

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 4

***Evidence Insufficient,
False Evidence
and
Expert Witness Funds Denied***

GROUND 4. EVIDENCE INSUFFICIENT,
FALSE EVIDENCE,
&
EXPERT WITNESS FUNDS DENIED

Petitioner contends his conviction on 52 counts of grand theft P.C. §487 subd.(a.) was obtained a.) with insufficient evidence, b.) by introducing false evidence, and c.) because the indigent Petitioner' appointed counsel failed to present expert testimony to the jury at trial presumably for lack of expert witness funds. Petitioner is cognizant these claims of insufficient evidence in view of a 25 day long trial and 78 prosecution witnesses at first sight seems unlikely, incredible and ludicrous.. "Petitioner has to be kidding" some might scoff, but assuredly, Petitioner is not kidding!

A .
EVIDENCE INSUFFICIENT .

The prosecution presented testimony of 53 individual complaining witnesses who established a customer relationship with Petitioner, a California licensed Real Estate Broker via his innovative Rent to Own program. Each paid Petitioner a fee for services ranging from \$2,600 to \$2,900. The contract between Petitioner and each of these individuals promised the fee they paid Petitioner would be refundable to them if they 'changed their mind' and requested a refund. Each of these individuals did 'change their mind' and sought a refund of the fee they paid to Petitioner. Their 'change of mind' came about because Petitioner could not provide all of the services Petitioner had
(Ronald Russell, Habeas Corpus Petition, Ground Four, page 35.)

1 promised them in a timely manner. Petitioner accepted these
2 fees fully intending at the time and subsequently to provide all
3 the benefits and services he promised to provide for the
4 consideration received. Petitioner utilized these fees to cover
5 the "program's business operating expenses" over a 28 month
6 period of time. Petitioner became unable to refund the fee to
7 these complaining witnesses who represented roughly 60% of the
8 Rent To Own customers.

9 Evidence presented also included full financial disclosure
10 of Petitioner's use of the fees collected from customers to
11 cover business operating expenses. These financial disclosures
12 did not reveal use of the funds for illegal or immoral purposes,
13 missing funds or significant financial irregularities despite
14 the co-mingling of Petitioner's personal funds with business
15 funds. Prosecution presented evidence each of these complaining
16 witnesses was a victim of the 2008-2009 real estate market
17 collapse and in danger of losing their home. The complaining
18 witnesses were in these dire straits because of the decisions
19 and mistakes they each made when purchasing their home during
20 the California residential real estate boom and believed they
21 had made another bad financial mistake when paying the fee to
22 Petitioner and now afraid they would never see their money again.

23 This was the sum and substance of the direct evidence
24 provided by the complaining witnesses presented by the
25 prosecution 54 times.

26 Each of the complaining witnesses was made financially
27 whole, receiving a full refund of the fee they paid to

1 Petitioner. Evidence of their recovery was withheld from the
2 jury.

3 The gist of this overwhelming volume of evidence was as
4 follows: We, (the complaining witnesses) paid the defendant and
5 he didn't deliver on either his promise to provide specific
6 services or a refund when we changed our mind ... Petitioner had
7 and offered no general dispute. The dispute arises at the point
8 the prosecution proceeded to spin this overwhelming volume of
9 evidence to infer, imply, and ascribe motive, criminal intent,
10 and knowledge of wrongdoing to the Petitioner but in the absence
11 OF ANY DIRECT EVIDENCE as to Petitioner's motive, criminal
12 intent, knowledge of wrongdoing. There was no direct evidence
13 Petitioner had knowingly and intentionally violated any law
14 whatsoever EITHER IN THE INSTANT CASE or in his entire lifetime.
15 (R.T. pages 321-340), (R.T. pages 359-382), (R.T. pages
16 393-432), (R.T. pages 454-482), (R.T. pages 499-521), (R.T.
17 pages 539-584), (R.T. pages 585-612), (R.T. pages 616-627),
18 (R.T. pages 648-717), (R.T. pages 720-758), (R.T. pages
19 758-797), (R.T. pages 797-825), (R.T. pages 892-907), (R.T.
20 pages 938-973), (R.T. pages 973-1018), (R.T. pages 1026-1045),
21 (R.T. pages 1085-1142), (R.T. pages 1142-1173), (R.T. pages
22 1174-1215), (R.T. pages 1220-1283), (R.T. pages 1284-1316),
23 (R.T. pages 1319-1334), (R.T. pages 1334-1362), (R.T. pages
24 1362-1391), (R.T. pages 1420-1444), (R.T. pages 1446-1479),
25 (R.T. pages 1482-1509), (R.T. pages 1520-1528), (R.T. pages
26 1563-1609), (R.T. pages 1611-1622), (R.T. pages 1657-1661),
27 (R.T. pages 1661-1691), (R.T. pages 1709-1716), (R.T. pages
28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 37.)

1 1719-1741), (R.T. pages 1767-1808), (R.T. pages 1811-1857),
2 (R.T. pages 1859-1882), (R.T. pages 1889-1914), (R.T. pages
3 1925-1948), (R.T. pages 2112-2164), (R.T. pages 2165-2211),
4 (R.T. pages 2254-2299), (R.T. pages 2300-2333), (R.T. pages
5 2334-2363), (R.T. pages 2364-069 - 2364-099), (R.T. pages
6 2364-100 - 2364-124), (R.T. pages 2364-125 - 2364-149), (R.T.
7 pages 2370-2440), (R.T. pages 2440-2466), (R.T. pages
8 2468-2501), (R.T. pages 2502-2533), (R.T. pages 2534-2556),
9 (R.T. pages 2558-2599), (R.T. pages 2615-2618), (R.T. pages
10 2618-2671), (R.T. pages 2672-2714), (R.T. pages 2716-2759),
11 (R.T. pages 2759-2783), (R.T. pages 2784-2854), (R.T. pages
12 3297-3310)

13 The prosecution offered two (2) theories of crime pursuant
14 to theft by deception (P.C. §487 subd.(a.) being that of FRAUD
15 or EMBEZZLEMENT. If granted an evidentiary hearing Petitioner
16 will show the evidence against him was insufficient in that it
17 failed to include any of the "badges of fraud" as the legal term
18 is generally understood and applied; nor any direct evidence of
19 embezzled funds.

20 Petitioner will present direct evidence the jury never heard
21 which went directly to the issues of motive, intent and
22 knowledge of wrongdoing. This evidence includes, but is not
23 limited to the existence of the Broker's Recovery Fund,
24 Petitioner's knowledge of the Fund's existence, purpose,
25 operation and Petitioner's plan to utilize the Broker's Recovery
26 Fund to restore the complaining witnesses to wholeness.
27 Petitioner will prove he offered the complaining witnesses

1 information that allowed them to receive the promised refunds
2 from the Broker's Recovery Fund (R.T. 3456:12-13) and
3 furthermore, prove, upon the conclusion of the trial, each of
4 the complaining witnesses received a full refund of the fee each
5 paid to the Petitioner from the Broker's Recovery Fund.
6 Petitioner will successfully argue had the jury received
7 evidence and testimony regarding the relevant aspects of the
8 Broker's Recovery Fund relating to the underlying factual
9 dispute, they would have come to a different conclusion as to
10 their verdict.

11 Petitioner, a California licensed Real Estate Broker knew
12 the Broker's Recovery Fund existed and the fund's purpose before
13 accepting fees from all Rent To Own customers. Although he
14 considered it unlikely the Rent To Own program would fail or
15 most of the customers would request a refund, the Broker's
16 Recovery Fund, to which he had continued to contribute during
17 his career as a real estate broker was his "insurance" for
18 paying out refunds if the business failed. This knowledge and
19 intent directly contradicts any and all inference as to
20 Petitioner's criminal intent and knowledge of wrong doing.

21 B .

22 F A L S E E V I D E N C E

23 Prosecution presented evidence which they purported was
24 evidence that Petitioner's Rent to Own program was a Ponzi
25 scheme. The Prosecution presented Mr. Edward Hudson as an
26 expert witness to testify Petitioner was operating a Ponzi
27 scheme. The Prosecution repeatedly referred to Petitioner's

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 39.)

1 business as the Petitioner's "Rent To Own Ponzi scheme" when
2 addressing the jury. In total, he referenced Petitioner's
3 business activities as a ponzi scheme some eighteen (18) or more
4 times.

