ORIGINAL

CASE NO. 18-7085

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IN THE UNITED STATES SUPREME COURT

****

LARRY A MCGHEE,
Petitioner,

-V-

Duncan MacLaren,
Respondent,

****

ON PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

****

Larry A. McGhee

/s/ LARRY A. MCGHEE
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TABLE OF CONTENTS

ATTACHED APPENDIXS

Appendix-A- Michigan Supreme Court Order

Appendix-B- Michigan Court of Appeals ORDER

Appendix-C- Trial Court ORDER

Appendix-D- Search Warrant AFFIDAVIT

Appendix-E- Forensic Laboratory REPORT

Appendix-F- Grand Jury Testimony Northern

Appendix-G- Police Statement Northern

INDEX OF AUTHORITIES

QUESTIONS PRESENTED

i

WHETHER THE TRIAL COURT ERRED IN FINDING THAT PETITIONER FAILED TO SHOW ENTITLEMENT TO RELIEF PURSUANT TO MCR 6.508 WHERE TRIAL COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO CHALLENGE THE VERACITY OF THE AFFIDAVIT THAT WAS USED TO PROCURE A SEARCH WARRANT WHERE CONFLICTING TESTIMONIES WERE GIVEN BY INFORMANT TO FEDERAL AND LOCAL GRAND JURIES AND STATEMENT MADE CONTRARY TO THOSE TESTIMONIES AND GOVERNMENT AGENT KNOWINGLY AND INTENTIONALLY SHOW A RECKLESS DISREGARD FOR THE TRUTH USING STALE INFORMATION AND TRIAL COUNSEL FAILED TO REQUEST A FRANKS HEARING.

ii

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING RELIEF WHERE TRIAL COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL WAIVED PETITIONERS' RIGHT TO CROSS EXAMINE HIS ACCUSER

B. WHETHER THE TRIAL COURT ERRED IN FINDING THAT PETITIONER FAILED TO SHOW CAUSE AND PREJUDICE WHERE PETITIONER WERE RENDERED THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL FAILED TO FILE THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

iii

WHETHER THE TRIAL COURT DENIED THE PETITIONER THE DUE PROCESS OF THE LAW WHEN IT SENTENCE PETITIONER UNDER A STATUTE THAT WAS OUTDATED DURING THE PENDENCY OF PETITIONERS' CASE.

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OPINIONS BELOW

The Michigan Supreme Court DENIED Petitioners' Application For Leave to Appeal, holding that the Petitioner failed to meet the burden of establishing entitlement to Relief under MCR 6.508(D), in doing so, DENIED Petitioners' Motions to remand For an Evidentiary Hearing to People V Ginther, Franks V Delaware, and for Resentencing, Dated October 30, 2018. (see Appendix-A -Michigan Supreme Court Unpublished Opinion Case No 157460).

The Michigan Court of Appeals DENIED Application For Leave to Appeal, holding that the Petitioner failed to establish that the Trial Court Erred in DENYING the Motion For Relief From Judgment. (see Appendix-B -Michigan Court of Appeals Unpublished Opinion Dated February 22, 2018, Case No 340080).

The Trial Court DENIED Petitioners' Motion For Relief From Judgment in a lengthy Opinion that was contrary to Supreme Court Precedent, Dated May 25, 2017. (see Appendix-C- Trial Court Opinion, Case No. 01-177766-FC).

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JURISDICTION

This Petition For Writ of Certiorari is filed within 90 days of the October 30, 2018, Michigan Supreme Court ORDER DENYING Petitioner Relief, as required by US Supreme Court Rule 13(1).

This Court has Jurisdiction pursuant to 28 U.S.C. §1254(1).

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UNITED STATES CONSTITUTION AND

MICHIGAN CONSTITUTION AMENDMENT

1. U.S. Constitution Am. IV

"the right of tne people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the person or things to be seized".

Mich. Const. 1963, Art 1, §11.

"the persons, houses, papers and possessions of every person shall be secured from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, not without probable cause, supported by oatn or affirmation. The provision of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside tne curtilage of any dwelling house in this State".

UNITED STATES CONSTITUTION AND
MICHIGAN CONSTITUTION AMENDMENT

2. U.S. Constitution Am. VI

"in all criminal prosecution, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which the District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

Mich. Const. 1963, art 1§20.

"here, the Michigan Constitution adopted verbatim the United States Constitution Amendment".

STATUTORY PROVISION

3. MCL 333.7401(2)(a)(i)

"MCL 333.7401(2)(a)(i), requires that a minimum term of 20 years in prison for possession of 650 grams or more of a controlled substance".

