No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROBERT L. BURNS JR-PETITIONER

VS.

STATE OF OHIO-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

_____

ROBERT L. BURNS JR, PRO SE

_____

P.O. Box 5500

_____

Chillicothe, Ohio 45601

QUESTIONS PRESENTED

Are the sixth Circuit Court of Appeals in conflict with the United States Supreme Court, and other Circuit Courts by denning a *Certificate of Appealability*, and adopting the rulings of the Southern District of Ohio Eastern Divisions erroneous *opinion and order*.

☑ All parties appear in the caption of the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For Cases from **Federal Courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at (unpublished)

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at *Burns v. Warden, Chillicothe Corr. Inst., 2018 U.S. Dist. LEXIS 16221 (S.D. Ohio, Feb. 1, 2018)*

The opinion and order of the United States district court appears at Appendix C to the petition and is

[✓] reported at *Burns v. Warden, Chillicothe Corr. Inst., 2018 U.S. Dist. LEXIS 36504 (S.D. Ohio, Mar. 6, 2018)*

JURISDICTION

☑ For cases from **Federal courts:**

The date on which the United States Court of Appeals decided my case was August 8, 2018.

☑ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at appendix, N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
2. Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
3. Sixth Amendment: In all criminal prosecutions, 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 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.
4. Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After a two day jury trial petitioner was convicted of three counts of illegal use of a minor in a nudity oriented performance, three counts of corruption of a minor, and one count of corrupting another with drugs. See Ohio Rev. Code §§ 2907.323(A)(1), 2907.04(A), 2925.02(A)(4). On April 25, 2012, petitioner was sentenced to thirteen years and three months in prison. The Ohio Court of Appeals affirmed the trial court's judgment on direct appeal. *State v. Burns, No 2012-CA-37, (Licking County, Ohio).* Petitioner did not appeal to the Ohio Supreme Court.

On October 22, 2015, petitioner filed a *post-conviction* petition with newly discovered evidence and the trial court denied petitioner's petition for post-conviction relief as untimely. On July 6, 2016, the fifth appellate district affirmed. See *State v. Burns, 5th Dist. Licking No. 15-CA-98, 2016-Ohio-4833*. Petitioner's attempts to have the decision reviewed by the Ohio Supreme Court and the United States Supreme Court were unsuccessful. See *State v. Burns, 147 Ohio St.3d 1506, 2017-Ohio-261, 67 N.E.3d 824; Burns v. Ohio, 138 S.Ct. 73, 199 L.Ed.2d 50 (2017).*

On February 23, 2015, Petitioner filed a motion in the trial court for "production of Brady v. Maryland, 373 U.S. 83 (1963), material. On June 22, 2017, petitioner then filed a "*motion to compel disclosure of exculpatory material and information.*" On August 8, 2017, the trial court denied petitioner's motion to compel disclosure via a judgment entry.

On August 31, 2017, petitioner filed a notice of appeal. The notice of appeal herein raises the following sole Assignment of Error:

"I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S 'MOTION TO COMPEL DISCLOSURE OF EXCULPATORY MATERIAL AND

INFORMATION,' WHEN IT IS CLEAR THAT SOME OF THE DISCOVERY WAS SUPPRESSED, AND OTHER DISCOVERY WAS MARKED 'COUNSEL ONLY' BY THE PROSECUTION WHO SET OUT TO MISLEAD THE TRIAL PROCESS, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS."

When the trial court decided after 30 months to answer the first motion and then denied the "*motion to compel disclosure of exculpatory material and information*," the court then stated in the Judgment Entry dated August 8, 2017; the materials requested by defendant were either provided to defendant in discovery or were the work product of his own trial attorney. There appears to be nothing in defendant's request that he did not or does not have access to through his own counsel.

After filing two affidavit's by certified mail to petitioner's trial attorney, Diane M. Menashe, 'one asking for the trial transcripts in case number 99-CA -124 and 99-CA-125 (Licking County Ohio),' which was a dependency hearing which would have been beneficial for a defense. This evidence would have proven that there was a conspiracy when the prosecution claimed that they had underage pornographic material, when in reality, there were only pictures of pornographic people who were of age. The magistrate accepted one of these pictures as an underage model, and ruled against petitioner with this evidence. Evidence was later planted by Officer Robert Carson of the Newark, Ohio Police Department, which would have supported there lie.

