No. 19-5131

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN L. RACKLEY — PETITIONER
(Your Name)

vs.

BRIGHAM SLOAN, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

STEVEN L. RACKLEY
(Your Name)

501 Thompson Road
(Address)

Conneaut, OHIO 44030
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. The question of whether the District Court properly applied the statue of limitations to Rackley's habeas petition in Respondent's first order by the District Court to file an answer and brief the merits of Rackley's petition waived his defense on the statue of limitations that was not the primary focus of his dismissal.

2. The question of whether Rackley should have been given a COA on the lack of notice of the involuntary manslaughter charge that he involuntary plead to.

3. The question of whether the post-indictment delay prejudiced Rackley's case and caused the illegal arrest without probable cause determination that violated his Fourth and Sixth Amendment Constitutional Rights.

4. The question of whether Petitioner's Fifth Amendment Right was violated from the direct indictment and the District Court for not conducting an evidentiary hearing on his actual innocence claim, and alibi defense.

5. The question of whether Petitioner's guilty plea was knowingly and voluntary and counsel's ineffectiveness for not telling Petitioner about his appeal rights, and having a pre-sentence investigation report prepared during the sentencing hearing.

LIST OF PARTIES

[X] All parties appear in the caption of the case on 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

[X] 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[X] reported at WWW.supremecourt.ohio .gov; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 29, 2019.

[X] 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: May 01, 2019, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was June 16, 2016. A copy of that decision appears at Appendix A-3.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

Steven Rackley an Ohio prisoner proceeding pro se, had appealed a district court judgment dismissing as untimely his petition for a writ of habeas corpus filed pursuant to 28 U.S.C § 2254. Rackley requested a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requested leave to proceed in forma pauperis.

Rackley pleaded guilty to involuntary manslaughter and aggravated robbery. He was sentenced to serve ten years of imprisonment for the manslaughter conviction and nine years of imprisonment for the robbery conviction, to run consecutively. The judgment was entered on April 24, 2013. Rackley did not file a timely appeal.

On March 27, 2015, Rackley filed a State application for a writ of habeas corpus. The Ohio Court of Appeals dismissed Rackley's petition, and the Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals on June 16, 2016.

Rackley mailed his habeas corpus petition from prison on July 19, 2016, and it is considered filed on that date. **See Houston v Lack, 487 U.S. 266, 276 (1988); Cook v Stegall, 295 F.3d 517, 521 (6th Cir. 2002).** Rackley's petition raised seven grounds for relief. On the recommedation of a magistrate judge and over Rackley's objections, the district court dismissed Rackley's habeas corpus petition as time-barred and denied a certificate of appealibility.

A certificate of appealability may issue only if a petitioner makes " a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). "A petitioner satisfies this standard by demonstrating that jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." **Miller-El v Cockrell, 537 U.S. 322, 327 (2003).**

REASONS FOR GRANTING THE PETITION

In the case of Rackley v Sloan, Warden, there has been a complete miscarriage of justice, that has continued through-out petitioner's due dilligence to be heard of his constitutional claims in the State and Federal Courts, from (1) the deprivation of his detention caused by the state;(2) the ineffectiveness of trial counsel for not looking into the facts of his illegal detention or the pre-indictment delay:(3) the direct indictment by the State without probable cause determination in 48 hours:(4) the signing of the coerced speedy trial waiver; (5) final the coerced guilty plea and the lack of notice to appeal his otherwise void sentced for not having a pre-sentence investigation report. The evidence that was overlooked by the district court to show and prove Rackley's actual innocence the Sixth Amendment guarantee's a defendant assistance of counsel for is defence.

When a indigent defendant is faced to defend himself against judicial scrutiny, and fundamentally unfair procedures, and relying on the Sixth Amendment to defend against this unjust system, Due Process is offended. The Fourteenth Amendment guarantee's the Equal Protection of the laws, the Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In **Re Winship, 397 US 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Ops 2d 323.** The question in this case is what standard is to be applied in a Federal Habeas Corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence.

Whether the Strickland standard be applied due to counsel's commulitive errors, and having his client plead guilty without fair notice, it is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of Due Process. **Cole v Arkansas, 333 US 196, 201, 92 L. Ed. 644, 68 S. Ct. 514; Presnell v Georgia, 439 US 14, 58 L.Ed 2d 207, 99 S. Ct. 235.** These standards no more than reflect a broader premise that has never been doubted in our

constitutional system: That a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. e.g.j. Hovey v Elliot, 167 US 409, 416-420, 42 L. Ed. 215, 17 S. Ct. 841. Boddie v Connecticut, 401, US 371, 377-379, 28 L. Ed. 2d 113, 91 S. Ct. 780. A meaningful opportunity to defend if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.

Accordingly, we held in the Thompson case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. See also Vachon v New Hampshire, 414 US 478, 38 L. Ed. 2d 666, 94 S. Ct. 664; Adderley v Florida, 355 US 39, 17 L. Ed. 2d 149, 87 S. Ct. 242; Gregory v Chicago, 394 US 111, 22 L. Ed. 2d 134, 89 S. Ct. 946; Douglas v Budery, 412 US 430, 37 L. Ed. 2d 52, 93 S. Ct. 21 99. The "no evidence" doctrine of Thompson v Louisville, 362 US. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960), thus secures to an accussed the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty.

Mr. Rackley asks this Honorable Court to review five issues:

1. The question of whether the district court properly applied the statue of limitations to Rackley's habeas petition in Respondent's first order by the district court to file an answer and brief the merits of Rackley's petition waived his defense on the statue of limitations that was not the primary focus of his dismissal.
2. The question of whether Rackley should have been givien a COA on the Lack of notice of the involuntary manslaughter charge that he involuntary pled too.
3. The question of whether the post-indictment delay prejudiced Rackley's case and caused the illegal arrest without probable cause determination that violated his Fourth and Sixth Amendment.
4. The question of whether petitioner's Fifth Amendment Right was violated from the direct indictment and the district court for not conducting an evidentiary hearing on his actual innocence claim, an alibi defense.
5. The question of whether petitioner's guilty plea was knowing and voluntary and counsel's ineffectiveness for not telling him about his appeal rights, and not having a pre-sentence investigation report during sentencing.

I. **The waiver of the statue of limitations defense.**

On September 30, 2016, Respondent filed a motion to dismiss Rackley's petition arguing that Rackley's claims are not cognizable and/or were waived/ procedurally defaulted. **(Doc.# 8).** Rackley filed a response. **(Doc.#9).**

On March 21, 2017, the magistrate judge issued an Order stating that Respondent filed a motion to dismiss five of the seven grounds asserted in Rackley's petition, noting that the Court's initial order required Rspondent to brief the merits of Rackley's claims, stating that Respondent had not briefed the merits of the petition or even moved to dismiss all of the grounds as procedurally defaulted, noting that federal courts on habeas review are not requried to address a procedural default issue before deciding the merits, denying Respondent's motion to dismiss, and noting that Respondent may refile a motion to dismiss if the motion also addresses the merits of Rackley's grounds for relief. **(Doc.# 17, Order, PageID#: 1069).**

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and Local Rules 7.2 and 72.3, Respondent filed objections to the magistrate judge's order. **(Doc.# 20).** Respondent noted that he did seek dismissal all of Rackley's grounds for relief as waived/procedurally defaulted and argued that Rackley's first and fifth grounds for relief were not cognizable. **Id. at 4, PageID#: 1078.** Respondent also argued that permitting Rackley to recieve a merits review of his claims despite not having established cause and prejudice, or actual innocence, to excuse his procedural defaults was contrary to United States Supreme Court precedent, a rule requring Respondent to address the merits of clearly defaulted grounds for relief was unduly burdensome, and required merits briefing places petitioners who fairly present their claims in the state courts at a disadvantage when compared to those who default their claims. **Id. at 4-5, PageID#: 1078-79.**

