

IN THE SUPREME COURT OF OHIO

GEORGE L. DINGESS, CASE NO. 07CR-08-6217
PETITIONER

V. HABEAS CORPUS

TIMOTHY BUCHANNON,
(WARDEN)
RESPONDENT

FILED
SEP 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

13-1332

MEMORANDUM OF LAW IN SUPPORT OF EVIDENTIARY HEARING

NOW COMES THE PETITIONER GEORGE DINGESS. HE WAS INDICTED ON AUGUST 2007 ON COUNT ONE OF FIRST DEGREE FELONY POSSESSION OF CRACK COCAINE, ONE COUNT OF FOURTH DEGREE FELONY OF POWDER COCAINE AND ONE COUNT OF THIRD DEGREE FELONY POSSESSION OF MARIJUANA. HE MOVED THE COURT TO SUPPRESS EVIDENCE RECOVERED FROM 1946 FOUNTAINVIEW COURT APARTMENT C. THE COURT HELD A HEARING ON 12-4-2009. THE CASE PROCEEDED TO TRIAL ON AUGUST 2, 2010 AND MR. DINGESS WAS FOUND GUILTY ON THE CHARGES OF POSSESSION OF CRACK, POWDER COCAINE, AND MARIJUANA, THEN SENTENCED ACCORDINGLY IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY OHIO. THE PETITIONER FILED THE APPROPRIATE APPEALS AND FOLLOWED UP TO THE SUPREME COURT FOR THE STATE OF OHIO. THE APPEALS WERE ULTIMATELY DENIED AND THE PETITIONER HAS NOW BROUGHT THIS CAUSE OF ACTION BEFORE THIS COURT FOR PROPER DISCLOSURE OF THE ERRORS COMMITTED. PURSUANT, TO R.C. 2725.02 AND 2725.04. THERE STANDS A POSSIBILITY THAT THE PETITIONER HAVING NOT BEGAN SERVING HIS SENTENCE AT THE TIME OF HIS APPEAL HAS A NEW SET TIME LINE TO FILE WHERE THE GOVERNMENT MAY SEEK THE UNTIMELINESS OF THE PRESENT APPEAL.

RECEIVED
SEP 23 2013

STATE OF OHIO

SS.


GEORGE L. DINGESS

COUNTY OF NOBLE

Procedural Default

Pursuant to Appellant Rule 26(B), an application for reopening and reconsideration was filed on 11/14/2012 alleging the applicant was deprived of the effective assistance of counsel on appeal for failing to recognize a Crawford v. Washington violation. However, an application to reopen and reconsider an appeal must be filed within ninety days from journalization of appellate judgment, then it must contain "[A] showing of good cause for untimely filing in the application.

Petitioner's application was denied as tardy and not on its merits.

Here as cause for the procedural default of ineffective assistance of counsel. Mr. Dingess asserts that appellate counsel Clark was ineffective because she was specifically appointed to represent him in his appeal process. He therein made specific request that counsel Clark keep him abreast of any new facts or conditions that may arise in his case that would be intimate enough in nature that would and should be relayed over to a petitioner or defendant in appeal process. Throughout the course of the appeal proceeding time Mr. Dingess made several request to counsel inquiring as to the status of his appeal that she had presented to the Ohio Supreme Court. An to this date counsel has not responded in a manner to allow the petitioner a sound opportunity to pursue his proper avenues of appeal.

Mr. Dingess has diligently searched for a way to find out the status of his case and subsequently found that his appeal case that was submitted to the Ohio Supreme Court had been denied and

that was direct and proximate result of the Department of Corrections (new policy) delaying legal mail until it can be paid for which delayed the filing of petitioner's 26(B) and all other pleadings subjudice.

Trial counsels performance falling below objective standards of reasonableness because her professional obligation to monitor the Supreme Courts docket listings while she had a open case before the court concerning Mr. Dingess. Moreover she failed to demonstrate her awareness and concern to the Supreme Courts denial of Mr. Dingess Appeal. Counsel failed notify the petitioner that his appeal was denied in that aspect. This is a clear constitutional violation of the sixth amendment. In *Smith v. State of Ohio Department of Rehabilitation and Correction* 463 F3d 426, 433-35 (6th Cir. 2006) (discussing (a) attorneys' failure to notify a criminal defendant of the outcome of an appeal constitutes ineffective assistance of counsel's performance under *Strickland v. Washington*.) Here in the present case this establishes cause for Mr. Dingess for the present case being submitted after the ninety day state timeliness standard, of final judgment in the court of appeals. Ohio R App. 26(B). Moreover counsel Clarks failure to monitor and advise the defendant of his appeal proceeding being denied violates his 14th amendment right to procedural due process and ultimately prejudice him because counsels error prevented him from meeting the timeliness of the Ohio R. App. 26(B). Where he could have presented his claims in a timely fashion. Including the state Department of Corrections delay in mailing the 26(B) timely caused it's dismissal implying interference by the state in petitioner's corrective process.