5 A "Ponzi scheme" however, is a precise term referring to
6 precise characteristics well established case law. The local
7 twelve (12) year old entrepreneur operating a lemonade stand in
8 the front yard and advertises "Free Refills"; who spends the
9 customer's money to buy more sugar and lemons "to keep the
10 business going" (along with a single piece of bubble gum) but
11 can't provide refills to all the customers because the grocery
12 ran out of lemons, the young entrepreneur can't provide refunds
13 to dissatisfied customers who wouldn't wait any longer for a
14 free refill IS NOT OPERATING A PONZI SCHEME.

15 Ponzi Schemes require INVESTORS who are PROMISED ATTRACTIVE
16 RETURNS on their investment far and above what is customary and
17 usual in the specific times and circumstances. The "Ponzi
18 scheme operator" knows from the beginning he or she cannot pay
19 these exceptional returns on the investors' money; does not
20 invest the money with the investor's best interests at heart;
21 AND, when the early investors demand to be paid either or both
22 the return on their investment and their principal the operator
23 pays them from the funds the operator has taken in from new
24 investors. Like the fictional lemonade stand operator,
25 Petitioner wasn't operating a Ponzi scheme because (a.) There
26 were no investors, (b.) There were no funds tendered as
27 "investments", (c.) there was no exceptionally high rate of
28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 40.)

1 return promised to investors on their investment, (d.) the early
2 investors were not paid the promised return and or principle
3 with investment funds received from new investors.

4 Like the fictional lemonade stand operator, Petitioner was
5 not operating a Ponzi scheme because a.) There were no
6 investors. b.) Customer didn't tender funds as "investments"
7 c.) The Petitioner did not offer an exceptionally high rate of
8 return on investor's principles. d.) Early investors were not
9 paid the promised exceptional return or their principle with
10 investment funds received from new investors.

11 Petitioner is not arguing a mere matter of semantics here.
12 "False evidence" can be a conjured fact as a falsity in itself,
13 physical evidence moved, removed or "planted" at a crime scene
14 by an entity motivated to create or draw falsified conclusions;
15 or evidence as fact true or untrue in itself, but not evidence
16 of what it is presumed or purports to demonstrate or prove. In
17 the instant case, intent to defraud is presumed in the operation
18 of a Ponzi scheme. Over and over again the prosecution referred
19 to Petitioner's Rent to Own business as a ponzi scheme² and a
20 scam³ recalling such "psuedo facts" (erroneous inferences) like

21 NOTES

22 ² Prosecution references to Petitioner's Rent to Own business as a Ponzi
23 scheme: (R.T. 3340:15-19), (R.T. 3334:9-11) (R.T. 3344:10-11), (R.T.
24 3346:23-25), (R.T. 3348:20-22), (R.T. 3359:1-2), (R.T. 3386:14-15),
25 (R.T. 3390:26-28), (R.T. 3391:7-12), (R.T. 3393:5-10), (R.T. 3395:2-4)
(R.T. 3396:9-11), (R.T. 3396:26-28), (R.T. 3417:7-8), (R.T. 3432:7-10)

26 ³ Prosecution references to Petitioner's Rent to Own business as a scam:
27 (R.T. 252:19-20), (R.T. 259:9-12), (R.T. 263:27-28), (R.T. 269:10-13)
28 (R.T. 275:2-5), (R.T. 275:21-23), (R.T. 3328:10-11), (R.T. 3340:15-16)
(R.T. 3343:10-11), (R.T. 3366:4-5), (R.T. 3367:24-25) (R.T.3386:17-18)

1 'Petitioner never had any intention of buying anyone a house'
2 and absolute fact such as Petitioner paid refunds to some
3 customers from the money he collected from new-comers to the
4 Rent to Own scam. The prosecution's entire theory of
5 embezzlement rested on a showing the Rent to Own program "was a
6 ponzi scheme." And the prosecution said "here are 'the facts'
7 why we know it was a ponzi scheme." By definition under the
8 law, the Rent to Own program was not a ponzi scheme and the
9 evidence presented was intended to deceive the jury and persuade
10 a false conclusion the instant case was all about a ponzi
11 scheme.

12 Petitioner points to the following as other examples of
13 "false evidence:"

- 14 a.) Evidence Rent To Own was a scam or sham (R.T.
15 252:19-20) (R.T. 255:14-19) (R.T. 263:27-28)
- 16 b.) Petitioner "had no other income". (R.T. 275:5)
- 17 c.) Petitioner and Earl Neff had opposite interests and
18 intentions.
- 19 d.) The non-existence of HUD Program - no application.
- 20 e.) Conclusions of Petitioner's wrong doing by Real Estate
21 Board pursuant to Real Estate Law.
- 22 f.) Rent to Own contract was illegal or flawed.
- 23 g.) Witness statements regarding Petitioner's lavish
24 lifestyle and spending.

25 ===== N O T E S C O N T I N U E D =====

26 ³ Prosecution references to Petitioner's Rent to Own business as a scam:
27 (R.T. 3391:1-3), (R.T. 3396:15-17), (R.T. 3441:4-6) (R.T. 3450:14-16)
28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 42.)

1 If granted an evidentiary hearing Petitioner will argue the
2 false evidence presented to and argued before the jury had the
3 exclusive purpose to demonize the Petitioner in such a way
4 that Petitioner's intent COULD ONLY BE nefarious or criminal
5 intent with respect to starting and operating his innovative
6 Rent To Own program. Further, he will demonstrate the
7 prosecution's slight of hand juggling between actual repetitive
8 witness testimony and frequent repetitive false summarization of
9 all of complaining witness testimony was designed and intended
10 to antagonize the jury against the Petitioner; going so far as
11 to character assassination making a mockery of Petitioner's
12 Christian faith. (R.T. 3337:15-21), (R.T. 3438:24-04) (R.T.
13 3465:4-8), (R.T. 3465:21-28) Petitioner will argue; Had it not
14 been for the introduction of false evidence as to Petitioner
15 operating "a Ponzi scheme" or "scam" and false evidence of his
16 nefarious or criminal intent, in all likelihood, the jury in
17 this matter would have reached an opposite conclusion as to
18 Petitioner's guilt and would have acquitted.

19
20 C .

21 **EXPERT WITNESS FUNDS DENIED**

22 The indigent Petitioner was represented by appointed
23 Sacramento County Public Defender Mr. Mark Slaughter at trial.
24 Mr. Slaughter admitted to Petitioner while preparing during
25 preliminary matters that he lacked experience and background in
26 real estate matters as a whole. Early on, this became of major
27 concern to Petitioner who was frustrated in the task of
28 assisting in the preparation of his defense because for the most
(Ronald Russell, Habeas Corpus Petition, Ground Four, page 43.)

1 part, Mr. Slaughter didn't comprehend basic concepts, terms and
2 customary practices in the real estate industry nor how these
3 matters were central to crafting a defense in the instant case.
4 Mr. Slaughter assured and reassured Petitioner several times
5 while preparing for trial that he (Slaughter) would hire a real
6 estate expert. Mr. Slaughter did not however utilize any
7 special expertise of professionals in the real estate industry
8 while preparing for trial nor hire any experts of any kind to
9 offer expert testimony at trial. (Reader should note at this
10 juncture the trial date in this matter was postponed numerous
11 times in the instant case and so it is unlikely the lack of
12 expert testimony can be attributed to scheduling conflicts and
13 equally unlikely attributable to a lack of qualified experts
14 avail- ability in the Sacramento area.)

15 Petitioner must presume he was deprived the benefit of
16 expert witness testimony and the assistance such experts could
17 provide the defense in preparing for trial because funds for
18 expert witnesses were not approved. Petitioner further presumes
19 the defense was denied the funds for expert witnesses because in
20 all likelihood a request for such funds was never presented by
21 defense counsel.

22 Petitioner also contends in aside: Had he been released from
23 custody pending trial, not only would he have fully assisted his
24 counsel preparing a defense, he would have identified appro-
25 priate expert witnesses relative to specific defense problems
26 and himself investigated and initiated whatever process and
27 procedures were involved to secure funds for expert witnesses.

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 44.)

1 Petitioner was totally unaware the Prosecution intended to
2 call a series of expert witnesses at trial until these
3 prosecution witnesses actually testified. Hence, Petitioner was
4 at a severe disadvantage to provide his appointed counsel with
5 even impeachment material to counter the prosecution's expert
6 witness testimony, much less call his own expert witnesses.