Respondent noted that the Court permits pre-answer motions to dismiss in other civil cases and it is not clear why federal habeas cases would be treated differently. **Id. at 5, PageID#: 1079.** Respondent also requested an extension of time to file an Anwser/Return of Writ to allow for the district Judge's consideration of Respondent's dispostive motion to dismiss and Respondent's objections to the magistrate Judge's March 21, 2017 Order. **(Doc.#23).** On August 15, 2017, the magistrate judge issued an order denying Respondent's motion for extension of time and directing Respondent to file an anwser/return of writ on or before September 5, 2017. **(Doc.#27).** The magistrate judge noted that "[r]ather than complying with the court's order, respondent filed an objection and ...moved for an extension." **(Doc.#27, Order p. 1, PageID#: 1116).** The magistrate judge citing Sixth Circuit cases stated that "[w]hether or not the district judge agrees with the arguments asserted in respondent's objection to the court's order denying its motion to dismiss, federal courts on habeas review are not required to address procedural issues before deciding on the merits." Id. The magistrate also stated that "Respondent is unnecessaryily delaying the disposition of this case." **Id. at 2, PageID#: 1117.**

Respondent filed his second pleadings with the statue of limitations bar. **(Doc.# 28).** Rackley's question is whether Respondent waived his argument of the statue of limitations in his first responsive pleadings, in **Scott v Collins, 286 F. 3d. 923 (6th Cir. 2001),** reversed and remanded based on the facts that Respondent waived his statue of limitations argument. To avoid waiver under the rules of pleadings and to comply with the court order, Respondent had to plead the § 2244(d) statue of limitations defense.

The § 2244(d) statue of limitations defense is an affirmative defense as opposed to a jurisdictional defect. See **Hill v Braxton, 277 F. 3d. 701, 705 (4th Cir. 2002); Acosta v Artuz, 221 F. 3d. 117, 122 (2nd Cir. 2000)**(" The AEDPA

statue of limitations is not jurisdictional, and nothing in the AEDPA or in the § 2254 Habeas Rules indicates that the burden of the pleading the statue of limitations has been shifted from the Respondent to the petitioner. The AEDPA statue of limitations therefore an affirmative defense and compliance * there with need not be pleaded in the petition.")(Citations omitted); **Kiser v Johnson, 163 F. 3d. 326, 329 (5th Cir. 1999)**(recognizing that "the statue of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional"); **United States ex. rel. Galvan v Gilmore, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998)**("Since § 2244(d) does not affect this court's subject-matter jurisdiction over habeas petitions, the State can waive the § 2244(d) timeless issue by failing to raise it")(Citations omitted).

Because the § 2244(d) statue of limitations is an affirmative defense, Rule 8(c) of the Federal Rules of Civil Procedure requires that a party raise it in the first responsive pleading to avoid waiving it. Federal R. Civ. P. 8(c) (' In pleading to a proceeding, a party shall set forth affirmative ... statue of limitations ... and any other matter constituting an avoidance or affirmative defense.") **Haskell v Washington Township, 864 F. 2d 1266, 1273 (6th Cir. 1988)** (pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, a defense based upon a statue of limitations is waived if not raiesd in the first responsive pleadings."); See also **Phelps v McCellan, 30 F. 3d. 658, 662 (6th Cir. 1994)**(" Generally, a failure to plead an affirmative defense, like statue of limitations, results in the waiver of that defense and its exclusion from the case."); **Carrington v Robinson, 2001 US Dist. LEXIS 6758 at *4, No. 99-cv-76377, 2001 WL 558232 (E,D. Mich. Mar, 27, 2001)**(explaining that "the statue of limitations provision of the AEDPA is an affirmative defense"); **5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1278, a 477 (2dEd). (1990).**

The Sixth Circuit is not alone recognizing that a respondent who does not raise the § 2244(d) statue of limitations defense , waives it. see, e.g., Galvan, 997 F. Supp. at 1026(" Since the state did not raise the § 2244(d) limitations argument in this case, we find that it has been waived."); Samuel v Ducan, 1996 U.S. App. LEXIS 18542 at *7, No. 95-56380, 1996 WL 413632 (9th Cir. July 8, 1996)(explaining that the government waived the § 2244(d) statue of limitations defense by not raising the defense when the habeas petition was filed after the one-year statue had run).

In Wood v Milyard, 566 U.S. 463, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2002), the Court held even the Courts of Appeals have authority to consider a forfeited timeliness defense sua sponte.

II. Whether the Court of Appeals should have granted a COA.

A COA will issue only if the requirements of § 2253(c) have been satisfied. "The COA statue establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." Slack v McDaniel, 529 U.S. 473, 482, 120 S. Ct. 1595, 1602-1603, 146 L. Ed. 2d 542 (2000); Hohn v United States, 524 U.S. 236, 248, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In Slack, Supra, at 483, 120 S. Ct. 1595, the Supreme Court recognized that Congress codified the standard, announced in Barefoot v Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), for determining what constitutes the requisite showing.

Rackley contends that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S. Ct. 1595 (qouting Barefoote, supra, at 893, n. 4, 103 S. Ct. 3383).

Rackley was not given fair notice of the Involuntary Manslaughter charge as stated by the magistrate Judge in his footnote bottom of page, see Doc.# 32 PageID#: 2054, which clearly violates the Due Process Clause of the Fourteenth Amendment. In determining whether a COA should issue where the petition was dismissedd on procedural grounds has to components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the " Court will pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," Ashwander v TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), allows and encourages the court to first resolve procedural issues.

The Ashwander rule should inform the court's discretion in this regard. In this case Rackley did make a substantial showing of the denial of a constitutional right, but the district court and the Sixth Circuit court of Appeals overlooked his constitutional violation regarding the issuance of his COA.

The Sixth Circuit Court in Watson v Jago, 558 F. 2d 330 (6th Cir. 1977), reversed and remanded the case to the district court with instructions to grant the writ of habeas corpus, there is no question that the Fourteenth Amendment encompasses the right to fair notice of criminal charges. The Supreme Court In Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948), in dealin with the Due Process Clause of the Fourteenth Amendment, stated that:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of Jurisprudence.....

" Rackley statisfies this standard by demostrating that jurists of reason could disagree with the district court and the Court of Appeals resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v Cockrell, 537 U.S. 322, 327 (2003).

III. Whether the Six-year post-indictment delay constituted the Illegal Arrest without probable cause determination.

A. pre-indictment delay

In United States v Hofstetter, No. 3:15-CR-27-TAV-CCS, 2017 U.S. Dist LEXIS 149134, 2017 WL 4079181 at *6 (E.D. Tenn. Sept. 14, 2017), To assess whether a constitutional violation occurred, courts must determine whether the'" fundamental conceptions of justice which lie at the base of our civil and political institutions,'and which define 'the community's sence of fair play and decency,'" are violated. Lovasco, 431 U.S. at 790 (qouting Mooney v Holohan, 294 US 103, 112 55 S. Ct. 340, 79 L. Ed. 791 (1935), and Rochin v California, 342 US 165, 173 72 S. Ct. 205, 96 L. Ed. 183 (1952)). The defendant must shoulder a "heavy burden" in order to show that his or her rights were violated by pre-indictment delay. United States v Baltimore, 482 F. App'x 977,981 (6th Cir. 2012).

"Dismissal for pre-indictment delay is warranted only when the defendant shows substantial prejudice to his right to a fair trial and that the delay was intentional device by the government to gain a tactical advantage." United States v Brown, 667 F.2d 566, 568 (6th Cir. 1982), See also Marion, 404 US at 324; United States v Atchley, 474 F.3d. 840, 852 (6th Cir.)(finding government did not file superseding indictment in order to gain a strategic advantage), Cert. denid, 550 U.S. 965, 127 S/ Ct. 2447, 167 L. Ed. 2d 1145(2007). The defendant bears the burden of showing substanial prejudice by definite proof, rather than speculation. United States v Birney, 626 F.2d 102, 105-06 (2nd Cir. 1982); see also United States

tates v Rogers, 118 F.3d. 466, 475 (6th Cir. 1997).