Question of Error

Whether Counsel Inadequately Presented

Probable Cause Objections

The petition is based on the 6th amendment to the United States Constitution and the 14th amendment equal protection and due process clause and article I § 9, § 10, and § 16 of the Ohio Constitution.

Notwithstanding the 4th amendments guarantees which states, the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the things to be seized. Section 14, Article 1 of the Ohio Constitution contains the same language (2933.22[A] and 2933.23) similarly provides that “[A] warrant to search or seizure shall issue only upon probable cause supported by oath or affirmation particularly describing the place to be searched and the property a search warrant must set.

It is a fact that an affidavit requesting a search warrant must set forth all facts that lead the affiant to believe that the item(s) are at the address listed, without this a warrant base on such an affidavit is *Altra Vires* and Invalid. *Akron v. Williams* (1963) 175 Ohio St. 186.

Here under *Crawford v. Washington* the Supreme Court recently explained that under AEDPA: “The pivotal question is whether the state court's application of the *Crawford* standard was unreasonable.” Appellate counsel Clarks performance fell below objective standard of reasonableness because she did not adequately present claims in which relief could have been granted. Counsel could have presented the fact that she was aware of the petitioner's 4th and 14th amendment constitutional as well as his 6th amendment constitutional right had been violated where the acts and directives of sergeant Allen could have been presented by her.

Prima Facie Evidence:

On direct appeal under the umbrella claim of ineffective assistance of counsel on trial counsel

Mr. Benton.

Here Mr. Dingess specifically request the court appointed counsel Mrs. Clark to challenge in his appeal the key factors that are required of an attorney to establish that a defendants 4th and 14th amendment rights to be free of illegal search and seizure, was violated. It was then counsel Clarks obligation to demonstrate that the petitioner's rights had been violated by:

First and foremost trial counsel Benton failed to raise any factual law objections as to whether Sergeant Allen affidavit established probable cause to execute a search warrant for search and seizure of the residence of one Natasha Felts in order to link one George Dingess to the actual possession or constructive possession of contraband in another persons dwelling.

It is a fact that appellate counsel could have demonstrated that trial counsel should have objected to the fact that sergeant Allen failed to procedural obtain a search warrant from the magistrate in a proper manner that established affirmation of the address to be searched. This was a exhibited fact upon Sergeant Allen's report. See (Franks v. Delaware 438 U.S. 154, 98 S. Ct. 2674, 57 L. ed 2d 667 (1978)

In Allen's testimony in the transcripts of the motion to suppress case number 07CR-6217 P. 15, He states that he was working narcotics August 2006 when he requested a warrant for "the search of George Dingess residence," indicated at 1946 Apt. C fountainview court Columbus, Ohio Id. at par. 14-25 and p. 16 Par. 1-25, also p. 17.

Counsel Clarks representation was well outside of the "wide range" of reasonable professional assistance. Id at 689 because the record of fact, suppression, transcripts, affidavit and trial testimony are contradictive, sergeant Allen had mislead the magistrate judge to believe that the informant information was accurate and that he had observed the information that the informant lead him to believe that the address in which the request for a search and seizure was to issued

