21-5022

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SHERON G. TERRELL — PETITIONER
(Your Name)

vs.

LUMPKIN, DIR. TX. DCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHERON GABRIEL TERRELL
(Your Name)

2425 14TH AVE. N
(Address)

TEXAS CITY, TEXAS 77590
(City, State, Zip Code)

(409) 621-2819
(Phone Number)

Questions Presented

1. Did Terrell make a substantial preliminary showing that the omissions made by Affiant from his warrant affidavit were recklessness by the proof of omissions itself?

2. Did Terrell make a substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth was included by Affiant in his warrant affidavit?

3. Did a Neutral and Detached Magistrate approve Terrell's probable cause affidavit?

4. Did the state provide Terrell with a Full and Fair Franks Evidentiary Hearing in accordance with Due Process?

5. Was Terrell's 4th Amendment claims meritorious?

6. Was defense counsel's combination of Terrell's 4th Amendment claims at the suppression hearing litigated competently? If so, was Terrell prejudiced by defense counsel's incompetence?

7. Was defense counsel's failure to impeach Affiant with his warrant affidavit deficient performance? If so, was Terrell prejudiced by defense counsel's incompetence?

8. Was defense counsel's failure to investigate Terrell's case deficient performance? If so, was Terrell prejudiced by defense counsel's incompetence?

9. Was the deliberate/negligent concealment by the state of the third officer whose testimony, when evaluated in the context of the entire record, violate Terrell's Due Process?

10. Did Terrell demonstrate a colorable need for the third officer to testify to events that he had personally observed, and whose testimony would have been relevant and material to the defense? If so, was Terrell prejudiced by the state's failure to compulsory process of this witness?

11. Did the State knowingly and intentionally use false testimony? Was the false testimony material?

12. Was Terrell's appellate counsel's performance deficient? If so, was Terrell prejudiced by their incompetence?

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:

Related Cases

1. Sheron Terrell v. The State of Texas, cause no. 11CR1752, 56th District Court, Judgment:3/29/2012
2. Sheron Terrell v. The State of Texas, cause no. 01-12-00404-CR, 1st District Court of Appeals, Judgment:1/07/2014
3. Sheron Terrell v. The State of Texas, Petiton for Discretionary Review, Court of Criminal Appeals, Judgment:11/19/2014
4. Sheron Terrell v. The State of Texas, cause no. 11CR1752-83-1, Court of Criminal Appeals, Judgment:6/25/2014
5. Sheron Terrell v. The State of Texas, cause no. 11CR1752-83-2, Court of Criminal Appeals, Judgment:6/22/2016
6. Sheron Terrell v. The State of Texas, cause no. 3:16-CV-179, United States District Court, Southern District of Texas, Judgment:7/01/2019
7. Sheron Terrell v. The State of Texas, cause no. 19-40678, United States Court of Appeals for the 5th Circuit, Judgment:1/262021

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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 _____ 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 _____ to the petition and is

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

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

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

[ ] reported at _____; 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 JANUARY 26, 2021.

[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: _____, 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. § 1254(1).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4TH AMENDMENT
5TH AMENDMENT
6TH AMENDMENT
14TH AMENDMENT

Statement of the Case

On June 18, 2011, Terrell was detained under the authority of a warrantless arrest by Galveston Police officer Hassain Mustafa. Thereafter, Terrell retained his right to a court appointed attorney. On June 22, 2011, Attorney Robert G. Coltzer was appointed to represent Terrell. On July 14, 2011, an indictment was returned by the Grand Jury. Terrell was true billed for possession of a controlled substance > 4 grams with two enhancements and a 60,000 bond. Shortly thereafter, Terrell received a copy of his Affidavit for Warrant of Arrest and Complaint and noticed that his warrant affidavit had been procured by material and knowing misstatements of fact, in addition, the face of the warrant affidavit lacked a probable cause determination.

On September 16, 2011, Terrell filed a motion to dismiss on the basis of an illegal charging instrument and a motion to suppress evidence that the warrant affidavit contained deliberate falsehoods; in addition to, the illegal execution thereof, pro se. On November 1, 2011, Terrell also filed a motion for a Franks Evidentiary Hearing and Brief in support of the investigation detention and arrest pro se.

On November 18, 2011, the 56th District Court held Terrell's third disposition. However, when Terrell entered the courtroom trial counsel privately expressed to Terrell that he wasn't pleased with Terrell filing pro se motions to the court. Trial counsel told Terrell to 'stop filing pro se motions or he wouldn't be able to help Terrell's situation. Thereafter, a short hearing was held with Judge Lonnie Cox presiding over the hearing. The hearing was concerning the pro se motions Terrell had previous filed in the court. Trial counsel, Terrell, and District Attorney Jon Hall discussed the matter with the court.

At this hearing, Judge Lonnie Cox implicitly denied Terrell's pro se motions by stating: Terrell because you were arrested on the street, a warrantless arrest, you are not entitled to a Franks Evidentiary Hearing. Franks Evidentiary Hearings are only for search warrants. In addition, trial counsel stated on the record, he will be filing his own motion to suppress evidence in the future. (Terrell has e-mailed court reporter Dale Lee on numerous occasions to obtain transcripts of this hearing, However, he has not responded.)

On November 18, 2011, the court set trial counsel's motion to suppress evidence to be heard on

REASONS FOR GRANTING THE PETITION

TERRELL SEEKS JUSTICE FROM THE STATE COURTS DELIBERATE CONCEALMENT OF THE THIRD OFFICER NOT TELLING WHAT HAPPENED ON THE NIGHT OF THE INCIDENT.

TERRELL SEEKS A FAIR HEARING IN FEDERAL COURT TO EXPOSE THE KNOWN FALSEHOODS OF AFFIANT

TERRELL SEEKS A NEW TRIAL WITHOUT THE ILLEGALLY FALSE STATEMENTS.

WHATEVER THE COURT DEEMS JUST.

Franks Evidentiary Hearing

In Franks v. Delaware, 438 US 154, 98 SCT. 2674, 57 Led 2d 667 (1978), the Supreme Court held that if an officer, in an affidavit supporting a warrant, makes a false statement knowingly and intentionally, or with reckless disregard for the truth, the false statements must be disregarded in the determining whether the affidavit is sufficient to support probable cause. Id at 171-72.

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, U.S. Const. amend IV and IVX requires that a hearing be held at the defendant's request; so that he may challenge the truthfulness of the factual statements made in the warrant affidavit. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be voided and the fruits of the arrest excluded to the same extent as if probable cause was lacking on the face of the affidavit. Id at 155-156.

The holding in Franks applies to omissions as well. If the facts omitted from an affidavit are "clearly critical" to a finding of probable cause, then recklessness may be inferred from the proof of the omission itself. United States v. Thompson, 615 F2d 329 (5th Cir. 1980) (quoting Hale v. Fish, 899 F2d at 400). The Federal Courts of Appeals decisions allowing a defendant to challenge the veracity of a warrant affidavit rest on a constitutional footing. See United States vs. Thomas, 489 F2d 664, 668, 671 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975).

Part 1

Terrell developed in the state court record that his warrant affidavit was procured with known falsehoods and a disregard for the truth. Terrell in his state criminal prosecution made a challenge to the veracity of his warrant affidavit in a motion to suppress; and motion for Franks Evidentiary Hearing and Brief in Support, pro se, filed months prior to his trial. Terrell's motions stated the grounds upon which they were made as set by the standards of the United States Supreme Court.

