

***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

(Ronald Russell, Habeas Corpus Petition, Ground Five, page 48.)

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 <sup>against</sup> 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 fellows 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.  
- Not to further victimize them.

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

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

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

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

29 Petitioner offers the following as clear reasons why his counsel  
30 was ineffective.

(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. Cronic, 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 presumptive 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 re- stricted the right to present evidence of significant  
24 probative value violating petitioner's Fifth Amendment right  
25 to a fair trial.