was the residence of one George Dingess. The affidavit further alleged that the search would produce legally drug trafficking, possession of the sort that incontestably or constructively belongs to George Dingess. The petitioner asserts "that but for" the false information in the sergeant Allen's affidavit, the magistrate would not have issued a search warrant for Natasha Felts apartment in the name of George Dingess, rendering it *ultra vires*. Appellate counsel did not properly challenge the fact that trial counsel could have argued that sergeant Allen failed to demonstrate to the magistrate judge the "basis-of-knowledge" prong of the 4th amendment in order for a legal search warrant of particular premises is proved. For a example if the informant would have told sergeant Allen that Mr. Dingess or {dog} was using Natasha Felts apartment to sell marijuana and crack cocaine. See *State v. George* 45 Ohio st.3d 325, paragraph one of the syllabus and quoting from *Illinois v. Gates* {1983} 462 u.s 213, 238-239, 103 s.ct 23, 2332, 76 L.ed 527, *State v. hale*, Montgomery app. No 23582, 2010-Ohio-2389. Counsel could have demonstrated that sergeant Allen did not present actual nor factual information that within the for corners of the affidavit that the assumption was factual corroborated or legal basis for assuming Frank's case¹. The warrant was obtained as a result of untruthful an misleading averments in violation of the principle set forth in the residence in which a search warrant is being requested for actually belonged to George Dingess.

Mr. Dingess contends that it was appellate counsel Clarks obligation to present this claim under the umbrella of ineffective assistance of counsel on trial counsel Mr. Benton, thus by neither counsel presenting in a manner this section 14 article I, violation of the Ohio Constitution as guaranteed the defendant by the 6th amendment, this failure to do so identifies a ineffective claim

1 Frank's v Delaware 438 U.S. 154, 98 S. Ct 2674, 57 L. Ed 2d 667 (1978)

of error that is so serious that counsels were not functioning as effective assistance of counsel in the professional norms of defending a defendant. Having applied an incorrect Legal argument under the 14th amendment instead of the confrontation clause of the 6th amendment U.S. Constitution. Thus, the ripple effect leading the trial court and appellate courts into error or applying an unreasonable application of clearly established law from the United States Supreme Court. Appellate counsel prejudice the petitioner because she could have properly demonstrated that had trial counsel Benton properly argued and adequately challenged the fact that Sergeant Allen failed to establish in a proper manner and affirmation to the magistrate judge fro probable cause for a search and seizure warrant of Natasha Felts residence to establish that George Dingess was selling drugs out of her residence. Under the 6th amendment confrontation clause and in accordance with 2933.22(A) and 2933.23 where counsel failed to adequately present this issue at trial that set a path for appellate counsel to have had the opportunity to present this claim but did not and failure to do so has demonstrated a “reasonable probability that, but for counsel's unprofessional errors, the result of the suppression hearing would have been different.”²

The reason the suppression hearing would have been different is because attorney Insley for the state questioned Sergeant Allen as to the complete honesty of the affidavit, and testimony. See Supp. Tran. P. 16. In paragraph 25 indicates “there wasn't any additional testimony that judge Green needed other than what was in the search warrant contains all the information that is considered” that tail that wags the dog”, was drawn from an unknown (C.I) without indicia of reliability or trustworthiness and unavailable for cross-examination. Appellate counsel failed to demonstrate that trial counsel was ineffective on cross-examination where trial counsel Benton inadequately questioned the constitutionality of the requested search and seizure warrant and

2 Mapp v. Ohio 367 U.S. 643, 81 S. CT. 1684, 6 L. Ed 2d 1081(1961)

affidavit. See p. 36 par. 5-15, in which indicates that the court did recognize the uncontested avenue of constitutional violation by trial counsel. The court clearly established (we've entered into a lot of what is there, what is not there"), a showing that counsel was not effectively making a constitutional challenge to the illegality of the procedures that had been taken, by Sgt. Allen the court then stated that("I have in front of me, I think this is more appropriate for argument.) See p. 36 par. 4-7 of Supp. Tran. The court was fully aware that no proper challenge was being conducted in the hearing and appellate counsel prejudiced the petitioner by not filing the ineffective assistance of counsel on the trial counsel. Appeal counsel Clark had ample opportunity to file a proper appeal in Mr. Dingess behalf. She could have filed ineffective assistance of counsel on trial counsel.³ There was reasonable probability sufficient enough to undermine the confidence of the suppression and trial because counsel should have presented the fact that if Sergeant Allen hadn't disregarded the law when he was in full possession of the paperwork and facts as identified in exhibit #5. Sergeant Allen could then have "acted in good faith," by acknowledging the plain view facts of residency.⁴ Had the court and in the alternative the jury had the opportunity to be presented with the exact facts of the initial search procedure the the seizure of drugs and other articles from that point of the search would have been inadmissible. Thus Sergeant Allen could have stopped the search procedure and returned to the magistrate judge for a proper search and seizure warrant in the name of Natasha Felts that would have satisfied th constitutional particularity requirement.