MCL 333.7401(2)(a)(ii)

"MCL 333.7401(2)(a)(ii) requires not more than 30 years in prison for a person in possession of 450 grams, but less than 1,000 grams.

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summary of arguments

i.

PETITIONER WAS RENDERED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO INVESTIGATE CONFLICTING EVIDENCE PRESENTED TO BOTH THE POLICE AND GRAND JURIES AND EVIDENCE THAT GOVERNMENT KNOWINGLY AND INTENTIONALLY SHOWED A RECKLESS DISREGARD FOR THE TRUTH IN PROCURING A SEARCH WARRANT CHALLENGE THE STALE EVIDENCE USED TO PROCURE THE SEARCH WARRANT AND REQUEST A HEARING TO ESTABLISHED PROBABLE CAUSE PURSUANT TO FRANK V Delaware.

The United States Supreme Court held in Franks V Delaware, 483 US 154, 155-56 (1978), "that where the defendant makes a substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by the

affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of "Probable Cause" the Fourth Amendment requires that a Hearing be held at the defendants' request. Should an allegation of perjury or reckless disregard for the truth be established by a preponderance of the evidence the affidavit as to the allegations should be set aside and if the remaining affidavits are insufficient to support "Probable Cause" then the search warrant must be voided and the Fruits of the search excluded. EMPHASIS ADDED.

Here, Trial Counsel knew that Lamark Northern testimony was inconsistent before two Grand Juries, and again made conflicting statements to the Police concerning Petitioner and drug activities in 1994 and 1995.

The alleged incident was outlined in DEA Agent Furmack April 26, 1997 Police Report. Here, Agent Furmack states: "Mr. Northern was a drug dealer and that Mr. Northern informed him of drug transaction between Joe Abraham, Mr. Abraham was Mr. Northern drug supplier. The report went on to include Demar Garvin, Roderick Lee and Willie Adams, who went to Mr. Abrahams' home in Belleville to pick up 10 Kilograms. Accordingly, Mr. Northern stated that 8 Kilograms were for Willie Adams, 1 Kilogram was for Mr. Garvin, and 1 Kilogram were to be divided between Mr. Garvin, Mr. Marvin Smith, Mr. Ahmed Anthony and himself. Petitioner was not mentioned in this transaction.

Next, Mr. Northern testified before a Federal Grand Jury, here Mr. Northern repeated the trip to Mr. Abraham house for the 10 Kilograms, he stated that that trip occurred in 1995, but, although the same incident, the car in which they drove was now Mr. Roderick Lees' car, and they had to wait until Mr. Abraham get the drug. He further testified, that while waiting Roderick Lee. informed them that 2 Kilograms were for Willie Adams,

and the rest were to be divided between Mr. Roderick and Mr. Demar. Here, Mr. Northern denied the truthfulness of DEA Agents' Furmack account of the statement made. There was no mention of Petitioner.

Next, Mr. Northern again testified, this time before the Oakland County Grand Jury, here Mr. Northern for the first time implicated Petitioner, this version of events different from the previous two accounts. This time Mr. Northern testified that he can't remember tne type of car they rode in, and this time, it was Mr. Roderick and Mr. Nathaniel Lee that had pooled money with Willie Adams, Toodaloo Adams and Petitioner to purchase the cocaine.

Mr. Northern testimony to the Federal Grand Jury, Oakland County Grand Jury and that to DEA Agent Furmack was inconsistent in facts.

Here, Agent Sharpe failed to inform the Magistrate Judge tnat the affidavit included inconsistent statements made by Mr. Northern in (1) Mr. Northern Police Report to Agent Furmack, (2) Oakland County Grand Jury, and (3) Federal Grand Jury.

The search warrant was not issued until 1998. Agent Sharpe failed to tally the number of buys Mr. Northern made, in an effort to mislead tne Magistrate.

The Trial Counsel was ineffective where Counsel failed to Motion the Trial Court to suppress the evidence for lack of Probable Cause.

In order to obtain New Trial, a defendant must show: (1) Counsels' performance fell below an objective standard of reasonableness and (2) but for Counsels' deficient performance, there is a reasonable probability that the outcome would have been different. Strickland V Washington, 466 US 668, 687 (1984). Strickland, at 691., permit Counsel to make a reasonable decision that

makes particular investigations unnecessary.

It can not be said that Trial Counsel was performing Trial Strategy, knowing that the warrant was defective, and that there was "No Probable Cause" pursuant to Franks V Delaware, 438 US 154, 171-2 (1978). A Franks nearing would have put the veracity of the Government evidence to the test.