In United States v Jones, 555 F. Ed. App'x. 485 (6th Cir. 2014), The Sixth Amendment provides criminal defendant's a right to a speedy trial. "Courts must balance four factors to determine whether a delay violated the Sixth Amendment: (1) the '[l]ength of the delay'; (2) 'the reason for the delay '; (3) ' the defendant's assertion of his right '; (4)' prejudice to the defendant.'" Ferreira, 665 F. 3d. at 705 (qouting Baker v Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101(1972)). The parties agree that relevant "delay" in this case is the Six years and two weeks between the indictment and the arrest. The parties also agree that Jones timely asserted his speedy trial right.

" The First factor is a threshold requirement : we only consider the remaining Barker factors if the delay is longer than Oneyear." United States v Zahawa, 719, F.3d 555, 563(6th Cir. 2013)(citing United States v Robinson, 455 F.3d. 602, 607 (6th Cir. 2006)). The Rationale here is the judicial examination of a speedy trial claim is needed only where the delay crosses the line dividing ordinary from "'presumptively prejudicial [.]"' Girts v Yanai, 600 F. 3d. 576, 588 (6th Cir. 2010)(qouting Doggett v United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d. 520 (1992)).

In this case, the delay was six years and two weeks, so we must consider the remaining Barker factors. "The Second Barker Factor looks at 'whether the governement or the criminal defendnat is more to blame for [the] delay.'" Zahawa, 719 F. 3d. at 563 (qouting Maples v Stegall, 427 F.3d 1020, 1026 (6th Cir, 2005)).

"Governmental delays motivated by bad faith, harrassment, or attempts to seek a tactical advantage weigh heavly, and valid reasons for the delay weigh in favor of the government." Robinson, 455 F.3d. at 607. Thus, "different weights should be assigned to different reasons[,]" Barker, 407 U.S. at 531, and a dist-

rict court's conclusions regarding these inquires are entitlted to "' considerable deference," **United States v Brown, 169 F.3d 344, 349 (6th Cir. 1999)(qouting Doggett, 505 U.S. at 652).** Here, Jones does not allege any "bad Faith " on the government's part and the government offers no "valid reason" for the delay.

The parties dispute only whether the government exhibited reasonable diligence in attempting to discover Jone's whereabouts from the time of the indictment until his arrest. The district court did not clearly err infinding that it did.

In Rackley's case he was charged with Aggravated murder and Aggravated Robbery, the alledge crime took place on November of 2006, the Six in a half year post-indictment delay presumptively prejudice, Rackley case there was no probable cause determination for his arrest, the record states that there was no direct indictment but the charges Rackley was forced to face was in fact/or according the magistrate Judge Parker assesment of his indictment suggest that Rackley was direct indicted. **See (Doc.# 32 PageID#: 2052-53).**

In **United States v Ingram, 446 F.3d 1332 (11th Cir. 2006).** "Determination of whether a defendant's constitutional right to a speedy trial has been violated is a mixed question of law and fact. Questions of law are reviewd de novo and findings of fact are reviewed under the clearly erroneous, standard." **United States v Clark, 83 F.3d 1350, 1352 (11th Cir. 1996)(citing Yapp v Reno, 26 F.3d 1562, 1565(11th Cir. 1994)).**

In **United States v Shell, 974 F.2d 1035,** stated in it's opinion: Shortly after our opinion was filed, The Supreme Court held that a defendant was not always required to show actual prejudice to prove a violation of his speedy trial rights. **Doggett v United States, 112 S.Ct. 26 86, 26 94, 120L. Ed. 2d 520 (1992).** The court modified the **Barker v Wingo, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S. Ct. 2182 (1972),** four-part test, and held that no showing of prejudice is

required when the delay is great and attributable to the government. The Ninth Circuit ruled that a five-year delay violated the defendant's Sixth Amendment right to speedy trial. Like the eight-year delay in Doggett, created "a strong presumption of prejudice.

B. lack of probable cause arrest without warrant.

The Ohio Supreme Court has established a four-part test to determine whether a person is under arrest. **State v Darrah (1980), 64 Ohio St.2d 22, 412 N.E.2d 1328.** An arrest occurs when there is "(1) [A]n intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."(citations omitted.) Id. at 26.

Each of the four prongs is not present in Rackley's case, the officers approched Rackley with intent to place him under arrest and acted without real authority. Moreover, when the officers approched, they detained him by surrounding the gas station he was at in Shaker hts. and held him at gun pointin front of his daughters and his fiance', and secured him from leaving. The fourth and final factor Rackley asked the officers how did they know he was at the gas station, the officer reponded by stating they followed him from his house to the gas station.

The proper inference to be drawn from such bad conduct is that Rackley did not understand the implications of his false arrest. The federal constitutional right implicated here is the Fourth Amendment Right to be arrested only upon probable cause. **Pyles v Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995); Donovan v Thames, 105 F.3d 291, 297-98 (6th Cir. 1997).** Thus, this court must address whether the evidence, when construed most favorable to Rackley, states a claim that Shaker Hts. police officers arrested him without probable cause. **Pyles, 60 F.3d at 1215. also see (Objection to Magistr. R&R Doc#. 33 Page 17.)**

Today it is well established that any arrest without probable cause violates the Fourth Amendment. See Gardenhire v Schubert, 205 F.3d 303, 315 (6 th Cir. 2000); Ahlers v Schebil, 188 F.3d 365, 370 (6th Cir. 1999); See Baker v McCollan, 443 U.S. 137, 142 43, 61 L.Ed. 2d 433, 99 S.Ct. 2689 (1979)'("by virtue of its's 'incorporation' into the Fourteenth Amendment, the Fourth Amendment requires the states to provide a fair and reliable determination of probable cause as condition for any sigificant pretrial restraint of liberty.")(citing Gerstein v Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S.Ct. 854 (1975). also see Rackley's petition Doc.# 1-1 PageID#: 28-43.

In Cochran v Town of Jonesborough, U.S.Dist. LEXIS 34088(6th Cir. 2018), first alleges unlawful arrest under the Fourth Amendment (Count 1) and Tennessee law (Count 5). "It is beyond debate that and arrest made without probable cause violates the Fourth Amendment." Smith v City of Xenia, 417 F.3d 565, 573 (6th Cir. 2005)). Conversely," the existence of probable cause forecloses a false arrest claim." Stemler v City of Florence, 126 F.3d 856, 871(6th Cir.1997) (cleaned up). Probable casue to make an arrest exists "if, at the moment of the arrest, 'the facts and circumstances within the officers ' knowledge and of which they had resasonable trustworthy information weresufficient to warrant a prudent man in believeing that the arrestee had committed or was committing an offense. ""Klein v Long, 275 F.3d 544, 550 (6th Cir. 2001)(internal citation omitted)(cleaned up). The arresting officer's knowledge depends on the "law of the jurisdiction at the time of the Occurrence." Ingram v City of Columbus, 185 F.3d 579, 594, (6th Cir. 1999). Alegal arrest together with the filing of a valid sworn complaint upon which a warrant is issued subjects an accused to a Municipal courts jurisdiction. State v Jones, 76 Ohio App. 3d 602, 604, N.E.2d 1267, 1992 Ohio LEXIS 116 (1992). Doc.# 1-1 PageID#: 30.

The Supreme Court has held that the probable cause findings required by the Fourth Amendment must be made by a neutral and detached magistrate. See Shadwick v City of Tampa, 407 U.S. 345, 350, 92 S. Ct. 2119, 32 L.Ed.2d 783(1972) ; United States v Pennington, 328 F.3d 215, 217-18 (6th Cir. 2003).

In Cooley v Stone, 134 US App. DC 317, 414 F.2d 1213(1969), The district Judge granted the writ, ruling orally as follows:

> "no person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. Such is the Teachings of Gault and Teaching of Kent. The historic writ of habeas corpus is proper way to challenge illegal detention or irregularites in procedures leading to detention, as was clearly set forth in Washington v Clemmer, [119 US App. D.C. 216] 339 F.2d 715.