When prompt by exigent circumstances officers acting in good faith and with a reasonable belief that they have probable cause for a search may take steps to secure the status

³ Crawford v. Washington 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004)

⁴ United States V. McLavain 310 F.3d 434, (6th Cir. 2002)

quo, to prevent the time required to obtain a warrant from defeating the very purpose for which the warrant is sought. In other words, the U.S. Constitution amendment IV guarantee is not offended when: officers, having probable cause, enter premises and with probable cause, arrest the occupants and secure the premises from within to preserve that status quo while others, in good faith, are in the process of obtaining a warrant.

Mr. Dingess asserts that appellate counsel was ineffective for not raising the ineffective assistance of trial counsel because trial counsel did not adequately challenge on cross-examination the fact that Sergeant Allen (had already persuaded the magistrate judge) that George Dingess was the occupant of the residence requested to be searched. Upon the actual search, Sergeant Allen failed to seek an additional search warrant for 1946 Apt C Fountainview Court after corroborating the fact that upon plain view of the initiated search of the residence established clear residency ownership within the bills, lease receipts, and other collective paper documents which displayed that the address being searched did not match up to the search warrants occupants registry. The warrant was in the name of George Dingess and the apartment was in the name of a Natasha Felts. See trial tran. p. 85, par. 16-25, p. 86, par. 1-12, also exhibit #5 of the search and seizure evidence.

Appellate counsel could have provided the court with the fact that Sergeant Allen was aware that his actions of continuing to search Natasha Felts apartment was actually a constitutional violation because he was then invading the privacy of someone other than George Dingess. Appellate counsel could have established the fact that this continued search was thus being proceeded in "bad faith," because the officer could have legally secure the apartment once inside until a more favorable search warrant had been obtained or complied with the commands of R.C. 2933.22(A) and 2933.23. The result of the search and seizure was illegal. Had trial counsel

Benton properly presented this violation of section 14 article I of the Ohio constitution as language R.C. 2933.22(A) and 2933.23 is similar to the 14th amendment to the constitution of the United States as grounds for suppression. There was indeed facts that a reasonable probability sufficient enough to undermine the confidence of the outcome of the suppression also the trial.

Appellate counsel could have additionally presented the fact that trial counsel Benton failed to challenge the lack of officers obtaining additional search warrants for DNA and other collected items of evidence not considered contraband and appellate counsel Clark also prejudiced Mr. Dingess because it was her professional duty to diligently present the existence of trial counsels errors by her failing to do so violates the petitioner 6th amendment right to the effective assistance of counsel as well as it prejudices the petitioner where the appellate courts decision was inconclusive because of a (detrimental inadequate representation of the merits on the original appeal.) George Dingess has been ultimately prejudice by a lack of representation and has properly demonstrated that the search and seizure warrant was flawed and illegal based on the fact of false representation and information presented to the magistrate in the original affidavit. See State V. Underwood Scioto App No. 03CA2930 2005-Ohio_2309, 19 citing Franks Supra, 438 US at 155-156.

Terry Stop of George Dingess Vehicle Stop and Seizure Before Execution of Search

Warrant⁵

To establish deficient performance of counsel, a person must show that counsel's representation fell below an objective standard of reasonableness. [Strickland] 466 U.S. At 488. Counsel failed to argue the legality of the Dingess stop instead of the Ward and Burney stop. Here Mr. Dingess

5 Terry v. Ohio 392 U.S. 1, 20 L. Ed 2d 889, 88 S. Ct. 868 (1968).

claims that counsel Benton rendered constitutional ineffective assistance of counsel in his litigation at the suppression hearing and that appellate counsel failed to adequately present the fact that trial counsel failed to present the coherent 14th amendment due process clause that protects him under the 4th amendment from unreasonable seizure and to have any evidence illegally seized excluded from his criminal trial, under Terry v. Ohio. As fruit of the poisonous tree doctrine. Appeal Counsel could have presented the fact that trial counsel failed to present constitutional claims of merit upon motion preceding the suppression hearing in which relief could be granted. This failure violates the 6th amendment right to counsel at critical stage of the proceedings. Also thus establishing cause for Mr. Dingess to establish ineffective assistance of counsel on appellate counsel Mrs. Clark . Here Mrs. Clark could have demonstrated the afore mentioned constitutional violation of ineffective assistance of counsel on trial counsel Mr. Benton for not adequately utilizing defense procedures under the law to establish procedural deficiencies stemming from the illegal stop itself of Mr. Dingess. The petitioner contends that counsel could have asserted that the detention of a person for the purpose of executing a search warrant does not impose upon police a duty base on geographic proximity, that is, defendant must be detained while still on his premises. Rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, this performance-based duty will normally , but not necessarily result in detention of an individual in close proximity to his residence. Michigan v. summer, 452 U.S 692,69 L.ed 2d 340, 101 s.ct 2587 {1981}. Appellate counsel could have properly identified the governing authorities as prejudicial to the petitioner. She could have established that { in assessing prejudiced under Summers} where the question should have been addressed accordingly had to effect the outcome or whether it is possible a reasonable doubt in the jury's