STALENESS

In this case, Mr. Northern alleged statement and testimonies before the Grand Juries occurred sometime in 1994 and 1995 respectively. The search warrant was not issued until 1998. DEA Agent Furmack report was not generated until April 26, 1997, some 2 and 3 years since the Grand Juries testimonies and 4 years before the issuing of the Warrant by the Magistrate Judge.

"The Probable Cause showing may have grown STALE in view of the time that has passed since the warrant was issued". The facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that Probable Cause can be said to exist as to the time of tne search, and not simply, as of some time in the past. EMPHASIS ADDED., see Sagro V United States, 287 US 206, 210-11 (1932).

Here, Petitioner was using the home as rental property, and had not been to the home in some time, as indicated by the next door neighbor Marilyn Bender, whom testified that although she lived next door to 483 Montana for some time, she knew the resident at the time as Mr. Butler and she had never seen Petitioner. (Trial Transcript Vol II, page 241-243).

Mr. Michael Butler was renting the property at 483 Montana, and claimed to have moved out of the home, leaving the keys on the kitchen

table because Petitioner did not want Mr. Butler recently paroled brother residing in the home. (Trial Transcript Vol II, page 210-225).

When looking at the totality of the circumstances, coupled with Petitioners' personal information being put in a box and stored in a back bedroom closet. Can not be reasonably to establish that Petitioner main resident was the home in question.

Stale information cannot, at least alone, provide the basis for Probable Cause. United States V Frechette, 583 F3d 374, 377-78 (6th Cir. 2009). That Court held: "this is because Probable Cause determination is concerning with facts relating to a presently existing condition. United States V Spikes, 158 F3d 913, 923 (6th Cir. 1998). W. LaFave, Search and Seizure §3.7 at 338 (3d. ed. 1996)".

That Court further explained: "the staleness inquiry depends on the inherent nature of the crime". Frechette, at 378. Insomuch, that Court reasoned: "in the contents of drug crimes information goes stale very quickly because drugs are quickly sold or consumed". EMPHASIS IN ORIGINAL.

In allowing the staleness of the 1994 and 1995 evidence to go uncontested, Trial Counsels' representation fell well below the assistance that is guaranteed a Defendant under the Sixth Amendment. Where counsel failed to conduct a thorough investigation of possible mitigating evidence. Porter V McCallum, 558 US 30. 39-40 (2009).

ii

TRIAL COUNSEL WAS INEFFECTIVE WHEN COUNSEL DENIED PETITIONERS' RIGHT TO CONFRONT HIS ACCUSER THAT ACCUSED PETITIONER OF POSSESSION MORE THEN 650 GRAMS OF NARCOTICS WHICH REQUIRED A MANDATORY SENTENCE OF 20 YEARS OR CHALLENGE THE ANALYSIS REPORT OF DENNIS E.

LIPPERT WHERE THE NARCOTICS WAS LESS THEN 5 GRAMS OVER THE 650 THRESHOLD.

In this case, the Government entered into the evidence several Laboratory Report prepared by Dennis E. Lippert of the State Police Forensic Laboratory. These report alleges that the amount of Narcotics found at the Montana street home weighed 654.2 grams.

The Sixth Amendment [GUARANTEE] a Defendant the right to confront his accuser, unless, the witness are unavailable for Trial and the Defendant had an opportunity to cross examine the witness in a prior proceeding. Crawford V Washington, 541 US 36, 69 (2004).

Petitioner had no opportunity to cross examine or challenge the report prepared by Dennis E. Lippert, the reports were introduced at Trial to establish the substance found and the weight of the substance. Insomuch, the weight of the substance could potentially increase Petitioners' sentence.

Trial Counsel was ineffective in the failure to object or seek to cross examine the reports produced to increase Petitioner sentence. This Court held in Porter V McCallum, 558 US 30, 39-40 (2009): "the duty of an Attorney is to conduct a thorough investigation of possible mitigating evidence is well established by [OUR] cases". Id,. Strickland, at 688.

Here Petitioner was prejudice by Trial Counsel deficient performance during the course of Trial. Had Counsel challenged the Warrant on the basis of: (1) inconsistent statements and testimonies, (2) staleness of the evidence and (3) that DEA Agent Jerome Sharpe knowingly and intentionally showed a reckless disregard for the truth in procuring a search warrant. Pursuant to Franks V Delaware, 483 US 154, 155-56 (1978), Counsel could have showed that the warrant was

"DEFECTIVE" and insufficient to support "Probable Cause". Albeit, Counsel could have shown by a preponderance of the evidence.