7 As the trial proceeded, it became increasingly evident to
8 Petitioner that his counsel could have and should have called
9 expert witnesses for the defense as to the following topical
10 areas:

- 11 1. Residential real estate market in California,
12 2002-2005, 2006-2012 (facts re: bubble / facts re:
13 market collapse)
- 14 2. Real estate sales profession and marketing (market
15 cycles, market trends, market segments, property
16 values)
- 17 3. California contract law (nature of contracts,
18 consideration given, specific non-performance,
19 refunds, recourse)
- 20 4. Real Estate Financing, Private investment /
21 (mortgages types of mortgages, sources of funds,
22 PPM's, legalities, restrictions)
- 23 5. Small Business Forensic accounting / taxes
24 (Defendant's accounting records, allowable business
25 expenses, special accounts)
- 26 6. HUD programs (Variety, purpose & availability,
27 application procedures)

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 45.)

1 If granted an evidentiary hearing Petitioner will demon-
2 strate the Prosecution's case against him relied heavily on the
3 Prosecution's use of expert witness testimony which received
4 undue weight by the jury because the defense offered no
5 impeachment testimony nor any expert testimony which would
6 reveal either an alternative viewpoint or contrary view point.
7 Petitioner will argue the point the lack of expert witness
8 testimony for the defense seriously diminished Petitioner's
9 credibility, particularly whereafter the Prosecution pointed out
10 to the jury the defense failed to present any expert witnesses
11 who stated the prosecution's experts were wrong, and proceeded
12 to infer the reason for this being the prosecution's expert's
13 weren't wrong! Petitioner will demonstrate the prosecution
14 spent in excess of \$13,000 in just the forensic analysis of
15 Petitioner's bank accounts.

16 Petitioner will argue at an evidentiary the prosecution's
17 case against him largely rested on the expert opinion of "cherry
18 picked" experts and had expert witness funds been available to
19 the defense; or, if such were available and actually utilized by
20 the defense such that the jury heard expert witness testimony
21 presented by the defense, the jury's verdict in this case would
22 likely been completely different and Petitioner would have stood
23 acquitted on all charges.

24 APPLICABLE CASE LAW:

25
26 Jackson v. Virginia, 443 U.S. 307 (1979) (Insufficient Evid-
27 ence) The petitioner's conviction was obtained as the result
28 of evidence that is insufficient to persuade a properly instruc-
(Ronald Russell, Habeas Corpus Petition, Ground Four, page 46.)

1 ted, reasonable jury of his guilt beyond a reasonable doubt
2 violating petitioner's Fifth Amendment right to due process.

3 Miller v. Pate, 386 U.S. 1 (1967) Petitioner's conviction
4 was based on evidence to be false violating petitioner's Fifth
5 Amendment right to a fair trial.

6 Ake v. Oklahoma, 470 U.S. 68 (1985) (Expert Witness Funds)
7 The high court held where the Petitioner was indigent was denied
8 funds to be used to rebut experts consulted and called by the
9 prosecution petitioner's Fifth Amendment right to due process
10 and Sixth Amendment right to counsel were violated. "The
11 Fourteenth Amendment due process guarantee of fundamental
12 'fairness' requires that the basic tools of an adequate defense
13 ... be provided to those defendants who cannot afford to pay
14 for them."

15 Holmes v. South Carolina, 126 S.Ct. 1727 (2006) The defendant's
16 right to defend was impaired because state rules of evidence
17 were applied in a way which denied Petitioner the right to
18 pre- sent a complete defense violating petitioner's Fifth
19 Amendment right to a fair trial.

Russell v Borders

*Writ
Of
Habeas Corpus*

Ground 5

Ineffective Assistance of Trial Counsel

*Counsels Conflict of Interest
Failure to Investigate*

*Utter Failure to Defend
“Cronic Standard”*

1 GROUND 5.

2 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

3 COUNSEL'S CONFLICT OF INTEREST

4 FAILURE TO INVESTIGATE

5 &

6 UTTER FAILURE TO DEFEND - "CRONIC" STANDARD"

7 A .

8 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

9 Petitioner contends his appointed Sacramento County Public
10 Defender, Mr. Mark Slaughter provided ineffective assistance to
11 him to defend against the charges brought against Petitioner.
12 The IAC claim definitely is not a pathetic sour grapes
13 rationalization the Petitioner raises for the first time "after
14 the fact." Petitioner was convicted of 50 counts of grand theft
15 by false pretense pursuant to P.C. §487 subd.(a.). Petitioner
16 struggled with counsel's lackadaisical approach and general
17 ineptness through his entire pretrial detention in the
18 Sacramento County Jail which form the bulk of his IAC claims.
19 Petitioner brought these issues and concerns directly to Mr.
20 Slaughter in conversations and in writing. Petitioner's brother
21 Richard Russell repeated these issues of concern to Mr.
22 Slaughter in telephone conversations and in writing. Petitioner
23 addressed his concerns regarding counsel's fundamental lack of
24 knowledge about inherently relevant real estate matters and
25 generally poor performance to the court when Petitioner
26 attempted to assert his right to a speedy trial.(R.T. 182:28 -
27 185:9) and a Marsden hearing, (R.T. pages 2-13), (C.T. pages
28 41-50) Literally weeks before trial, the Court inquired of
Petitioner whether he wanted Mr. Slaughter to defend him at

1 trial. Alluding to the issues, Petitioner answered it had taken
2 Mr. Slaughter 19 months to prepare for trial while he remained
3 in custody and the 73 year old Petitioner was unwilling to spend
4 another 19 months in custody while a different attorney prepared
5 to defend him at trial. (R.T. pages 197-199) Mr. Slaughter
6 spent so little time with Petitioner in custody, he never really
7 advised Petitioner about the essential elements of the crimes he
8 was charged with, how the prosecution would likely make it's
9 case the Petitioner nor the available defenses Mr. Slaughter
10 intended to present to the jury. All that Mr. Slaughter would
11 say was: (a.) This is really a civil matter. and (b.) They will
12 never prove intent.

13 Petitioner contends while a.) and b.) sounded hopeful to him
14 at the time, if a.) and b.) were foundational as a defense to
15 the 52 counts he was facing, Mr. Slaughter did a poor job (if
16 any) in preparing such a defense and an even poorer job
17 communicating such a defense to the jury.

18 Mr. Slaughter waived making an opening statement at trial
19 (R.T. 277:8-11) leaving among other things a gaping hole in the
20 jury's perception about the basic decency and credibility of the
21 Petitioner as a human being. A simple opening statement similar
22 to what follows would have provided clarity to the jury
23 regarding whether there was evidence of any crime and
24 Petitioner's defense to the charges.

25 **THE SIMPLE APPROPRIATE OPENING STATEMENT NEVER MADE:**

26 Ladies and gentlemen, the evidence you are about to hear in what looks
27 to be a really long trial will point to just one conclusion. There is no
28 evidence of any crime here, this was a civil case about a contract between
Mr. Russell and 54 of his customers. Each paid Mr. Russell between \$2,600
and \$2,900 dollars for specific services he promised to deliver in a -

(Ronald Russell, Habeas Corpus Petition, Ground Five, page 49.)

1 contract. The contract also provided if a customer "changed their mind", the fee
2 paid to Mr. Russell was refundable to them. Mr. Russell outlined how customers
3 could go about obtaining their refund. Mr. Russell utilized the fees he collected
4 to cover business operating expenses. Nothing unusual or illegal about that is
5 there? Business owner receives payment from customers with which he pays the
6 costs of operating the business

7 The problem occurred when the majority of Mr. Russell's Rent to Own customers
8 'changed their mind' and wanted the promised refund - creating what we might call
9 a "run on the bank." Most businessmen don't anticipate a scenario where all their
10 customers will 'change their mind' and demand a refund ... If they did, they would
11 never seriously consider going into business in the first place, would they? Mr.
12 Russell was a Licensed California Real Estate Broker and he had a contingency plan
13 in event of such an unlikely and devastating scenario: He would ensure each
14 customer would get a full refund of the fee through the Broker's Recovery Fund.
15 You are going to hear more about the Broker's Recovery Fund and how it operates
16 during the course of the trial.

17 The prosecution will present more than fifty complaining witnesses. They are
18 all going to complain about the same problem: Each one paid Mr. Russell a fee in
19 order to receive specific services that Mr. Russell promised them. They became
20 dissatisfied with the passage of time, 'changed their mind' and wanted the
21 promised refund. When they didn't receive an immediate refund they panicked at
22 the thought they might not get a refund at all. That, ladies and gentlemen is
23 pretty much the reason why we are here.