mind, might have been established if Sergeant Allen acted differently. Here appellate counsel could have shown the result would have been different because procedural due process pursuant to the 14th amendment, whereas upon officer John Earl making the initial stop of Mr. Dingess's vehicle, see Arizona v. Johnson{2009 at 129 S.ct 781 , 784 also see trial tran. p.72 par. 15-25, where as the officers performance was factually distinguishable from the courts holdings in Michigan v. Summers 452 U.S. 692 ,69 L.ed 340, 101 S.Ct 2582 {1981}, see also trial tran. p.3 par. 21-22. Based on the fact that Sergeant Allen was actually conducting a pre-rate surveillance and not executing the actual search procedure on 1946 apt. C Fountainview court. The evidence on record shows that Sergeant Allen instructed a{ on duty patrol officer to make a traffic stop } on Mr. Dingess's vehicle more than a mile away from the residence being surveilled for a actual search warrant execution. Appellate counsel could have presented the fact that trial counsel failed to argue the fact that the actual stop was performed in a illegal manner , because it was utilized as cause for the actual connection of Mr. Dingess and the residence that was in question to be searched at a later time. Appellate counsel could have presented the fact that the actual stop was more than less out of the practicable vicinity of the residence to be search and thus was unconstitutional public stop used as a basis to enter another's location on a search incident to arrest . Here Mr. Dingess's 4th amendment constitutional right was violate when he was detained by police in order for a search team to approach an activate and execute the search warrant on Natasha Felts residence in the name of George Dingess. See tran. p. 75 par. 23-25. Mr. Dingess contends that it is reasonable likely that the result of a later executed search warrant and search of the residence would have been different , had he not been illegally stop, detained and arrested without being charged with a traffic violation or another illegal act. See trial tran.

p.73 par. 19-23.⁶ Evidence of record indicates that there was contradiction in the testimonies of the officers events that trial counsel professionally should have objected to. See p. 76, par. 2-3, where sergeant Allen would have been relying on the warrant in good faith had he proceeded with the search of the residence and found no trace of documents, papers, and utility records that Natasha Felts presence Name and address on it that identified her as the resident lease owner of the apartment in which he was presently searching apartment C of 1946 Fountainview Court.

“Where the official action was pursued in Bad Faith, the Deterrence rationale [of the exclusionary rule] gains much of its force.” United States v. Leon 468 U.S. At 919 quoting Michigan v. Tucker (1974), 417 U.S. 433, 447. The petitioner contends that counsel could have adequately demonstrated that the wrong legal principal was argued at the, suppression hearing, also the improper use of general verdict form at trial. Accord. Could have been differently. It could have been different had the 4th amendment exclusionary rule been applied and argued correctly and objections made to the officers grossly negligent conduct. It was a fact that the officers where in possession of legal documents as to the ownership of the residence. The warrant indicated articles particularly describing what is to be discovered and seized once and once those articles are found, the search ceases. Here the officers continued the fishing expedition for cause to show that George Dingess was the owner of the residence by any manner of exhibits they could find that indicated his presence. To continue the fishing expedition after a finding of lawful documents of residency was in “bad faith,” because the evidence showed that the warrant was presently deficient and had to be revised officially.⁷ United States V. Leon 468

⁶ It is noteworthy that Mr. Dingess was not charged with the small amount of marijuana found on his person during the “Terry stop,” of his vehicle or a traffic violation.

⁷ Officials act in bad faith when they make a conscious-decision to act outside the scope of their official capacity. Either arbitrarily, maliciously, or saddistically.

