the new Indictment chilled his exercise of his right to testify at the Revocation Hearing.) ..... Mr. Angero for the State disagreed that the Nolle Prosequi Order was with prejudice and the Court yielded to Mr. Angero's position (T66-67).

17. Pruitt stated and contended that Shannon Tension's sudden availability for the revocation hearing, but not the trial, raised serious question whether the State ever intended to try Number 633-07. He urged a penalty of disallowing the testimony of the CI Shannon Tension. He contended that an evidentiary hearing would help show that the Nolle Prosequi reason of CI could not be found was a misrepresentation and proof would likely show the jury wasn't even summonsed for the Pruitt trial and thus the State already knew it would not try the new case but pursue the revocation only, but such development was not told to Pruitt nor his attorney. Now, it is clear by the Circuit Judge's initial Order Denying PCCR, that there was some ex party conference between the State and the Circuit Judge to call off the trial of Number 633-07 and same was no told Pruitt.

18. Here, the PCCR Attorney re-stated the 'Hobson's choice". The State has had its cake and ate it too. The Nolle Prose Order in 633-07 says the case was Nolle Prosed because "CI cannot be located by Task Force." However, the Task Force found the CI, arguably, before the State had

requested to Nolle Prose the case. The Judge at the end of the hearing, considered his Order was with(out) prejudice. (See CP 91-92, Transcript of Revocation Hearing)

19. Here, Pruitt began to state instances of ineffective counsel at Revocation hearing counsel, stating specifically here that counsel should have filed a Motion to Suppress the cocaine crumb and residue and purported "buy-money", two twenty dollar bills, and Pruitt's statements to the Agents at the scene or later. He contended that counsel could have shown that Shannon Tension's accusation of an ounce of cocaine in Pruitt's car was false and not credible. Pruitt's consent to a search was obtained by deception and falsehood. Agents' true intent was to seize "buy money". Any Miranda Rights waiver by Pruitt was tainted. Factually, according to Pruitt, there was no Miranda until 7:36 P.M. At the white Lincoln, the Agents did not say Pruitt was arrested at all, especially not Sale of Drugs. Only at the Task Force Office, was Pruitt arrested for anything, then for sale of drugs. This was after Pruitt denied selling drugs and the Agents said they got their buy money from Pruitt's car.

20. Here Pruitt stated that counsel was ineffective because counsel should have advised Pruitt to testify. Further Pruitt stated that Attorney Jones had not prepared because he never had Pruitt review the drug sale tape but Attorney Jones himself had the tape introduced. Pruitt stated that Attorney Jones was ineffective in cross examination of Shannon Tension about the sales tape in at least two ways, i.e. Tension attempting to buy drugs from others though Agent Merchant testified Pruitt was the target Shannon Tension did not stay with that plan. The tape revealed Tension, after leaving the drop-off agents' vehicle several blocks from Valley Street, immediately started trying to buy drugs from anyone. After apparently getting Freak's(nickname for Cecil Junior Pruitt) phone number and calling it, Tension says "he ain't got none," apparently to those standing around on the street. Without Freak the target, a "buy-bust" is improbable. Tension was motivated to have the agents' get the purported "buy-money', and Tension fabricated the scenario of an ounce of crack in the car after Tension's purported purchase of crack. Further as counsel failure Merchant at T10 testified the October 9, 2007 alleged drug buy was the sole and only one Shannon Tension made. He qualified that immediately by saying that's all he recalled. As defense counsel pointed out, at T33, when Tension got back to the designated location there were no agents there to pick him up. Tension testified just the opposite (T50). Defense counsel also pointed out that Freak's response as said by

Tension when Tension warned Freak that law enforcement were everywhere, that "this is my block. I run this here" was not on the tape (T51).

Additional ineffective counsel claims are that Attorney Jones never discussed a defense and only visited him in the jail once or twice, again, never played the tape to Pruitt and never asked him to explain the "buy money" in Pruitt's car.

21. Attorney Jones failed to insist that the tape be played to the Judge in open court.

22. Here and in Paragraphs 23, Pruitt claimed there was insufficient credible non-hearsay evidence to support a revocation and thus defendant was denied due process of law. At Paragraph 23, 24 and 25, Pruitt challenged the sufficiency of the evidence to meet the State's burden of proof and the absence of specific conclusion and definite finding by the Circuit Judge that a sale had occurred and faulted that the conclusion was just the personal opinion of the judge.

26. Pruitt here independently, outside the umbrella of ineffective counsel, complained of search and seizure defects and that his statements were tainted.

27. Here Pruitt stated a violation to the right to discovery in a revocation hearing, right to know the evidence against the probationer. Pruitt contends the Judge erred in not sustaining objection to Agent Merchant's testimony at T17 about a crack cocaine crumb on the front floor of the driver's side and some cocaine residue in the console. Attorney Jones argued there was no crime lab results to prove the residue or crumbs were cocaine in the Discovery he received from the State, the Court then distinguished (T18) that the discovery was on the sale charge and not the revocation Petition. Effectively, Petitioner argues, the Court by this distinction compounded the prejudice to Petitioner of holding the revocation hearing in lieu of the trial.

28. Pruitt contends it was a denial of the right to confrontation when the Court ruled what had happened a few months before ,when Pruitt was stopped on the Interstate, was irrelevant, where despite that the source had said Pruitt was transporting drugs, none were found (T24).

29. Here Pruitt stated what his testimony would have been and what other evidence would have been presented. Pruitt stated that his testimony would have been that Shannon Tension did call Pruitt and told him he had the money he had borrowed from him a few weeks before. When Pruitt pulled up beside Shannon, he gave Pruitt the $40.00, and Shannon started telling about police being

in the area and Pruitt left. Pruitt would have testified he did sale drugs to Shannon.

30. Here Pruitt stated a right to confrontation claim based on no introduction of the cocaine and no live forensic testimony. Pruitt contends the actual cocaine should have been introduced into evidence, not just a lab report. He further adds now that the State's not presenting a Forensic Lab expert belies again that the State ever intended to try the new case and in fact had decided not the day before or such and never told Pruitt nor his attorney of this decision.

31. Here Pruitt stated a reasonable factual basis that showed Shannon Tension lied about one ounce of drugs still in his car. There was no opportunity to get rid of such a large amount of crack cookie, since Agent Merchant testified Pruitt was in sight from the time Shannon left Pruitt's window until "one minute" later and about 3 city blocks away, he stopped Pruitt.

Motion for Reconsideration/Supplementary Materials

The Court, after the Amended PCCR was filed , had consented to Pruitt's attorney filing additional supplementary materials and affidavits. However, through the Court's oversight, it went ahead and ruled on the Amended Petition. When questioned by Pruitt's counsel, the Court allowed him to file the promised materials. The Court reviewed the Supplementary Materials and issued a final styled Order Denying Motion for Reconsideration.

In his ***Prefatory Statement***, to the Motion for Reconsideration, Pruitt requested that all the allegations, complaints and errors alleged in these supplementary Materials be considered ***as independent claims or elaborations of claims previously made in his filings*** herein.

The Reconsideration Motion had attached an Affidavit of Petitioner (A-1 - A-2) which swore to the contents of the supplemental facts, arguments or criticisms and documents attached. Those attachments were: (a) *Factual/Legal Claims Arguments.*(A3 - A7); (b) *Complaints of Factual Events, Etc.*(A8-A19)(containing at its page 3 a "Transcript (of the Revocation Hearing) Analysis and Complaints of Counsel and Proceedings",; (c) Duplicate Certificate of Title (A20) on the white Lincoln October 8, 2007; (d) Eleven(11) photographs (A21-A31)of the street scenes, stop signs and drug neighborhood from the CI drop off point through to the front of Addy Dunnigan's house(Pruitt's mother) just south of the intersection of Valley Street and 33rd Avenue. These are labeled "P-1" through "P-11"; (e) The aerial view of the streets (A32) involved from 30th Avenue

and 8th Street through 33rd Avenue at the "X" where Addy Dunnigan's house is and the Drug Task Force Stop occurred. This drawing shows the route of the CI from 8th Street, turning right at Stop Sign on 7th and then going to Valley Street; (f) A drawing (A33) of what a one(1) ounce "cookie or cake" of crack cocaine would look like in approximate size;

Also attached to the Motion for Reconsideration were the Affidavits of two witnesses at the Addy Dunnigan house where Pruitt was stopped, seized and the White Lincoln searched, that of Donna Marie Pruitt McElroy; two(2) affidavits, marked "Affidavit One" and "Affidavit Two". (A34 - A40) ; that of Nicole Hill. (A41-A44) ; and the Affidavit of Dwayne Pruitt("Donte" on the tape of the wire worn by the CI) revealing events at the encounter between Pruitt and the CI on Valley Street. (A45-A47)

Also attached or submitted were the Full Transcript of the March 18, 2008 Revocation Hearing in Lauderdale Circuit Court Number 522-04; selected relevant excerpts of the Discovery Packet in Lauderdale Circuit Case Number 633-07(the new cocaine sale case) (A48-A65); the Order of Nolle Prosequi (A66) in Lauderdale County, Mississippi Circuit Case Number 633-07; All post release supervision filings in Number 552-04 by MDOC Field Officer Robert Baysinger being only :"Affidavit(Violation of Post-Release Supervision)" filed October 10, 2007; "Warrant(Post-Release)" filed October 10, 2009; and "Petition(Post Release)", filed October 10, 2007.