Terrell offered as proof in his pro se motion- there is no possibility of Affiant seeing Terrell walk away from a hand to hand transaction, run around a parked car, and throw something. In spite of the fact that Affiant nearly hit Terrell but kept traveling east on avenue K away from Terrell's specified location. Affiant circled 3 ½ blocks to come back to Terrell's location, as Terrell continued to walk southbound on 27th street.

Terrell presented oral testimony: "when the Affiant turned south from the 1000 block of 27th street (27th street and avenue J) Terrell was located at the southeast corner of the 1100 block of 27th street (27th street and avenue K)". Affiant's warrant affidavit clearly has affiant and Terrell documented at these specific locations. See: arrest warrant affidavit #2; 28 USC § 2254 (e)(1).

R.R. Vol. 2, page 41.

Affiant's warrant affidavit states :(2) "Affiant was patrolling the area of 1000 block of 27th street. Affiant observed a male black known to Affiant as Sheron Terrell and an unknown white male doing a hand to hand transaction on the east corner of 2700 avenue K". It is clear and convincing evidence that when Affiant claims to had seen Terrell make a hand to hand transaction, Affiant was one block north of Terrell, as Affiant turned south towards Terrell's location. 28 USC § 2254 (e)(1).

Terrell added further testimony: "the Affiant's patrol car lost control at the southeast corner of 27th street and avenue. K, as it bounced against the curb and almost hit Terrell and the unknown pedestrian. However, Affiant served off the curb and kept driving east on avenue. K- going to 26th street. Affiant had to circle 3 ½ blocks in order to come back to Terrell's location on 27th street; in which Terrell had now walked ½ block south on 27th street". It is clear and convincing evidence, if Terrell would have made a drug deal in front of Affiant, Affiant would not have been able to travel 3 ½ blocks away from Terrell's location and still find Terrell walking southbound on 27th street of only ½ block. 28 USC § 2254(e)(1).

R.R. Vol 2, page 42-43.

Affiant clearly documented in his warrant affidavit: (3) "Affiant turned around and observed Terrell quickly starting walking southbound on 27th street". It is clear and convincing evidence that Affiant was going south from 27th street and avenue J to Terrell's specific location on 27th street and avenue K. However, Affiant's statement that he "turned around and observed Terrell walking southbound on 27th street from avenue K", is clear and convincing that Affiant did pass Terrell's location

on 27th street and avenue K, and circled around the block to meet Terrell once again on 27th street. 28 USC § 2254 (e)(1).

Affiant's false testimony at Terrell's motion to suppress hearing: "Affiant was parked east on avenue K, mid-block between 26th-27th street, standing beside his patrol car. When Affiant observed Terrell and the unknown white male make a hand to hand transaction on the northeast corner intersection of 27th street and avenue. K. Thereafter, Terrell walked south up 27th street and the unknown white male walked in a different direction. Affiant then entered his patrol car and turned around, making a U-turn on avenue. K- now going west on avenue. K. When Affiant approached the intersection of 27th street and avenue K, Affiant turned left, now driving south on 27th street to follow Terrell".

R.R Vol. 2, page 6, 15-22.

It is clear and convincing evidence, Affiant was going south on 27th street and avenue J as Terrell eventually started walking southbound on 27th street. However, it's impossible for Terrell and the unknown white male to have been at the north east intersection of 27th street and avenue K, making a hand transaction, with Affiant being located at 1000 block of 27th street. Thereafter, Affiant testified his patrol car was facing north on 27th street, when he stopped Terrell. Which is the opposite direction of Affiant following Terrell southbound but only proves that Affiant approached Terrell driving north on 27th street; coming from the other direction. Terrell established proof that the omissions made by Affiant's false testimony were clearly critical to probable cause. Affiant's false testimony was material because it was contrary to the location Affiant actually documented in his arrest warrant affidavit. 28 USC § 2254(e)(1).

Affiant presented in the state court record, critical information that was omitted in his warrant affidavit. This omitted information is clearly critical to, where was Affiant located when he supposedly observed a hand to hand transaction? And, omits any information of Affiant being parked, standing outside of his patrol car at that specific location. Affiant's affidavit only documented "Affiant patrolling the area of 1000 block of 27th street" (or, 27th street and avenue J). Which Affiant failed to mention one time in his testimony at the hearing. 28 USC § 2254 (e)(1).

The holding in Franks applies to omissions as well. If the facts omitted from an affidavit are

"clearly critical" to a finding of probable cause, then recklessness may be inferred from the proof of the omission itself. United States v. Thompson, 615 F2d. 329 (5th Circuit 1980).

2 part

In addition, Terrell offered as proof in his pro se motion- the Affiant states that he found a plastic bag containing "beige rocks" four feet from where he detained Terrell when in fact they were found 15-20 minutes after Terrell was detained by an unknown third officer who came to the scene of the detention.

Terrell added further testimony: As Terrell crossed over the alley-way on the west side of 27th street- walking south, Terrell saw the same patrol car from an open field on the northeast corner of 27th street and avenue L- making the block. Therefore, Terrell got off the sidewalk and begin walking on the drive-way pavement of a funeral home. The patrol car ran the stop sign on 27th street and avenue L- turning north.

R.R. Vol. 2, page 44-45.

The patrol car quickly drove to the northwest side of 27th street from avenue L and then slammed on its breaks at the curb. Thereafter, officer H. Mustafa stepped out of his patrol car, pointed his tazor at Terrell, and hollered at Terrell," get on the ground" several times. Terrell complied with officer Mustafa's orders. Officer Mustafa then fell on Terrell's back with his knee and put handcuffs on Terrell. Thereafter, officer Mustafa grabbed Terrell off the ground, frisked him, and accused Terrell of selling drugs to the pedestrian Terrell passed on the previous corner. In addition, officer Mustafa obtained Terrell's name and information and called in Terrell to dispatch for any warrants.

After Terrell had been detained for about five minutes, Sergeant Andre Mithcell arrived at the scene. Sgt. Mitchell took Terrell while officer Mustafa searched the immediate area and waited on Terrell's status for any warrants. Around five minutes afterwards, we all witnessed a motorcycle crash into a ditch at the northeast corner of 27th street and avenue M. Therefore, Sgt. Mitchell quickly dispatched for medical assistance via using his hand held radio. About five minutes afterwards, a small firetruck arrived at our location. However, once a paramedic exited the firetruck, he was briefed about the incident by Sgt. Mitchell and then left en route to the accident up the street.

Several minutes after the fire truck left, a third patrol car came from a southern direction up 27th street. However, upon that officer walking up to the area where we were located, the unknown third

officer showed officer Mustafa an object of some sort he had in his hands. The unknown third officer told officer Mustafa, he found the object on the ground after he exited his patrol car. Thereafter, officer Mustafa took the object, went to the trunk of his patrol car and tested the object. After the object tested positive for cocaine, officer Mustafa transferred Terrell to the Galveston County Jail.

Terrell was detained for 15-20 minutes before an unknown third officer arrived at the location. However, upon the third officer walking up to the area where we were located, the third officer showed H. Mustafa an object he had in his hands. The unknown third officer said, he found the object on the ground after he exited his patrol car. Thereafter H. Mustafa took the object from the third officer and wrote false statements in his affidavit knowingly and intentionally, or with reckless disregard for the truth.

R.R. Vol.2 page 38-48.

Affiant warrant affidavit States: (4) Affiant observed that Sheron Terrell raised his arm and threw a small object out of his right hand...Affiant walked back approximately four feet where Affiant observed Sheron Terrell raising his arm up and throwing an object on the ground. (5) Affiant observed a small clear plastic bag containing two small beige rocks.