The other affidavit asking for an investigation that petitioner discovered after filing for a docket sheet in the Licking County Court of Common Pleas. On this docket sheet was an investigation that was performed by Matt Sauer, where the court had appropriated the sum of

$1,000 dollar's on 2/14/2012. The only person who could have ordered this investigation was petitioner's trial attorney.

On July 11, 2018, Attorney Diane M. Menashe responded to the letter by stating; as stated in my February 10, 2017 I sent you a complete copy of your file. I do not have and never did have the transcripts that you reference in your affidavit. I also don't have any work product from investigator Matt Sauer. Anything that I had you were provided in my mailing on February 10, 2107.

On January 8, 2018, the appellate court affirmed the judgment of the trial court denying petitioner's *"Motion to compel disclosure of exculpatory material and information."* Petitioner did not appeal to the Ohio Supreme Court.

On January 22, 2018, petitioner filed a *Pro Se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 1 2018, arguing the following grounds for relief. (1) the trial court abused its discretion when they denied a petition for "post-conviction relief" when new evidence demonstrates that police officers planted evidence, and that other evidence was tampered with to secure a conviction of one who is innocent, thereby creating a "miscarriage of justice"? Was the suppression or exclusion of this evidence at the criminal trial by the prosecution a violation of the Fifth, and Fourteenth Amendments of the United States Constitution., and Brady v. Maryland, 373 U.S. 83 (1963). Also was this "miscarriage of justice" a violation of 18 U.S.C.S. 241-242 and the equal protection clause?

The second argument being; (2) trial counsel rendered ineffective assistance by (a) allowing the introduction of tainted evidence, allowing suppression of exculpatory and impeachment evidence which assisted prosecutor misconduct. (b) Not filling for a suppression hearing thereby

allowing a general or exploratory search. (c) Not seeking a competency hearing and (d) not moving to dismiss the indictment for a speedy trail violation, and appellate counsel rendered ineffective assistance by not raising issues such as ineffective assistance of trial counsel.

the United States District Court for the Southern District of Ohio, Eastern Division recommended that the action be dismissed. *Burns v. Warden, Chillicothe Corr. Inst., 2018 U.S. Dist. LEXIS 16221.* Petitioner filed an Objection to the Magistrate Judge's Report and Recommendation. On March 6, 2018, the Court conducted a de novo review. Petitioner's objections were overruled, and the report and recommendation was adopted and affirmed. *Burns v. Warden, Chillicothe Corr. Inst., 2018 U.S. Dist. Lexis 36504.* The court declined to issue a *certificate of appealability.* The *motion for discovery* was also denied. The court never ruled on the *motion to expand the record.* Petitioner's Motion for Leave to proceed in forma pauperis was denied, as moot. Stating, Petitioner already has paid the filing fee.

Petitioner filed an appeal to the Sixth Circuit Court of Appeals for a Certificate of Appealability which was denied on August 8, 2018, case number 18-3326.

REASONS FOR GRANTING THE PETITION

Are the sixth Circuit Court of Appeals in conflict with the United States Supreme Court and other Circuit Courts by denying a *Certificate of Appealability,* and adopting the rulings of the Southern District of Ohio Eastern Divisions erroneous ***opinion and order***?

The Sixth Circuit Court of Appeals **Order** stating on page 3; when the appeal concerns a district court's procedural ruling, a COA should issue when the petitioner demonstrates "that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural rulings."

To start this petition, petitioner is **innocent** of the charges that he now brings before this court, and has shown many times that police tampered with evidence, and has also shown that several different constitutional violations resulted in his conviction, along with actual violations or both state and federal law. The exhibits in the *habeas corpus* petition clearly show an "**extrinsic fraudulent pattern of police corruption**." Exhibit B unambiguously shows that police planted evidence despite what the sixth circuit stated that they were just vague allegations.

Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. In exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the usages and principles of law. Furthermore, when a court seeks to dismiss a pro se petition without discovery or an evidentiary hearing, the court is obliged to accept a petitioner's well-pleaded allegations as

true, and. to draw all reasonable inferences therefrom in the petitioner's favor. This was stated by the Fourth Circuit Court of Appeals in *Taylor v. Craig, No. 5:05-cv-00781, 2009 U.S. Dist. LEXIS 24667, 2009 WL 900048, at * 36 (S.D.W. Va. Mar. 24, 2009).* Also See *Harris v. Nelson, 394 U.S. 286, 300, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969).*

Exhibit C stated that; to the extent it may constitute evidence favorable to the defendant, (Burns), or petitioner, the state now notifies counsel for the defendant that witnesses in this matter have differing recollections as to the number of photographs of Janice Woods, (alleged victim) and the manner in which the photographs of J.W. were placed into the custody of the Newark Police Department.