The Motion explained the reason for unavailability of an Affidavit of Henry Armstrong which would have shown that the CI, Shannon Tension, Armstrong's younger brother, had revealed to him that he(the CI) was arrested for ***"pills and powder"*** and that was why he was working for the Drug Task Force. Armstrong had also been told by the CI of some bad cocaine he said he had bought from Pruitt that had torn up his nose and Pruitt had laughed at him or such when he wanted his money back. Further undersigned Counsel stated that when that attorney visited Shannon Tension in the jail , Tension had recounted the to that Attorney the same bad cocaine story.

Pruitt then specified and expanded on how the so-called "buy money" was actual repayment of a loan by Pruitt to Shannon Tension, which was supported by a part of the Affidavit of Dewayne Pruitt.

The Motion revealed that the Tape of the wire worn by the CI had been listened to by the

undersigned Attorney and once by Cecil Pruitt at the penitentiary.

The Motion then had a section entitled ***An Evidentiary Hearing is Justified*** in which Pruitt argued there insufficient proof that Pruitt had sold crack cocaine to Shannon Tension and that the standard of proof was not met at the hearing and the hearing contained material misrepresentations of fact by Agent Merchant and Shannon Tension. In Paragraph 7, Pruitt argued how unusual, ridiculous, specious and self-serving was Tension's converting a drug buy into a "buy-bust". Then followed several Paragraphs, whose contents are reserved for the Propositions, but whose descriptive titles were as follows: 8. CI not Immediately Retrieved--all Drug Task Force agents/vehicles at Manipulated Buy-Bust. 9.False Report by CI that Ounce of Cocaine Still in Pruitt's Vehicle; 10. Drugs Readily Available to Shannon Tension, the CI.; 11. CI Falsely Swore under Oath at Revocation Hearing; 12. Take-Down was Time-consuming; 13. Dewayne Pruitt's Affidavit and That of Cecil Pruitt Show "Don't Have to Break it Down" Involves Taking Tobacco out of a Cigar; 14. Agent Merchant falsely Swore at the Hearing that Cocaine Residue was in the White Lincoln's Floorboard

Then followed a Section denominated as ***FACTUAL AND LEGAL ARGUMENTS*** under which Pruitt complained of the un-noticed revocation hearing, that the holding over Pruitt's head of a possible trial in Number 633-07 chilled his right to testify at the Revocation Hearing, ineffective counsel, that The Search and Seizure, including statements of Pruitt was in Violation of the 4th, 5th, 6th and 14th Amendments to the United States Constitution, a ***new complaint*** that there was No Preliminary Revocation Hearing nor Waiver and right to confrontation denied through failure to actually introduce the cocaine and reliance upon the Drug Lab Report and no testimony by the Forensic Expert.

Orders Denying PCCR

The initial order denying the PCCR revealed to Pruitt how the decision was made not to try the new charge, Number 633-07, but only pursue the Revocation:

> "On March 18, 2008, the Court, to best serve justice and judicial economy, held a Revocation Hearing on Cause No. 5 52-04, the petition for which had been filed on October 10,2007. Following the Court's decision on the revocation issue, the Court entered an Order of Nolle Prosequi in Cause No. 633-07 dismissing the charge of sale of cocaine within 1500 feet of a church. The Court and the District Attorney felt that the revocation of the suspended time in Cause No. 552-04 was suitable punishment for the Defendant in both cases."

The Court said at CP 97, RE 9, that the decision of the Court to grant the State's Motion to Nolle Prosequi "the charge in an effort to promote judicial economy is irrelevant as to the revocation."

At CP 98, RE 10, the Court limited its review of the challenges to the hearing as one of a claim against use of hearsay and denied the challenge to the evidence.

AS to the ineffective counsel claim where no suppression motion was filed, the Court said at CP 99, RE 12, that the Mississippi Rules of Evidence did not apply in revocation hearings.

As to no playing of the tape wire recording in open court, the Circuit Judge said Pruitt's own counsel had requested a listening in chambers by the judge. Generally as to ineffective counsel claims, the judge ruled that there was no showing of deficiency and no showing of prejudice.

In the Order Denying Reconsideration with new materials, the Judge denied the PCCR. Though Pruitt had raised many points and issues challenging the Post Release Revocation hearing and the underlying basis for it, the trial court concluded the only new claims were the following, as stated at CP 194, RE 15: (1) standard of proof was not met;(2) no notice of the revocation hearing, (3) without notice, Pruitt was not prepared to testify, (4) ineffective assistance of counsel(trial court did not reconsider same though additional substantial materials were submitted), (5) search and seizure, including statements made by Pruitt were in violation of the 4th, 5th, 6th and 14th Amendments to the United States Constitution, (6) no preliminary revocation hearing nor waiver thereof and (7) no introduction of the cocaine and only lab reports were used and thus denied right to confrontation.

As to the factual conclusion to deny the PCCR the judge at CP 196, RE 17, in his Order Denying the Reconsideration, wrote:

> After extensive testimony this Court found on the record:
>
> > [The testimony of Mr. Tension was documented by Mr. Merchant and verified in all significant portions by the wire that was garbled but essentially convinces the Court that there was a drug transaction that took place between Mr. Tension and an individual he referred to as "Freak" and identified here in court as the Defendant. The Court is convinced that Mr. Pruitt was involved in a drug sale, cocaine sale, on the evening of October 9 of 2007. And as such, it was a clear violation of his post-release supervision contract.(T65)
>
> The Petitioner has now presented evidence trying to disprove portions of the testimony of Karl Merchant and Shannon Tension. After reviewing all supplemented material provided by the Petitioner, this Court finds that there is sufficient evidence that the CI, Shannon Tension, was searched, wired, and given two marked twenty (20) dollar bills. He was

> dropped off in the vicinity of the sale, after which he had a conversation with Mr. Pruitt in his automobile and money was exchanged. The agents involved immediately stopped Mr. Pruitt and cocaine residue was found in the console of the automobile he was driving, along with the marked twenty (20) dollar bills that were given to the CI. The CI was picked up at the designated location and was in the possession of cocaine. As such, the burden of proof for the revocation was met, and based upon the facts presented the revocation of Petitioner's post-release supervision was appropriate.

Finally, as to the absence of the cocaine and use of a Lab report to prove same, the judge again stated that the Rules of Evidence did not apply.

SUMMARY OF ARGUMENT

In general, Pruitt complains that it was error for the trial judge not to hold an evidentiary hearing on his PCCR. The Affidavits and materials and documentation and critical analysis of the transcript of the revocation, under the decision rules on PCCR evidentiary hearings clearly justified an evidentiary hearing.

Cecil Junior Pruitt argues that he had no notice that he was to face a revocation hearing on the date for trial of the new cocaine sale indictment and he was unprepared and chilled to exercise his right to testify. This failure to provide notice was directly participated in by the trial judge in a ex parte decision with the District Attorney. This action by the judge caused him to become invested in revocation of Pruitt. The rulings during the hearing and the participating of the judge in resurrecting damaging testimony of the CI, Shannon Tension, help support this position. In fact, the judge went into the revocation under apparently a false impression that the State was totally declining to pursue the new indictment. However, by the end of the hearing, again showing partiality, the judge yielded to the State's position that the *nolle prosequi* order on the new indictment was without prejudice and the State could bring it up again.

Pruitt then focuses on one ruling of by the trial judge that it was admissible testimony from the drug enforcement agent that the residue material found on the floorboard of Pruitt's car when it was immediately stopped after the CI left Pruitt was cocaine was allowed despite a failure of such to be disclosed by the Discovery Packet materials. The judge stated that failure of the trial discovery materials to have the information was irrelevant, despite the fact that that was all the discovery the defense counsel had gotten from the State as to the evidence to be presented in either the trial or the

revocation hearing.

Next, Pruitt argues ineffective counsel and submitted voluminous materials that would have resulted in a different outcome. These materials and the actual performance of counsel all show that he was denied effective counsel at the hearing.

Next, Pruitt presents a persuasive array of facts to show that the Agents and the CI falsely misrepresented the truth at the hearing and that the sudden turn of events by the CI that a normal drug buy operation was turned into a "buy-bust" operation was motivated by the lack of credibility of the CI and that the CI lied about a larger block of crack cocaine in Pruitt's vehicle. Further the agents and the CI lied about the length of time between the CI's encounter with Pruitt and his retrieval by the Agents, thus allowing further opportunity for the CI to obtain drugs from others than Pruitt.

Next, Pruitt contends the Affidavits and materials show the CI falsely swore that Pruitt had sold the CI cocaine.

Next Pruitt recounts again how the judge was not impartial proven by rulings and material participation by the judge in resurrecting the CI's testimony.

Next Pruitt states the claim of no impartial hearing officer as an independent basis for reversal

Finally, Pruitt complains that he should have had a preliminary revocation hearing and that he was denied his right to confrontation when the cocaine was not introduced nor was their testimony from a forensic examiner nor any affidavit to support the lab test.

Pruitt respectfully submits that the judgment revoking his post release supervision should be reversed and rendered and in the alternative that it should be reversed and an evidentiary hearing ordered on all points raised by him.