Terrell demonstrated a substantial preliminary showing and if the clearly critical omissions made at #2 of Affiant's warrant affidavit; in addition to, the known falsehoods and disregard for the truth made at #4 and #5 of Affiant's warrant affidavit were necessary to a probable cause finding, the 4th and 14th Amendments requires that a Franks Evidentiary Hearing be held at Terrell's request. Franks v. Delaware, 438 US at 155. In Terrell's State Habeas Court proceedings, his Franks claim was not adjudicated on the merits. However, there was no reasonable basis for the state court to deny relief. Harrington v. Richter, 562 US 86 (2011); 28 USC § 2254 (e)(1).

Terrell diligently developed the factual basis of his Franks claim in state court. Terrell made a prima facie showing of what specifically he intended to prove. It is clear and convincing evidence, Terrell established a factual dispute alleging that the unknown third officer found the contraband 15-20 minutes after Terrell had been detained creating a challenge to the false statements made in Affiant's warrant affidavit. However, the State Habeas Court denial of Terrell's request for a Full and Fair Franks Evidentiary Hearing was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court in Franks v. Delaware. See: William v. Taylor, 529 US

362, 413 (2000); 28 USC § 2254 (d)(1). In addition, the state's fact-finding procedures which lead up to the state court's summary denial of Habeas relief "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" (d)(2).

When there is a "factual dispute, that, if resolved in petitioner's favor, would entitle him to relief and the state has not afforded the petitioner a full and fair hearing," a federal habeas court petitioner is entitled to discovery and an evidentiary hearing. Ward v. Whitely, 21 F3d. 1355, 1367 (5th Circuit 1994), cert denied, -- US --, 115 SCT. 1257, 131 Led 2d 137 (1995). However, the discovery and evidentiary hearing are limited to the factual dispute; the court has made clear that 28 USC S 2254, rule 6, "does not authorize fishing expeditions". Ward, 21 F3d. at 1367. A Habeas Petitioner must make specific allegations, "conclusory allegations unsupported by specifics," or "contentions that in the face of the record are wholly incredible" will not entitle one to discovery or a hearing. Blacklegde v. Allison, 431 US 63, 74, 97 SCT. 1621, 1629, 52 Led 2d 136 (1977); Franks v. Delaware, 438 US 154, 98 SCT. 2674, 57 Led 2d 667(1978).

Terrell alleged that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by Affiant in the warrant affidavit. And, with Affiant's false material set to one side, the affidavits remaining content would be factually insufficient to establish probable cause; that was also legally insufficient because it failed to be confirmed by a neutral and detached magistrate. The arrest warrant should have been void and the fruits of the illegal search and seizure (the crack cocaine), excluded as a result. See: 28 USC S 2254 (e)(2) (requiring an applicant to show, inter alia, that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no factfinder would have found the applicant guilty of the underlying offense" only if "the applicant has failed to develop the factual basis of a claim in state court proceedings").

Section 2254(e)(2) of the United States Code Title 28 did not constrain the District Court's discretion because Terrell diligently developed the factual basis of his claim in state court. Schriro v. Landrigan, 550 US 465, 127 SCT 1933, 1937, 167 LED 2d 836 (2007) ("In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court.") McDonald v. Johnson, 139 F3d 1056, 1059 (5th Circuit 1998) (citing United States v. Cervantes, 132 F3d 1106, 1110 (5th Circuit

1998)) ("Denials of an evidentiary hearing are reviewed for an abuse of discretion").

In determining whether to grant a hearing, under Rule 8(a) of the habeas Court Rules "the judge must review the answer and any transcripts and records of state-court proceedings...to determine whether an evidentiary hearing is warranted". Schriro, 127 SCT at 1939. Cullen v. Pinholster, 131 SCT. 1388 (2011) (state court record includes everything that was presented to the state court. And, the Supreme Court has held since AEDPA that the court must also "consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate". Id. At 1940. (citing Hall v. Quarterman, 534 F3d 365, 368 (5th Circuit 2008); Townsend v. Sain, 372 US 293 (1963).

The District Court abused its discretion in not holding an evidentiary hearing because the state court failed to provide a full and fair hearing. Clark v. Johnson, 202 F3d 760, 766 (5th Circuit 2000) (citing Moaward v. Anderson, 143 F3d 942, 948 (5th Circuit 1998)) ("To find an abuse of discretion which would entitle... petitioner to discovery and an evidentiary hearing to prove his contentions, we would necessarily have to find that the state did not provide him with a full and fair hearing...") Although Terrell did have a state court hearing before his trial date, the hearing was not a full and fair Franks Evidentiary Hearing due to the ineffective assistance of counsel, among other things.

The 5th Circuit COA assessment that Terrell has not shown that reasonable jurists would find the District Court's application of Stone was debatable or wrong, are wrong by clear and convincing evidence. Terrell made a substantial preliminary showing that his Due Process was violated when his request for a Franks Evidentiary Hearing was misgoverned at Terrell's suppression hearing and on State Habeas application. The 5th Circuit COA erred when it failed to decide that the District Court abused its discretion in not conducting a Franks Evidentiary Hearing because Terrell shown that his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 US 473, 483-84 (200); 28 USC § 2254 (c);(e)(1).

Ineffective Assistance of Counsel

Failed to litigate an 4th Amendment claims competently

Motion to Suppress Hearing

The court began the hearing by asking trial counsel: Will Terrell's motion to suppress evidence, pro se; and his own motion to suppress evidence, be consolidated at the hearing? Trial counsel replied, yes sir. There was no objection from the state. The state called officer Hassian Mustafa as its first witness.

R.R. Volume 2, page 5.

H. Mustafa direct testimony by Jon Hall

On the night of June 18, 2011, Affiant was parked east on avenue K., mid-block between 26th and 27th street. Affiant was standing beside his patrol car in the street, about thirty feet from the intersection of 27th street and avenue K. (Jon Hall's courtroom distance example). When Affiant observed Terrell and an unknown white male make a hand to hand transaction on the northeast intersection of 27th street and avenue K. Thereafter, Terrell walked south up 27th street and the unknown white male walked in a different direction.

R.R. Vol. 2, page 6.

Affiant got in his patrol car and turned around, making a U-turn, now going west on avenue K. When Affiant approached the intersection of 27th street and avenue K, Affiant turned left driving south up 27th street to follow Terrell. Affiant got out his patrol car and said to Terrell, "hey come here"! That's when Terrell got behind a parked car in front of the apartments on the sidewalk at the northwest corner of 27th street and avenue K and threw something out of his right hand.

R.R. Vol. 2, page 15-22.

H. Mustafa cross examination by Robert Coltzer

Q. When you were out there and your car was stopped?

A. Yes, sir.

Q. You were on avenue K on the eastside of 27th street?

A. Yes, sir.

Q. Were you in about the middle of the block, the block between 26th and 27th street?

A. Approximately.

Q. The middle of the block would be about 150 feet?

A. Yes, sir.

Q. Were the two men on the north side of the street or the south side?

A. Northeast corner.

Q. What was different about their hand movements?

A. It was really quick- the other reason was they both were just- like they don't really know each other. They just met at the corner. They are looking around the whole time and they are exchanging whatever is in their hands.

Q. Now when you got in your car, you said you had to turn around?

A. Yes, sir.

Q. Now did you make a U-turn there on avenue K?

A. I think. I don't really remember.

Q. Or, did you go around the block?

A. No, sir.

Q. When you stopped him, were y'all next to the apartments?

A. We were right by it-yes.

Q. Where was the car parked that you say he ran between?

A. It was on the sidewalk in front of the apartments.

Q. When you stopped your car, which direction was your car parked?

A. North.

Q. Was your car facing south?

A. As best I remember it was facing north.

R.R. Vol. 2, page 25-30.