To obtain relief on the basis on Ineffective Assistance of Counsel, the Defendant as a general rule, bears the burden to meet two standards. First Defendant must show deficient performance that the Attorney errors was so serious that Counsel was not function as the Counsel guaranteed the Defendant by the Sixth Amendment. Stricklano, at 687. Second, the Defendant must show that the Attorneys' error prejudiced the defense. Ibd.

iii

PETITIONER WAS DENIED THE DUE PROCESS OF THE LAW WHERE THE TRIAL COURT SENTENCE PETITIONER PURSUANT TO MCL 333.7401(2)(a)(i) THAT WAS AMENDED PURSUANT TO MCL 333.7401(2)(a)(ii) DURING THE PENDENCY OF PETITIONERS' CASE.

Here, Petitioner was charged under MCL 333.7401(2)(a)(i), wnich require a mandatory minimum prison term of 20 years for possession of 650 grams or more of a controlled substance.

In 2003, the Michigan Legislature Amended that Statute pursuant to MCL 333.7401(2)(a)(ii), under the new Amendment, the Statute provides: "that a person who possessed a controlled substance in the amount of at least 450 grams, but less than 1,000 grams, was guilty of a Felony punisnable by imprisonment for not more than 30 years, or a fine of not more than $500,000.00 or both.

Had the Trial Court properly sentence the Petitioner, Petitioner would have been sentence less then the mandatory 20 years in prison.

Under the Michigan Sentencing Scheme, a

Defendant will typically be given an indeterminate sentence. MCL 769.8. The maximum sentence under this system is set by law. MCL 769.8(1).

Under the Sixth Amendment to the United States Constitution, a Criminal Defendant is guaranteed the right to a speedy and public trial, by an impartial Jury. The Sixth Amendment right to a Jury Trial, considered together with the Due Process Clause of the Fourteenth Amendment, guarantees Criminal Defendants' to a Jury determination that he is guilty of every element of the crime witn which he is charged beyond a reasonable doubt. Apprendi V New Jersey, 530 US 466, 477 (2000).

Here, the sentence of 20 to 30 years in prison was significantly increased where the Trial Court relied on an outdated Michigan Statute which requires a "mandatory" 20 years. Where Petitioner is a first time offender.

In this case, the Amended Statute went into effect on March 1, 2003, Petitioner was found guilty by a Jury on May 28, 2004, and was sentence on July 1, 2004.

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STATEMENT OF THE CASE

Petitioner was charged with: 1 Count of "Possession W/Intent to Deliver Over 650 grams of Cocaine" contrary to MCL 333.7401(2)(a)(1), 1 Count of "Possession W/Intent to Deliver Heroin Under 50 grams" contrary to MCL 333.7402(2)(a)(iv), and 1 Count of "Possession W/Intent to Deliver Marijuana" contrary to MCL 333.7402(2)(d)(iii).

This case stem from the statement made to the DEA Agent Randy Furmack by Mr. Lamark Northern and the testimony in two Grand Juries.

It is unclear how DEA Agent Furmack and Mr. Northern came into contact with one another, albeit, Mr. Northern testified that he purchased Cocaine from Petitioner in 1994 or 1995 in increments of 7 grams and 28 grams. DEA Furmack then related the information received from Mr. Northern to Special Agent Jerome Sharpe. As set forth in DEA Agent Furmack April 26, 1997 report, Mr. Northern further alleged: 'that he was a drug dealer, that he recalled a drug deal between Joe Abraham, who was Mr. Northern drug supplier, Mr. Northern indicated that Mr. Demar Garvin and Mr. Roderick Lee went to Mr. Abrahams' home in Belleville, that they made the trip in Mr. Willie Adams' blue Cadillac to pick up 10 Kilogram of Cocaine. Mr. Northern alleged that 8 Kilograms were for Mr. Adams, 1 Kilogram was for Mr. Garvin and 1 Kilogram was to be divided up between Mr. Garvin, Mr. Smith, Mr. Ahmed Anthony and Mr. Northern.

On July 29, 1997, Mr. Northern testified before a Federal Grand Jury in Detroit, Mr. Northern recounted the statement given, this time Mr. Northern alleged that he, Mr. Roderick and Mr. Garvin went to Mr. Abraham home to purchase 10 Kilos' that this incident occurred in 1995, this time Mr. Northern alleges that they went in Mr. Roderick car, and that they had to wait to get the drugs, while waiting Mr. Roderick informed them that 2 Kilos were for Mr. Adams and the rest were to be divided between Mr. Roderick and Mr. Demar. Mr. Northern denied that the Police report by DEA Agent Furmack were accurate.