Exhibit D showed the court that the *"Amended Bill of Particulars"* charged three different illegal use of a minor in nudity oriented performance before a second warrant was issued in which the state then says they found the third peace of evidence they claimed to have had all along.

In *Chamberlain v. Mantell, 954 F. Supp. 499, 512 (N.D.N.Y 1997)* On August 1, 1995, petitioner, Carl E. Chamberlain, filed a petition for a writ of habeas corpus challenging the constitutionality of his state court convictions and his subsequent incarceration pursuant to 28 U.S.C. § 2254.

Trooper David L. Harding was a Unit Supervisor for the Forensic Unit from Troop C of the State Police in 1989. He arrived at the scene of the accident on May 5, 1989 at approximately 12:00 p.m. He was immediately met by one his colleagues, Trooper Lishansky. Harding then began to investigate the scene. Upon his examination of the body of the victim, it was his testimony that he found a piece of what he believed to be bondo in the hair of the victim. Trooper

Lishansky told him that there was a vehicle down at the State police barracks that may have been involved in the accident. Harding then proceeded to the barracks and took some photographs of the vehicle. After taking his photographs, he returned to the scene to inform Lishansky that body work had been done on the car at the barracks.

Throughout the day, Harding worked with Lishansky in the collection of physical evidence from the scene. It was Harding's duty to take several items of evidence, including those items given to him by Lishansky, and transport them first to the barracks evidence locker and ultimately to the State Police laboratory in Port Crane, New York.. These items included the bondo found in the victim's hair, other pieces of bondo found at the scene, pieces of automobile plastic, a hub cover, and a bicycle brake pad. Harding also secured a bondo "control sample" from the petitioner's car to be used by the State Police laboratory.

Almost four years later, on March 10, 1993, Special Prosecutor Nelson Roth interviewed Harding pursuant to an ongoing investigation of evidence tampering in criminal cases by members of Troop C of the New York State Police. In that interview, Harding admitted that his testimony regarding the bondo he had found at the accident scene was false since he had actually removed that bondo from the petitioner's car when it was impounded at the State Police barracks. He also stated that Lishansky had planted a piece of the headlight assembly from the petitioner's car at the scene of the accident.

The United States District Court for the Northern District of New York concluded that; our criminal justice system cannot tolerate perjury and evidence tampering from those whom we trust to enforce the law. Dishonesty by the law enforcement personnel of the state, left uncorrected, is a wellspring of tyranny. To tolerate such an attempt to pervert the truth would

tarnish the well deserved reputation of the overwhelming number of police officials who are dedicated to justice. Instead of knowing that they were hearing perjury, the jury was free to place their trust in the testimony of Harding and Lishansky. Had the jury known the true facts, the testimony of these prosecution witnesses would have been a potent source of reasonable doubt. The prosecution's attempt to then obtain a conviction of murder in the second degree would almost certainly have been unsuccessful.

Accordingly, was the "firm belief" of the Court that the evidence of perjury adduced by the petitioner, had it been known to the jury, would probably have resulted in a different verdict. *Sanders v. Sullivan, 863 f. 2d 218 at 226, (2d Cir 1988).* It is thus material evidence. That New York State has let this untrue testimony stand has resulted in a denial of the petitioner's right to due process. *Giglio v. United States, 405 U.S. 150, 155, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972).* The continued incarceration in the absence of a new trial is therefore unconstitutional and he was entitled to relief under 28 U.S.C. § 2254.