Failed to object to false or misleading testimony and properly impeach key government witness with warrant affidavit

When the state offered into evidence Affiant's testimony: "Affiant was parked mid-block between 26th-27th street on avenue K, standing beside his patrol car". Trial counsel was deficient when he failed to object to the false testimony of Affiant and present the warrant affidavit into evidence and show that Affiant's arrest warrant affidavit stated he was located at the 1000 block of 27th street, when he first observed Terrell; not parked mid-block between 26th-27th street on avenue K, standing beside his patrol car. Agurs, 427 US at 112-113, n.21, 96 SCT. At 2401-2402, n.21 (the effective impeachment of one eyewitness can call for a new trial...).

Trial counsel's consolidation of both motions at the suppression hearing proved deficient performance. Trial counsel acted objectively unreasonable by failing to impeach Affiant with his warrant affidavit and ask Affiant to explain, why was his initial testimony omitted from his warrant affidavit? When trial counsel knew Affiant changed his statement from being located at 1000 block of 27th street to being parked mid-block between 26th- 27th street and avenue K, standing beside his patrol car. Which is a total of over 450 feet from where his warrant affidavit stated he was located. Trial counsel's performance was deficient under "prevailing professional norms" when he failed to attack Affiant's credibility by stating the omissions were proof of Affiant's recklessness and disregard for the truth. Strickland, 466 US at 687, 690; Franks supra.

Trial counsel's deficient performance prejudiced Terrell because had counsel objected to the deliberate deception of the court and proved his contentions by submitting the warrant affidavit into evidence, trial counsel would have established that the omissions made by Affiant were reckless by the proof of the omission itself. United States v. Thompson, 615 F2d 329 (5th Circuit 1980). It is reasonably probable had counsel objected to the aggravated perjury of Affiant and impeached Affiant with his warrant affidavit, the false information would have been incredible. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. See: Williams, 529 US at 391; Strickland, 466 US at 694.

However, in Terrell's State Habeas proceedings, trial counsel neglected to answer in his affidavit and the State Habeas Court failed to make any findings concerning the issue of, why he failed to object or impeach Affiant with his warrant affidavit?

Furthermore, the district court's assessment that trial counsel's 'litigation of 4th amendment issues' were effective assistance of counsel are wrong by clear and convincing evidence. First, Terrell

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

suppression hearing was intentionally behind schedule on several different occasions until trial counsel eventually filed a motion to suppress evidence (search without warrant). However, the motion was frivolous and out of context concerning Terrell's specific situation. Terrell had a suppression hearing one business day before his trial. But, the cross examination by trial counsel of Affiant was mediocre and didn't adequately attack Affiant's credibility as it related to a challenge to his veracity. This tactic was not strategic but was due to his complete incompetence to bring to bear such skill and knowledge necessary to accord Terrell the ample opportunity to meet the case of the prosecution to which they are entitled. Strickland, 466 US at 685.

Finally, the District Court's assessment to Terrell's claim of trial counsel's IAC for failing to impeach Affiant with his warrant affidavit, is wrong by clear and convincing evidence. Trial counsel failed to disclose favorable evidence that conflicted with Affiant's testimony. Favorable evidence is that which, if disclosed and used effectively, "may make the difference between conviction and acquittal". United States v. Bagley, 473 US 667 (1985). Impeachment evidence is that which disputes, disparages, denies or contradicts other evidence. The District Court favors trial counsel's cross examination of Affiant, but overlooks his failure to impeach Affiant which is clearly erroneous under the circumstances.

It is clearly established federal law in Strickland v Washington, 466 US 668, 687 (1984) that counsel's role in the proceeding is comparable to counsel's role at trial- to ensure that the adversarial testing process works to produce a just result under standards governing decisions. Therefore, counsel's function is to assist the defendant, so he has a duty to advocate the defendant's cause at 688. Trial counsel's failure to object and impeach Affiant as it related to his initial location in his warrant affidavit versus his false testimony of being parked, standing beside his patrol car, etc. was deficient performance without producing the warrant affidavit into evidence. Trial counsel did not properly object to the false testimony because if he did it would have been properly preserved on the record. Kimmelman v. Morrison, 477 US 365 (1986).

The 5th Circuit COA assessment that Terrell has not shown that reasonable jurists would find the District Court's deference to the State Court's rejection of Terrell's claim of counsel failing to object or impeach Affiant was debatable or wrong, are wrong by clear and convincing evidence. Terrell made a substantial preliminary showing that Affiant's false testimony was omitted from Affiant's warrant affidavit. The 5th Circuit COA has ruled, 'recklessness may be inferred from the proof of the omission

itself'. Counsel's negligence to argue the substance of Terrell's pro se motion was deficient performance which caused prejudice to Terrell's Franks Evidentiary challenge. There is a reasonable probability had counsel objected and impeached the false testimony that was material to the states probable cause argument, the result of the suppression hearing would have been different.

Failed to investigate unknown third officer or present a defense

To render Effective Assistance, "counsel has duty to interview potential witnesses and to make a reasonable investigation of the facts and circumstances of the case; or to make a reasonable decision that a particular to investigation is unnecessary". Nealy v. Cabana, 764 F2d 1173, 1177 (5th Circuit 1985); Bryant v. Scott, 28 F3d 1411, 1419 (5th Circuit 1994). The information Terrell provided to counsel about the incident was the controlling factor of counsel's decision to or not to investigate. Strickland v. Washington, 466 US 668, 691 (1984).

However, counsel limited his pretrial investigation to only discussions with Terrell, review of the indictment, examination of the prosecution's file, reading the police report, and taken several pictures of 27th street. Courts recognize that "ineffectiveness is generally clear in context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such decision could be made" (citing Strickland, 466 US at 690-91). Strickland simply "does not require... deference to decisions that are uninformed by an adequate investigation into the controlling facts and law" United States v. Drones, 218 F3d 496, 500 (5th Circuit 2000).

In order to establish that counsel was ineffective due to a failure to investigate the case or to discover and present evidence, Terrell must do more than merely allege a failure to investigate. Terrell must state with specificity what the investigation would have revealed? What specific evidence would have been disclosed? And, how the evidence would have altered the outcome of the proceedings. United States v. Green, 882 F2d 999, 1003 (5th Circuit 1989).

Terrell did more than merely alleged counsel's failure to investigate

Terrell stated specifically what the investigation would have revealed? If counsel would have

interviewed and investigated the unknown third officer, it would have revealed that H. Mustafa did not walk back approximately 4 feet and find a small clear plastic bag containing beige rocks minutes after Terrell's initial detention.

What specific evidence would have been disclosed? The unknown third officer would have presented evidence that he found the small clear plastic bag when he exited his patrol car, 15-20 minutes after Terrell had been detained and gave it to officer Mustafa.

How the evidence would have altered the outcome of the proceedings? Terrell established that the proof of the omissions made by Affiant's false testimony were contrary to the location Affiant documented in his arrest warrant affidavit. However, the unknown third officer's statement that he found the plastic bag and presented it to Affiant would have been material and proof that Affiant's warrant affidavit stating: (4) Affiant observed that Sheron Terrell raised his arm and threw a small object out of his right hand...Affiant walked back approximately four feet where Affiant observed Sheron Terrell raising his arm up and throwing an object on the ground. (5) Affiant observed a small clear plastic bag containing two small beige rocks; was in fact known falsehoods and a disregard for the truth. The unknown third officer, could reasonably be taken to put the whole case in a different light so as to undermine confidence in the verdict. Kyles, 514 US at 434-35, 115 SCT at 1566.