Later, Mr. Northern testified before the Oakland County Grand Jury, in this testimony, Mr. Northern implicated Petitioner, this time, Mr. Northern testified that he couldn't remember what type of car they rode in and that Mr. Roderick and Mr. Lee had pooled the money with Mr. Willie Adams, Toodaloo Adams and Petitioner to purchase the Cocaine, that Mr. Willie Adams were getting at least 2

Kilos, and Mr. Toodaloo Adams and Petitioner were getting 1 each.

Althougn the alleged incident occurred in 1994 and 1995 respectfully.

The warrant for the 483 Montana nome in Pontiac, Michigan was procured in 1998. During the execution of the Search Warrant of the 483 Montana home, the police seized Marijuana found behind a hidden panel in the bathroom, (Trial Transcript Vol II, pages 111), Cocaine was found in a green box containing a knee brace, also in the bathroom, (Trial Transcript Vol II, pages 154-156), heroin was found in a Fritos bag in the packet of a jacket nanging in the closet, (Trial Transcript Vol II, page 176), Cocaine was found in the console of a 1981 Grand Prix parked in the garage, (Trial Transcript Vol II, page 159). The State Police Crime Lab reported that the combined weight of the Cocaine was 654.2 grams, (Preliminary Hearing Transcript 3/21/10, page 85). Also found as proof of residency were documents in the name of Larry McGhee, "these documents had been stuffed in a paper bag by the tenants and placed in a closet" (Trial Transcript Vol II, page 224).

Mr. Michael Butler testified tnat he had rented the 483 Montana home from Petitioner for more then a year, that Petitioner did not want Mr. Butler recently Paroled brother to move in the home, and told Mr. Butler to move. Mr. Butler was said to have moved out in August 1998, (Trial Transcript Vol II, pages 210-225).

Ms. Marilyn Bender testified that she lived next door to the 483 Montana resident, that she knew Mr. Butler as the resident of the home, that Mr. Butler moved out and someone else moved in and she saw a lot of cars there, that she never saw Petitioner at the home and did not recognize Petitioner in Court, (Trial Transcript Vol II, page 241-

243).

Mr. Lamark Northern testified to buying Cocaine from Petitioner in 1995, and admitted that he was testifying in exchange for a favorable outcome to his own drug case, (Trial Transcript Vol III, pages 57-58).

Petitioner argue that the Property was used as rental Property, That he resided in Atlanta Georgia, where he was apprehended in 2001, further Petitioner look to the items found in the resident at the time of the search, and reason, that had the resident been Petitioners' primary resident, than why would Petitioners' belonging be stuffed in a paper bag in the closet. The totality of the circumstances does not fit the allegations.

The Jury found Petitioner guilty as charged on May 28, 2004.

On July 1, 2004, Petitioner was sentence to: 20-30 years for Count 1, Possession With Intent to Deliver over 650 grams of Cocaine, Count II 1 to 20 years for Possession with Intent to Deliver Heroin under 50 grams, and Count III 90 days for Possession with Intent to Deliver Marijuana.

LEGAL ANALYSIS

i. ineffective assistance of trial counsel

probable cause

DEFICIENT PERFORMANCE BY TRIAL COUNSEL

In the case before the Court, Government Agent Jerome Sharpe knowingly and intentionally showed a Reckless disregard for the truth in procuring a Search Warrant for Petitioners rental property, when Government Agent presented conflicting testimonies and statements beforet the Magistrate.

A reviewing Court must determine whether the

Magistrate had a substantial basis for concluding that Probable Cause exist. Illinois V Gates, 462 US 213 (1983). The United States Supreme Court held that a rigid application of such a two pronged test was not required to establish a substantial basis for crediting hearsay. Gates, at 231 n 6, 238. Rather Probable Cause determination should be based on the totality of the circumstance.

A claim of Probable Cause existence is set forth in a sworn Affidavit by Law Enforcement seeking a Warrant. The Affidavit must contain facts detailing the underlying circumstances which lead the Affiant to believe that Probable Cause exist and can be found on hearsay. United States V Ventresca, 380 US 102. 108-09 (1965). Moreover, the Affidavit establishing Probable Cause may be based on personal observation of another person who supplied the information to the Affiant so long as a substantial basis for crediting the hearsay is presented. Jones V United States, 362 US 257, 269 (1960).

Here, Government Agent Sharpe in procuring the Search Warrant, failed to provide the issuing Magistrate with the "inconsistent" testimonies before the local and Federal Grand Juries, and the inconsistent statement made to Government Agent Furmack.

The Affiant neither observed the informant, nor sough to verify the information.

"The task of the issuing Magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Gates, at 238.

A reviewing Court must [only] determine

whether the Magistrate had a substantial basis for concluding that Probable Cause existed". Gates, at 238-39.