24 Mr. Russell is counting on each of you ladies and gentlemen to be attentive
25 listeners. Attentive listeners are critical thinkers that is they think
26 critically about what they are hearing. Why did the complaining witness 'change
27 their mind' and want a refund? Did the complaining witness testify they requested
28 a refund in writing from Mr. Russell? Did the complaining witness utilize the
information and means Mr. Russell provided them to obtain their refund?

Now I'm thinking after you the jury have heard this same story with only
slight or minor variation from twenty-five of the complaining witnesses you'll be
bored and impatient. You are likely to tell yourself "Yeah, I get it, I get it!".
The thought of hearing the same story another twenty-five or thirty times is going
to be frustrating. But please, resist this natural sense of boredom, impatience
and frustration. Resist the temptation of taking out your frustration on my
client ... And above all else, resist the temptation of telling yourself "All
these complaints mean Mr. Russell had to DO SOMETHING WRONG!" Critical thinking:
Ask yourself; Are all these witnesses complaining that Mr. Russell didn't fulfill
the contract they had with him? Didn't make good on the promises he made to them?
Did Mr. Russell intend to steal this witness' money with false promises? Critical
thinking .. Did Mr. Russell make promises to this witness he had no intention of
keeping - including the refund promised if the customer 'changed their mind?' Did
Mr. Russell make these promises knowing he had no intention of ever fulfilling
them or was he for some reason or reasons simply unable to fulfill these promises
because of unforeseen circumstances causing his business to fail? Did Mr. Russell
have a sincere desire to help this person or was he just after their money?

Now I'm also thinking you will no doubt have a great deal of compassion for
these complaining witnesses who are real victims of the real estate market
melt-down in 2008-2010. I'm going to ask you to resist the temptation of laying
all the blame for their misfortune on Mr. Russell. True, these people lost their
homes. True, it's somebody's fault. - Well, Mr. Russell was a real estate broker
and he is here - lets blame him. Not true That's also plain and simply not
fair Mr. Russell played no part in these witness' original home purchase when
the real estate market was booming. The market drastically changed. Mr. Russell
understood their plight and it will be reasonably clear his desire and intention
was to help these people who were indisputably victims of the housing market

1 collapse to mitigate their financial losses and return them to being home owners.
2 - Not to further victimize them.

3 In addition to all this testimony from the prosecution's complaining
4 witnesses, you are going to hear about Mr. Russell's good character and generosity
5 . Witnesses are going to tell you about Mr. Russell donating tens of thousands of
6 dollars from real estate commissions he earned to their local charity. You are
7 going to hear he has been in the real estate business more than thirty years
8 without anyone lodging a single complaint about him. You are going to hear he has
9 no criminal record of any kind. Again, critical thinking: The questions that are
10 bound to enter your mind are: Why would a 73 year old grandfather with an
11 impeccable reputation suddenly decide to go Bernie Maddoff in our community? It
12 doesn't make sense. Does it?

13 After we've heard all the testimony in this matter, both Mr. Archibald and
14 myself will attempt to summarize what we've heard in this room and then you will
15 all retire to the jury room to decide the case based on what you heard and
16 critical thinking about what you heard Thank you

17 **MR. SLAUGHTER PRESENTED NO OFFERING STATEMENT.**

18 **The instant case was unlike a murder trial or typical theft case**
19 **where it is clearly established outright a crime had been committed**
20 **and the question for the jury to consider would be whether the**
21 **defendant participated in the commission of the crime. In the**
22 **instant case Mr. Slaughter failed to hold the prosecution to the**
23 **basic standard to prove any crime was actually committed! He**
24 **allowed the prosecution to lead the jury to presume fifty-two (52)**
25 **crimes had been committed against fifty-four (54) victims and the**
26 **jury's only job was limited to deciding whether Petitioner committed**
27 **them. If granted an evidentiary hearing, Petitioner will argue,**
28 **among other things, he received ineffective assistance of counsel**
29 **from Mr. Slaughter who failed to construct and present any defense**
30 **to the charges Petitioner faced. Petitioner will also argue his**
31 **conviction on fifty-two (52) counts was a result of his counsel's**
32 **gross failure to effectively present any cognizable defense to the**
33 **jury and had he done so the jury would have likely acquitted**
34 **Petitioner on all counts.**

35 Petitioner offers the following as clear reasons why his counsel
36 was ineffective.

37 (Ronald Russell, Habeas Corpus Petition, Ground Five, page 51.)

B. COUNSEL'S CONFLICT OF INTEREST

Petitioner contends his counsel was ineffective because of a conflict of interest. Counsel's conflict of interest was his self interest in preserving his employment requiring his attention to twenty-one (21) felony cases assigned to him as a public defender pitted against putting in the time, work and attention required to effectively defend the Petitioner. Counsel himself admitted this conflict in open court. (R.T. 186:26-02) The prosecution provided thousands and thousands of pages of documents (R.T. 186:27-28) and shortly prior to each pre-trial conference would tender another stack of documents to the Petitioner's counsel. (R.T. 194:23-28)

Counsel was so overwhelmed by the documentation he was unable to state with certainty whether or not, or to what degree subsequent stacks of documents largely duplicated earlier submissions of documents. If granted an evidentiary hearing, Petitioner will introduce evidence his appointed counsel's workload of twenty-one felony cases, whether within or exceeding national caseload guidelines created a conflict of interest for his attorney. Petitioner will demonstrate this conflict of interest was incompatible with quality legal representation particularly at the preliminary and pre-trial preparation stages of legal representation.

C. FAILURE TO INVESTIGATE

Petitioner contends his appointed counsel failed to investigate essential matters critical to his defense. These matters included:

(Ronald Russell, Habeas Corpus Petition, Ground Five, page 52.)

1. The existence, purpose, availability and financial cap of the Bureau of Real Estate Consumer Recovery Fund.
2. The existence, purpose, operation, eligibility requirements and application process of the Department of Urban Development's (HUD) Neighborhood Revitalization program.
3. The efforts of attorney Harold Gentner to recruit any and/or specific investors for the Rent to Own Program.
4. The Bureau of Real Estate's conclusions following their investigation of the Petitioner and his Rent to Own program.
5. Existence or non-existence of state law requiring fees collected by Petitioner from Rent to Own customers in trust accounts, escrow accounts or other special segregated accounts.
6. Existence or non-existence of state law prohibiting or restricting Petitioner's use of the fees he collected from Rent to Own customers in the operation of his business.
7. The business relationship between Mr. Hermie Bacus (Best Realty) and Petitioner.
8. The business relationship between Faiz Riza Awadan, Craig's list and Petitioner.
9. The business relationship between Haven of Hope and Petitioner relative to the purchasing of the fourplexes.
10. The existence, purposes, operation, eligibility requirements, application process and program funding of the CARES program prior to and subsequent Haven of Hope's purchase of the fourplexes.
11. The background of complaining witness of Mr. Jeffery Johnson to include forensic examination of his computer relative to his motivation for shutting down the Rent to Own program and prosecuting Petitioner.
12. Petitioner's contacts with Senator Lungren regarding assistance and support for application to HUD's Neighborhood Revitalization Program.

Petitioner contends investigation of each of the above was critical to crafting Petitioner's defense either providing direct evidence as to Petitioner's lack of culpability, material demonstrating no crimes had occurred, material reflecting the decency and good character of the Petitioner or material

1 impeaching the testimony of prosecution's expert witnesses.
2 Petitioner contends the failure of his counsel to investigate
3 the matters above ultimately resulted in his conviction on all
4 52 counts because his legal counsel was unprepared to call
5 expert witnesses for the defense, elicit helpful testimony from
6 both prosecution and defense witnesses and could not effectively
7 cross examine prosecution witnesses and impeach their testimony.
8 Neither was his appointed counsel prepared to object to the
9 prosecution's voluminous evidence on the grounds the evidence
10 was either irrelevant or duplicative.