Petitioner believes that because he is a *Pro Se Litigant,* half African American, and that because these are white police officer's, petitioner is left stuck in a procedural trap. It is well established that a petitioner being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a "procedural morass." *Price v. Johnston, 334 U.S. 443, 464, n. 19 (1948).*

Exhibit E showed that petitioner's court appointed counsel, Diane M. Menashe, who only after facing Ohio Supreme Court's disciplinary proceedings, did she decided to turn over most of the discovery in her possession. She has yet to turn over two specific items. (1) Transcripts form a

dependency hearing which she now states she doesn't have. And (2) an investigation that was performed by an investigator that lives in the same city as she from Columbus, Ohio by the name of Matt Sauer, who petitioner only found out about after filing for a docket sheet in the Licking County, Ohio Clerk of Courts. There is also sealed evidence that she claims to have talked to petitioner about, but this statement is untrue.

Petitioner informed his trial counsel about the evidence tampering and she, Diane M. Menashe, stated she would check the tape which petitioner suspects is part of the Matt Sauer investigation. Contained in the children's transcripts in case number, *In re Burns (June 26, 2000), Licking App. No. 99CA124, 2000 Ohio App. LEXIS 2843.* The magistrate as well as the prosecution stated that they had found evidence of child porn on a diskette found after a search of petitioner's home. However, nothing was ever found on a diskette until evidence was planted by Officer Robert Carson of the Newark, Ohio Police Department.

Some evidence that was sealed may contain investigations that were performed by petitioner's former attorney Robert W. Suhr, who hired an investigator to check the authenticity of the tape used to gain probable cause to arrest and search petitioner's home. This tape was a recording of petitioner and the alleged victim Woods, that petitioner is certain were doctored to make it look like he agreed to take more pictures of Woods. This tape was analyzed by petitioner's former attorney; however, the tape turned out to be a copy so there was no way to further investigate until given the original. This tape also helped seal the conviction.

After petitioner was sent a new packet of discovery, it was learned that there was more evidence that petitioner's attorney could have used to show that Ashland O'Neal, (petitioner's

son) had taken pictures of the supposed victim. There were more pictures of Woods in O'Neal's bedroom.

Evidence that someone other than the defendant may have committed the crime is critical exculpatory evidence that the defendant is entitled to present to the jury. See *United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (citing Chambers, 410 U.S. at 302*, and holding that "fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.").

Also in the new packet of discovery, petitioner used Exhibit I which were two interviews done by Detective Ken Ballantine, lead investigator in this case. In these statements, two witnesses, who Oneida Roseberry, Woods best friend, testified that there were two other boys there on the night of homecoming. During Ballantine's interview with Joshua Wingo, and Jeremy S. Mitchell, who were the alleged witnesses for the prosecution?

Joshua Wingo, stated that he hung out with Woods, had sex with her a few times when he would visit her sister. "But stated she was like that." "Wingo then stated he didn't know Robert Burns (petitioner), never even heard of anyone known as Robert Burns." "Never knew Jeremy Mitchell (potential witness)" "Never Knew Ashland Burns, (petitioner's son)." "Never Knew Marshall King, another witness for the State who was supposed to be there on the night of homecoming." "Never knew Mitch Burns, (petitioner's brother)." So these witnesses could have testified as a defense to prove that Oneida Roseberry and Janice Woods were both lying when they said they were there on that night. In fact Roseberry claimed that later they went to see

some property that petitioner rented out. The only property that petitioner has ever owned was he and his wife's home in Newark. Ohio.

Vicky King, Petitioner's ex wife changed her story only after she became involved in an investigation for an unrelated drug-related charge that was fairly recent by the time of trial. King stated in Exhibit K, that after being confronted with what they could get on the computer. King says she wanted to see if Woods would take her clothes off with her in the room. "She said she isn't quit sure who said anything about Woods taking her cloths off, but that Woods striped naked while standing on the bed." She then states, when Woods did this she got upset, and told woods to get dressed and then left the room. When told that that didn't make sense, King states she was high she smoked a lot of marijuana.

During direct-examination Mrs. King States; I had been feeling ill one day and was lying up in bed and Robert, (petitioner), had come up, got on the computer and was talking and Woods came in. He, meaning Petitioner was on the computer, and he was telling Woods to take off her shirt. She then elaborates. "He was probing her to take her shirt off, which she obliged, and then he was trying to get me to take mine off, and that's when I got mad and told him to get out and leave." Tr 200 So as this court should clearly be able to see, is that Mrs. King was prepped on a new story by the prosecutor.