In the event that at the hearing the allegation of perjury or reckless disregard is established by Terrell by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the arrest warrant must be voided and the fruits of the arrest excluded to the same extent as if probable cause was lacking on the face of the affidavit. Id Franks, 438 US at 155-156.

However, in Terrell's State Habeas proceedings, trial counsel submitted an affidavit stating: "I reviewed the entire offense report produced to me. I saw no indication in the report that there was a third officer involved. Prior to trial there was a hearing on a motion to suppress evidence at which both officer Mustafa and Terrell testified and were cross examined. Officer Mustafa denied the presence of a third officer".

In counsel's opinion, 'he conducted an investigation sufficient to satisfy himself that further inquiry into the possibility of a third officer who might have planted contraband in order to build a case against Terrell would have been a fruitless investigation'.

Thereafter, the Habeas court found that the representations contained in trial counsel's affidavit correct and credible; and the outcome of the proceedings wouldn't have been different but for counsel's alleged error. However, the state Habeas court assessment that trial counsel's affidavit was correct and credible on the issue of 'officer Mustafa denying the presence of a third officer' are wrong by clear and convincing evidence.

H. Mustafa testified of an unknown third officer arriving at the scene:

H. Mustafa direct examination by Jon Hall.

Q. And did any other units arrive?

A. I believe two other units showed up.

Q. And do you know who those officers were?

A. I believe one was sergeant Mitchell, and I don't recall who was the other officer.

Q. Okay. And did they arrive in two separate units?

A. Yes, sir.

Q. Were they marked patrol units?

A. Yes, sir.

R.R. Vol. 2, page 22.

H. Mustafa cross examination by Robert Coltzer.

Q. And who arrived first?

A. To the best of my knowledge, as I remember, I think it was Sgt. Mitchell who arrived first. But the other unit had arrived next to him.

Q. But you don't remember that officer's name?

A. No, sir.

Q. How long was it before that officer arrived?

A. I would say a minute or two maybe.

Q. You found it?

A. Yes, sir.

Q. The other, the third officer didn't find it?

A. No, sir.

R.R. Vol. 2, page 32-35.

Terrell filed a motion for discovery in his state Habeas Corpus proceedings. However, the state

Habeas Court arbitrarily denied Terrell a fair opportunity to discover the third officer? Clearly, the state's fact-finding procedures which lead up to the state court's summary denial of Habeas relief "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding"; because Terrell never had a fair chance in State Habeas Court to have the relevant facts heard and determined- where those facts, accepted as true, satisfied the basic requirements for relief.

In addition, the State Habeas Court crediting trial counsel's affidavit on the issue of 'him conducting an investigation sufficient to satisfy himself that further inquiry into the possibility of a third officer who might have planted contraband in order to build a case against Terrell would have been a fruitless investigation'; was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court in Strickland v. Washington, 466 US 668, 691 (1984). William v. Taylor, 529 US 362, 413 (2000); 28 USC § 2254 (d)(1).

The district court's assessment that trial counsel adequately addressed issues from Terrell's pro se motion by cross examining Affiant on the role of third officer who arrived late the scene, contradicts trial counsel's affidavit that 'Affiant denied the presence of a third officer'. Trial counsel was put on notice by Terrell of the unknown third officer, but the unknown third officer was also confirmed by Affiant at the suppression hearing. Trial counsel had a responsibility to investigate the unknown third officer. At the very least, trial counsel could have requested a continuance to secure the unknown third officer witness testimony because: Terrell stated specifically what the investigation would have revealed? What specific evidence would have been disclosed? And, how the evidence would have altered the outcome of the proceedings? Terrell established this in his pro se motions and in his testimony.

However, the district court stated in its opinion, 'Terrell provides no specific facts demonstrating that the third officer's presence would have benefited his defense or supported his theory that the third officer planted evidence against him. This is wrong by clear and convincing evidence. First of all, Terrell made a statement that 'Affiant made false statements knowingly and intentionally or with reckless disregard for the truth, by stating that he found a plastic bag containing beige rocks 4 feet from where he detained Terrell, when in fact they were found 15-20 minutes after Terrell had been detained by an unknown third officer at the scene of the detention. Clearly, this statement suffices for an adequate

demonstration of, how the third officer is material to Terrell's defense. 28 USC § 2254 (e)(1).

Second, Terrell never stated nowhere in the record that the third officer planted evidence against him. Terrell only statement was that 'after the unknown third officer exited his patrol car, "he said" he found the evidence of the ground and gave it to Affiant'. Clearly, the district court has credited trial counsel's affidavit when trial counsel stated: "further inquiry into the possibility of a third officer who might have planted contraband in order to build a case against Terrell would have been a fruitless investigation". The District Court assertions that suggest Terrell claims that the unknown third officer planted evidence against him is not found on the record from Terrell.

However, it is unreasonable for the District Court to not see why the concealment of the third officer and not questioning his involvement in the incident violates Terrell's Due Process rights. 28 USC S 2254 (e)(1). The deliberate concealment of a named eyewitness whose testimony would admittedly be material constitutes a prima facie deprivation of Due Process. Clark v. Blackburn, 632 F2d. 531 (5th Circuit 1980); Freeman v. Georgia, 599 F2d. 65 (5th Circuit 1979); Lockett v. Blackburn, 571 F2d. 309 (5th Circuit 1978), cert. denied, 439 U.S. 873, 99 S.CT. 207, 58 LED 2d 186. (negligent concealment of a witness theory)

The 5th Circuit COA assessment that Terrell has not shown that reasonable jurists would find the District Court's deference to the State Court's rejection of Terrell's claim of counsel failing to investigate was debatable or wrong, are wrong by clear and convincing evidence. Trial counsel's deficiency to investigate the third officer who was the sole and only person that could clear Terrell from fault, was contrary to, or involved an unreasonable application of clearly established federal law. 28 USC S 2254 (d)(1). The 5th Circuit COA erred when it failed to decide that the District Court abused its discretion in not investigating the third officer because Terrell shown that his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 US 473, 483-84 (2000); 28 USC § 2254 (c);(e)(1).

Failed to challenge "no neutral and detached magistrate" of warrant

First, it is the function of a magistrate to determine the reliability of the information and credibility of an affiant in deciding whether the requirement of probable cause has been met. In Shadwich v. City of Tampa, 407 US 345, 92 SCT. 2119, 32 Led 2d 783 (1972) the court held, "someone

independent of police and prosecution must determine probable cause for issuance of warrant". The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests: he must be neutral and detached; and, he must be capable of determining whether probable cause exists for the requested arrest and search.

The United States Supreme Court in Johnson v. United States, 333 US 10, 13-14 (1948); Jones vs. United States, 362 US 257, 270-71, 80 SCT. 725, 735-36, 4Led 2d 697 (1960); and Giordenllo v. United States, 357 US 480, 485- 86(1958), insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime'.

In Gertain v. Pugh, 420 US 103, 43 Led 2d 54, 95 SCT. 854 (1975), the context of a challenge to the pretrial detainment of persons suspected of criminal acts, the court held that "states must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty", and required that "this determination must be made by a judicial officer either before or promptly after arrest". Id at 125, 43 Led 2d 54, 95 SCT. 854; Franks vs. Delaware, 438 US at 681(a magistrate's determination is presently subject to review before trial as to sufficiency without any undue interference with the dignity of the magistrate's function).