ARGUMENT AND BRIEF

PROPOSITION ONE

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS AND A FAIR HEARING WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE HE SHOWS THAT HE WAS DENIED THE RIGHT TO TESTIFY BECAUSE HE HAD NO NOTICE THAT THE TRIAL OF THE NEW CHARGE WAS NOT TO GO FORTH BUT THAT THE COURT TIME WOULD BE USED FOR A REVOCATION OF POST RELEASE SUPERVISION AND THUS THE PROSPECT OF A TRIAL OF THE NEW CHARGE WAS HELD OVER HIS HEAD THROUGHOUT THE HEARING AND THE TRIAL JUDGE PARTICIPATED IN THIS DECISION WITH THE DISTRICT ATTORNEY AND THE JUDGE'S FAIRNESS WAS TAINTED.

Standard of Review

In **Kirksey v. State,** 728 So.2d 565, 567(Miss.,1999), the Court stated:

> In reviewing a trial court's decision to deny a petition for post conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous. State v. Tokman, 564 So.2d 1339, 1341 (Miss.1990).

In **Stewart v. State**, 938 So.2d 344, 345(Miss.App.,2006), the Court explained that "factual findings" are subject to "clearly erroneous" review, findings will be presumed and distinguished *de novo* review for questions of law:

> This Court will not disturb the trial court's factual findings, when reviewing a decision to deny a petition for post-conviction relief, unless they are found to be clearly erroneous; however, the applicable standard of review is de novo where questions of law are raised. **Brown v. State**, 731 So.2d 595, 598(¶ 6) (Miss.1999). "Furthermore, where the trial court summarily dismisses the post-conviction relief claim, it does not have an obligation to render factual findings and 'this Court will assume that the issue was decided consistent with the judgment and ... will not be disturbed on appeal unless manifestly wrong or clearly erroneous.' " **Culbert v. State,** 800 So.2d 546, 550(¶ 9) (Miss.Ct.App.2001) (quoting Par Indus., Inc. v. Target Container Co., 708 So.2d 44, 47(¶ 4) (Miss.1998)).

In **Par Industries, Inc. v. Target Container Co.,** 708 So.2d 44 46(Miss.,1998), explained "clearly erroneous" as protecting a circuit judge's ruling where his findings "are supported by substantial, credible, and reasonable evidence", and will not disturb them "on appeal unless manifestly wrong or clearly erroneous". In utilizing "clearly erroneous", " the reviewing court must examine the entire record and must accept, 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact.' **Cotton v. McConnell**, 435 So.2d 683,

685 (Miss.1983) (quoting **Culbreath v. Johnson,** 427 So.2d 705, 707-708 (Miss.1983)).

The Court, at 46, strongly acknowledge as to matters of law:

> "Notwithstanding our respect for and deference to the trial judge, on matters of law it is our job to get it right. That the trial judge may have come close is not good enough." Cooper, 587 So.2d at 239 (quoting UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., 525 So.2d 746, 754 (Miss.1987)).

Evidentiary Hearing

In **Turner v. State**, 590 So.2d 871, 873(Miss.,1991) the court gave a substantive standard for denying an evidentiary hearing and analogized to summary judgement, saying:

> We adhere to the principle that a post-conviction collateral relief petition which meets basic pleading requirements is sufficient to mandate an evidentiary hearing ***unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*** Myers v. State, 583 So.2d 174 (Miss.1991); Harris v. State, 578 So.2d 617, 619 (Miss.1991); Wright v. State, 577 So.2d 387, 389 (Miss.1991); Billiot v. State, 515 So.2d 1234, 1237 (Miss.1987).(Writer's emphasis)

> We have analogized the court's position when faced with a petition meeting pleading requirements with that of a court in a civil procedure considering a motion for summary judgment. Neal v. State, 525 So.2d 1279, 1281 (Miss.1987); Harris, 578 So.2d at 619; Wright, 577 So.2d at 389; Billiot, 515 So.2d at 1237. There is a distinction however. Our Post-Conviction Collateral Relief Act [Miss.Code Ann. § 99-39-1 et seq. (Supp.1992)] provides a procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on *875 direct appeal. Miss.Code Ann. § 99-39-11 provides that the trial court judge shall examine not only the motion, but also files, records, transcripts, and correspondence relating to the judgment under attack as well as prior proceedings in the case to determine whether movant is entitled to relief. Summary dismissal motions under Miss.R.Civ.P. 12(b)(6) restrict the court to the pleadings. If matters outside the pleadings are considered, the motion is treated as one for summary judgment and disposed of as provided in Miss.R.Civ.P. 56.

In **Billiot v. State**, 515 So.2d 1234, 1236(Miss.,1987)

The Court pointed out that in a post conviction petition the "procedural posture is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim. See Rule 12(b)(6), Miss.R.Civ.P." In **Simmons v. State**, 784 So.2d 985, 987(Miss.App.,2001), the Court wrote:

> Secondly, we must address the issue of when an evidentiary hearing is required ... In regards [sic] to evidentiary hearings, the Post Conviction Collateral Relief Act reads: (1) If the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require. Miss.Code Ann. § 99-39-19(1) (Rev.1994). Clearly, the trial court is not required to grant an evidentiary hearing on every petition it entertains. More specifically, the Act states: "If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings

> in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified." **Miss.Code Ann.** § 99-39-11(2) (Supp.1999).

McMillian v. State, 774 So.2d 454 (¶¶ 5-6) (Miss.Ct.App.2000).

In **Meeks v. State**, 781 So.2d 109, at 111(Miss. 2001), the Court explained "clearly erroneous" as applied to a finding of an "ultimate fact" as "when, although there is evidence to support it, the reviewing court on the entire evidence is left ***with the definite and firm conviction that a mistake has been made***".(writer's emphasis.)

Constitutional Standards for Revocation Hearings.

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) adopted the standards for a parole revocation established in the case of **Morrissey v. Brewer**, 408 U.S. 471,487, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484 (1972). Those standard are

> (a) written notice of the claimed violations; (b) disclosure of the evidence against him; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross examine adverse witnesses; (e) a 'neutral and detached' hearing body; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revocation.

No Notice of Revocation Instead of Trial,
Ex parte Decision between State and Trial Judge.

In particular as to notice of the revocation hearing, undersigned, after review of the jury payment roll, but especially in light of the Court's statements in Part 2 of its Order, states that Pruitt was ambushed as to the revocation hearing. The Court says: "The Court and the District Attorney felt that the revocation of the suspended time in Cause No. 552-04 was suitable punishment for the Defendant in both cases." It is respectfully submitted that this decision was made the day before the jury trial set for March 18, 2008, and the jury was told not to come in. Substantially troubling also is that this decision was made by the District Attorney and the sitting judge without participation by Defense Counsel. Admittedly Defense Counsel professes no memory of the Pruitt proceedings. The reason for the Nolle prosequi of Number 633-07 is that the CI could not be located. This failure to locate the CI may or may not be the reason, in light of the Court's statements in Part 2. If the decision was made by the District Attorney and the Court the day before the trial set for March 18, 2008 based upon a failure to obtain the CI, then the fact that the CI was located, supposedly after

9:00 A.M. on the 18th, raises serious doubt of whether the State per the Task Force made diligent efforts to locate him. Regardless , a failure to notice Defendant as to the hearing, whether the fault of the Court and the District Attorney, and whether a decision by the Task Force at the hearing to "wing it" with just Agent Merchant, does not diminish the right of the Defendant to notice of the hearing.

This apparent participation of the Court in the decision to cancel the trial and focus only on the revocation, with all due respect, has a natural tendency to commit the Court to the revocation without hearing evidence. This circumstance implicates the Defendant's right to a 'neutral and detached' hearing judge. The Mississippi Supreme Court adopted the protections of **Gagnon** and **Morrisey** in **Riley v. State,** 562 So.2d 1206 (Miss. 1990) , see also The circumstances in **Grayson v. State,** 648 So.2d 1129 (Miss. 1994). was that the case went to a mistrial because the jury was deadlocked and, immediately after, with just the evidence presented during trial, the judge in Grayson revoked Grayson without a hearing. There of course the reversal was due to no notice of the revocation hearing. Surely **Grayson** applies here as far as notice was denied.

Hobson's Choice on Testifying at Revocation

In **Simmons v. United States**, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, the Supreme Court, in the context of a case where an accused testified on a motion to suppress evidence in order to protect his Fourth Amendment rights but later discovered that the testimony would be used by the prosecution as 'a strong piece of evidence against him,' found it "intolerable that one constitutional right should have to be surrendered in order to assert another." The holding was that the protection of Defendant's Fourth Amendment rights did not warrant surrender or dilution of his Fifth Amendment rights.

The Court of Appeals for the District of Columbia Circuit in **Melson v. Sard**, 131 U.S.App.D.C. 102, 104, 402 F.2d 653, 655, held that a parolee who testifies on a hearing in revocation of his parole may give testimony that may not be used in a subsequent criminal trial in violation of the Self-Incrimination Clause of the Fifth Amendment and said: "If a parolee is not given the full and free ability to testify in his own behalf and present his case against revocation, his

right to a hearing before the Board would be meaningless. Furthermore, his Fifth Amendment rights must not be conditioned 'by the exaction of a price."

In the context of withholding federal probation revocation pending full defense of pending state charges, the Court in **Thigpen v. United States Parole Comm'n**, 707 F.2d 973, 978 (7th Cir.1983); Franklin, 642 F.2d at 763, recognized the "salutary policy of allowing a suspected parole violator to clear himself of state charges prior to his revocation hearing, thus avoiding the necessity of his choosing between pleading his right against self-incrimination, making admissions against his interest, or testifying falsely to exculpate himself."