In Jones V United States, 362 US 257 (1960). This Court held: "an Affidavit in support of a search warrant was challenged as insufficient because it rested wholly on hearsay, the Affiant did not personally observe the alleged illegal activity Jones, at 257. In particular, the Affiant averred that an unnamed informant told him that the defendant was involved in narcotics trafficking and kept heroin in his apartment for that purpose. Jones, at 268. The informant also claimed to have purchased narcotics from the defendant at the apartment. The Affiant further indicated that the informant had given him information on previous occasion which was correct and that other sources had also provided the same information about the defendant. Jones, 268-69. The Affiant averred, the defendant was an admitted user of narcotics. Jones, at 269.

The Jones Court held that the Affidavit established Probable Cause because there was a Substantial basis for crediting the hearsay. Jones, at 267-68. The Jones Court went on to explain: "that if the Affiant had merely been told that the defendant was selling narcotics in his apartment, such information may have not been enough to support a warrant". EMPHASIS ADDED. Jones, at 271.

In failing to Motion the Trial Court for a Hearing to test the veracity of the warrant, due to the inconsistent testimonies made to both the Federal Grand Jury and the Oakland County Grand Jury, and the statement made to the police concerning Petitioners' drug activities, Trial Counsel performance fell way below the objective standard, where a Motion pursuant to Franks V Delaware, 483 US 154 (1978), would have voided the warrant. The Franks Court held:

(a). "to mandate an evidentiary hearing, the challengers' attack must be more than conclusionary and must be supported by more than a mere desire to cross examine. The allegation of deliberate falsehood or reckless disregard must point out specifically with supporting reasons, the portion of the warrant Affidavit that is claimed to be false, it must also be accompanied with an offer of proof, including Affidavits, or sworn or otherwise reliable statements of the witnesses, or a satisfactory explanation of their absence".

(b). "if these requirements as to allegations and offer of proof are met, and if when material that is the subject of the allegation falsity or reckless disregard is set to one side, there remains sufficient content in the warrant Affidavit to support a finding of Probable Cause, no hearing is required, [BUT] if the remaining content is insufficient, the defendant is entitled to a hearing".

(c). if, after a hearing a defendant by a preponderance of the evidence, that the false statements was included in the Affidavit by the Affiant knowingly and intentionally, or with the reckless disregard for the truth, and the false statements was necessary to the finding of Probable Cause, then the Search Warrant must be voided and the Fruits of the search excluded from the Trial to the same extent as if Probable Cause was lacking on the face of the Affidavit". Franks, at 155-56.

In Franks, the defendant in a State criminal Trial claimed that his Fourth Amendment rights were violated in connection with the Trial Courts' failure to allow defendant to challenge the veracity of the Affidavit for a search warrant under which clothing and a knife had been seized, and that such clothing and knife should have been excluded at his

prosecution for rape. This Court held: "We will not view the admission of such evidence as harmless beyond a reasonable doubt" where the sole issue at the Trial had been whether the woman with whom the defendant admitted having sexual relations had consented to the relations, and there is no assurance that if warrant had been quashed and the knife excluded from Trial as evidence, the Jury would have found no consent as it had, particularly, in view of there having been other countervailing evidence on the issue". Franks, Id,.

Unfortunately, in this case, Trial Counsel effectively denied Petitioners right to challenge the veracity of the Affidavit that the Government used to procure a Search Warrant of Petitioners' rental property. Moreover, the challenge to the Affidavit at Trial could have "VOIDED" the search warrant and excluded evidence in Petitioners State Criminal Prosecution.

Petitioner has met the burden of Deficient performance by Trial Counsel. "To establish Ineffective Assistance of Counsel, a defendant must show both deficient performance by Counsel and prejudice. Knowles V Mirzayance, 556 US 111, 122 (2009). To establish deficient performance, a person challenging a conviction must show that Counsels' representation fell below an objective standard of reasonableness. Strickland, at 688.

The error in failing to challenge the Affidavit, fell below an objective standard of reasonableness, where Petitioner was pitted against charges and consequently, convictions in the State Prosecution.

PREJUDICE TO PETITIONER

Had Trial Counsel Motioned the Trial Court to have the Search Warrant Voided and the evidence seized excluded, there is a "HIGH"

probability that Petitioner would not have been convicted of the within charges, where the evidence would have been excluded from a Criminal Prosecution. Franks, at 155-56.

Although this Court afford deference to Counsels "STRATEGIC" decisions. Strickland, at 690-91. For this defence to apply there must be some evidence that the decision was just that: STRATEGIC. EMPHASIS ADDED.

These cases also make clear that Counsels' decision to fail to discharge that duty can not be strategic. The only conceivable strategy that might support forgoing Counsels' ethical obligations under these circumstances would be a reasoned conclusion that further investigation is futile and thus, a waste of valuable time. Strickland, at 691.