The specificity that the Sixth Circuit claims were lacking was clearly shown in the *habeas corpus* petition, and later reaffirmed in the *certificate of appealability.* Petitioner elaborated more on his "***motion for reasons why a certificate of appealability should issue.***" There is much more evidence to be discovered in this case, for instance; "(petitioner had paid to have an investigator

speak with the supposed victim in this case Janice Woods, and Woods stated to the investigator that the **charges weren't true**, this evidence was either destroyed or sealed).

Petitioner's trial attorney was well aware of this sham, so this conviction is a product of **"Fraud upon the Court,"** so any attempt to procedurally bar these meritorious claims is a **sham process** perpetrated by a legal system that's gone horribly wrong. AEDPA does not bar a petition for habeas corpus based upon fraud upon the court. The Sixth Circuit reaffirmed this themselves in *Workman v. Bell, 245 F.3d 849, 852 (6th Cir. 2001)* A court can consider the petition if there was a fraud upon the court"). This Court has held similarly with respect to a recall of the mandate, the appellate equivalent of a 60(b) order. *Calderon v. Thompson, 523 U.S. 538, at 556-7 (1998),* (applying AEDPA in general to recalls of the mandate because a "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief," but exempting cases of "fraud upon the court, calling into question the very legitimacy of the judgment").

The elements of a fraud upon the court are (1) conduct by an officer of the court (2) directed towards the judicial machinery itself that is (3) intentionally false, willfully blind to the truth or is in reckless disregard for the truth and (4) a positive averment or concealment, when one is under a duty to disclose, and that (5) deceives the court. *Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).* "'Fraud upon the court' has been narrowly defined to embrace: only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so the judicial machinery can not perform in the usual manner its impartial task of adjudging cases. It generally involves a deliberately planned and carefully executed scheme designed to subvert the integrity of the judicial process" *True v. Comm'r, 999 F.2d 540 (6th Cir. 1993)* (unpublished) (internal citations omitted). However, intentional, fraudulent

nondisclosure during discovery can form the basis of a claim of fraud upon the court. *Demjanjuk, 10 F.3d at 338.*

All of the exhibits show a clear **pattern of corruption** that goes back to Detective Ken Ballantine, who was the lead investigator in this case and also the lead investigator in the Lefever case. For instance, in the case of *LeFever v. Ferguson, Nos. 2:11-CV-935, 2:12-CV-664, 2013 U.S. Dist. LEXIS 96950, 2013 WL 3568053, at *24 (S.D. Ohio July 11, 2013).* In addition to suing the City of Newark, Virginia LaFever also sues Officer Ballantine, the Newark police officer who was the lead investigator into William's death in 1988; and the lead investigator in this case. Virginia sued to hold Officer Ballantine liable for constitutional violations under Section 1983.

Virginia LeFever claims that Officer Ballantine violated her constitutional rights by withholding exculpatory evidence, in violation of his *Brady*[1] obligation. Specifically, Virginia complains of three items of evidence that Ballantine supposedly failed to disclose to the prosecutor:

- A copy of Defendant Ferguson's "sensationalist dime-store novel" titled "Angel of Mercy or Angel of Death?";
- A witness statement from Susan Nickerson concerning the type and serial numbers of syringes stocked at the nurse staffing office where Virginia worked; and
- Notes of a conversation Ballantine had with the Franklin County Coroner, Dr. Fardal, who said he could not tell whether the strychnine-based rodent killer found in William LeFever's colon was ingested orally or rectally.

So, as this court should clearly be able to see, this is a corrupt Officer of the law who was retired for his participation in this case and was later sued for his part in a wrongful conviction. This Officer was aloud to perjure himself when he stated at petitioner's trial that during an

[1] *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).*

interrogation; that petitioner stated the pictures were for her boyfriend. Detective Ballantine was the lead investigator on this case, so he had to be the one who directed Officer Robert Carson to plant the evidence they needed to finish their corrupt process.

On page four of the sixth circuit's **ORDER**, stated that petitioner's daughter testified that petitioner stated that he had been "set up" by the police and others. Thus, petitioner knew of the factual predicate for this claim by the time of trial. While this statement may be true; one must still ask how can someone get a fair trial when their counsel is working against them? Furthermore, there is no way to get the evidence needed to prove petitioner's innocence when the critical evidence is being withheld by petitioner's own counsel, who has purposely conspired with the prosecution to aid suppressing evidence.