Clearly Pruitt was chilled in his right to testify, and preparation of a factual challenge to the revocation by the sudden substitution of a revocation hearing for the trial he expected.

No Waiver of Right to Testify

Recently in the federal revocation context and pointedly dealing with the right to counsel, in **U.S. v. Hodges**, 460 F.3d 646

(5th Cir. 2006), the Court recounted the popular federal constitutional view that knowing and voluntary waivers of the rights in a revocation hearing and cited the application of **Morrissey** by the the First, Second, Seventh and Ninth Circuits have all agreed that waivers of the rights protected by Rule 32.1 must be knowing and voluntary, citing **Correa-Torres,** 326 F.3d at 22 ("waiver of [Rule 32.1] rights ... cannot be effective unless that waiver is made both knowingly and voluntarily"); **United States v. Pelensky**, 129 F.3d 63, 68 n. 9 (2d Cir.1997) ("a defendant's waiver must actually be knowing and voluntary"); **United States v. LeBlanc**, 175 F.3d 511, 515 (7th Cir.1999) (waiver must be "knowing and voluntary"); **United States v. Stocks**, 104 F.3d 308, 312 (9th Cir.), cert. denied, 522 U.S. 904, 118 S.Ct. 259, 139 L.Ed.2d 186 (1997) ("the Rule 32.1(b) rights at issue require the application to a waiver of the knowing, intelligent, and voluntary standard").

Here there was no waiver of the right to testify.

PROPOSITION TWO

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE THE TRIAL JUDGE RULED AT THE REVOCATION HEARING THAT HE HAD NO RIGHT TO DISCOVERY OF THE EVIDENCE AGAINST HIM, THIS IN PARTICULAR BEING EVIDENCE THAT A PURPORTED RESIDUE OF COCAINE WAS FOUND IN THE PRISONER'S VEHICLE, WHICH EVIDENCE IS CRITICAL IN SUPPORTING THE STORY OF THE CI'S ACCOUNT OF PURCHASING COCAINE FROM THE PRISONER ON POST RELEASE SUPERVISION.

The Crime lab submission and analysis report is found in Clerk's Papers at page 184-183, where items 001(rock like substance), 002(razor blade and rock like substance), 003(tissue paper and particles of rock like substance) and 004(console from Lincoln), are requested by Agent Merchant to be examined for controlled substances. At CP 187, the results of the analysis show, only 001 was cocaine, this from the console. Items numbered 002 and 003 were negative.

As stated elsewhere herein, Shannon Tension, though apparently Pruitt was supposed to be the person targeted by Tension, once he was dropped off by the Agents, began trying to buy drugs. First, he pointedly asked the person at the stop sign whether he had any "green" for sale. The Agents must have heard this. Next they hear other attempts to buy drugs. They must hear that Tension has made a phone call to someone, and that person says he doesn't have any. Finally Pruitt comes into the picture; Tension approaches his car window and there is conversation. Tension states separately to the Agents over the wire that he has bought crack and then, factually false, says Pruitt has a "block" ounce of crack. The Agents probably are mystified by all the arguably shenanigans of Tension and take Tension's bait to turn a regular undercover buy into a "buy-bust". Thus it is critical, under all these circumstances, to find cocaine in Pruitt's vehicle. The immediate seizure of Pruitt's vehicle and him and the ravenous search occurs. Having now baited the Agents away from his retrieval, Tension is free to get dope somewhere else.

When Agent Merchant testified he had found found the residue cocaine in the floorboard, Attorney Jones objected to the failure of his trial discovery packet to show a positive test of the residue of cocaine, but the Court overruled the objection differentiating that because it wasn't in the trial discovery packet didn't matter since this was a revocation hearing. (T 18) This ruling clearly contradicts the protections of **Morrissey v. Brewer**.

PROPOSITION THREE

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE HE SHOWS THAT HE DID NOT HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COUNSEL DID NOT MOVE TO SUPPRESS EVIDENCE SEIZED FROM THE PRISONER AND STATEMENTS PURPORTEDLY MADE BY THE PRISONER BASED UPON NO PROBABLE CAUSE ARREST AND NO MIRANDA WARNING AND CONSENT OBTAINED BY DECEPTION; DID NOT PRODUCE DOCUMENTARY VEHICLE TITLE EVIDENCE THAT THE PRISONER HAD JUST PURCHASED THE VEHICLE THE DAY BEFORE; DID NOT HAVE PRISONER TESTIFY; DID NOT CROSS EXAMINATION CI ON CONTRADICTORY MOTIVATIONS; ON THE CI TRYING TO BUY COCAINE OR DRUGS FROM OTHERS BEFORE CONTACT WITH THE PRISONER; DID NOT POINT OUT CONTRADICTORY DRUG AGENT STATEMENTS OF TIME CI HAD BETWEEN PRISONER ENCOUNTER AND HANDING DRUGS TO AGENTS; CI'S OPPORTUNITIES TO BUY ELSEWHERE; DID NOT POINT OUT THAT THE RESIDUE SUBSTANCE PER THE LAB REPORT WAS NEGATIVE FOR COCAINE; DID NOT SUBMIT VEHICLE TITLE DOCUMENTATION THAT PRISONER HAD THE WHITE LINCOLN ONLY ONE DAY BEFORE THE PURPORTED SALE; AND WHERE COUNSEL DID NOT PREPARE FOR THE HEARING BY AT LEAST KNOWING WHETHER PRISONER SHOULD TESTIFY AND BY INTRODUCING WIRE TAPE RECORDING OF CI'S ENCOUNTER WITH THE PRISONER BUT THE PRISONER HAD NEVER LISTENED TO THE TAPE.

Standard of Review

Pruitt submits that this issue, since the PCCR was dismissed at the pleading state, tantamount to review of a Rule 12(b)(6), Miss.R.Civ.P., dismissal, then *de novo* review is mandated. **Turner v. State**, supra states that an evidentiary hearing is required "***unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief***" analogizing it to review of a grant of a Defendant's motion for summary judgment.

Thus in **Partin v. North Mississippi Medical Center, Inc.**, 929 So.2d 924, 928(Miss.App.,2005) citing **Williamson ex rel. Williamson v. Keith**, 786 So.2d 390, 393(¶ 10) (Miss.2001) (quoting **Heigle v. Heigle**, 771 So.2d 341, 345(¶ 8) (Miss.2000), the Court of Appeals stated:

> Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the *929 motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version

of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt.

The Law of Ineffective Counsel

In **McMillian v. State**, 774 So.2d 454, 456(Miss.App.,2000) the court said:

McMillian argues several instances of actions or inactions on the part of his counsel which he asserts amount to ineffective assistance of counsel. The two-part test announced in **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Mississippi Supreme Court in **Stringer v. State**, 454 So.2d 468, 476 (Miss.1984), is our standard of review for resolving whether counsel was effective. Under Strickland, McMillian must demonstrate 1) that counsel's performance was deficient, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Stringer, 454 So.2d at 476. As a legal construct, it is presumed "that trial counsel's conduct is within the wide range of reasonable conduct and that decisions made by counsel are strategic." Edwards v. State, 615 So.2d 590, 596 (Miss.1993). McMillian bears the burden of proving that both parts have been met. **Leatherwood v. State,** 473 So.2d 964, 968 (Miss.1985). This test is also reviewed under the strong but rebuttable presumption that an attorney is competent and his conduct is reasonable. Vielee v. State, 653 So.2d 920, 922 (Miss.1995). Application of the Strickland test is applied with deference to counsel's performance, considering the totality of the circumstances, to determine whether counsel's actions were both deficient and prejudicial. Conner v. State, 684 So.2d 608, 610 (Miss.1996).

In **Coleman v. State**, 971 So.2d 637, 643(Miss.App.,2007)the Court spoke:

To obtain an evidentiary hearing in the lower court on the merits of an ineffective assistance of counsel claim, a defendant must state "a claim prima facie" in his application to the court. Read v. State, 430 So.2d 832, 841 (Miss.1983). To get a hearing "he must allege ... with specificity and detail" that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Perkins v. State, 487 So.2d 791, 793 (Miss.1986); Knox v. State, 502 So.2d 672, 676 (Miss.1987).

Materials Presented in this PCCR

From the quantity of information and circumstances revealed in the filing of the Amended PCCR, and the supplementary materials and especially in light of Pruitt's affidavit that his attorney visited him only once or twice in the jail, never played the purported cocaine sale tape of Tension's actions and never discussed with Pruitt what explanation he had for the so-called "buy-money" being in his console, all show with sufficient particularity ineffective counsel instances that required an evidentiary hearing.

Further, the Court is respectfully requested to review the Affidavit of Pruitt with *Complaints of Factual Events, etc.* followed by the *Transcript Analysis and Complaints of Counsel and*

Proceedings(Clerk's Papers 123-141, Record Excerpts 51-69).

This analysis shows that Pruitt's counsel did not meet the standard of counsel in Strickland v. Washington, 466 U. S. 668, 669(1984). The citations to Hill v. Lockhart, 474 U. S. at 56, 106. S. Ct. at 369, 88 L. Ed. 2d at 208, as it quotes from McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763(1970) are not justified under the above analysis of the Transcript and especially so, when compared with all the methods and opportunities for destruction of the case presented against Pruitt as revealed in the Affidavits and other supplemental materials. The level of preparation of Pruitt's counsel is shown by the focus of his questions and is totally lacking when compared to how he could have confronted Agent Merchant and Shannon Tension.