STALENESS

Again, Trial Counsel was Ineffective in the failure to challenge the STALENESS of the information used by the Government to procure a Search Warrant for Petitioners' rental property.

Here, Mr. Northern alleges that drug transaction between himself and Petitioner occurred in 1994 and 1995. Mr. Northern did not part with this information to DEA Furmack until Mr. Northern himself was caught with drug.

Petitioner submit, that the years between the allegations and the time it took to procure a Search Warrant stale the information, thus, lose any Probable Cause.

In United States V Frechette, 583 F3d 374, 377-78 (6th Cir. 2009), that Court held: "Stale information cannot, at least alone, provide the basis for Probable Cause". The Court went on to explain: "this is because Probable Cause determination is concerning

with facts relating to a presently existing condition. The staleness inquiry depends on the inherent nature of the crime. Frechette, at 378. In the content of drug crimes, information goes stale very quickly because drugs are quickly sold and consumed. Facts is, an Affidavit supporting a Search Warrant must be sufficiently close in time to the issuance of the Warrant and the subsequent search conducted so that Probable Cause can be said to exist as to the time of the search and not simply as of some time in the past. Sgro V United States, 287 US 206, 210-11 (1932). United States V Grubbs, 547 US 90, 91-102 (2006).

Here, had Trial Counsel challenged the Affidavit on the basis of Probable Cause, where the information used to procure the Search Warrant was stale. There is a Probability that the Trial Court would have voided the Warrant in light of the staleness. Here, Trial Counsel was Ineffective in his failure to make a challenge and investigate the mitigating evidence. Premo V Moore, 562 US 115, 121-23 (2010), citing Strickland, at 691.

ii. ineffective assistance of counsel

confrontation

At Petitioners' State Criminal Prosecution, the Prosecutor introduce several Laboratory Report prepared by Dennis E. Lippert of the State Police Forensic Laboratory Division, these Report were introduced to establish the quantity or weight of the drugs recovered in the 483 Montana home. Here, the weight of the substance were of great significance to Petitioner, a greater weight, could possibly mean an increased punishment.

Moreover, Trial Counsel failed to require that the person that prepared the report testify.

The introduction of "hearsay" testimony violates a defendants' Sixth Amendment right to confront the witness against him, unless, the witness is unavailable for Trial and the defendant had a prior opportunity to cross examine the witness. Crawford V Washington, 541 US 36, 69 (2004).

More and more, forensic evidence plays' a decisive role in criminal Trials today, but it is hardly immune from the risk of manipulation. Melendez Diaz V Massachusetts, 557 US 305, 318 (2009).

A forensic analyst may feel pressure, or have an incentive to alter the evidence in a manner favorable to the prosecution. Ibid,. Even the most well meaning analyst may lack essential training, contaminate a sample, or err during the testing process. Bullcoming V New Mexico, 564 US 647, 654 n.1 (2011). (documenting laboratory problems).

This Court further held: "to guard against such mischief and mistakes and the risk of false convictions they invite, our "Criminal Justice" system depends on adversarial testing and cross examination, because cross examination may be the greatest legal engine ever invented for the discovery of the truth". California V Green, 399 US 149, 158 (1970). The Court promises every person accused of a crime the right to confront his accusers.

There is no Trial strategy where Trial Counsel failure to put the Government charges against Petitioner to a meaningful adversarial test, our United States Supreme Court has held: "that that failure constitute a denial of defendants' Sixth Amendment rights. UNITED States V Cronic, 466 US 648, at 654 (1984). Here, Trial Counsel representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for Trial Counsels' error, the results of the

proceedings would have been different. Strickland V Washington, 466 US 668, 691-92 (1984).

In Williams V Illinois, 567 US 50 (2012). That Court held: "The four Justices in Williams plurality took the view that forensic reports qualifies as "TESTIMONIAL" only when it is prepared for the primary purpose of accusing a targeted individual who is in custody or under suspicion". Williams, at 84. Meanwhile, four dissenting Justices took the broader view that even a report devised purely for investigatory purposes without a target in mind can qualify as "TESTIMONIAL" when it is made under circumstances which would lead an objective witness, reasonably to believe that it would be available for use at a later Trial. Williams, at 121.

Moreover, a routine postarrest forensic report, like the one here, must qualify as testimonial. For even under the pluralitys' more demanding test, theres' no question that Petitioners' was in custody when the Government conducted its forensic test or that the report was prepared for the primary purpose of securing a future conviction. EMPHASIS ADDED.