In County of Riverside v McLaughlin, 114 L.Ed.2d 49, 500 US. 44 (1991), On Certiorari, the United States Supreme Court vacated the Judgement of the Court of Appeals and remanded the case for further proceedings. In an Opinion by O'Connner,J., joined by Rehnquist Ch.J., and White, Kenndy, and Souter,JJ., it was held that (1) jurisdictions that provide judicial determinations of probable cause within 48 hours of a warrantless arrest will, as a general matter, comply with the promptness requirement of the federal constitution's fourth amendment, and such jurisdiction will be immune from systematic challenges to thier probable cause determinationproceedings, (a) 48-hour Rule accommadates the competing interest involved, (b) the vague admonition of the common law that an arresting officer must bring a person arrested without a warrant before a judicial officer "as soon as he reasonabley can " offers no support for an in flexible standard that would reqiure a probable cause determination tobe made as soon as the adminstrative steps incident to arrest are completed, and (c) given that it can take 36 hours to process arrested persons, a rule setting 24-hours as the outer boundry

for providing probable cause determinations would compel countless jurisdictions to speed up thier criminal justice mechanism substantially; and (2) the defendant county is entitled to combine probable cause determinations with arraignments; but (3) The Supreme Court in Gerstein did not hold that the fourth amendment affords arrestee's the right to attend a probable cause determination.

The Supreme Court based it holding that warrantless arrestee's must recieve a prompt probable cause determination upon the premise that warrantless atterstee's should be treated on par with those arrested with a warrnant. **Gerstein , 420 US at 120.** The Fourth Amendment, therefore, affords those arrested without arrested without a warrant the same right to have the evidence against them reviewed by a neutral and detached magistrate as to that enjoyed by those arrested with a warrant. **Gerstein at 420 US at 112.** Rackley was held for two days and was not released, he also was not given counsel by Shahker Hts. Municipal court. **See Doc.# 1-1 PageID#: 30. also see booking sheet Doc.# 10-1 PageID#: 1008.**

The Booking sheet of Shaker Hts police Dept. shows that Rackley was not charged with a felony crime. **Picard v Connor, 30 L.Ed. 2d 438, 404 US 270,** Mr. Justice Brennan delivered the opinion of the Court:

The Court of Appeals for the First Circuit, reversing the district court's dismissal of Respondent's petition for a writ of federal habeas corpus, held that "the procedure by which [Respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of Equal protection of the Laws." **434, F,2d 673 (1970).** The question is whether Rackley was entitled to a probable cause determination for further detention. Whether Equal protection of the Fourteenth Amendment has violated Rackley's Rights of Procedural Due Process.

IV. The question of whether Rackley's Fifth Amendment Right was violated from the direct indictment and the district court for not conducting an evidentiary hearing on his actual innocence claim, and alibi defense.

Section 2241 "is an affirmative grant of power to federal courts to issue writs of heabeas corpus to prisoners being held 'in violation of the Constitution or laws or treaties of the United States.'" Rice v White, 660 F.3d 242, 249 (6th Cir. 2011)(28 U.S.C. § 2241 (C)). In order to prevail on due process claim, a petitioner must show that the government has interfered with a protected liberty or property interest.

Fourteenth Amendment Section 1 states;

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 or life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States v Reiter Court of Appeals 2nd Cir. (1989), A defendant enjoys both a constitutional right and a right under Fed. R. crim. P. 43 to be present at trial. The constitutional right is premised on anaccussed's Sixth Amendment right to Confront his accusers, See Illinois v Allen, 397 U.S. 337, 338, 25 L.Ed. 2d 353, 90 S/ Ct. 1057 (1970), and Fifth Amendment, Fourteenth Amendment Due Process right to be present at certain trial-related proceedings where he is not actually confronting witness or evidence against him, see Kentucy v Stincer, 482 U.S. 730, 745, 96 L.Ed. 2d 631, 107 S.Ct. 2658(1987); United States v Gagnon, 470, U.S. 522, 526-27, 84 L.Ed 2d 486, 105 S.Ct. 1482(1985)(percuraim); United States v Crutcher, 405 F.2d 239, 242 (2nd Cir. 1968), Cert. denied, 394 U.S. 908, 22 L. Ed. 2d 219, 89 S.Ct. 1018(1969).

In Giordenello v United States, 357 US 480 (1958), the Supreme Court stated Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written sworn complaint (1) setting forth "the essential facts constituting the offense charged," and (2) showing " that there is probable cause to believe that [such] an offense has been committed and that defendant has committed it ....

The provisions of these Rules must be read in light of the constitutional requirements they implement. The langauge of the Fourth Amendment, that" ... that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing ....the persons or things to be seized," of course applies to arrest as well as search warrants. See Ex parte Burford, 3 C

cranch 448; McGrain v Daugherty, 237 U.S. 135, 154-157. The protection afforded by these Rules, when they are viewed against thier constitutional background, is that the inferences from the facts which lead to the complaint"....be drawn by a neutral detached magistrate, instead of being judged by the officer engaged in the often competive enterprise of fettering out crime." Johbson v United States, 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determined whether the "probable cause" required to support a warrant existence.

The warrant requirement exists in order to permit a neutral magistrate to make the decision whether to authorizes arrest, rather than leaving this decision up to the prosecutor or officer. Gerstein v Pugh, supra; Johnson vUnited State, supra. Gerstein and Johnson involved determinations of probable cause but the same pricipals are applicable here. Even where an Indictment has been handed down and there is a presumption of probable cause, a warrant requirement remains. Fed. R. Criminal P. 9 (b)(1).

Habeas petitions will be granted for prosecutorial misconducto only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v Wainwright, 477 US 168, 171, 106 S.Ct. 2426, 91 L.Ed.2d 144 (1986) (qouting Donnely v DeCristoforo, 416 US 637, 643 94 S.Ct. 1868, 1871, 40 L.ed.2d (9th Cir. 1995). To constitute a due process violation, the prosecutorial misconduct must be "of sufficient signifcance to result in the denial of the defendant's right to a fair trial." Green v Miller, 483 US 756, 765, 107 S.Ct. 3102, 3109, 97 L.Ed. 2d 618 (1987)(qouting United States v Bagely, 473 US 667, 105 S.Ct. 3375, 87 L.ed.2d 481 (1985).

In Pointer v Texas, 380 U.S. 400

In Pointer v Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965), On certiorari, the Supreme Court of the United States reversed, in an opinion by Black, J., expressing the views of seven members of the court, it was held that (1) the Sixth Amendment guaranty protecting an accused's right to confront the witnesses against him was made obigatory on the States by the fourteenth amendment ; and (2) the facts, as stated above, constituted a denial of defendant's constitutional right to confrontation.

The Sixth Amendment right of an accused to confront the witness against him is a fundamental right, essential to a fair trial, and is made obligatory on the states by the fourteenth amendment. Blackford v Lazaroff (2017) (6th Cir) R & R opinion 2921.52 shame legal. The prosecution used sham legal process for aggravated murder and aggraveted robbery in Rackley's case , the Confrontation Clause is applicable to the States through the fourteenth amendment's due process clause. Herriandez v Mckee 2018 US Dist. LEXIS 38158 (6th Cir. 2018).

The magistrate Judge stated in his Report and recommendation, State court rulings on issues of state law may "rise to the level of due process violations [if] they' offend [] some principal of justice so rooted in the traditions and conscience of our people as to rank as fundamental." ' He further stated that Rackley's contentions do not reveal any violations of state law that denied him fundamentally fair proceeding or any violation of his due process rights.