Facts from the Affidavit and materials

Under the rules of PCCR, on the way to determining whether an evidentiary hearing was called for, the trial judge was duty bound to review all the Affidavits, documents and materials. This material contained a critical analysis of the Transcript of the revocation hearing.

Contradictions of Agent Merchant's Testimony that Shannon Tension was Immediately retrieved after Encounter with Pruitt

(A) Three Drug Task Force vehicles were involved in the "buy". All three participated in the Pruitt take-down at his mother's house, Addy Dunnigan's, within nearly sight of the Valley Street encounter between the CI and Pruitt. The Affidavit of Pruitt has him pulling over at his Mother's house because of Merchant's vehicle barreling down 33rd Avenue Donna McElroy in her Affidavit has one vehicle(Merchant's) coming from the North and two other Task Force Vehicles coming up from the South on 33rd Avenue and stopping in front of her Mother's house.

(B) However, Agent Merchant in the 6-page account of the Action(first six pages of the Discovery Packet excerpts attached) first in recounting the drop off of the CI says at page 4, number 3, "The CS was taken by Agents Merchant, Greg Lea and Daniel Boyd and dropped off in the area of 30th Avenue by 8th Street..."(Incidentally this comports with the CI traveling South on 30th Avenue to the stop sign on 7th Street and turning right.) At Number 7 on page 4, it says "Agent Merchant, Lea and Boyd got behind Cecil Pruitt where he was parked close to his residence..."

(C) Further as to vehicles and accounts of contact with the CI, apparently after Pruitt was indicted, the first set of discovery items did not account for retrieval of the CI. Then Agents Joe

White and Jesse Fairchild wrote separate accounts of the retrieval, collection of the crack cocaine from the CI and taking CI's handwritten statement.. Agent White said it was his and Fairchild's duty to both monitor the CI via the wire and retrieve him. Agent White recounts that when he heard the CI was at the pickup location, he and Fairchild then retrieved him. White further recounts that, once they got back to the Task Force office, Agent Fairchild ***then*** wrote the CI's statement in the CI's own words and the CI signed it and ***later*** Merchant was given the crack cocaine. However, Agent Jesse Fairchild writes that Merchant was first given the crack cocaine, it appearing from that statement that Merchant had already returned to the Task Force Office before White and Fairchild and "then" the CI's statement was taken

(D) Two further details from the Discovery Packet are of critical interest as to contact with the CI. First contradicting Merchant's 6-page account, the "EMDTF Controlled Substance Purchase Log Sheet", says that Agent Lea "equipped the CI with the listening device". But at page 2 of Merchant's 6-page account in number 2, Merchant says he equipped the CI with the wire. The author of the Purchase Log Sheet is not stated, but the writing is distinctly different from Merchant's on Pruitt's Miranda Waiver completed by Agent Merchant, but highly similar to Agent Fairchild's on his handwriting of the CI's statement. Why is the retrieval time of the CI only written "6:__". This suggests that the time of the pick up of the CI is unknown. It does call into doubt, under all the affidavits, whether Merchant's testified truthfully that the retrieval agents were picking up the CI as Merchant and others stopped and searched Cecil Pruitt.

(E) Returning a moment to the tape of the Action, in the very end the siren and voice of Merchant are heard on the tape. None other's are heard. Some doubt must be raised whether Agents White and Fairchild were truly monitoring the CI"s wire.

False Report by CI that
Ounce of Cocaine Still in Pruitt's Vehicle.

In General

Agent Merchant, by admitting on cross examination that the agents had Pruitt in constant view from the time of Tension leaving the Pruitt vehicle until they stopped Pruitt(T. 39, CP 64), proves Tension lied about Pruitt having an ounce of cocaine. Now, we know from the Lab Report that there was cocaine in the console, but we also know from these Materials that the Title Certificate

documents that Pruitt only purchased the car the day before. Any use of the console cocaine to verify the Tension declaration that Pruitt had more cocaine is not worthy of belief.

Agent Merchant misrepresented the actual truth when he said the retrieval Agents immediately picked up Tension. He laid the plans to say this by cutting off the tape recording of Tension's wire, thus eliminating any contradictory tape recording that shown a substantial delay in Tension's retrieval. The Affidavits of the lay witnesses at the Addy Pruitt home where the "take-down" occurred show that all Agents collected there. In in the form entitled *Controlled Substance Purchase Log Sheet* denoted as "Left Target Location", where the time of CI retrieval would be entered, is incomplete, containing only "6:_ _". This shows that Tension was not immediately retrieved and confirms that all agents went to the Pruitt vehicle stop. Their account, along with Pruitt's, of the intensity of the search, both at Addy's home and later at the Drug Task Force Office, all show a material felt need of the Agents to confirm the ounce of crack cocaine, to avoid proof that Tension lied about the very crack buy itself. Tension on the stand said he was to buy from anyone, but the Agent Merchant said Pruitt was targeted. This contradicts Tension efforts before the Pruitt encounter to buy drugs from anyone. Alternatively, it shows that Tension was framing Pruitt, knowing Pruitt would come to get the money Tension owed him and thus Tension by repaying with "buy money", had some evidence on Pruitt and just had to make the agents get that evidence and all the rest was left to Tension's lying. Strangely, Tension said he was paid before the buy, and sadly, the Judge perceiving how this supported a pre-Pruitt encounter buy, saw to it that it was cleared up which resulted in Tension saying he was paid after the undercover buy.

(A) The photographs show you can stand in one point and photograph the brown trim house, across from which the Pruitt/CI contact occurred, and then pivot and get a shot of Addy Dunnigan's house. The distance is inappreciable and the Agents were immediate in seizing Pruitt and his vehicle.

(B) The white Lincoln was ravenously searched, both at the take-down and later at the Drug Task Force Office. The Affidavit of Donna McElroy , who circled around the Task Force Office proves this. Agent Merchant knew he had to find the crack cocaine "cookie". He didn't believe Shannon Tension, who had started trying to buy from anyone . Merchant well knew this since

Tension's wire transmissions are fed into his vehicle. Recall on the tape, Merchant is heard in his vehicle as the stop of Pruitt takes place.

(C) About the "take-down" of Pruitt, we know it was immediately after he drove off Valley onto 33rd. Though Merchant testified the other agents were retrieving the CI while he was seizing Pruitt, the tape and affidavits prove conclusively otherwise. Substantively important is Merchant's testimony that there was hardly any time lapse between the CI's voice on the tape inquiring where the Agents were and the CI's being retrieved, is belied by the events at Addy Dunnigan's house. All Agents came, three vehicles. Pruitt was seized, an infant female was stripped searched and her legs spread apart by Agent Merchant. This created immense anger in the Dunnigan family. Merchant used racial slurs. The scene was at the boiling point and thus no agents could be spared to retrieve the CI. The danger to the agents precipitated by this would have required all agents, all vehicles to stay at the scene. Why there is no other calls from the CI is because the tape of the wire was controlled by Merchant. It was cut off probably as Merchant exited his vehicle.

Drugs Readily Available to Shannon Tension, the CI.

(A) Shannon Tension, if he had been used for other drug buys in and along Valley Street or at the old Chantilly Arms apartments at the southwest corner of 30th Avenue and 7th Street would have known the "drop off" point was the Used Car Lot, so, he could have stashed cocaine there, thus the need to lure the Agents away from the "pick up" point. Agent Merchant at the hearing said he didn't recall if the CI had made other buys. Surely none were made after the Pruitt encounter, so they would have been made before. Just as easily he could have gotten crack from his relatives across the street from the Brown Trim house. There was where he borrowed the phone. Likewise he could have gotten cocaine as he went and returned by accessing drug dealers at the Chantilly Arms apartments. Recall, the Affidavit of Donna Marie McElroy has Shannon Tension back in the neighborhood within an hour and a half, ostensibly, at least, to pay for the cocaine he was given which he said he had bought from Pruitt.

(B) Shannon Tension on the Tape says he is at the stop sign on 7th Street(time 1:27 on Tape) and there engages in drug buy conversation with "Slim"(time 1:43) and right after Tension rejects Slim's offer to take him to the "green", at 2:12 , the CI says on the tape "I'm taking a right on 7th

Street." At 3:10 on the tape, Tension is first asking about "Freak".

The Petitioner submits that Tension comes down 30th Avenue to 7th, not down 31st Avenue to 7th. There are stop signs on these two avenues as they cross 7th. To turn right on 7th Street, Tension would have been at the stop sign on 30th and 7th, then turned right and gone to 31st Avenue then left and then right onto Valley. There is no stop sign for 30th or 31st Avenues to as they intersect Valley Street.. The Discovery Packet excerpts numbered pages 1 through 6 in the upper right hand corner, at page 4, number 3, states that Tension was "dropped off in the area of 30th Avenue by 8th Street in the Used Car Lot next to Wendy's..."

The street photographs, submitted herewith, show stop signs for traffic going south and coming to 7th Street both on 30th and 31st Avenues. To turn right on 7th Street from 30th Avenue puts Tension going right by the old Chantilly Arms apartments. It is unlikely, for security/success that the CI would have been dropped off by known Drug Task Force vehicles then immediately walked directly to Valley Street. It is more likely that he was dropped off and proceeded to the Welbourn Oil Change, went down 30th Avenue, turned right at the stop sign at 7th then turned left on 31st and then turned right on Valley.