In reviewing the district court's determination that 'a magistrate determined probable cause', this court is not limited to the "clearly erroneous" standard and may make an independent review of the sufficiency of an affidavit. 2254 (f); United States v. Phillips, 727 F. 2d 392, 394-95 (5th Cir. 1984). In Illinois v. Gates, 462 US 213, 103 SCT. 2317, 76 Led 2d 527 (1983), the Supreme Court adopted the "totality of the circumstances" test for determining whether a search warrant is supported by probable cause. Under Gates:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis

for... concluding" that probable cause existed".

462 US at 239-40, 103 SCT. at 2332-33 (citing Jones v. United States, 362 US 257, 271, 80 SCT. 725, 736, 4 Led 2d 697 (1980). Although Gates dealt with the issue of whether a search warrant was properly issued, it has been applied to cases involving arrest warrants as well. See, e.g., United States vs. Jackson, 818 F2d 345 (5th Cir. 1987).

Terrell offered as proof in his pro se motion- the warrant affidavit failed to meet the Constitutional standards of a 'neutral and detached' magistrate. The undersigned authority on page #2 (name illegible #400) of Terrell's warrant affidavit, is in fact a sworn peace officer in violation of the neutral and detached requirement. Coolidge v. New Hampshire, 403 US 443, 449 (1971) (warrant affidavit invalid because not issued by a neutral and detached magistrate). Nathanson v. United States, 290 US 41,47(1933); Aguilar v. Texas, 378 US 108, 114-15(1964) ("No warrants shall issue, but upon probable cause, supported by oath or affirmation...") see: Motion to dismiss on the basis of illegal charging instrument, pro se.

However, in Terrell's State Habeas proceedings, trial counsel submitted an affidavit stating "Terrell's probable cause affidavit was accepted and approved by a magistrate". Thereafter, the Habeas Court found that the representations contained in trial counsel's affidavit correct and credible; and the outcome of the proceedings wouldn't have been different but for counsel's alleged error. The State Habeas Court assessment that trial counsel's affidavit was correct and credible are wrong by clear and convincing evidence. 28 USC § 2254 (e)(1).

Terrell made a substantial preliminary showing that the warrant affidavit 'on its face' clearly displays a sworn peace officer accepting and approving that probable cause existed in violation of the 'neutral and detached' requirement. Terrell in his state criminal prosecution made a challenge to the legal sufficiency of his arrest warrant affidavit in a motion to suppress; and motion to dismiss based on an illegal charging instrument, pro se, filed six months prior to his trial. Terrell's motions stated the grounds upon which they were made set by the standards of the United States Supreme Court. See: 28 USC § 2254(f); (e)(1).

However, trial counsel deliberately disregarded to advocate Terrell's cause of action to squash the arrest warrant affidavit by failing to submit the arrest warrant affidavit into the pretrial hearing record on the basis that the arrest warrant affidavit was in fact legally insufficient. There was no

determination whatsoever of probable cause or a valid signature of a neutral and detached magistrate. Therefore, Terrell was arbitrarily deprived of his Due Process and Substantive rights under the United States Constitution based on the ineffective assistance of trial counsel.

Terrell diligently developed the factual basis of his 'neutral and detached' claim in state court. Terrell made a prima facie showing of what specifically he intended to prove. It is clear and convincing evidence, Terrell established a factual dispute alleging that Terrell's warrant affidavit was in violation of the neutral and detached requirement creating a challenge to the issuance of Affiant's warrant affidavit.

When there is a "factual dispute, that, if resolved in petitioner's favor, would entitle him to relief and the state has not afforded the petitioner a full and fair hearing," a federal habeas court petitioner is entitled to discovery and an evidentiary hearing. Ward v. Whitely, 21 F3d. 1355, 1367 (5th Circuit 1994), cert denied, -- US --, 115 SCT. 1257, 131 Led 2d 137 (1995). However, the discovery and evidentiary hearing are limited to the factual dispute; the court has made clear that 28 USC S 2254, rule 6, "does not authorize fishing expeditions". Ward, 21 F3d. at 1367. A Habeas Petitioner must make specific allegations, "conclusory allegations unsupported by specifics," or "contentions that in the face of the record are wholly incredible" will not entitle one to discovery or a hearing. Blacklegde v. Allison, 431 US 63, 74, 97 SCT. 1621, 1629, 52 Led 2d 136 (1977).

Terrell's State Habeas Court proceedings resulted in a decision that was based on an unreasonable determination of the facts in the light of the evidence submitted by Terrell in the state court proceedings. In addition, the proceedings resulted in a decision that was contrary to clearly established Federal law, of a neutral and detached magistrate, as determined by the Supreme Court of the United States. 28 USC § 2254 (d)(1)(2).

Furthermore, the District Court's assessment that trial counsel 'litigated issues from Terrell's pro se motion at the pretrial proceedings' are wrong by clear and convincing evidence. Trial counsel suppressed the warrant affidavit from the record, failed to place any responsibility on the State for its failure to comply with the neutral and detached requirement, failed to challenge the false statements in Affiant's warrant affidavit, failed to investigate the third officer, failed to object to false testimony, and failed to request a continuance; counsel was not functioning as counsel should. Kimmelman v. Morrison, 477 US 365 (1986).

The 5th Circuit COA assessment that Terrell has not shown that reasonable jurists would find the

District Court's application of Stone was debatable or wrong, are wrong by clear and convincing evidence. Terrell never had a full and fair opportunity at his pretrial hearing or State Habeas Corpus because the state failed to accept as true Terrell's factual allegations in his petition; that were neither incredible on its face nor clearly refuted by the record. The 5th Circuit COA erred when it failed to decide that the District Court abused its discretion in not conducting a Franks Evidentiary Hearing because Terrell shown that his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 US 473, 483-84 (200); 28 USC § 2254 (c);(e)(1).

Right to compulsory process

The sixth amendment right to compulsory process of witnesses is applicable to the states through the fourteenth amendment. Washington v. Texas, 388 U.S. 14, 87 S.CT. 1920, 18 L.ed 2d 1019 (1967). There are limits, however, to the defendant's right to use the state's process to compel the attendance of witnesses. In Washington the Supreme Court based its holding on the fact that the state arbitrarily denied the petitioner the right to call a witness "who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense". 388 U.S. at 23, 87 S. CT. at 1925 (emphasis added); (Quoting Ashley v. Wainwright, 639 F2d 258 (5th Circuit 1981)).

In this case Terrell demonstrated how the unknown third officer's testimony would have been beneficial, relevant and material to the defense. Terrell's defense to the charges were that Affiant did not walk back approximately 4 feet and find a small clear plastic bag minutes after Terrell's detention. But, the unknown third officer found the plastic bag 15-20 minutes after Terrell had been detained and gave it to Affiant.

The trial court, the prosecutor, and trial counsel was personally aware of the unknown third officer's involvement via Terrell's written motions, pro se and Terrell's testimony. However, they deliberately concealed this witness from Terrell and didn't want his information to be documented on record. (The state includes prosecutor and employees of his office; members of law enforcement connected to the investigation and prosecution of the case. United States v. Agurs, 427 US 97 (1976)). In

United States v. Bagley, the court held, that regardless of the request (the "specific request" and "general or no request" situations) favorable evidence, is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" 473 US at 682. If the unknown third officer was disclosed and questioned, the court would have known that Affiant did not walk back 4 feet and find a plastic bag after Terrell's immediate detention. In Brady v. Maryland, the court held, "the suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material either to guilt or to punishment, irrespective of good or bad faith of the prosecution" 373 at 87.