11 One illustration demonstrating how critical counsel's
12 failure to investigate was to Petitioner's defense is item #1
13 above. The People submitted Motion in Limine #3 to exclude
14 evidence of the Bureau of Real Estate Consumer Recovery Account.
15 (R.T. 208:5-7) Counsel was heard on the motion with Mr.
16 Slaughter asking "it remain open or available for me to discuss
17 by way of a defense." (R.T. 208:12-13) Both the Court and
18 prosecutor inquired of defense counsel as to the relevance of
19 the fund and Mr. Slaughter was unable to make any point or state
20 any fact why such evidence was of particular relevance to the
21 defense. (R.T. 208:23-16)

22 Subsequently the Court ruled Motion Number Three to exclude
23 evidence of the Bureau of Real Estate Consumer Recovery Account
24 was granted. "The evidence is not relevant. That some persons
25 may have applied or considered applying for relief from a fund
26 for persons defrauded by real estate agents is not germane to
27 any issues in this trial." (R T 226:20-28) Petitioner contends
28 had his counsel investigated the fund's existence and purposes.

1 had clearly formulated his defense to fraud and/or embezzlement
2 (i.e. no criminal intent, no knowledge of wrong doing),
3 Petitioner's knowledge of the Broker's Recovery Fund for
4 recourse in the worst case scenario, express purpose of the
5 contract's "mediation clause", facts regarding how the fund
6 operates made evidence of the fund totally germane to Petitioner
7 's defense. Furthermore, one cannot reasonable argue defense
8 counsel's inability to prevail on this motion was all in all "a
9 strategic defense move" because the reason counsel couldn't
10 demonstrate relevance was defense counsel hadn't properly
11 investigated the matter.

12 If Petitioner is granted an evidentiary hearing in this
13 matter, he will demonstrate the degree and extent to which trial
14 counsel failed to investigate in the above and other matters was
15 indeed ineffective assistance of trial counsel. Petitioner will
16 argue had his appointed counsel properly investigated the above
17 matters, in all probability, the jury would have reached a
18 different verdict on all 52 counts and acquitted him.

19 D .

20 **UTTER FAILURE TO DEFEND**
21 **THE "CRONIC STANDARD"**

22 Petitioner contends his appointed counsel's trial strategy
23 or lack thereof belies his utter failure to properly defend at
24 trial. Mr. Slaughter failed to present a defense to the
25 charges. Although Mr. Slaughter promised Petitioner he would
26 call a real estate expert at trial, he call no experts. When
27 Petitioner inquired about expert witness testimony at trial, his
28 counsel replied: "You're all the expert testimony we need." It
is unclear whether Mr. Slaughter wasn't mentally attending

(Ronald Russell, Habeas Corpus Petition, Ground Five, page 55.)

1 Petitioner's trial (as in paying attention) or asleep during the
2 26 day trial... The prosecution's case in chief was "Mr. Russell
3 (Petitioner) is a really bad guy and this is what bad guys like
4 him do: They lure in desperate victims so they can steal their
5 money." (R.T. 3370:26-03) Petitioner's credibility at trial was
6 under constant attack. And his defense counsel is going to put
7 Petitioner in front of the jury as their (only) expert witness?
8 That wasn't strategy, that was lunacy.

9 If the court grants an evidentiary hearing in this matter,
10 Petitioner will demonstrate: Had his legal counsel laid a proper
11 foundation based on expert testimony as to lawful, ethical and
12 proper real estate transactions methodologies AND THEN called
13 Petitioner to testify in his own defense that in the course of
14 operating his innovative Rent to Own program he adhered to each
15 of the lawful, ethical and proper real estate transaction
16 methodology described by defense expert witnesses, Petitioner's
17 testimony would have established an abundance of reasonable
18 doubt as to Petitioner's culpability for each and every element
19 of the offense charged. Petitioner will argue; were it not for
20 this utter failure of counsel to meet the low bar of the "Cronic
21 Standard" in all likelihood, the jury would have acquitted him
22 on all counts.

23
24 **A P P L I C A B L E C A S E L A W :**

25 Mickens v. Taylor, 535 U.S. 162 (2002) The high court held
26 petitioner's counsel had a conflict of interest which materially
27 compromised the defense violating petitioner's Fifth Amendment
right to due process and petitioner's Sixth Amendment right
(Ronald Russell, Habeas Corpus Petition, Ground Five, page 56.)

1 to counsel. To succeed on a IAC conflict of interest claim
2 the Petitioner must demonstrate (1.) counsel labored under
3 an actual conflict of interest that adversely affected counsel's
4 performance; (2.) Absent counsel's deficiencies arising from
5 the conflict it is reasonably probable the result of the
6 proceedings would have been different. Note that **Mickens** is
7 a key post-Stricklen decision.

8 Strickland v. Washington, 466 U.S. 668 (1984) The U.S. Supreme
9 Court found the Petitioner's trial counsel was ineffective
10 in violation of petitioner's Sixth Amendment right to counsel.

11 Wiggins v. Smith, 539 U.S. 510 (2003) Petitioner's counsel
12 was ineffective in failing to conduct a reasonable pre-trial
13 investigation in violation of petitioner's Sixth Amendment
14 right to counsel.

15 U.S. v. Cronk, 466 U.S. 648 (1989) Petitioner's counsel so
16 utterly failed to defend against the charges that the trial
17 was the functional equivalent of a guilty plea, rendering
18 counsel's representation presumptively inadequate violating
19 petitioner's Sixth Amendment right to counsel and Fifth
20 Amendment right to due process.

21 Washington v. Texas, 388 U.S. 14 (1967) The high court held
22 the petitioner was denied a fair trial when the court improperly
23 restricted the right to present evidence of significant
24 probative value violating petitioner's Fifth Amendment right
25 to a fair trial.

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 6

Prosecutorial Misconduct

1 **GROUND 5. PROSECUTORIAL MISCONDUCT**

2 Petitioner contends prosecutorial misconduct was a primary
3 factor in his wrongful conviction on fifty-two counts of theft
4 by either fraud or embezzlement. Prosecutorial misconduct is
5 evident in nearly every phase of this proceeding from
6 investigative phase through the sentencing phase. Petitioner
7 argues there is sufficient evidence to suggest his conviction
8 resulted from discriminatory charges, selective prosecution, and
9 vindictive prosecution.

10 The elderly Petitioner, an experienced licensed real estate
11 broker represented the stereotype of the white collar criminal
12 who "made tons of money" at the expense and misery of "ordinary
13 people" leading up to and during the collapse of the California
14 residential real estate market. The prosecutor was newly named
15 to head a task force on white collar crime.

16 Petitioner and his innovative Rent To Own program had been
17 thoroughly investigated by the Bureau of Real Estate which con-
18 cluded no wrongdoing on the Petitioner's part. The investi-
19 gation was undertaken in response to several complaints about
20 the Rent to Own program by dissatisfied customers. Complaining
21 witness Jeffery Johnson, also a Real Estate Broker was
22 instrumental in calling upon the other customers to submit
23 complaints. When the Bureau of Real Estate found no evidence of
24 wrongdoing and took no action against Petitioner, complaining
25 witness Mr. Johnson became the ringleader, spearheading his
26 personal campaign to flood the Sacramento County District
27 Attorney's office with complaints from nearly every one of the
28 Rent To Own customers.

 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 58.)

1 The core issue underlying the complaints was the customers
2 had paid a fee to Petitioner pursuant to a contract for specific
3 services which would enable them to temporarily rent and eventu-
4 ally purchase a home they selected from the Petitioner. The
5 customers were dissatisfied because not all the services
6 promised had been rendered. The contract also provided the fee
7 was refundable if they "changed their mind." Petitioner took no
8 issue with either the fact he had not rendered all the services
9 the contract promised nor that dissatisfied customers were
10 promised and entitled to a refund. The problem at hand was
11 Petitioner financially overwhelmed by all the refund requests
12 and could only make refunds as funds were available.

13 Like the majority of small business owners, Petitioner ex-
14 pected his business would succeed, categorized the fees he col-
15 lected from customers as business income and utilized the
16 business income to pay his business operating costs. He paid
17 refunds to customers who "changed their mind" from the same
18 account until funds ran out. Petitioner never reasonably
19 expected all the customers would request refunds or that his
20 business would fail do to a set of business conditions beyond
21 his control, BUT IT DID. And Petitioner had a contingency plan
22 for customer refunds from the Broker's Recovery Fund (now known
23 as the Consumer Recovery Account) if the remote possibility
24 became a painful reality.

25 Based on the fact Petitioner paid these refunds out of the
26 same account where fees from all customer were deposited as
27 business income and from which business operating ex- penses
28 were paid, the prosecution concluded Petitioner was operating a
 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 59.)