(C) Petitioner must add that CI remarked on tape "he's not got any." This could be reference to Pruitt. Also heard on the tape is a voice saying "here it is". This could have been crack being ***given*** to the CI by a relative bystander or someone else who did not require to be paid. This would free up the buy money to be used to re-pay Pruitt from the money Tension had borrowed about a month before.

CI Falsely Swore under Oath at Revocation Hearing.

In addition to saying Pruitt sold him crack cocaine, Shannon Tension lied about there being any cocaine, "an ounce" in Pruitt's vehicle. He lied about not knowing Pruitt; they had known each other since childhood. He lied about not being an informant working off a charge himself when he testified he was being paid. Incidentally, there is no statement by the Task Force in the Discovery Packet that an informant was paid. It is submitted that he lied about Pruitt's as the only case he worked for the Drug Task force. He also lied about having gotten bad drugs from Pruitt and since Pruitt would not make up for it, he was motivated by vengeance. His testimony, even as well as that

of Agent Merchant's, was that he had named others from which he could buy, but they were hard to access. Armstrong's unavailable affidavit shows Tension was arrested for "pills and powder."

Take-Down was Time-consuming/Tension Unattended.

On page 1 of 12 of *Complaints of Factual Events, Etc.* attached to Cecil Pruitt's Affidavit, at number 5, is a detailed account of the events transpiring after the Agents stopped Pruitt. All the time, Shannon Tension is unattended and able to do what he must to obtain cocaine to give the Agents and say it was brought from Pruitt. The Affidavits of Donna McElroy also show time-consuming activity at the take-down, further Ms Pruitt contradicts Petitioner's recollection that one of the Agent's vehicles left. Ms Pruitt's account is more reliable since she wasn't in the milieu of the search and seizure.

Agent Merchant falsely Swore at the Hearing that Cocaine Residue was in the White Lincoln's Floorboard.

At the Revocation Hearing, Attorney Jones made much of the fact that he had not been given evidence of cocaine residue from Pruitt's vehicle floorboard. The cocaine residue was critical evidence, it tidied up the CI's tale that Pruitt had used a nail to break off crack from a crack cocaine ounce. In the Discovery Packet Excerpts, there is the Drug Lab Evidence submission by Agent Gartel Willis and the Lab's analysis. The only cocaine proof from the White Lincoln was from within the console, despite the fact that two other sizeable sets of "evidence" were submitted for drug testing, "razor blade and rock like substance" and "tissue paper and particles of a rock like substance". A microscopic view of the texture of the crumbs(crack is cooked with another substance and part of it should have similar content characteristics) from the console and the crack cocaine the CI handed the Agents retrieving him, much as biscuits cooked from the same batter, would disprove or prove Shannon Tension's tale.

Pruitt's Counsel Allows Tape to be Heard in Chambers/ Pruitt has Never Heard the Tape

At CP 82-83, the trial judge recounts his listening to the tape. He said:

> There were some things that the Court was able to perceive clearly. The bulk of the tape was somewhat unintelligible. The essence of the matter was that it was apparent to the Court that there was apparently some confrontation between Mr. Tension and an individual who he called "Freak." And that after that confrontation, Mr. Tension reported that it --the

deal was complete, he had some dope in his hand, and that "Freak" had left and was in a white Lincoln Automobile. He did say clearly that he felt like he had plenty of other dope with him, and shortly thereafter he said he was at the designated pickup place and he was asking for the officers. Shortly thereafter, the tape did end.

The Affidavits of Pruitt and Dewayne Pruitt and recount the scene as Tension re-paying Pruitt for a loan made a few weeks before. The Affidavits show Tension was asking for a cigar with which to roll up marijuana. Pruitt's affidavit reveals that the **"you don't have to break it up for me",** was breaking up of a cigar within whose wrapper marijuana is rolled to smoke. This is supported by the Affidavit of Dewayne Pruitt, who was standing on the porch looking down at Tension at Pruitt's car window. This supports the conclusion that Tension had marijuana and only got a cigar from Pruitt to "roll a blunt", as they say.

There was no testimony presented by Revocation Counsel to explain the "buy money" and the "you don't have to break it up". The Tape should not have been introduced by Defense Counsel, unless Pruitt was going to testify and the Tape critically and materially contradicted. There is grave likelihood, on the Tape, that Tension got crack cocaine from someone other than Pruitt. One Affidavit shows that Tension had a relative in the neighborhood and she was across the Street with Tension.

By way of conclusion, the Transcript analysis itself shows how sparse was the "defense" presented by Revocation Hearing Counsel. Significantly, he could have presented documentation that Pruitt had purchased the white Lincoln just the day before and thereby seriously drawn into question the residue cocaine, falsely represented by Agent Merchant to have been on the floorboard, and actually the residue found within the Lincoln's console.

Revocation Counsel could have had Pruitt testify successfully to raise serious doubts about the testimony of Agent Merchant, Shannon Tension and the tape of the wire(had Pruitt's counsel ever played it to him). Pruitt and Dewayne Pruitt could have testified as to the reason for the two $20.00 bills, repayment of the $80.00 loaned to Tension a few weeks before by Pruitt.

An evidentiary hearing should have been held on the PCCR. The Exhibits and Materials so show.

PROPOSITION FOUR

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE HE SHOWS THAT THE CONFIDENTIAL INFORMANT LIED ABOUT THE PRISONER SELLING THE CI COCAINE, THE CI WAS ATTEMPTING TO PURCHASE DRUGS BEFORE ENCOUNTERING THE PRISONER, AND THE CI HAD AMPLE OPPORTUNITY TO OBTAIN COCAINE ELSEWHERE THAN THE PRISONER AND THERE WERE CONFLICTING ACCOUNTS FOR THE MOTIVATION OF THE CI AND CONFLICTING ACCOUNTS SUPPORTED BY DOCUMENTATION BY THE BETWEEN THE TESTIFYING AGENT AND THOSE NON-TESTIFYING AGENTS AS TO THE LENGTH OF TIME THE CI WAS OUT OF CONTROL AFTER THE ALLEGED PURCHASE.

The factual underpinnings of this issue are explored above, but it is raised separately because it shows that the hearing was corrupted by false swearing and an evidentiary hearing is required under the circumstances.

PROPOSITION FIVE

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE HE SHOWS THAT THE CONFIDENTIAL INFORMANT'S CREDIBILITY DEPENDED UPON THE OFFICERS IMMEDIATELY SEIZING THE PRISONER, THE ALLEGED "BUY MONEY" AND THE "OVER OUNCE OF COCAINE" FROM WHICH THE CI SAID THE PRISONER BROKE OFF THE SMALLER PIECE OF CRACK COCAINE TO SELL THE CI.

This Issue is raised separately to focus on the credibility of the CI, Shannon Tension.

Firstly, why was a normal undercover "buy" of drugs turned into a "buy-bust" at the call of the CI. The CI had bought no drugs from Pruitt. If the CI only had two $20.00 bills then why does he start his trek to Valley Street and continue it there by wanting to buy any kind of drugs from anyone. The CI turned the "buy" into a take-down of Pruitt for the sole purpose of finding the two $20.00 bills, money the CI had re-paid Pruitt for a loan of $80.00 about a month before.

The lure the CI used with the Agents to get them away from the return "CI pick-up" point and to have them seize the only evidence of a drug sale by Pruitt was one ounce of crack cocaine, the CI, ridiculously, said Pruitt had broken off with a nail from the crack cocaine "cookie". "Ridiculously" is valid for crack is sold by the gram and such is weighed and measured not on the street, but in the confines of a secure location. Furthermore, no one is going to expose an ounce of

crack cocaine to a person hanging in the car window , because theft of crack cocaine is not the subject of a police report complaint.

PROPOSITION SIX

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN HE IS DENIED AN EVIDENTIARY HEARING ON A POST CONVICTION COLLATERAL RELIEF PETITION WHERE HE SHOWS THAT THE CONFIDENTIAL INFORMANT HAD LIED ABOUT WHAT HAPPENED AT HIS ENCOUNTER WITH THE PRISONER AT THE PRISONER'S AUTOMOBILE WHERE THE AFFIDAVITS SHOW THAT ANY MONEY RECEIVED FROM THE CI WAS REPAYMENT OF A LOAN TO THE CI FROM THE PRISONER.

This issue is raised separately, from underneath the umbrella of ineffective counsel, because it shows that the new materials extraordinarily contradict the testimony of Shannon Tension, and correct the absence of Pruitt's testimony. Pruitt requests the Court to incorporate factually all previous revelations and arguments on the facts.

Specifically at CP 131, RE 59, Pruitt swore to the reason for the two $20.00 bills from Tension to be in Lincoln. Shannon Tension owed Pruitt money and partially paid him back on Valley on October 7. Back in late August or early September, 2007, Shannon was working on a roofing job around the corner from Cecil's sister house on 2711 -11th street. He asked Pruitt for $100.00 and pruitt said no, but he only loaned him $80.00. Shannon was in Pruitt's car and left his roofing tools and Pruitt drove around the block corner and Shannon was on the roof and told Pruitt to throw them in the yard.

Dewayne Pruitt corroborated the loan. In his affidavit, explained that about a month before, he was with Pruitt, when Shannon Tension was working on a roofing job and had borrowed $80.00 from Pruitt. Pruitt explained that, after he had loaned Pruitt the money, he discovered Tension's roofing tools were in his car and had driven around the block to the house where Tension was working, a house near a relative of Pruitt's, thus the reason Pruitt was in the vicinity of Tension working on the roof.