The fourth circuit has stated in *Bizzell v. Hemingway, 548 F. 2d 505, 507 (4th Cir. 1977),* where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side." *United States v. Throckmorton, 98 U.S. 61, 66, 25 L. Ed. 93 (1878); accord, Fiske v. Buder, 125 F.2d 841, 849 (8th Cir. 1942).* When a judgment is obtained in this manner, a party, through no fault of his own, has had no opportunity to present an otherwise meritorious claim or defense. See Restatement of Judgments §§ 118, 121, 122 (1942). The district court's power to entertain an independent action to alleviate the consequent hardships is expressly preserved by Rule 60(b) of the Federal Rules of Civil Procedure. 11 Wright & Miller, Federal Practice and Procedure § 2868 (1973).

The Sixth Circuit stated on page 4; that petitioner's vague allegations of planted evidence did not include the dates that he purportedly discovered this new evidence.

There is a circuit split as to the meaning of the term "new" in *Schlup.* [2] *Compare Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003)* ("All Schlup requires is that the new evidence is reliable and that it was not presented at trial."), with *Amrine v. Bowersox,238 F.3d 1023, 1028 (8th Cir. 2001)* ("' Evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence.'") (quoting Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997)).

While Petitioner cannot prove when he discovered this evidence because of the way it was delivered, it wasn't available at the time of trial, and Petitioner has already proved that his attorney was working with the State or else this evidence and much more exculpatory material would have been used at the criminal trial.

Janice Woods the alleged victim in this case while under cross-examination, stated during a controlled call to petitioner, performed by Detective Ballantine, which happens to be the doctored tape. Woods states on this tape; ain't having sex with nobody, just like before. And again she repeats this answer; I didn't have sex with nobody. Yet Petitioner is now incarcerated for three counts of having sex with a minor. When asked you didn't say sex on the internet, you say sex on the call, don't you? Yes! Tr 127-128

Woods goes on to say, when asked by counsel, on March 17th when you wrote the handwritten statement same day you do the controlled call, nowhere do you mention the University Inn? Answer, yes Tr 129 Nowhere do you mention Staddens Bridge, Answer, yes. Tr 130 When asked about the May statement, Woods states, she said she didn't know if she had sexual intercourse or not. And then when asked, did you previously write the last thing you

[2] *Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*

remember was having a screwdriver, answer, yes. Then asked, did you pass out that night, Answer, I did not pass out. Then asked, so when you wrote that statement, you lied when you said the last thing you remember? Answer, I was writing it to the best of my ability at that time. Tr 133

Then Woods was asked, so when you wrote the last thing you remember in the statement on May of 1999 that was a lie, because now you remember something else? And isn't it true, you talked about your birthday when Mr. Reamer (Prosecutor), was questioning you about how he took you there on your birthday, which is November 3rd. Tr 135 This statement is important because Woods had to be told by the prosecution that this day was in fact her birthday. This is supposedly when she went to the University Inn. This is something anyone could have recollected and stored in their memory, and this wasn't a stupid teenager even at that time because she had set up other people for the Police prior to this set up, which is probably why there was a lot of sealed documents. Petitioner used exhibit G which were all three hand written statements.

Then when Woods was asked, in March when you first disclosed the photographs, you had those photographs on your personal possession, correct? Answer, yes. Question; and actually didn't you talk to a Police Officer, and then you went back and got the photographs and you brought them back? Answer, I don't know. Tr 146 This question is important because in exhibit H in Ballantine's notes, it was stated, Patrolman Cook stated Woods gave him one picture of her naked and said it was the one Petitioner took of her. Later it was learned that one of the exhibits marked (Exhibit 6) of the States was in fact planted.

When the court asked the prosecution about its position on exhibit 6, the prosecution responds; that it has been properly authenticated, although there may be some chain of custody issues; that goes to the weight of evidence obviously, not its admissibility. Tr 300 The court then asked counsel, what's your thought. Menashe, (Counsel) states; there is definitely a chain of custody issue with respect to it, and Id also argue there is an authentication problem. Counsel then states; with respect to the chain of custody, the Detective testified that he received one photo which he wrote a case number on the back of. He received that photo from Cook. I do have a slip regarding that photograph, and it is marked a 1. There is no property slip—there has been—there is nothing else in regards to this other photo. Tr 302-304 Petitioner was also convicted of three separate counts of taking pictures of a minor.