1 ponzi scheme or scam. The prosecution's theory further held the
2 fees were no his property thus Petitioner had no legal right to
3 use the fees he collected from customers for business operating
4 expenses. Petitioner contends this is selective prosecution in
5 the sense he operated his business according to widely accepted
6 business practices, these were selectively deemed in his case to
7 be a ponzi scheme, and he stood accused of stealing money from
8 customers by false pretenses. This astonishing prosecution
9 theory continued to grow more astounding and vague with the
10 passage of time.

11 The prosecutor viewed a quick conviction in this case with
12 54 alleged victims would be political capital for his own career
13 advancement and anticipated the 72 year old Petitioner to jump
14 at his offer to resolve the case with a short prison sentence.
15 Instead, Petitioner maintained his innocence and attempted to
16 assert his right to a speedy trial. In response, the prosecutor
17 further expanded his investigation producing more than 7,000
18 pages of "evidence" to deliberately overwhelm Petitioner's
19 Public Defender and continued vigorously to oppose Petitioner's
20 release from custody pending trial. Petitioner contends the
21 prosecutor's conduct in both pretrial and trial matters
22 evidences a high level of vindictiveness, the vindictiveness was
23 a result of Petitioner's exercise of his right to maintain his
24 innocence and his right to a speedy public trial. At an
25 evidentiary hearing, Petitioner will argue discriminatory
26 enforcement of the law, unconstitutionally selective prosecution
27 and vindictive prosecution resulted in Petitioner's conviction.

28 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 60.)

1 A. PROSECUTORIAL MISREPRESENTATION
2 OF MATERIAL FACT

- 3 1. Rent To Own was a Ponzi scheme and scam operated by
4 the Petitioner. (R.T. 3386:9-21), (R.T. page 3393-3396)
5 (Note: Also see Ground 4, Notes: @ Footnote ²) As a
6 matter of legal definition the Rent To Own program was
7 not a Ponzi scheme. A ponzi scheme involves investors
8 who were promised an attractive exceptionally high return
9 on their investment by the operator. The operator does
10 not properly invest the funds and the return on the
11 investment funds, if any is substantially less than
12 promised to investors at the outset. To provide the
13 ongoing appearance of extremely large returns, the
14 operator pays early investors the promised return out of
15 the funds collected from new investors. The scheme
16 ultimately collapses when the operator is unable to pay
17 the high returns and/or repay the principal to each
18 investor. This a misrepresentation of material fact
19 because no Rent To Own customers were investors nor were
20 they promised a high rate of return on their money.
21 Dissatisfied customers were promised a refund if they
22 "changed their mind." The prosecution could have
23 misstated this as material fact by calling the Rent To
24 Own program "a lemon" because it leaves a sour taste in
25 the mouth or an "Edsel" because customers decided "it
26 wasn't all it was cracked up to be" but there is a huge
27 prejudicial difference between "ponzi scheme" and "a
28 lemon" or "an Edsel" in that the former has significant
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 61.)

1 negative emotional overtones, dastardly corrupt criminal
2 connotations and attaches specific criminal liability (i.e. the
3 operator's nefarious intent is presumed in a ponzi scheme.) The
4 prosecution's express purpose of repetitive references to "ponzi
5 scheme" and "Bernie Madoff" was to emotionally and
6 quasi-intellectually vilify Petitioner to the jury.

7 2. The funds Petitioner took from customers remained
8 their property and Petitioner promised to hold it "in
9 trust" for them. (R.T. 3449:17-20) This a misrepres-
10 sentation of material fact because "took from" is charac-
11 teristic of stealing and theft. It is further
12 misrepresentation because the prosecution tried
13 repeatedly to characterize the fee "as really" a rental
14 security deposit, "as really" the down payment on a house
15 or "as really" earnest money in an escrow account. All
16 these "as reallys" were essential to the prosecution's
17 case for embezzlement against Petitioner. And as matters
18 of material fact all of these "as reallys" were
19 essentially false misleading conclusions made by the
20 prosecutor. Customers paid a fee to Petitioner in
21 advance of a promise for specific services rendered by
22 the Petitioner. Complaining witnesses admitted they
23 understood Mr. Russell wouldn't do anything for them
24 until they paid him the \$2,900 fee. The contract
25 provision stating this fee would be refunded if the
26 customer "changed their mind" or contract provision at an
27 indefinite date in the future Petitioner would apply the
28 fee to a rental deposit did not alter the nature of the
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 62.)

1 transaction such that the fee remained the property of the
2 customer to be held in trust by Petitioner. The contract made
3 it clear Mr. Russell would be both the landlord and eventually
4 the seller. A landlord is largely free to structure rental
5 deposits as he deems necessary in a rental agreement.
6 Petitioner and customers hadn't yet established a rental
7 agreement spelling out the terms of a lease or deposit.
8 Conceivably, with a damage deposit might cause property damage
9 in excess of the damage deposit. The deposit as first and last
10 month's rent creates another set of scenarios. Landlords can
11 use rental deposits as he sees fit during the term of a lease.
12 As the seller Mr. Russell was promising he would consider the
13 fee as part of the down payment which was a bookkeeping matter.
14 Mr. Russell was not saying in the contract 'Even if you cause
15 \$10,000 of damage to my property which I have to pay
16 out-of-pocket, I'm going to put the \$2,900 toward your down
17 payment. These are matters to be carefully negotiated in the
18 future between the contracting parties.

19 3. Petitioner had a duty under the law to hold the \$2,900
20 fee customers paid him in segregated accounts. (R.T.
21 3458:12-20), (R.T. 3386:9-15) This a misrepresentation
22 of material fact because there is no such requirement and
23 no such duty under California law. As in #2 above, this
24 misrepresentation was essential to the prosecution's case
25 for embezzlement against Petitioner. The prosecution
26 deliberately confused the jury with information
27 Petitioner was a Real Estate Broker and information when
28 real estate brokers are either the buyer's or seller's
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 63.)

1 broker the broker has a duty to segregate funds received in a
2 separate account. The misrepresentation of material fact is
3 Petitioner was never these customers' broker. Initially,
4 PETITIONER WAS THE BUYER and landlord. At an unspecified future
5 date PETITIONER WOULD BE THE SELLER. In the former case Mr.
6 Russell could serve as his own broker. In the latter case, the
7 customer might well choose a different broker to handle the
8 property transaction between owner-seller Mr. Russell and
9 themselves as buyer.

10 4. Petitioner's use of these fees to pay business
11 operating expenses was illegal and prohibited by law.
12 (R.T. 3335:13-20) This a misrepresentation of material
13 fact because there is no such restriction or prohibition
14 under California law. The prosecution's evidence showed
15 Petitioner treated the fees as business income disbursed
16 for acceptable and legitimate business purposes including
17 advertising, office operations and rent. This
18 misrepresentation was material to the prosecution's case
19 of theft by deception and fraud attempting to mislead the
20 jury part of the Petitioner's deception was he didn't
21 explain to each customer he intended to use these fees
22 for business operating expenses. The prosecutor's intent
23 was to link Petitioner's use of fees for operating
24 expenses to a ponzi scheme where funds invested are held
25 in segregated investor accounts but diverted by and
26 converted to purposes of the operator. The prosecutor
27 continued to condemn Mr. Russell using this false
28 comparison reiterating to the jury 'Once Mr Russell got
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 64.)

1 their money he considered it his money.' Under the law
2 and pursuant to the contract these fees were his money.

3 5. The contract signed by Petitioner was illegal and an
4 "instrument of fraud." (R.T. 3339:10-3340:6), (R.T.
5 3465:9-13) The "contract as illegal" is a
6 misrepresentation of material fact because the contract
7 was reviewed by Petitioner's attorney who saw nothing
8 illegal about it. The prosecution's own expert witness
9 Mr. Kovar testified "In my opinion, it's a grab bag of
10 attractive ideas. I've never seen -- up until now I have
11 never seen this particular contract nor have I ever read
12 a contract this disjointed." (R.T. 2876:6-9) The nature
13 of any contract would of course offer attractive ideas
14 and options in return for some consideration. The
15 witness was entitled to his opinion this as unusual -
16 like nothing he had seen before and disjointed. As a
17 matter of contract law however, in contract disputes,
18 contracts operate against the party who drafts and offers
19 it and to the benefit of the other party meaning in this
20 disagreements about attractive ideas or confusion caused
21 by disjointed construction would operate to the
22 customer's benefit. The contract as an "instrument of
23 fraud is a misrepresentation of material fact because the
24 contract was an agreement executed between parties
25 neither of whom contested their signatures as forgeries.
26 Instruments of fraud include checks drawn on nonexistent
27 accounts, falsified documents i.e. titles, deeds,
28 securities, stock certificates, counterfeit currency or
(Rogald Russell, Habeas Corpus Petition, Ground Six, page 65.)