The indictment signified that a grand jury found probable cause to support the charges based on the sworn complaint of the assistant prosecutor. Rule 6 of the Supertendence for the courts of Ohio states: Each court shall require an attorney to include the attorney or pro hav vice registration number issued by the Supreme court on all documents filed with the court. Each court shall use

the attorney or pro hac vice registratation number issued by the Supreme Court as the exclusive number or code to indentify attorneys who file documents with the court. The complaint that was filed without and affidavit of a police officer has no [registration number] so the court cannot identify the signatures of the deputy clerk. See Complaint filed by the prosecutor (Doc#: 28-1 PageID#: 1310, see also complaint summary and bond report, Doc#: 28-1 PageID#: 1308), " this process is called direct indictment." "The term direct indictment simply means that no criminal complaint was first filed against the defendant. There is no constitutional or statutory requirement that criminal prosecution begin by complaint. Doc#: 32 PageID#: 2051-56. The magistrate's determination of the facts where errorneous an "resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established Federal Law, the Fifth Amendment to the United States Constitution requires indictment by grand jury for all federal prosceutions for felonies or capital crimes. The Supreme Court has held that this requirement is not binding on the the States. Hurtado v California, 110 US 516, 4 S.Ct. 111, 28 L.Ed. 232((1884). Critics of the grand jury contend that it is now so completely under the control of the prosecutor that it serves as little more than a "Rubber Stamp" for the prosecutor's charging decisions.

The complaint is the jurisdictional instrument of the Municipal Court. A court's subject-matter jurisdictment is invoked by the filing of a complaint. In the matter of: C.W. Butler App. No. CA. 2004-12-312, 2005 Ohio 3905, P.11. The filing of a valid complaint is therefore a necessary prerequisit to a court's accquiring jurisdiction. Columbus v Jackson, (1952), 93 Ohio App. 516, 518, 114 N.E.2d 60. Criminal Rule 6(f) states that the grand jury - or it's foreperson or deputy foreperson - must return the indictment to a Magistrate Judge in open court, the Appearance Docket does not show that an indictment was returned. See Appearance Docket certified copy Doc#: 28-1 PageID#: 1383-96.

In Hasan v Ishee, U.S. Dist. LEXIS 25081 (6th Cir. 2018) stated that there is no constitutional right to an indictment in State Court criminal proceedings. Hurtado v California, supra, In Butler v Warden, 2012 U.S. Dist. LEXIS 123381 (6th Cir. 2012), as Respondent pointed out in the Retuen of writ (Doc.# 8, P.12), it is well settled that there is no federal constitutional right to an indictment in the State criminal proceedings. Bransburg v Hayes, 408 U.S. 665, 688 n. 25, 92 S.Ct. 2546, 33 L.Ed. 2d 626 (1972); Koontz v Glossa, 731 F.2d 365, 369 (6th Cir. 1984)(" The law is well settled that the federal guarantee of a grand jury indictment has not been applied to the States.... it is also well settled in this Circuit that the constitution does not require any particular State indictment rule"). Therfore this should constitute as a Fifth Amendment violation of the Fourteenth Amendment to the United States consitution and whether this would amount to the trial court not accquiring jurisdiction of the subject-matter.

In Doyle v State, 17 Ohio, 222,224, where the defendants was not indicted by a proper grand jury, it is said: "hence no indictment in this case was ever found by a grand jury, because there was no grand jury to pass upon it. Hence that which purports to be an indictment was no indictment, and the party charged could not be put upon trial to answer. But it iis said the objection comes too late.

No objection can come to late, which discloses the fact that a person has been put to answer a crime in a mode violating his legal and Constitutional Rights. ***No man, by express consent, can make that an indictment, authorizing the court to try that which, in fact, was not an indictment, should be put upon file, not purporting to be bound [found] by a grand jury, could the person charged, by entering a plea of not guilty, confer upon the court power to try and sentence him ? no one would pretend it". Rackley filed a motion for grand jury minutes on October 16, 2017 but was denied. **See Doc#: 30 and Doc#: 31.**

In **Strickland v Washington, 466 US 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),** the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudice the defendasnt resulting in an unreiable or fundamentally unfair outcome. In **Parisi v United States, 529 F.3d 134 (2d Cir. 2008),** Parisi's submissions can be read as raising the claim that his attorney was ineffective in advising him to accept the plea agreement rather than advising him to move to dismiss the indictment with prejudice based on alleged Speedy Trial Act violations. This claim survives the appeal waiver because, by focusing on the advice Parisi recieved from his attorney, it connects the alleged ineffectiveness of Parisi's attorney with the voluntary nature of his plea. **See United States v Hansel, 70 F.3d 6,8 (2d Cir. 1995)(per curaim)**(allowing ineffective assistance claim based on failure to move to dismiss counts as time-barred to proceed, desite guilty plea, because "Hansel's waiver of the time-barr defense cannot be deemed knowing and intelligent" as "he would not have pled guilty to counts that he knew to be time-barred " (emphasis added)). The Parisi Case is very similar to Rackley's case because counsel was ineffective for advising Rackley to sign a Speedy Trial Act waiver, **(see petition Doc#: 1-1 PageID#: 55-57)**.

The Supreme Court recently described the requirement that the district court make such findings as "categorical" and held that "if a Judge fails to make the reguisite findings regarding the need for an end-of-justice continuance, the delay resulting from the continuance must be counted. **"Zedner v United States, supra, 547 US 489 (2006).** There, after indictment and at the urging of the distict court, the defendant had signed a form waiving all Speedy Trial Act claims in advance. Id. at 494-96.

The court held that defendant's cannot prospectively waive the Act, which does not provide for "exclusion on the grounds of mere consent or waiver," becasue the act was designed to protect both " a defendant's right to a Speedy Trial " and " the public interest."Id. at 500-01. An ineffective assistance of counsel claim survives the guilty plea or the appeal waiver only where the claim concerns " the advice [the defendant] recieved from counsel," United States v Torres, 129 F.3d 710, 715-16 (2d Cir. 1997)(internal qoutations marks ommitted).

When an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for omission, his proformance falls below the standard of proficient representation that the constitution demands. Prou v United States, 199 F.3d 37, 42, (1st Cir. 1999). Counsel commulative errors started July 02, 2012 the time he was appointed to Rackley's case at his arraigment Rackley was not at this arraignment and not by choice, Rackley didnot recieved this transcript in order to prove he was not at attendence, On July 02, counsel filed a motion for evidence notice, which was not responed by the prosecution, On July 10, counsel requested for evidence notice, but the State failed to respond to that request. See Appearance Docket Doc#: 28-1 PageID#: 1383-96 certified copy.

This would have shown the weakness of the States case against petitioner such as the actual innocence claim that Rackley presented to the Sixth Circuit Court of Appeals to demonstrate that he was actual innocent of this crime. This evidence that was not produced in Rackley's case should have been relavant to show cause for further inquiry to defendant's guilty plea, qouting Bousley v Unied States, 523 US 614, 623, 118 S.Ct. 16, 04, 140 L.Ed.2d 828(1998)).

The magistrate Judge's Report and Recommendation stated: Rackley's traverse asserts his actual innocence. "The evidence in this case that has been submitted will prove that Rackley did not commit this crime."

ECF Doc#: 29, PageID#: 1984. "[Defense counsel] coerced Rackley to [plead guilty to] involuntary manslaughter without any prior notice, when the state failed to respond to the evidence notice filed by counsel this should show that the state never intended on going to trial. " In the instant case, the claim of actual innocence is presented along with allegations of underlying constitutional violations. Id. at PageID#: 1994.