The unknown third officer would have impeached the general credibility of Affiant- that Affiant did not walk back 4 feet, after Terrell's immediate detention, and find the contraband on the ground. The unknown third officer would have also cleared Terrell of fault concerning Affiant's allegations. This testimony would have corroborated Terrell's defense. It is reasonably possible that the outcome of the proceeding would had been different had the prosecution made a disclosure of the information contained from this witness. A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the proceedings. Kyles v. Whitley, 514 US 419 (1995). Terrell demonstrated a "colorable need" in State court for an investigation of the third officer's testimony, so as to invoke the sixth amendment right to compulsory process and Due Process. A reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different, necessarily entails the conclusion that the suppression must have had, 'substantial and injuries effect or influence in determining the jury verdict". Kotteakos, 328 US, at 776, 66 SCT., at 1253; Brecht v. Abrahamson, 507 US 619 (1993).

However, in Terrell's State Habeas Court proceedings, the Habeas Court failed to answer Terrell's allegation on his right to compulsory process of this witness.

However, the District Court's assessment that Terrell claims that, "the third officer planted drugs at the scene of the arrest", are wrong by clear and convincing evidence. The District Court has arbitrarily credited trial counsel's affidavit when he stated: 'he conducted an investigation sufficient to satisfy himself that further inquiry into the possibility of a third officer who might have planted contraband in order to build a case against Terrell would have been a fruitless investigation'.

The 5th Circuit COA assessment that Terrell has not shown that reasonable jurists would find the District Court's deference to the State Court's rejection of Terrell's claim of his right to compulsory process was debatable or wrong, are wrong by clear and convincing evidence. The 5th Circuit COA erred when it failed to review the District Court's findings of fact for clear error and review it conclusions of law de novo; because Terrell has shown that his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v McDaniel, 529 US 473, 483-84 (200); 28 USC § 2254 (c);(e)(1).

Prosecutor Misconduct

The state prosecution introduced testimony by Affiant that they knew was false, did not correct it and was material.

H. Mustafa direct examination by Jon Hall

Affiant testified: "On the night of June 18, 2011, Affiant was parked east on avenue K., mid-block between 26th and 27th street. Affiant was standing beside his patrol car in the street, about thirty feet from the intersection of 27th street and avenue K. (Jon Hall's courtroom distance example). When Affiant observed Terrell and an unknown white male make a hand to hand transaction on the northeast intersection of 27th street and avenue K. Thereafter, Terrell walked south up 27th street and the unknown white male walked in a different direction".

R.R. Vol. 2, page 6.

R.R. Vol. 5, page 18-22

"Affiant got in his patrol car and turned around, making a U-turn, now going west on avenue K. When Affiant approached the intersection of 27th street and avenue K, Affiant turned left driving south up 27th street to follow Terrell".

R.R. Vol. 2, page 15-22.

R.R. Vol. 5, page 46-49.

"It is established that a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the IVX Amendment... the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears". United States v. O' Keefe, 128 F3d 885, 893 (5th Circuit 1997) (Quoting Napue v. Illonois, 360 US 264269 (1959). To establish a Due Process violation based on the Government's use of false or misleading testimony,

defendant must show that (1) The testimony in question was actually false, (2) The testimony was material; and (3) The prosecution had knowledge that the testimony was false. Id at 893 (citing United States v. Blackburn, 9 F3d 353, 357 (5th Circuit 1993).

Affiant presented in the state court record, critical information that was omitted in his warrant affidavit. This omitted information is clearly critical to, where was Affiant located when he supposedly observed a hand to hand transaction? Affiant's warrant affidavit omits any information of Affiant being parked, standing outside his patrol car at that specific location. Affiant's affidavit only documented "Affiant patrolling the area of 27th street and avenue J" see: warrant affidavit #2. However, Affiant failed to mention this location at any time in his testimony at the pretrial hearing stage or at trial. Mooney v. Holohan, 294 US 103 (1935).

In United States v. Agurs, 427 US at 103,104, the court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". Brady v. Maryland, 373 US 83 (1963).

At Terrell's trial during deliberation, the jury sent a note communicating to the court." Want to see a copy of the police report. 3/27/12 2:19 PM. Judge's response: The police report is not in evidence. Mr. Hall: I agree with that Judge. Mr. Coltzer: I wish it was in evidence, but I don't believe it is.

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It is clear and convincing evidence, there is a reasonable likelihood that the false testimony affected the judgment of the jury. In addition to, the trial court and trial counsel intentionally and deliberately suppressed the warrant affidavit from the record.

Once the facts are developed as to, where was Affiant located? And, a showing is established as to, how did Affiant turn around when he was following Terrell? Would shed light on, why would Terrell make a drug transaction in front of Affiant, wait until Affiant came back 3 ½ blocks, got out of his patrol car and then run behind a parked car and throw something out of his hands? The warrant affidavit is substantial evidence that 'Affiant was patrolling at 27th street and avenue J' when he first saw Terrell located at '27th street and avenue K'. Affiant was never parked, standing beside his patrol car between 26th-27th street and avenue K.

However, in Terrell's State Habeas Court proceedings, the court failed to answer Terrell's

allegation on the State prosecution soliciting false testimony from Affiant.

However, the District Court assessment that" Terrell presents no facts supporting his claim that the prosecutors knew that Affiant's testimony was false", are wrong by clear and convincing evidence. Terrell has personally filed pro se motions in the court several months after he was incarcerated explaining Affiant was a liar. Terrell also explained to the court that Affiant was not parked mid-block between 26-27th street, standing beside his patrol car. But, Affiant was travelling south from 1000 block of 27th street to 27th street and avenue K. Affiant warrant affidavit collaborated Terrell's version of events, not Affiant's false testimony. It is clear and convincing evidence, the prosecutors knew that Affiant's warrant affidavit stated, "Affiant was patrolling the 1000 block of 27th street".

The 5th Circuit COA Assessment that Terrell has not shown that reasonable jurists would find the District Court's application of Stone was debatable or wrong, are wrong by clear and convincing evidence. Terrell made... Due Process was violated when the prosecutor knew Affiant's warrant affidavit stated he was located on the 1000 block of 27th street; not parked mid-block between 26th-27th street, standing beside his patrol car. The 5th Circuit decision is clearly erroneous when it failed to review the District court's findings of fact for clear error and review its conclusions of law de novo: because Terrell has shown that his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 US 473, 483-84 (200); 28 USC § 2254 (c);(e)(1).

Ineffective Assistance of Counsel

Trial Stage

The State's opening argument: "Affiant was parked east on avenue K, mid-block between 26th-27th street, standing beside his patrol car, watching suspicious activity in this high narcotic trafficking area. The reason why he was parked at this specific location was to watch 1105 27th street- a known drug trafficking area. When Affiant observed Terrell and the unknown white male make a hand to hand transaction on the northeast corner intersection of 27th street and avenue. K. Thereafter, Terrell walked south up 27th street and the unknown white male walked in a different direction. Affiant then entered

his patrol car and turned around, making a U-turn on avenue. K- now going west on avenue. K. When Affiant approached the intersection of 27th street and avenue K, Affiant turned left, now driving South on 27th street to follow Terrell".

R.R. Vol. 5, page 14-15; 18-22; 41.

Trial counsel questioned Affiant concerning, Did Affiant have this information documented in his report? Affiant replied, no. However, trial counsel failed to include into evidence Affiant's warrant affidavit to show to the jury the discrepancies in his testimony, as to, where he was actually located?