The court then states; obviously it turned up in our possession, Remer (prosecutor) states; I wasn't a prosecutor in 1999, and frankly, I do not know how it turned into our possession. The court responded by stating; generally I'm inclined to overrule your objection, referring to (Menashe). It has been authenticated; on that basis I will admit it. Tr 304-305 Now we have more planted evidence and a conviction that is *a manifest miscarriage of justice.*

First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the *Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Curran v. Delaware, 259 F.2d 707.See New York ex rel. Whitman v. Wilson, 318 U.S. 688, and White v. Ragen, 324 U.S. 760.* Compare *Jones v. Commonwealth, 97 F.2d 335, 338,* with In re Sawyer's Petition, 229 F.2d 805, 809. Cf. *Mesarosh v. United States, 352 U.S. 1.* The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. Texas, 355 U.S. 28;United States ex rel. Thompson v. Dye, 221 F.2d*

*763; United States ex rel. Almeida v. Baldi, 195 F.2d 815; United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382. [****9]* See generally annotation, 2 L. Ed. 2d 1575.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. See *People v.Savvides, 1 N. Y. 2d 554, 557, 136 N. E. 2d 853, 854-855 (1956).*

In *Banks v. Dretke, 540 U.S. 668, 696, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004),* Petitioner prison inmate was convicted in state court of felony murder and sentenced to death, but asserted that the prosecution failed to disclose that a key witness was a paid informant and knowingly allowed the witness to testify falsely. Upon the grant of a writ of certiorari, the inmate appealed the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a grant of the inmate's habeas corpus petition.

The State argued that the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence. This court concluded that: a rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley, 520 U.S. 899, 909, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997)* (quoting *United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 71 L. Ed. 131, 47*

S. Ct. 1 (1926)). This court further stated: courts have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials.

Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles, 514 U.S. 419 at 440, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995); Citing Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).* Yet dishonest conduct and unwarranted concealment is exactly what this case is about. Every time Petitioner has tried to obtain the evidence he needs, there has been a stumbling block, such as criminal rule 16, stating that the Prosecution can mark anything he wants *"counsel only"* and the defendant will never be aloud to obtain this evidence.

To conclude this argument; the prosecution and Petitioner's defense, conspired to gain a conviction of an innocent man who wasn't perfect, but nevertheless did not commit the crimes he was convicted of. This should have been a gateway to proceed further with or without newly discovered evidence. Instead Petitioner is left here in prison fighting for his life for crimes the Newark, City Police know he did not commit. This is unfair and Petitioner will fight until the ends of justice are met.

Punishing people for filing lawsuits is also unfair. Petitioner supplied this information to this court and it is not fiction or a lie. He filed a racial discrimination lawsuit against the company he worked for, and in the process named an ex-Police-Officer, who once worked for the City of Newark, Ohio Police Department. This Officer told Petitioner that he would put a word in to the Police Department, and now Petitioner is left stuck in prison where the system systematically

hampers the inmate legal process. This conviction is a fraudulent one and should be dealt with as such.

Petitioner also avers that by denying the other claims in the petition which all include "ineffective assistance of counsel." (a) Petitioner's counsel not filing for a suppression hearing and allowing a general or exploratory search. (b) The right to a competency hearing, when requested before trial. (c) Counsel not moving to dismiss the indictment for a speedy trial violation, and appellate counsel rendered ineffective assistance by not raising issues such as ineffective assistance of counsel.

The guarantee of counsel "cannot be satisfied by mere formal appointment," *Avery v. Alabama, 308 U.S. 444, 446 (1940).* "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Appellate counsel also rendered ineffective assistance by allowing this sham process and not arguing ineffective assistance on direct appeal. A State cannot discharge its duty to provide counsel by appointing an attorney who fails to render adequate legal assistance. *Strickland v. Washington, 466 U.S. 668, 685-686 (1984). See Evitts v. Lucey, 469 U.S. 387, 396 (1985).*

If a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois, 351 U.S., at 18*, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. Thus, to deny adequate review to the poor

means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.

All of these claims should have been cognizable since this case has extrinsic fraud written all over it. The *motion for discovery* pursuant to U.S.C.S. Sec 2254 rule 6 should have been granted, and then petitioner could have proven that he is indeed innocent of the charges. U.S.C.S. Sec 2254 rule 7 was never ruled upon by either the District Court or the Sixth Circuit.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully Submitted,

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