U.S. 897, 923, 104 S. Ct. 3405, 3421, 82 L. Ed. 2D 677 (1984) For U.S. Constitution amendment IV purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is being conducted. Both probable cause and reasonable suspicion are not “finely-tuned standards” and are “not readily”, or even usefully, reduced to a neat set of legal rules” Illinois v. Gates 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed 2d 527 (1983). Rather these “fluid concepts... take their substantive content from the particular contexts in which [they] are being assessed.” Ornelas 517 U.S. At 696.

Here counsel could have argued 14th amendment right to procedural due process where prejudice is established is because Mr. Dingess was unconstitutionally stopped and illegally seized at a separate location from the premises targeted by the search warrant. This unconstitutional stop, frisk, and arrest substantiates the illegal performance by the officers that violates the petitioners 4th, 5th, 6th and 14th amendment right to the U.S. Constitution. See trial tran. p. 86 par. 7-12. Prejudice exist where Mr. Dingess indicated after being questioned by officers that he did not reside at the residence. See supp. Tran p. 37 par 15-20 and trial tran p. 88 par. 2-7. Counsel could have presented that the latter executed search of the residence could have adequately established that exhibit #5 was proof that Mr. Dingess did not own the residence. HE was not the lease holder renter, nor occupant of the resident. See trial Tran. p. 85 par. 16-25. It was crucial that officers search for evidence of who lived in the apartment, and on this point “the warrant could not reasonably have described the items more precisely.”⁸

See Enyart, at 39, quoting Hale at 77. In Michigan v. Summers 452 U.S. 692, 69 L. Ed 2d 340,

⁸ Police detective Sgt. Allen knew or should have known that the warrant was defective on its face and lost its force and effect as it related to George Dingess. But knowingly and purposely continued the conspiracy to deprive Mr. Dingess and Ms. Felts of their rights, privileges, and immunities.

101 S. Ct. 2587 (1991). The dispute focused on whether police officers were justified in their initial stop of defendant in his vehicle and had authority to require an individual to re-enter his house and remain there while they executed a search warrant of such individuals dwelling, would be inapplicable. The supreme court concluded that such a detention amounted to seizure but did not violate the 4th amendment. Here, there was plain error regarding the police performance, purpose, and scope of the initial stop of Mr. Dingess's Vehicle which broadened the officer's acts to manipulate the circumstances in order to connect Mr. Dingess to the apartment sought out to be searched. Here the officers stopped the petitioner at a public location seized him and arrested him while a search was be conducted at another location that did not belong to him and subsequently charged him with contraband found from there.

Terry v. Ohio 392 U.S. 1, 20 L.Ed. 2D 889, 88 S. Ct. 1868 (1968) does not provide a means or stepping-stone for compelling the occupant of residence, that is away from the premises, to return to the residence to aid in a search thereof. See United States v. Cochran 939 F. 2d 337 (1991). Here Mr. Dingess case is much unlike the focus in either Summers or Cochran where there was probable cause in those cases. Here the petitioner was not charged with any traffic violation. He was not charged with any possession of illegal substance. He was not charge with any attempt to evade the traffic stop and did not make any irrational movements or acts upon being stopped. Thus had counsel presented these facts under the 4th and 14th amendments, there would exist a possibility that the proceedings would have resulted in Mr. Dingess favor.

Vindictive Prosecution:

The constitutionality of prosecutions failure to disclose the information obtain from the interview with key component Natasha Felts. See trial tran. p. 88 par. 2-25. Crosses the threshold of

vindictiveness (noting that Mr. Dingess indicated that he did not own the apartment in question upon being stopped. Sergeant Allen on the record stated that he had found documents with Natasha Felts name on them as the address belonged to her, See trial tran. p. 85 par. 16-25, evidence of record indicates that testimony was that exhibit #5 was “just documents, papers to establish residency and documents to show the address of the house being searched”) and the question on trial trans. p. 88 par. 22-25, (referred to Sergeant Allen interviewing Natasha Felts, continued on page 89 par. 1-3 where Sergeant Allen, never recalled whether he had a in the station interview with Natasha Felts but talked with her on the phone.” There was never any mention of the information obtained from the resident owner.

Appellate counsel could have challenged the fact that trial counsel did not fulfill his obligation as a professional attorney and challenge this omission of the prosecution presenting the necessary information.