Dewayne Pruitt's Affidavit and That of Cecil Pruitt Show "Don't Have to Break it Down" Involves Taking Tobacco out of a Cigar

No doubt such language is tied to emptying tobacco from a cigar to use the wrapping to fill with marijuana and then to smoke. Cecil Pruitt was in front of the house where Dewayne Pruitt("Donte") was. Revealing also is that Shannon Tension, after getting nothing but Pruitt's phone number from Donte, went across the street and there borrowed a phone. Over there was Tension's niece, Roshanna Cole. Drugs are rampant in this area.. Tension had been asking for "green", marijuana, and by the time Pruitt drove through, Tension could have had some and needed a cigar emptied.

PROPOSITION SEVEN

A PRISONER IS DENIED A FAIR HEARING, FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW IN A REVOCATION HEARING WHERE THE JUDGE RULES THERE IS NO RIGHT TO DISCOVERY OF THE EVIDENCE AGAINST THE PRISONER HAS NO 4TH AMENDMENT PROTECTIONS AND ACTIVELY PARTICIPATES IN FAVORABLY RESURRECTING THE CI WITNESS, UNDER THE CIRCUMSTANCES THAT THE JUDGE HAS PARTICIPATED IN A DECISION TO FOREGO TRIAL ON THE PRIMARY CHARGE AND ONLY HOLD THE REVOCATION HEARING AND THIS DECISION WAS NOT COMMUNICATED TO THE PRISONER.

Here Pruitt combines the judge's *ex parte* participation in substituting the revocation for the trial and Pruitt not having any notice of the revocation hearing, the erroneous discovery ruling, the no search and seizure rights ruling and the judge's resurrection of Shannon Tension as to other money he had to purchase drugs during his time away from the Agents.

Judge Resurrects Witness on Material Point

It was extraordinarily significant to the State's case that Shannon Tension have no other money on him than the two $20.00 bills while he was away from the agents. This because he could have bought drugs from another and, as Pruitt has shown now, repaid him the money Pruitt had loaned him. The Tape showed he had attempted to buy drugs before he got there and was affirmatively trying to buy drugs, including marijuana before the encounter with Pruitt.

Shannon, at T 53, asked whether he would not have been paid had he returned without any drugs, Tension said "Nope, because they already paid me up front." When asked whether he was paid if he produced drugs or not, Tension said "Yes." But asked when did they pay him, Tension,

said "When everything was over with. We already had made a contract. We had signed the contract and everything. When everything is over with, you will get your money. But they paid me up front." (T53.) Attorney Jones asked "when up front" and Tension said it "been about a minute ago." The Court told Tension he could just say he didn't remember. Attorney Jones asked was that the same day as the operation and Tension said yes. Confronted that he said he was paid before the operation, Tension said, (as the judge had suggested) that he could not remember. He said he believed Jones knew what he was saying that "they did pay me that same day." (T54) The Court then asked whether Tension had any money other than the $40.00 when he met with Mr. Pruitt. Tension said again, as he had said earlier " No, Mr. Judge, I only had the two $40(sic), what they had made copies on. That's the only money I had in my pocket when I went and seen Cecil Pruitt." (T 54)

Fairness of the Judge

In **Hubbard v. State**, 919 So.2d 1022, 1026-1027(Miss.App.,2005) Hubbard alleged the judge essentially acted in a prosecutorial capacity when, after probation officer Clark made report of violations to the judge, the judge specified the probation violations that Clark should allege against Hubbard. The court, in that Hubbard's claim was couched in "recusal" stated:

> The case of Dodson v. Singing River Hospital Sys., 839 So.2d 530, 532-33 (¶¶ 10-13) (Miss.2003) discussed the standard by which this Court reviews a claim that a judge should have disqualified himself under Canon 3. There is a presumption that a judge was qualified and unbiased. Id. at 533 (¶ 10). A judge must disqualify himself if "a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." Collins v. Joshi, 611 So.2d 898, 901 (Miss.1992) (citations omitted). "[R]ecusal is required when the evidence produces a reasonable doubt as to the judge's impartiality." Dodson, 839 So.2d at 533 (¶ 13). In determining the question of recusal pursuant to Canon 3, "the propriety of the judge's sitting is to be decided by the judge and is subject to review only in case of manifest abuse of discretion." Collins, 611 So.2d at 901 (citations omitted).

Search and Seizure Rights of Probationer

In **Pennsylvania Bd. of Probation and Parole v. Scott**,524 U.S. 357, 118 S.Ct. 2014,(1998), in a parolee search by a parole officer, the Court refused to extend the exclusionary rule to parolees.

In **U.S. v. Knights**, 534 U.S. 112, 122 S.Ct. 587(2001), the Court examined the import of a provision in Knights' probation conditions that he would consent to a search by either a probation officer or any law enforcement officer. It should be said here that the Order Accepting Guilty Plea

and Sentencing in this conviction, number 552-04 found in Clerk's Papers at page 213, does not contain any such waiver of probable cause in searches by either probation officer nor regular law enforcement. In **Knights** a regular detective searched without probable cause and the Court found it did not require suppression of the evidence in a new criminal charges.

In **U.S. v. LeBlanc**, 490 F.3d 361(5th Cir. 2007), the court acknowledge the "special needs" exception for probation officers contained within the probation conditions, that the U. S. Supreme Court had acknowledged in **Griffin v. Wisconsin**, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).

In **Robinson v. State**, 312 So.2d 15, 18 (Miss.1975), the Mississippi Supreme Court concluded that "courts generally hold that although an inmate is released on parole, the parole authorities may subject him, his home and his effects, to inspection and search as may seem advisable to them." Pruitt submits that this does not allow him to be searched in violation of the 4th Amendment to the U. S. Constitution, since there was no such condition in his original sentencing order on this case.

Pruitt's factual account of the stop, search, seizure and his statements **(CP 130, RE 58)**

Pruitt drove from the house on the south side of Valley, only one house from the corner house on Valley and 33rd, where his folks lived, and turned the corner and slowed down in the middle of the road to converse with some relatives there. He looked behind him and a SUV was barreling down south on 33rd avenue toward him and he then just pulled a few feet to in front of his Mother's house. There were two Task Force vehicles barreling up 33rd Avenue and he was surrounded. Merchant got him out of the driver's seat with gun drawn, etc. and took him to the back of the Lincoln. Since relatives were getting aggravated from the treatment and cursing by agent Merchant, Pruitt was asked to calm them down. Merchant says: "Just want to talk to him right now; back up, it's all right." They did calm down, but later when the infant is taken by Merchant from his mother Ashley's arms who were sitting in the back seat, the family members get excited.

At least the following two relatives were present: Donna McElroy and Teresa Dunnigan(now married). Pruitt's mother was also there. At the house where the CI was, the tape reveals there were

two people known by Pruitt: Donte Pruitt and Lakesha Armstrong. The house address was 3127 Valley Street.

Pruitt is required to remove his artificial leg and Merchant searches it, and he puts it back on and this takes about 5 minutes. The agents search the car, find what they say is buy money and then huddle up. Considerable time has passed, then one Agent leaves in a vehicle. Merchant at first has told Pruitt that he got a call that Pruitt had drugs in the car. There never is any accusation of selling drugs until down at the Task Force office at the end of Pruitt's being interviewed. Merchant had though asked there when was the last time Pruitt sold drugs and he talked about a small mount of marijuana. Pruitt is not give his Miranda warnings until he is told he is being arrested for possession of cocaine and sell of cocaine. Prior to that time, Pruitt has denied selling cocaine.

While at the mother's house, a "suck" truck wrecker arrives, Pruitt still there and a marked Police Cars arrive and he is taken in one of them following or going with the wrecker to the Task Force Office.

Down at the Task Force, Merchant again searches Pruitt and he takes off his artificial leg again and there is some kind of tissue paper that Merchant thinks is drugs. After all the efforts by questions and searches and at the end of his investigation of Pruitt, is when Merchant reads Miranda and says Pruitt is arrested for sale and possession of drugs. He may had revealed some crumbs of cocaine in the car to Pruitt as basis for possession charge.

Agent Merchant's Revocation Testimony Relevant to Search/Seizure/Miranda

Agent Merchant testified at the hearing that Pruitt was arrested for sale of cocaine at the search of the Lincoln when Pruitt said he didn't have any cocaine. Transcript page 16.

There should now be no doubt that the stop, seizure and search of Pruitt's white Lincoln and Pruitt was not done as incident to an arrest for sale of cocaine. Pruitt was stopped and consequently seized and searched from the now fairly clear statement over the wire from Shannon Tension that he had the one ounce cocaine "cookie". There is no accusation of cocaine sale by Agent Merchant until after the interrogation of Pruitt at the Task Force Office.

Oh there is great need, in Agent Merchant's hindsight, to claim that he arrested Pruitt at his mother's house and accused him there of sale of cocaine, and that is legally and factually because

Pruitt's consenting to search of his vehicle without knowledge of an accusation of cocaine sale so unconstitutionally corrupts his consent, that the search's fruits of the buy money, and Pruitt's statements of that money being from gambling are totally inadmissible under the 4th, 5th and 14th Amendments to the United States Constitution. There is little doubt that Pruitt was "in custody" at the Dunnigan house. The nature of the contact with Pruitt there by the Task Force caused such to be custodial and any statements involuntary, regardless of the absence of an accusation and actual arrest. In **Oregon v. Elstad,** 470 U.S. 298, at 318, 105 S.Ct. 1285(1985) the Supreme Court said: "The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements".