1 other counterfeited items or merchandise. The prosecutor
2 applied this term to convey to the jury the contract
3 represented only false promises and the pretense by which
4 Petitioner stole the customer's money - false pretense
5 being a necessary element of fraud. To accept this false
6 premise by the prosecution, one would also accept the
7 ridiculous proposition Petitioner willingly memorialized
8 his false pretenses in writing when he executed the
9 contract.

10 6. Petitioner made attractive false promises to customers
11 he never intended to keep in order to get their money.
12 (R.T. 3390:13-16) This a misrepresentation of material
13 fact because the misstatement is directly controverted by
14 the totality of evidence. Petitioner went to great
15 length and expense to create the PPM as a vehicle for
16 private investor funds, hired an attorney to recruit
17 prospective investors and personally participated in the
18 HUD application process for the Neighborhood
19 Revitalization Program if he had no intention of
20 fulfilling his "attractive promises." The contrary
21 statement is more reasonably true: Petitioner went to
22 great lengths doing everything in his power to fulfill
23 his attractive promises made to Rent To Own customers.
24 This false misleading statement to the jury by the
25 prosecution was made in an attempt to establish
26 Petitioner's nefarious intent. This is more of the same
27 circular logic: Mr. Russell made attractive false
28 promises with nefarious intent and we can infer Mr.

(Ronald Russell, Habeas Corpus Petition, Ground Six, page 66.)

1 Russell's nefarious intent from all his false promises.
2 What if, however, we (correctly) conclude Petitioner was
3 fully intent on keeping all of his attractive FUTURE
4 promises when he made them, but the future brought
5 unforeseen circumstances preventing him from fulfilling
6 his promises. A promise is not a false promise simply
7 because it goes un-fulfilled.

8 7. Mr. Neff and Mr. Russell were at cross purposes in the
9 operation of the Rent To Own program. (R.T. 3462:13 to
10 3463:14) This a misrepresentation of material fact
11 because it is predicated on the false assumption Mr.
12 Russell had no intention or financial incentive to
13 purchase homes for Rent To Own customers and Mr. Neff's
14 financial success depended entirely on closing the sale
15 of homes to Rent To Own customers. The \$2,900 fee
16 Petitioner collected from each customer pales in
17 comparison to his expected income from buying homes
18 (broker's fee paid by seller at least \$15k), rental
19 income from the home he owned (at least \$1,800 x 24
20 months = \$43.2k) and profit from selling the house to the
21 Rent To Own customer (20% more than what he paid for the
22 property i.e. \$200,000 x 20% = \$40k) It is absurd to
23 assume Petitioner had no intent and interest in \$98k
24 income he would derive from buying, renting and selling a
25 home to each and every Rent to Own customer. Similarly,
26 Earl Neff had an interest in "growing the business",
27 increasing future customer traffic, some of whom would be
28 referrals from satisfied customers who like Jim Mora were
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 67.)

1 able to purchase a home with conventional financing.
2 Testimony was "Mr. Neff was Petitioner's right hand man"
3 and as such, like Petitioner, he had a "long term view"
4 about the business. The prosecutor attempted to use this
5 separation as circumstantial evidence of Petitioner's
6 nefarious intent.

7 8. Petitioner took advantage of Ms. Cannon and Haven of
8 Hope in 2006 to pocket a \$57k commission. (R.T.
9 3341:3-27), (R.T. 3461:1-28) This a misrepresentation of
10 material fact because the misstatement is totally
11 controverted by the testimony of Ms. Cannon and Ms.
12 Raymond, both of whom were Haven of Hope executive
13 officers. The prosecutor attempted to use gross
14 misrepresentation of material fact as circumstantial
15 evidence as to Petitioner's self serving intent. This
16 was part and parcel of Mr. Archibald's tactic to demonize
17 and vilify Petitioner in front of the jury at every
18 opportunity irregardless of circumstances and witness
19 testimony.

20 9. Petitioner bought a car from Mr. Mora but refused to
21 pay him for it. (R.T. 3341:28 - 3342:27) This a
22 misrepresentation of material fact because the testimony
23 of witness Jim Mora is contained in Volume XI. pages
24 3118-3134 of the Reporters Transcript and contains no
25 references of any kind to vehicles or vehicle sales.

26 10. Petitioner's Christian faith was part of Petitioner's
27 deception of Rent To Home customers. (R.T. 3337:15 -
28 3338:2), (R.T. 3465:21-28) This a misrepresentation of
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 68.)

1 material fact because the testimony of witnesses Ms.
2 Cannon, Ms. Raymond and the Petitioner himself revealed
3 the nature of Petitioner's religious convictions and
4 faith substantially years before the innovative Rent To
5 Own program was even conceptualized. This was another of
6 the prosecutor's really "cheap shots" in front of the
7 jury intended to demonize and vilify Petitioner not only
8 as a con man but also hypocrite.

9 11. Petitioner only looked out for himself and what was
10 best for Mr. Russell. (R.T. 3340:24 - 3341:27) This a
11 misrepresentation of material fact because the testimony
12 of numerous prosecution witnesses controverted the
13 statement as false. Prosecution witnesses, for example
14 testified Petitioner donated his sales commission to
15 completely furnish living facilities for homeless people,
16 gave his nephew in a college a used car and saved them a
17 great deal of money. Furthermore, it is inconceivable
18 that a man who "only looked out for himself and what was
19 best for himself" could be engaged in the real estate
20 business for thirty (30) years without ever being subject
21 of a complaint. Again, this is material fact misstated
22 by the prosecutor to paint the Petitioner as a
23 self-centered, self-indulgent, self-serving con man whose
24 style is to take advantage of everyone he's ever
25 encountered in his life. Probably nothing could be
26 farther from the truth - at least according to the
27 prosecution's own witnesses.

28 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 69.)

1 12. Petitioner made an enormous profit from the Rent To
2 Own program. (R.T. 3391:24 - 3392:6), (R.T. 3451:1-4)
3 This a misrepresentation of material fact because the
4 prosecution spent at least \$13,000 for expert witness
5 testimony from a forensic accountant who determined the
6 Rent To Own program went broke and therefore was unable
7 to provide the promised refunds to all the customers.
8 Profit and income are not the same. Profit is the
9 amount remaining after subtracting costs from income.
10 Furthermore, the forensic account found no evidence
11 Petitioner's business expenses (costs) were questionable
12 or unusual nor did the forensic accountant determine
13 that Petitioner had hidden away income in an off-shore
14 account or invested it in a non-business item like a
15 private jet or services for a prostitute. This is
16 material because it was essential to the prosecution's
17 case that Petitioner had enriched himself by victimizing
18 the Rent To Own customers. The jury heard a great deal
19 of testimony about the financial losses of complaining
20 witnesses. This misstatement of material fact to the
21 jury was intended to inflame the jury against
22 Petitioner. The prosecutor also knew as a matter of
23 fact Petitioner was indigent, could not post bond and
24 was represented by the Public Defender. Hence, the
25 prosecutor, given these circumstances had to know there
26 was no measurable profit made by Petitioner in the Rent
27 To Own program.

28 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 70.)

1 If an evidentiary hearing is granted in this matter, Peti-
2 tioner will argue the prosecutor's misrepresentations of
3 material fact cited above and others severely prejudiced
4 Petitioner resulting in his conviction. Petitioner will further
5 argue the severity of prejudice resulting from misrepresentation
6 of material fact warrants reversal of Petitioner's conviction on
7 all counts.