Counsels' failure to object to the report being introduced into evidence, or demand that the person that prepared the report be made available for cross examination, prejudice the Petitioner, insomuch, that Petitioner was denied the opportunity to put the Government evidence to its test, thus, Counsels performance fell below an objective standard, where any reasonable Attorney in these days of forensic would have demanded the opportunity to cross examine the preparer of an report that increases the punishment. In that, there is no strategic decision made by Trial Counsel.

a. ineffective assistance of appellate

In bring an Appeal of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction with its' consequent, drastic loss of liberty is unlawful. To prosecute the Appeal, a criminal appellant must face an adversary proceeding that, like a Trial, is governed by intricate rules that to a layperson would be nopelessly forbiading an unrepresented Appellant, like an unrepresented defendant at Trial, is unable to protect the vital interest at stake.

In Evitts V Lucey, 469 US 387, 396 (1985). Our United States Supreme Court held: "accordingly, the State created impediment does not simply evaporate once defendant Appellant Counsel fails' to raise and research vitualable claims, a defendant is entitled to the Effective Assistance of Counsel on his first Appeal as a matter of right". Smith V Robbins, 528 US 259 (2000).

In this case, Appellate Counsel was Ineffective, when Appellate Counsel failed to raise or preserve Petitioners claims that he suffered "Ineffective Assistance of Trial Counsel" based upon Trial Counsels' failure to: (1) test the veracity of the Affidavit used to procure the Search Warrant, (2) test the Staleness of the information used to procure a Search Warrant, (3) effectively waived Petitioners' Sixth Amendment right to Confront his accuser, and (4) failed to assure Petitioner was sentence according to Statute. Strickland, at 687.

Appellate Counsel performance was objectively unreasonable and prejudice Petitioner where Counsel failed to raise an Apprendi claim on Direct Appeal.

A first Appeal as of right therefore is not adjudicated in accord with the Due Process of Law if the Appellate does not have Effective Assistance of Counsel. In short, the promise

tnat a criminal defendant has a right to Counsel on Appeal, like the promise that a criminal defendant has a right to Counsel at Trial would be a futile gesture unless it comprehended the Effective Assistance of Counsel. Evitts, at 402-05. Goeke V Branch, 514 US 115, 120 (1995). EMPHASIS IN ORIGINAL.

iii. denied due process

sentencing

Under the Michigan Sentencing Scheme a defendant will typically be given an indeterminate Sentence. MCL 769.8. The maximum sentence under this system is set by law. MCL 769.8(1).

Here, Petitioner was charged under MCL 333.7401(2)(a)(i), which require a mandatory sentence of 20 years for possession of 650 grams or more of a controlled substance.

In 2003, during the pendency of Petitioner current conviction, the Michigan Legislature Amended tnat Statute to:

MCL 333.7401(2)(a)(ii), which provide: "a person who possess a control substance in the amount of at least 450 grams, but less than 1,000 grams was guilty of a felony punishable by imprisonment for not more than 30 years, or a fine of not more than $500,000.00 or both".

Under the Sixth Amendment to the United States Constitution, a criminal defendant is guaranteed the right to a speedy and public Trial by an impartial Jury. Tne Sixth Amendment right to a Jury Trial considered together with the Due Process Clause of tne Fourteenth Amenoment, guarantees Criminal defendants' to a Jury determination tnat he is guilty of every element of the crime with which he is charged beyond a reasonable doubt. Apprendi V New Jersey, 530 US 466, 477 (2000).

Because a criminal defendant is entitled to have a Jury decide his or her guilt, other than the fact of a "Prior Conviction" any facts that increases the penalty for a crime beyond the prescribed Statutory maximum must be submitted to a Jury, and proved beyond a reasonable doubt. Apprendi, at 490. Thus, any fact that exposes the defendant to greater punishment than that authorized by the Jury guilty verdict, is an element of the crime that must be proven beyond a reasonable doubt. Apprendi, at 494.

CONCLUSION

Accordingly, the Trial Court, Michigan Court of Appeals and Michigan Supreme Court erred in finding the Petitioner did not meet the Standards set in MCR 6.508(D)(3), in showing Prejudice and Good Cause.

In this instant, Good Cause is waived under Strickland, at 668, where Appellate Counsel failed to raise the claim, thus, rendering Petitioner the Ineffective Assistance of Appellate Counsel.

WHEREFORE, Petitioner move that this Honorable Court reverse the Trial Court ORDER REMAND this matter back to the Trial Court.

VERIFICATION

Petitioner, LARRY A. MCGHEE, declare under the penalty of perjury that the above is true and accurate.

Dated: November 28, 2018

Larry A. McGhee

/S/ LARRY A. MCGHEE

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