Furthermore, it is clear that Shannon Tension lied about any one ounce crack cocaine "cookie". He lied about the nail as being used to break a piece off. His description of such a sale, with breaking off a few rocks on the street, is not credible. **Franks v. Delaware**, 438 U.S. 154, 98 S.Ct. 2674, at 2676(1978) clearly applies here. While this case speaks of a hearing, now that we've seen the CI's lie about the crack "cookie", such a hearing would no doubt would cause the stop, seizure, search and interrogation of Pruitt to be inadmissible evidence.

PROPOSITION EIGHT

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS IN A REVOCATION HEARING ON HIS POST RELEASE SUPERVISION WHERE THE TRIAL JUDGE, IN HIS RULING DENYING THE PETITION WHERE IT CONSIDERS THE ARGUMENT IN PRISONER'S PETITION THAT HE HAD NO NOTICE OF THE REVOCATION HEARING BUT CAME TO COURT EXPECTING ONLY TO BE TRIED ON THE NEW CHARGE, REVEALS THAT HE AND THE STATE HAD DECIDED NOT TO HOLD THE TRIAL ON THE NEW CHARGE, BUT ONLY HOLD THE REVOCATION HEARING, WHICH REVELATION DOES NOT INDICATE AT ALL THAT THIS WAS COMMUNICATED TO THE PRISONER OR HIS ATTORNEY AND THUS THE TRIAL JUDGE COULD NOT BE FAIR AT THE REVOCATION HEARING BECAUSE HE BECAME VESTED IN SECURING AN OUTCOME DISFAVORABLE TO THE PRISONER.

The fact that the Judge, facing a complaint of no notice from Pruitt of the revocation, did not specifically recount any communication by the Court of the D. A.'s office that Cecil Pruitt's attorney had been told of the decision, proves without doubt that the decision was totally *ex parte* and Pruitt

was blind sided. The actual "judicial economy" reason naturally tends to cause the judge to become invested in a disfavorable ruling toward Pruitt; actually leans the judge toward revocation. Further heavy weight is given to the *ex parte*, non disclosed substitution of a revocation for the trial, by the trial judge's view, gleaned from the record, that *nolle prosequi* of the new Indictment, cause number 633-07, was to be the end of matter. At the end of the hearing, the judge allows the State the position that the original charge could be brought up again against Pruitt.

These circumstances seriously question whether Pruitt got a "detached decision maker" to hear and decide the Revocation Petition.

In **Arnett v. Kennedy**, 416 U.S. 134, 94 S.Ct. 1633, 1666 (1974) the Court said:

> We have also stressed the need for impartiality in administrative proceedings, stating in Goldberg v. Kelly, supra, that an '***impartial decision maker is essential,***' 397 U.S., at 271, 90 S.Ct., at 1022. (Citations omitted.) To the same effect was Morrissey v. Brewer, 408 U.S. 471, 485-486, 92 S.Ct. 2593, 2602-2603, 33 L.Ed.2d 484 (1972), involving revocation of parole. In both Goldberg and Morrissey, this requirement was held to apply to pretermination hearings.(Writer's emphasis)

In **Morrissey v. Brewer** 92 S.Ct. 2593, at 2602-2603, the court spoke of this impartiality in the context of the preliminary revocation hearing and concluded that a parole officer other than the one assigned to the parolee should conduct the hearing. As an aside here, the trial judge in his decision to revoke invoked the belief by Robert Baysinger, Pruitt's probation officer, that he believed Pruitt had violated his probation. The evidence mounts, it is respectfully submitted, that the trial judge could not have been impartial. It has been recounted somewhat above as to the rulings and it has been noted as to the judge's view of the content of the tape. The judge's colloquy with Shannon Tension about his damaging testimony that he was paid for his services before the buy was perceived by the judge as allowing Tension to have more money with which to buy drugs. We now see, as the judge might have seen, that Tension was attempting to buy drugs before his encounter with Pruitt.

PROPOSITION NINE

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS AND NOTICE OF AND OPPORTUNITY TO PREPARE WHEN THE REVOCATION HEARING IS HELD WITHOUT THERE FIRST BEING A PRELIMINARY REVOCATION HEARING OR WAIVER AND THERE IS NO NOTICE OF THE REVOCATION HEARING DATE.

The only post release revocation papers filed in the court are found in Clerk's Papers at pages 189-191. First is the sworn affidavit of violation of Field Officer Robert Baysinger. Next is the Warrant. Then is the Petition. All these documents are signed on October 10, 2007, the day after Pruitt's arrest.

The probationer is entitled to due process and this includes a preliminary hearing, where the issue is a "finding of probable cause" and the right to confront witness. At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing. **Morrissey v. Brewer**, 408 U.S. 471,487, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484 (1972)

The final revocation hearing is less summary since the issue is the ultimate decision to revoke.

The Supreme Court adopted the procedural safeguards of **Morrissey** "to assure that the finding of a parole violation will be based on verified facts." 408 U.S. at 484, 92 S.Ct. at 2602. Accordingly, the Court stated that the preliminary hearing should be conducted reasonably near the place of arrest and as promptly as possible "while information is fresh and sources are available." Id. at 485, 92 S.Ct. at 2602. The Court also stated: "On the request of a parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence." Id. at 487, 92 S.Ct. at 2603.

In **Rusche v. State**, 813 So.2d 787,790-791(Miss.App.,2002), admittedly, the Court subjected a failure to have a preliminary revocation hearing under harmless error, but couched the "harmless analysis" as conditioned that the probationer receive all his other rights in a revocation hearing, and, as shown elsewhere above, Pruitt contends he did not receive such due process protections.

Additionally, the Probation officer, it is submitted, chose to yield to a strategic move by the State, to await indictment and subsequent trial of the new charge before pursuing the Revocation. This purposefully to deny the Probationer those rights to know the evidence and cross examine accusers. Under these circumstances the failure to hold a preliminary revocation hearing was purposefully and damaging to the probationer. Truly so, when the State chose to not pursue the new charge and resume revocation proceedings, without notice to Pruitt.

PROPOSITION TEN

A PRISONER IS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS AND RIGHT TO CONFRONTATION WHEN THE COCAINE FORMING THE BASIS OF THE REVOCATION IS NOT INTRODUCED INTO EVIDENCE AND ONLY A COPY OF A CRIME LAB ANALYSIS IS INTRODUCED AND THE FORENSIC ANALYST IS NOT PRESENTED TO TESTIFY.

Standard of Review

A constitutional challenge about the right of confrontation of adverse witnesses is reviewed *de novo*. **United States v. McCormick**, 54 F.3d 214 (5th Cir.), cert. denied, 516 U.S. 902, 116 S.Ct. 264, 133 L.Ed.2d 187 (1995).

Law of Confrontation in Revocation Hearings.

In **U.S. v. Grandlund**, 71 F.3d 507, 510-511(5th Cir. 1995), the Fifth Circuit declared that the right to confront was subject to a balancing test, but required, for future revocation hearings where positive laboratory tests were involved, among other things a copy of affidavit by responsible laboratory employee attesting to laboratory procedures, while earlier at and further such new requirement was supplementary to trial court's responsibility to determine whether good cause existed to disallow right of confrontation of particular witness. In **Morrissey v. Brewer**, Id. at 484, 92 S.Ct. at 2601-02 the Supreme Court held that a defendant must receive a fair and meaningful opportunity to refute or impeach evidence against him "to assure that the finding of a parole violation will be based on verified facts." Id. at 489, 92 S.Ct. at 2604. That means, according to the Court, that among a defendant's rights in a parole-revocation hearing is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."

As to the use of the lab reports to prove the Cocaine, Pruitt argues this violates his right to confrontation as recently decided by the United States Supreme Court in **Commonwealth v. Melendez-Diaz,** 129 S. Ct. 2527, 2009 WL 1789468(2009), reasoning that it was "testimonial" under **Crawford v. Washington,** 541 U. S. 36(2004). The trial judge simply rejected Pruitt's PCCR claim on this issue writing that the Mississippi Rules of Evidence do not apply. This clearly is error. Significantly, Agent Merchant falsely swore that the residue material from the floorboard was cocaine, clearly now contradicted by the Lab submission/report in the record here.

CONCLUSION

Cecil Junior Pruitt respectfully submits the Court should conclude that the order revoking his post release supervision and imposing the suspended sentence should be reversed and rendered. In the alternative he urges the Court to reverse and order a full evidentiary hearing on all matters raised in his PCCR.

RESPECTFULLY SUBMITTED,

James A. Williams, MS [redacted]
Attorney for Appellant
P.O. Box 5002
Meridian, MS 39302-5002
Phone: (601) 693-3881

CERTIFICATE OF SERVICE

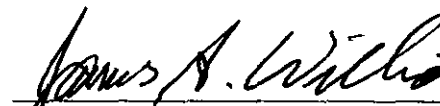
I, the undersigned James A. Williams, counsel for the Appellant, in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Brief of Appellant has been mailed by United States Mail, postage prepaid to the following:

Honorable Lester F. Williamson, Jr.
Circuit Judge
P.O. Box 1002
Meridian, Mississippi 39302

Honorable Bilbo Mitchell
District Attorney
P.O. Box 5163
Meridian, Mississippi 39302

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Done this the 22nd day of June, 2010.



James A. Williams MSB # [redacted]
Attorney for Appellant
Post Office Box 5002
Meridian, Mississippi 39302
Telephone: (601) 693-3881