The supreme court has held that the prosecutor's failure to disclose evidence favorable to the defense constitutes a denial of due process, “where the evidence is material either to the guilt or the punishment, irrespective of good faith or bad faith of the prosecution.” *Brady v. Maryland* 373 U.S. 83, 87, 83 S. Ct. 10 L. Ed 215 (1963)⁹ Here appellate counsel could have established the petitioner's 14th amendment due process right had been violated by the prosecution omissions. This is plain error a professional error in performance that ultimately prejudiced the trial and appeal process, subjudice.

It is a fact that counsel had access to the records and reviewed them. Appellate counsel

⁹ The state's choice to withhold favorable discovery information from the defense contrary to Crim. R. !6(e) and (f) effected the fundamental fairness of those state court proceedings particular trial.

Clark entered an appeal on Mr. Dingess Behalf. Counsel Clark on the other hand rendered ineffective assistance of counsel as guaranteed by the 6th amendment because she failed to present the fact that trial counsel was ineffective for not presenting or establishing the constitutional violations at trial where the petitioner must show that:

1. Evidence was suppressed by the prosecution in that it was not known to the petitioner and not available from another source;

➤ Here counsel Clark could have established that trial counsel Benton failed to demonstrate that a suppression hearing was held and there was never any mention of a interview with Natasha Felts or Mr. Dingess's alleged statement at the police department (which never occurred). Not occur if previously undisclosed evidence is disclosed during trial unless the defendant is prejudiced by its prior non-disclosure. See United States v. Word 806 F. 2d. 658, 665 (6th Cir. 1986). The Prior disclosure would potentially have identified whose contraband was found, and who's house was searched. Here the prosecutor's misconduct denied the petitioner due process and a fair trial when the state did not comply with the Ohio rules of criminal procedure rule 16 et. Seq. Or Evid r. 804 through 808 exception to hearsay evidence by disclosing witness testimony before trial for defense counsel's investigation or impeachment purpose. Appeal counsel was ineffective because she did not properly present this claim on appeal when it was in fact available for argument.¹⁰ prejudiced the petitioner because this was in fact a legal objection that could have been presented as grounds for relief. It was not until trial that Sergeant Allen released the fact that he had made prior contact with the actual owner of the residence Natasha Felts. Never

10 Ohio Evidence rule 803

the less, he did not release the actual information that he obtained in the interview and this conduct prejudiced the defense at trial because he was being charged for a crime he claims actual innocence to it cannot be said this information was vital, and could have changed the outcome of either the suppression hearing or the trial in his defense or maybe even the prosecution in general.

2. The evidence was favorable or exculpatory;

➤ Here counsel Clark could have demonstrated that trial counsel Benton failed to establish that upon the initial search of 1946 Fountainview Court Apt. C Sergeant Allen went against verification of residency by Natasha Felts Moreover he never made any attempt to solicit her statement.

3. The evidence was material to the question of the petitioner's guilt;

Here counsel could have shown that Natasha Felts testimony was detrimental to the case because there stands a possibility that Natasha excepted the responsibility of her residence possessions or maybe even she would have gave exculpatory testimony that was favorable to either of the prosecution or defense. See *Strickler v. Greene*, 527 U.S. 263, 281-82 119 S. Ct. 1936, 144 L. Ed. 2D 286 (1999).

Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley* 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 481 (1985). It is clearly fact that Natasha Felts testimony was material. Material evidence is that which is "clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." *United States v. Clark* 988 F. 2d 1459, 1467 (6th Cir. 1993).

Here Mr. Dingess contends that appellate counsel Clark could have demonstrated where trial counsel erred in not challenging the delay in the disclosure prejudiced the defense because the defense could have subpoena the testimony of Natasha Felts at the suppression hearing notwithstanding the alleged CI had this information not been omitted. There was possible favorable evidence in her statement that could have change the out come of those proceeding. The information could have established whether or not Mr. Dingess actually lived there and if the drugs they found actually belonged to him are not, instead of assumptions the petitioner was prejudiced because there stands a reasonable probability that the proceedings at the trial also would have been different as well as the suppression hearing. It would have been different because the jury would have known first hand what the actual person whom the apartment was leased to had to say about the presence of drugs found in her residence. Whether or not there was a connection between Mr. Dingess and the drugs would have been clearly established with her statement and testimony. The duty to disclose favorable evidence includes the duty to disclose impeachment evidence. *Bagely, Supra; Giglio v. United States* 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2D 104 (1972).