R.R. Vol. 5, page 42-43.

During Terrell's deliberation, the jury submitted a note to the court requesting to see a copy of the police report. 3/27/12, 2:19 PM. The judge's response was: the police report is not in evidence. Please continue to deliberate. Mr. Hall: I agree with that Judge. Mr. Coltzer: I wish it was in evidence, but I don't believe it is.

R.R. Vol. 5, page 134.

The false testimony of Affiant's whereabouts was material to Terrell's defense; Kotteakos v. United States, 328 US 750, 776, 66 SCT 1239, 1253, 90 LED 1557 (1946) (whether the violation had a substantial and injuries effect or influence in determining the jury's verdict) that's why the court deliberately excluded it.

It is clear and convincing evidence, trial counsel's performance was deficient when he failed to object to the false testimony, or failed to impeach Affiant with his warrant affidavit at trial. It is reasonably probable that had counsel displayed the warrant affidavit to the jury, they would have discredited Affiant's make belief story about being parked in the neighborhood watching suspicious activity, etc. The question is not whether Terrell would more likely than not have received a different verdict with the evidence, but whether in its absence Terrell received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Trial counsel's evidentiary suppression undermines confidence in the outcome of the trial. In addition, the result of the proceeding would have been different because it was evident that Affiant passed Terrell and circled around the block to meet Terrell again on 27th street. Trial counsel's error was so serious as to deprive Terrell of a fair trial. Strickland v. Washington, 466 US 668 (1984).

Furthermore, trial counsel performance was deficient when he failed to investigate the third

officer because Terrell stated specifically: 1. What the investigation would have revealed? 2. What specific evidence would have been disclosed? And, 3. How the evidence would have altered the outcome of the proceedings? However, counsel limited his pretrial investigation to only discussions with Terrell, review of the indictment, examination of the prosecution's file, reading the police report, and taken several pictures of 27th street.

Trial counsel affidavit further states: "At trial the defendant testified about a third officer, so the jury was aware of that theory. I did not find anything to suggest that any particular Galveston Police officer, or the Galveston Police Department in general, would have any reason to "plant" contraband on Terrell in order to pursue a criminal case."

Courts recognize that "ineffectiveness is generally clear in context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such decision could be made" (citing Strickland, 466 US at 690-91). Strickland simply "does not require... deference to decisions that are uninformed by an adequate investigation into the controlling facts and law" United States v. Drones, 218 F3d 496, 500 (5th Circuit 2000).

However, because Affiant was granted access to stay in the courtroom after he testified at the suppression hearing, so that he could hear Terrell's testimony, Affiant changed his testimony at trial that the third officer was summoned for a drug testing kit.

H. Mustafa testified of how the unknown third officer was involvement:

H. Mustafa direct examination by Jon Hall.

Q. After you recovered the item, the drugs..., did you stay at the scene for some time?

A. I stayed at the scene a little bit.

Q. And why would you remain at the scene?

A. Because I wanted to field test the item that I recovered.

Q. So you said you wanted to do a field test. Did you have a field test with you?

A. On that night I didn't.

Q. Did you have to wait for someone to bring you a field test?

A. Yes, sir.

Q. And did another officer bring a test?

A. Yes, sir.

R.R. Vol. 5, page 39-40

H. Mustafa cross examination by Robert Coltzer

Q. Who was the officer that came up in response to your call with the testing kit?

A. I don't remember.

Q. You didn't have his name in you report, did you?

A. No, sir.

R.R Vol. 5, page 42.

However, at the suppression hearing Officer H. Mustafa did testify of having a drug testing kit available.

H. Mustafa direct examination by Jon Hall.

Q. Okay. Did you have a field test kit available to test it?

A. Yes, sir.

R.R Vol. 2, page 23-24.

There is a reasonable probability that but for counsel's failure to investigate and call the third officer to testify, instead of assuming what part he played in the incident, the result of the proceeding would have been different. Trial counsel's evidentiary suppression to investigate any officer from the Galveston Police Department undermines confidence in the outcome of the trial and establishes prejudice. Trial counsel's error was so serious as to deprive Terrell of a fair trial. Strickland v. Washington, 466 US 668 (1984).

Trial counsel performance was also deficient when he failed to argue to the jury that there was no probable cause determination made by a neutral and detached magistrate.

Terrell was deprived of his Due process when counsel's failed to render adequate legal assistance, when the state failed to correct Affiant's false testimony, and when the state failed to secure attendance of the third officer witness.

Ineffective Assistance of Counsel

Appeal

Terrell's Appellate Attorney, Calvin Parks, professional evaluation of the record was objectively unreasonable due to his deficient performance to raise any arguable grounds on Terrell's Direct Appeal. Appellate Counsels' overview of Terrell's unlawful detention failed to review Terrell's probable Cause Affidavit. The warrant affidavit, page 2, is void without any magistrate's signature in violation of the neutral and detached requirement. Shadwich v. City of Tampa, 407 US 345, 92 SCT. 2119, 32 Led 2d 783 (1972) the court held, "someone independent of police and prosecution must determine probable cause for issuance of warrant". Appellate Counsel could have argued Terrell's warrant affidavit was legally insufficient on Terrell's Direct Appeal, however, he ignored the facts and the law and filed an Anders Brief.

Appellate Counsels' overview of Terrell's Suppression Hearing, failed to review the facts and the law concerning the record. Terrell's challenged the warrant affidavit on the ground that it contained known falsehoods and a disregard for the truth that was consolidated at Terrell's motion to Suppress Hearing. Terrell made a substantial preliminary showing of falsity in the warrant affidavit. First, that Affiant warrant affidavit omitted any facts of Affiant being parked east on avenue K, mid-block between 26th-27th street, standing beside his patrol car, watching suspicious activity in this high narcotic trafficking area. Second, the state never produced the third officer when Terrell demonstrated how the unknown third officer's testimony would have been beneficial, relevant and material to the defense. Therefore, since the trial court denied to suppress the false statements in the suppression hearing; the trial courts' decision was appealable. However, Appellate Counsel ignored the facts and the law and filed an Anders Brief.

Appellate Counsel's overview of trial counsel's performance during pretrial and trial was also deficient. First, trial counsel failed to establish any grounds to quash the illegal warrant affidavit. Second, trial counsel's consolidation of the suppression motions' did not provide any significant values of a Franks Evidentiary Hearing. Third, trial counsel failed to investigate the third officer and call him as a witness. Finally, trial counsel also failed to object or impeach Affiant with his warrant affidavit.

In addition, Appellate Counsel could have also filed against the State for their cover-up to

conceal the third officer from attending trial and failing to correct Affiant's false testimony. It is clear and convincing that counsel didn't want to fight against the State for the defendant which caused prejudice to Terrell's Direct Appeal.

Terrell's second Appellate counsel, James Ducote was also deficient. In addition to, Mr. Parks errors, Appellate counsel filed a frivolous argument requesting a Daubert/Kelly Hearing. Clearly since Terrell's Frank Evidentiary challenge was preserved on the record, it would have been reasonable for counsel to argue those issues on appeal. Especially since the 1st District Court of Appeals explained to Mr. Ducote the Daubert/Kelly Hearing was not preserved for the appeal. It is clear and convincing that counsel didn't want to fight against the State for the defendant which caused prejudice to Terrell's Direct Appeal. Strickland v. Washington. 466 US 668 (1984); Evitts v. Lucey, 469 US 387 (1985) (right to effective assistance of counsel applies on a appeal as of right).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sheron G. Jewell

Date: June 25, 2021