The magistrate continued to state Rackley has offered no new evidence that would establish his actual innocence or undermine his guilt. Rackley contends that the Booking sheets of Shaker Hts police Dept. and the Cuyahoga County Booking sheet is new evidence and shows it is not and official document that was sent by the sheriffs dept. of Cuyahoga County. see Shaker Hts. booking sheet Doc#: 10-1 PageID#: 1008, Cuyahoga County Booking Sheet Doc#: 10-1 PageID#: 1009, also see Appendix (E) Exhibit (A) (this is a letter that was sent by the Sheriffs dept. regarding a request for the booking sheet of Cuyahoga County that Rackley was prevented from obtaining, with the embossed seal). This will prove that Rackley was illegaly detained which fundamentally deprived him of his liberty interest. Other evidence that rackley submitted to the trial court to prove his innocence that was not presented by counsel such as: (On Feburary 28, 2010, I examined the tennis shoes confiscated from Steven Rackley by Sgt. Mullaney on december 13, 2006, with the cast of the foot impression collected at the crime scene. Rackley's tennis shoes (did not match the tread impression in the casts). Doc#: 28-1 PageID#: 1416, at the Bottom of the page. (2) (Note: an examination of the footwear by Lake County Crime Labortory Criminalist, David Green, of the above submitted items was conducted. (The submitted items (did not match the partial foot impressions submitted by Shaker Hts. Police Dept.) (item #144 Rackley's shoes). Doc#: 28-1 PageID#: 1415. On July 31, 2007, the Vehicle Rackley was driving the Chrysler Van that belonged to his Fiance' was checked inside for the presence

of blood with (negative reults). see Doc#: 28-1 PageID#: 1417-18. On November 9, 2006, the victims car was sent to the BCI Lab the inside of the vehicle was examined for blood the (results were negative) see Doc#: 28-1 PageID#: 1419-20.

Shaker Hts. contended as previously stated in this investigation, Steven Rackley consented to a DNA swabbing of his cheeks on December 12,2006, this was done without the assistance of counsel when Rackley was unsure if he should do this with representation, which clearly violated the Sixth Amendnment and the Fourth Amendment, cause this was a search in a persons mouthfor medical data, Shaker Hts. Detective consulted with scientists at the Cuyahoga County Coroner's office, (who are not DNA experts) I was informed that the DNA swabs indicated that Steven Rackley had handled the knife recovered from the Homicide crime scence. Doc#: 28-1 PageID#: 1440.

In viewing all the evidence that was submitted to the Cuyahoga County Coroner's office by detective Green of the Shaker Hts. police Dept. certain evidence was handled by different department officers, the knife could not be linked to the partial blade that was found near the crime scence. See Doc#: 28-1 PageID#: 1438. This would explain the lack of probable cause to issue a warrant for Rackley's arrest. Dr. Nasir Butt of the Cuyahoga County coroner's office said in his report that Steven Rackley and Stephanee Roebuck are the only two people in the mixture, (" There are no other possibilities"). On November 08, 2012, counsel filed a motion for forensic DNA testing at State expense, the motion was granted, March 19, 2013, DNA Diagnostic center is ordered to provide to State of Ohio all lab reports examinations and notes relative to this case. See Doc#: 28-1 PageID#: 1388 appearance docket. The examiner reported that there is a mixture of three or more individuals, on the handle the examiner also informed to counsel that it is highly unusual for DNA to be on the handle and not on the blade, See Doc#: 28-1 PageID#: 1442 for Dr. Nasir report, DNA Diagnostic center report 1449-50.

This shows that Dr. Nasir was wrong in his report about the DNA, counsel was ineffective for not fully investigating key factors regarding the knife handle such the discription of the location where the knife was found, the temperature was 60°F the overcast was foggy. Fog brings mositure in the air this would have casued the handle to be wet which would contaminate the handle, See Doc#: 28-1 PageID#: 1447. On July 03, 2007, members of the Shaker Hts police dept. executed a municipal court search warrant for the residence of Stephanee Roebuck, (Rackley also stayed at this residence as well, the detectives tried to isolate him from his family) during the search seven knives of similar types to the knife presumed to be used in the homicide, the knives were later examined by metallurgist/forensic examiner Dr. Susan Kazanjian, PhD. of the FBI labortory in Quantico, Virginia, she later determined they did not match the knife fragments and habdle collected from the homocide crime scene. See Doc#: 28-1 PageID#: 1438-39.

In **Cullen v Pinholster, U.S. 131 S.Ct 1388, 179 L.Ed2d 557 (2011)**, adopted the view and maintained that "New Evidence properly presented in federal courts hearing" should be deemed "relavant to the reasonableness to the State Court decision" in orederto "accommendate [] the competing goals, reflected in §§ 2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioner's to present evidence to the federal courts when they were unable to do so in state court Id." at 213-14 (Sotomayor, J., dissenting). justice Alito, who concurred in part in the majority's opinion and concurred in the judgment, joined Justice Sotomayor on this point. Id. at 203 (Alito, J., concurring in part and concurring in the Judgment)(" as the dissent point out, refusing to consider the evidence recieved in the hearing in federal court gives § 2254(e)(2) an implusible narrow scope").

The majority found a continuing role for section 2254(e)(2) and federal

evidentiary hearing in cases that are exempt from section 2254(d)(1) review, pointing to federal habeas corpus claims that were not adjudicated on the merits as an example of such a situation:

> **Section 2254(e)(2) continue to have force where § 2254 (d)(1) does not bar federal habeas relief for example, not all federal habeas claims by state prisoners fall within the scope of § 2254(d)(which applies only to claims "adjudicated on the merits in state court proceedings."**

The rule could not be otherwise. The whole history of the writ its unique development -refutes a construction of the federal court's 'habeas corpus powers that would assimilate thier task to that of court's of appellate review.

The function on habeas is different. It is to test by way of an original civil proceeding, independent of the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that thier detention violates the fundamental liberties of the person, safeguarded against state action by the federal constitution. Simple because detention so obtained is intorlerable, the opportunity for redress, which presuppoeses the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. **See Frank v Mangum, 237 US 309, 345-350, 59 L.ed 969, 987-989, 35 S.Ct. 582 (disenting opinion of Mr. Justice Holmes).** It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.

Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the act of Feburary 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the constitution. The language of Congress, the history of the writ, the decisions of this court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the

federal court to which the application is made has the power to recieve evidence and try the facts anew. The circumstantial facts, when taken together, are insufficient to establish Rackley's guilt. Such as the knife handle that was found near the crime scene and on the street that Rackley lives on, the handle could not be linked to the partial blade that also was near the crime scene. See Doc#: 28-1 PageID#: 1438. Counsel also failed his duties when he did not have an expert examine the knife, because the DNA would be questionable according to Kylie Graham an Ohio Bureau of Criminal Investigation, Forensic DNA Analysist. She also studied at the Forensic Institute of Ohio, she state that there are instances where the DNA generated from an evidence item is insufficient or it is a mixture of too many individuals where the individual DNA profiles cannot be teased apart, and therefore, does not have comparable value. So by not obtaining expert analysist counsel was deficient.

An Evidentiary hearing would find that " it surely cannot be said that a juror, conscientiously following the Judge's intructions requiring proof beyond a reasonable doubt, would vote to convict." citing Schlup v Delo, 513 U.S. 298, 329 (1995)). Rackley has dilligently pursued an evidentiary hearing but to nô avail was denied, counsel deficient proformance concerning Rackley's alibi that was overlooked, and not considered resulted in a total miscarriage of Justices because the phone records from Rackley's cell phone, and the tower signals show that Rackley was nowhere near the crime when the neighbors heard the disturbance in the street. Doc#: 28-1 PageID#: 1414. In a similar case Miller v Anderson, 255 F.3d 455,U.S. App. LEXIS 14384 (7th Cir. 2001), counsel's failure to present expert testimony concerning foot print, hair, and DNA evidence discovered at the crime was ineffective assistance where defendant's sole defense was that he was never at the crime scene. In these circumstances, it was irresponsible of the

lawyer not to consult experts. Wallace v Stewart, 184 F.3d 1112, 1117 (9th Cir 1999); Bean v Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998); cf. Strickland v Washington, 466 U.S. 668, 690-91, 80 L.Ed. 2 674, 104 S.Ct. 2052 (1984)(duty of reasonable investigation).