It was certain that Sergeant Allen was in possession of the knowledge so was the prosecution in possession of the knowledge of Natasha Felts statements to police. The duty to disclose favorable evidence includes the duty to disclose impeachment evidence. *Bagely, Supra; Giglio v. United States* 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2D 104 (1972). It is certain that Sergeant Allen was in possession of the knowledge of Natasha Felts statement and that his professional duty was to disclose the material evidence to the defense at some point and time but decided not to it was also the prosecutions duty to do the same of the information with in their in their possession. Crim R. 16(e) and (f) by the state failing to fully disclose the statement,

indicates the fact that there was impeachment evidence. And a conscious-decision to withhold it from petitioner's first prong of "Bad faith" and second prong of vindictive prosecution. Accord demonstrates that a reasonable jury would have foresaw a different outcome had they been presented with the proper evidence. Also the suppression hearing would have been conducted in a different manner had the information been presented for consideration as grounds for suppression. A defendant is denied effective assistance of appellate counsel where counsel fails to present errors that occurred during the course of pre-trial or trial which are apparent in facts of the record.¹¹

CONFRONTATION CLAUSE:

The confrontation clause of the sixth amendment guarantees a criminal defendant the right to confront the accuser and witness against him. Here Sergeant Allen never witnessed Mr. Dingess make a sell or delivery of any illegal substance. He never present the court with any evidence that he had made a proper surveillance where as he made a controlled buy of any illegal substance but only that he had gotten information from a unidentified informant that George Dingess was selling crack cocaine and marijuana from a residence.

"the main essential purpose of the confrontation clauses is to secure for the opponent in a criminal-case the opportunity of cross-examination." Here appellate counsel's professional duty was to present the fact that the prosecution failed to exercise due diligence to produce witness at trial.

¹¹ 2 part test under 28 USC §2241

The prosecution in a criminal trial must make a good faith effort to produce relevant witness at trial. See *Barber v. Page* 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2D 255 (1968).

Here the prosecution's case rested on the information of a witness statement. There was no cause of certainty as to Mr. Dingess actually living at the residence or owning it nor leasing it prior to obtaining the search warrant besides the informants statement that he lived there.¹²

This witness the informant in which Sergeant Allen testified had given him the information that he submitted to the magistrate judge in the form of a affidavit to obtain a search warrant in George Dingess's name for Natasha Felt's Apartment.

This information was never produced for the defense to question at the suppression hearing nor was the informant. The informant was never produced at trial in order for the defense to cross-examine to test the clarity, reliability, and truthfulness of his information against Mr. Dingess.

The standard for evaluating whether the prosecution has made a good faith effort to produce a witness is one of reasonableness. *Ohio v. Roberts* 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2D 597 (1990), overruled on other grounds, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2D 177 (2004).

The prosecution has and did not offer a good faith effort to locate and produce the informant witness. The reason this testimony would have been vital is because it would have allowed the defense a opportunity present to the jury any false information in which the prosecution relied on from the information presented an also for the defense to be able to cross-examine any information that the prosecution relied on, and character at this witness. Failing to raise this argument on appeal and it prejudiced the defense because it was material evidence that

¹² It is suspected by petitioner that the (C.I.) who to date is unknown in fact does not exist. Even though his alleged statements were admitted into testimony as the "tail that wags the dog"

should have been disclosed to the jury. Thus violating petitioner's right to confrontation and mending the 3rd prong of petitioner's bad faith and vindictive prosecution claims sufficient to have undermined the integrity of the jury verdict, *Humphress v. U.S.* 398 F. #d 855 (6th Cir. 2005)

CONCLUSION

Wherefore, all the above stated reasons presented above petitioner has grounds warranting an evidentiary hearing in order to develop state court record and Tease out the truth subjudice.

Respectfully Submitted,

A handwritten signature in cursive script that reads "George L. Dingess". The signature is written in black ink and is positioned above a horizontal line.

George L. Dingess, Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Habeas Corpus was served upon the Department of Corrections Litigation Division , by U.S. Mail to the following address 770 West Broad Street Columbus, Ohio 43215 on this 17 day of September, 2013.

George L. Dingess
George L. Dingess
15708 McConnellsville Road
Caldwell, Ohio 43724



DEBORAH KING
Notary Public, State of Ohio
My Commission Expires

2-12-14

Deborah King
Notary Public

My Commission expires 2-12, 20 14.

/ Noble County / State of Ohio /