8 B. PROSECUTION MISLED THE DEFENSE

9 1. Use of Testimony by Wonda Raymond and Margreta Cannon

10 (R.T. 215:13-7) January 23, 2014 the court convened to
11 consider motions in limine. Defense counsel submitted
12 Motion #10 to exclude other crimes evidence. The prose-
13 cution made representations to the Defense as follows:
14 "At one point I was looking at an earlier transaction Mr.
15 Russell had with Haven of Hope. As I advised the Court
16 in chambers and Mr. Slaughter, I am not currently intend-
17 ing to use that in the People's case in chief. I'm
18 presuming if Mr. Russell took the stand and somehow got
19 into that, that might open it, but I'm not planning to
20 use that in my case in chief." At trial, the prosecution
21 called witnesses Wonda Raymond and Margretta Cannon, both
22 of whom were Haven of Hope executive officers. The
23 testi- mony of both witnesses chiefly focused on the 2006
24 Haven of Hope real estate transaction. The prosecution
25 used the earlier transaction in his case in chief as
26 circumstan- tial evidence of Petitioner's intent in the
27 instant case. (R.T. pages 1962-1990), (R.T. pages
28 2014-2027), (R.T. pages 2028-2052), (R.T. pages
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 71.)

2057-2062), (R.T. pages 2014-2028)

2. Prosecution's Theory of the Crime (R.T. pages 3417-3419)

The prosecution led the defense to believe the instant case was theft by deception. Not until opening argument was the defense aware the prosecution was offering two theories of the crime being either fraud or embezzlement and asking the jury to decide which theory applied to individual counts. The jury had not heard evidence that supported each and every element of each and every count. This "two theory menu" allowed the jury to essentially side step the elements of intent and knowledge of wrong doing when considering the binary choice of either fraud or embezzlement. To defend as to each count the defense would have to make a showing that each specific count lacked the essential elements of fraud AND lacked the essential elements of embezzlement.

C. PROSECUTION'S USE OF PERJURED TESTIMONY

1. Earl Neff regarding receiving no compensation or payment

from Petitioner's Rent To Own program. (R.T. pages 2364-007 thru 2867) The prosecution called their witness Earl Neff who initially testified to receiving "a little bit of gas money once in a while and slept in the Rent To Own office because he described his financial situation as "Very meager". Several days later the prosecution recalls the witness to testify. The prosecution asks Mr. Neff to thumb through a stack of checks made payable to Mr. Neff and now the witness testifies he received a (Ronald Russell, Habeas Corpus Petition, Ground Six, page 72.)

1 series of checks "for living expenses" from the
2 Petitioner, his employer totally more than \$8,000. The
3 witness, testifying under a grant of immunity was warned
4 by the court before beginning to testify that he could
5 not commit perjury.

- 6 2. Complaining witnesses generally in reference to Petition-
7 er's alleged statements about trust accounts, escrow
8 accounts and a special safe place for fees Petitioner
9 collected. Petitioner contends most, if not all of the
10 complaining witnesses were "coached" either by Mr.
11 Jeffery Johnson or the Prosecution's Investigator on how
12 to answer questions regarding Petitioner's statements
13 about trust accounts, escrow accounts and special safe
14 place for the fees Petitioner collected from them.
15 Petitioner never discussed the topic of "safe keeping of
16 fees" with any customer and the disparity between
17 individual complaining witnesses' recollection of such
18 discussions suggests the ideas of trust accounts, escrow
19 accounts and special accounts was planted in their
20 thinking. Petitioner contends the Prosecutor was fully
21 aware these representations were false but they were
22 exactly the necessary words he needed to make his case
23 against the Petitioner.

24 D. BRADY VIOLATIONS

- 25 1. Bureau of Real Estate Investigation Petitioner, and his
26 Rent To Own program were subjects of a six (6) month
27 investigation by the Department of Real Estate later
28 known as the Bureau of Real Estate prior to the filing of
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 73.)

1 any charges in the instant criminal proceeding. The
2 Department or Bureau found no evidence of wrong doing and
3 took no action against Petitioner or the operation of the
4 Rent To Own program. Copies of documents related to this
5 investigation and the Investigation Report were
6 exculpatory material and never provided to the defense.

7 2. Broker's Recovery Fund or Consumer Recovery Fund This
8 fund became known as the Consumer Recovery Account. The
9 prosecution continued to deny the existence, purpose and
10 potential relief available through out the proceedings.
11 Petitioner insisted his customers would receive their
12 refund from this private pool of funds paid by all
13 brokers out of their commissions. The prosecution had
14 all the information about the fund in it's possession but
15 failed to tender it to the defense. Instead, after
16 obtaining Petitioner's conviction on all 52 counts,
17 provided the fund's application form to each of the
18 complaining witnesses who obtained a full refund of their
19 fee as promised by the Petitioner in their contract.

20 3. Witness statements to Investigators The prosecution
21 failed to turn over copies of the full statements
22 obtained by the prosecution's investigator from each
23 complaining witness. Several of these complaining
24 witnesses also testified they had not received or
25 reviewed their written statement(s).

26 CONCLUSION

27 If an evidentiary hearing is granted in this proceeding,
28 Petitioner will provide written documentation as to all of the
(Ronald Russell, Habeas Corpus Petition, Ground Six, page 74.)

1 above claims in Ground 6. He will argue that his conviction was
2 the result of prosecutorial misconduct in all of the forms cited
3 above; the prosecutor's conduct violated Petitioner's right to a
4 fair trial; and, in all likelihood, absent the prosecutorial
5 conduct, the result in this proceeding would be significantly
6 different. Finally Petitioner will argue, in view of the
7 prejudicial harmful effect of the prosecutor's conduct the only
8 reasonable and proper relief is reversal of the verdict on all
9 counts.

10 **APPLICABLE CASE LAW:**

11 U.S. v. Armstrong, 517 U.S. 456 (1996) The High Court found
12 the petitioner was convicted as the result of an
13 unconstitutionally selective prosecution violating petitioner's
14 Fifth Amendment right to due process.

15 Vick Wo v. Hopkins, 118 U.S. 356 (1886) The charges which
16 resulted in petitioner's conviction were the product of
17 discriminatory enforcement of the law violating petitioner's
18 Fifth Amendment right to due process.

19 Blackledge v. Perry, 417 U.S. 21 (1974) The charges which re-
20 sulted in Petitioner's conviction are the result of prosecutor-
21 ial vindictiveness based on Petitioner's exercise of a legal
22 right violating petitioner's Fifth Amendment right to due
23 process.

24 U.S. v. Goodwin, 527 U.S. 386 (1982) The charges which resulted
25 in Petitioner's conviction are the result of prosecutorial vin-
26 dictiveness based on Petitioner's exercise of a legal right
27 violating petitioner's Fifth Amendment right to due process.

1 Gray v. Netherland, 516 U.S. 152 (1996) The court held a prose-
2 cutor deliberately misled the defense about the evidence the
3 State intended to introduce regard the theory of defendant's
4 guilt violating petitioner's Fifth Amendment right to a fair
5 trial.

6 Napue v. Illinois, 360 U.S. 264 (1959) The prosecutor knowingly
7 used perjured testimony to obtain a conviction. The prosecution
8 knew or should have known the testimony was false and prejudice
9 resulted violating petitioner's Fifth Amendment right to a fair
10 trial.

11 Darden v. Wainwright, 477 U.S. 168 (1986) The court held the
12 petitioner's conviction was obtained as a result of prosecu-
13 torial misconduct violating petitioner's Fifth Amendment rights
14 to a fair trial and due process.

15 Doyle v. Ohio, 426 U.S. 610 (1976) The Supreme Court held the
16 trial court permitted defendant's credibility as a witness in
17 his own behalf to be impaired by fundamentally unfair means vio-
18 lating petitioner's Fifth Amendment right to a fair trial and to
19 testify in his own defense.

20 U.S. v. Young 470 U.S. 1 (1985) Petitioner's conviction follow-
21 ed from the prosecutor's vouching for the credibility of a
22 witness violating petitioner's Fifth Amendment right to due
23 process.

24 Berger v. U.S., 295 U.S. 78 (1935) The prosecutor's misstate-
25 ment of material fact were used to obtain Petitioner's convic-
26 tion violating petitioner's Fifth Amendment rights to a fair
27 trial and due process.

28 (Ronald Russell, Habeas Corpus Petition, Ground Six, page 76.)

1 Brady v. Maryland, 373 U.S. 83 (1963) The state failed to dis-
2 close evidence favorable to the accused violating petitioner's
3 Fifth Amendment right to due process.

4 Kyles v. Whitley, 514 U.S. 419 (1995) (Brady Violation by Inves-
5 tigative Agencies) The State failed to disclose Brady evidence
6 that was in the possession of investigative agencies to which
7 the State had access violating petitioner's Fifth Amendment
8 right to due process.

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 7

Cumulative Error