I remain only to consider whether Miller would have had reasonable shot at acquittal had his lawyer been minimally competent. We think so. The minimally competent lawyer would have presented expert evidence that there was no physical of Miller's presence at the crime scene, would have greatly undermined the hardware clerk's evidence, would not have undermined the alibi testimony of Miller's wife, would by forgoing psychological evidence (unlikely in any event to impress a jury) have keep the evidence of Miller's previous crimes from the jury, and would thus have forced the state to rely entirely on wood's questionable testimony.

The Judgment is reversed with directions thatthe state either release Miller or retry him within 120 days. Rackley would like to request this type of relief if applicable.

V. **V. The question of whether petitioner's guilty plea was knowing and voluntary and counsel's ineffectiveness for not telling him about his appeal rights, and not having a pre-sentence investigation report during sentencing.**

Under the Fifth Amendment's provision that no person shall be held to answer for a capital crime unless on the indictment of a grand jury, it has been the rule that after an indictment has been returned its charges may not be broadened except by the grand jury, itself. Stirone v United States, 361 U.S. 212 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960); Exparte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). See Russell v United States, 369 U.s. 749, 770, 82 S.Ct. 1038 8 L.Ed2d 240(1962); United States v Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076(1930). In 1887, the Supreme Court in Bain, supra, 121 U.S. at 9-10, 7 S.Ct.

781, held that a defendant could only be tried upon the indictment as found by the grand jury and that langauge in the charging part could not be changed without rendering the indictment invalid. Stirone, supra, 361 U.S. at 217, 80 S.Ct. at 273 , the Supreme Court stated the Bain "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." This rule has been reaffirmed recently several times in this Circuit. United States v Maselli, 534 F.2d 1197 1201 (6th Cir. 1976): United States Pandilidis, 524 F.2d 644 (6th Cir. 1975), cert. denied, 424 U.S. 933, 96 S.Ct. 1146, 47 L.Ed. 2d 340 (1976).

Stirone v United States, supra, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252, involved a "contructive" amendment. The defendant was found guilty, but the Supreme Court reversed the conviction, stating that the defendant's right to be tried only on charges presented in an indictment returned by a grand jury has been destroyed even though the indictment had not been formly changed. Stirone v United States, supra, 361 U.S. at 217, 80 S.Ct. 270.

Under Stiorne, the question to be asked in identifying a constructive amendment is whether there has been a modification at trial in the elements of the crime charged. United States v Silverman, 430 F.2d 106, 111 (2nd Cir. 1970), cert. denied, 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971). Such a modification would result in a constuctive amendment. As a matter of law, Rackley was prejudiced by the constructive amendment. The orginal indictment charged Rackley with the violation of R.C. § 2903.01(A), aggravated murder while the amendment of the indictment charged him with a violation of involuntary manslaughter, R.C. § 2903.04 (A), because the amended indictment took the mens re element of "purpose", Rackley was unduly prejudice by the change. The magistrate stated in a footnote that: (Rackley didn't have fair notice of the substance of the involuntary manslaughter

charge since the only difference between it an aggravated murder was the (elimination) of the requirement that the state prove purpose to cause death. See Doc#: 32 PageID#: 2054 (bottom of page).

In Henderson v Morgan, 49 L.Ed. 2d 108, 426 U.S. 637, Mr. Justice Stevens delivered the opinion of the Court. The question presented is whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense.

The case arises out of a collateral attack on a judgment entered by a state trial court in Fulton County, N.Y., in 1965. Respondent, having been indicted on a charge of first degree murder, pleaded guilty to second-degree murder and was sentenced to an indeterminate term of imprisonment of 25yrs. to life he did not appeal. In 1970, respondent initiated proceedings in the New York courts seeking to have his conviction vacated on the ground that his plea of guilty was involuntary. The state courts denied relief on the basis of the written record.

Having exhausted his state remedies, in 1973, respondent filed a petition for writ of habeas corpus in the United States District Court for the Northeren District of New York. He alleged that his guilty plea was involuntary because he was not aware (1) of the sentence that might be imposed upon conviction of second-degree murder, or (2) that intent to cause death was an element of the offense.

Based on the state-court record, the federal district court denied relief.

The Court of Appeals reversed summarity and directed the district court "to conduct an evidentiary hearing on the issues raised by petitioner, including whetheher, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed."

At the conclusion of the hearing, the District Court made only two specific findings of fact. First, contary to respondent's testimony, the court expressly found that he was advised that a 25yr. sentence would be imposed if he pleaded guilty. Second, the court found that respondent "was not advised by counsel or court, at any time, that an intent to cause the death or design to effect the death of the victim was an essential element of murder 2nd degree." On the basis of the latter finding, the District Court held "as a matter of law" that the Plea of guilty was involuntary and had to be set aside.

As stated by the Supreme Court, 'a guilty plea is an admission of the elements of a formal criminal charge, it cannot be truely voluntary unless the defendant posses an understanding of the law in relation to the facts. **McCarthy v United States, 394 US 459, 466 [22 L.Ed.2d 418, 89 S.Ct. 1166] (1969).** Based upon the foregoing, I hold as a matter of law that petitioner's plea of guilty to murder 2nd degree must be set aside as involuntary and unconditional." The District Court ordered that respondent be dischsrged from custody 'unless the state of New York takes such steps as are necessary to return [him] to Fulton County for rearraignment: said arriagnment is to be held in 60 days.

In the case at bar Rackley's guilty plea was involuntary according to Henderson the record in his case shows, cousel's ineffectiveness stated:

> we believe at this time he's prepared to change his formerly entered plea of not guilty (their is no record of Rackley pleading not guilty at his arriagnment he was not there) and enter a plea of guilty to the two counts amended by the state of Ohio in this matter, with full understanding that before you accept this plea you'll go over his constitutional rights with him.
>
> We're satisfied, Judge that once you have gone through his constitional rights with him that his change of plea will be Knowingly, intelligently and voluntarily made.
>
> thank you. **See Doc#: 28-3 PageID#: 1904-5 (Tp.lines pageID: 1904 15-25, pageID: 1905 lines 1-3.**

Counsel also advised Rackley to anwser yes to all of the Judges questions he advised him to say no when ask if anyone promised him anything or threatened him in any way in order to get him to change his plea, but counsel did induce fear, as to the amended count one to involuntary manslaughter which states that on November 8, 2006 that Rackley did cause the death of the victim, as to count five aggravated robbery, in violation of 2911.01(A)(3), which states that on November 6, 2006 that date is incorrect he did, in attempting or committing a theft offense as defined in the Revised Code, or in fleeing immediatly after the attempt or offense upon the victim, the evidence that Rackley presented to this court does not reflect that he committed this crime and his alibi shows his where abouts during the commission of the crime, there are no witnesses to place Rackley at the scence, furthermore Rackley's plea was involuntary because had he know that the essential elements of aggravated murder was taken away for them too have to prove he would have insisted on going to trial. **See Doc#; 28-3 PageID#: 1908 (tp. lines 19-25), PageID#: 1909(Tp. lines 1-25).** Counsel also shown that his performance was deficient when asked (" by the way; does he waive any defect in -- any defect in count 1 or presentment to the Grand Jury?)". **Doc#: 28-3 (Tp. line 16-18).**

In **State v Roberson, 141 Ohioo App. 3d 626 (2001),** stated: The Sixth Amendment to the United States Constitution guarantees the individual's Right to effective assistance of counsel during a criminal prosecution. This right applies to all crital stages, of the criminal proceeding where substanial rights of the accused may be affected. **Coleman v Alabama, (1970), 399 U.S. 1, 7, 26 L.Ed.2d 387, 90 S.Ct. 1999.** The United States Supreme Court has recognized that this right extends through the sentenceing stage. **Gardner v Florida, (1977), 430 U.S. 349, 358, L.Ed.2d 393, 97 S.Ct. 1197.**

The question becomes how much process is due. The ultimate test of whether

appointed counsel rendered ineffective assistance of counsel is whether the defendant had a fair trial. Lockehart vFretwell (1993), 506 US 364, 368-369, 122 L.Ed.2d 180, 113 S. Ct. 838, and State v Hester (1976), 45 Ohio St. 2d 71, 341 N.E.2d 304, paragraph four of the syllabus, overruled in part by State v Cole (1982), 2 Ohio St. 3d 112, 443 N.E.2d 169 on othe r grounds.

Furthermore, the United States Supreme Court has held that appointed counsel cannot be restricted in defending a criminal prosecution within the parameters of our Judicial system. Thus, the appointed counsel must have the "opportunity to participate fully and fairly in the adversary fact-finding process." Herring v New York (1975), 422 US 853, 858, 45 L.Ed.2d 593, 95 S.Ct. 2550.

More recent decisions, however, tend to go the other way and hold that the Due Process Clause "reuires that a defendant be afforded an opportunity to ensure that the information considered at sentencing hearing is accurate and reliable ." United States v Sciacca, C.A.8 1989, 879 F.2d 415, 416, see also United Statesv Romano (C.A.2 1987), 825 F.2d 725, 728.

At the end of Rule 11 the Judge asked counsel was the Rule satisfied counsel answered yes.See Doc#: 28-3 PageID#:1909 (Tp. Lines 19-25), they proceeded to sentencing, the state asked for a 20 year sentence, after the state mentioned that several members of the victims family were there to give a statement, the Judge asked the state to articulate the facts in this case as you know them.? see Doc.#: 28-3 PageID#: 1910-12). at line 14 of page 1912 of the transcript, the prosecution was asked how was Rackley apprehended? the responded through the tireless work of the Shaker hts. police dept., which we have the detectives and sergeant here with us. Lines 19 states: they located not only the knife blade but a knife handle. and once that handle was tested, it did come back with DNA which pointed to Mr. Rackley.

His DNA was on the knife handle along with a girlfriend of Mr. Rackley's, a Stephanee Roebuck's DNA as well. Donald Butler violated Ohio Rules of Professional conduct 8.4(b)(c)(d), when counsel failed to pursue the motion for evidence notice filed by him, the state never responed to that motion the record shows no response, counsel should have had the handle supressed even though it could not be linked to the partial blade that was found near the crime scene as stated in Rackley's actual innocence claim, SEE **Doc#: 28-1 PageID#: 1438.**

Rule 8 of the rules Governing § 2254 proceedings sets forth the procedure a district court must empoly when determining whether to conduct an evidentiary hearing. Under Rule 8, "the Judge must review the answer, any transcripts and records of state-court proceedings, and [other] material .... to determine whether to conduct an evidentiary hearing under rule 8 falls within the courts discretion. **Alley v Bell, 307 F.3d 380 389 (6th Cir. 2002).** In deciding whether to grant the hearing the court must consider whether the grounds petitioner alleges are sufficient to secure his release from custody and relavant facts are in dispute. **See Washington v Renico, 455 F.3d 722, 731 (6th Cir. 2006).**

Counsel deficient performance was further forseeable when he was on his phone in court, See **DOc#: 28-3 PageID#: 1914 (Tp. line 17-18).** As counsel addressed the court he stated that Rackley was not on the (Run). Shaker Hts. police Dept. always knew where he was, and he always made himself available to Shaker Heights Police department as they investigated this particular crime. I believe they interviewed him atleast three times between 2006 and 2012, when he was finally indicted on this particular crime. **Doc#: 28-3 PageID#: 1928 (Tp. lines 15-22).** he also stated on the record they knew about him before the DNA came back on the Handle of this knife. **Doc#: 28-3 PageID#: 1928 (TP. lines 23-25).** This shows that the six in half year delay was not the result of Rackley and the State was responsible.

Counsel failed to order a presentence investigation report, the sentencing Judge cannot render community control sanctions on a defender, or grant probation. See Criminal Rule 32.2, pursuant to R.C. 2953.08(A)(1)(b) the defendant as a right to an appeal who is convicted or pleads guilty to a felony, the sentence imposed upon the defendant, the Due Process Clause requires that a defendant be afforded an opportunity to ensure that the information considered at sentencing hearing is accurate and relible. This was not an aggreed upon sentence because counsel stated in his last remarks: (Judge , I just would express to you that when we have these kinds of cases where we have a range in sentence that the Court can impose, as it is here, between 15 and 20 years, you know, I've never not seen an instance where the State wants the maximum sentence and the defendants want the minimum sentence, and I think it's the same thing in this particular case today. **Doc#: 28-3 PageID#: 1934 - 35 (TP: lines 14-25, page 1934)(1-25 on page 1935).**

The judge proceeded to sentence Rackley and gave him five years (PRC) without a presentence investigation report, and without letting him he has a right to appeal. The right of notice is more fundamental than the rights privisously guaranteed by the Supreme Court. The Courts of Appeals for the First and Ninth Circuits have answered that question with a bright-line rule: Counsel must file a notice of appeal unless the defendant specifically intructs otherwise; failing to do so is per se deficient. **See e.g., Sterns, 68 F.3d, at 330; Lozada, supra, at 958; Tajeddini, supra, at 468.**

Such a rule effectivelyimposes an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly. We reject this per se rule as inconsistent with Strickland's holding that "the performance

inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 US at 688, 80 L.Ed.2d 674, 1001 S.Ct. 2052.

The Court of Appeals failed to engage in the circumstance-specific reasonbleness inquiry required by Strickland and that alon mandates vacatur and remand. Because the decision to appeal rests with the defendant, we agree with Justice, Souter, that the better practice is for counsel's routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function 4-8.2(A)(3d Ed. 1993); post, at 490-491, 145 L.Ed.2d, 1003-1004 (opinion concurring in part and dissenting in part).

The Due Process Clause of the Fourteenth Amendment guarantee's a criminal defendant the effective assistance of counsel on a first appeal as of right; nominal representation on such an appeal does not suffice to render the proceedings constitutionally adequate (Burger, Ch. J., and Rehnquist, J., dissented from this holding).

Therfore in Rackley's case a hearing is warranted. Actual innocence means factual innocence, not mere legal insufficiency. See Sawyer v Whiteley, 507 US 333 (1992). Here, constitutional error has resulted in the conviction of one who is actually innocent. Murray v Carrier, 477 US 478 (1986), and in light of the evidence, it is more likely than not that no juror would have convicted him. Bousely v United States, 523 US 614 (1998).

In the instant case, the claim of actual innocence is presented along with allegations of underlying constitutional violations, therefore, the actual innocence claim is not presented as a stand alone claim. In the very least, Rackley should have his claim reviewed under the no evidence standard, as stated in Thompson v Louisville, 362 US 199 (1990), Rachon v New Hampshire, 414 US (1974), In Re Winship, 397 US 355 (1969), and Speigner v Jago, 603 F.2d 1208 (6th Cir. 1979).

This is a neglected area of American Jurisprudence. To keep turning a "blind eye" to the necessity of federal review would be to allow, prescribed and indeed, further, constitutional violations across the board.

Surely, the Founding Fathers stood for more, as did the legislature when enacting provisions of §2254(d).

Case law holds a State Court finding of facts can be questioned in the Federal Court, and indeed, the second prong of U.S.C. 2254(d) shows legislature intent of the ADEPA calls for issuance of a Federal Writ of Habeas Corpus where there was three unreasonable determination of the facts.

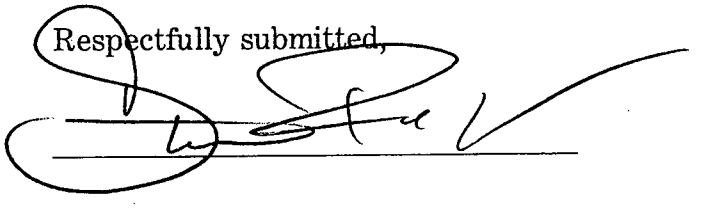
At each level of review it has been argued this conviction flies in the face of the facts. **Jones v. Palmer, (6th Cir. 2011).**

Rackley prays for an Unconditional Release or a Evidentiary hearing on the evidence he submitted to prove his case that was not disproved by the State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 25, 2019