No.:

In the Supreme Court of the United States

Benjamin Ross
Petitioner,

v.

The United States
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

Petition for a Writ of Certiorari

Rhys B. Cartwright-Jones
Counsel of Record
42 N. Phelps St.
Youngstown, OH 44503-1130
330-757-6609, tel.
866-223-3897, fax
rhys@cartwright-jones.com
Counsel for Petitioner

Question Presented for Review

If Article I, Section 9, Clause 2 of the United States Constitution enshrines the privilege of the Writ of Habeas Corpus as a critical bulwark against arbitrary detention, and if Ross presented at-the-least *plausible* grounds for relief in his appeal, did the Circuit Court's refusal to grant a Certificate of Appealability not only contravene this constitutional safeguard but also undermine the credibility of the appellate process? Moreover, by declining to grant the certificate in the absence of conditions like "Rebellion or Invasion," did the Circuit Court effectively suspend the privilege of Habeas Corpus, thereby violating the Constitution? Lastly, does the Circuit Court's decision warrant the scrutiny of the U.S. Supreme Court to affirm the integral principles of justice and due process? Based on the foregoing, should this Court assume jurisdiction?

Parties to the Proceeding and Rule 26.9 Statement

Petitioner and defendant-appellant below, Benjamin Ross, is an individual person and United States domiciliary. The respondent, here, and the plaintiff-appellee below is the U.S. Pursuant to S.Ct.R. 26.9 both parties, the U.S. and Ross, are non-corporate entities and have no corporate disclosures to make.

List of Related Proceedings

There are no proceedings that qualify as "related proceedings" under Rule 14 of this Court's rules of practice.

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Statutes, Constitutional Provisions, and Rules

Petition for a Writ of Certiorari

Benjamin Ross petitions for a writ of certiorari to review the decision of the U.S. Circuit Court for the Sixth Circuit, affirming and declining jurisdiction over the Northern District of Ohio's order denying a Certificate of Appealability and a petition under 18 U.S.C. sec. 2255.

Opinions Below

The final dispositive decisions in the Sixth Circuit, dated July 24, 2024, is unreported and reproduced in Appendix A. The District Court's opinion follows in Appendix B.

Jurisdiction

This Court's jurisdiction rests on 28 U.S. Code § 1254, allowing a writ to issue relative to the final decision of a Circuit Court. The Sixth Circuit is the Court with final jurisdiction in that Circuit, and it issued its decision in this case on July 24, 2023.

Constitutional and Statutory Provisions

This Cause turns on the following constitutional principle, viz: Article I, Section 9, Clause 2, stating "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." As well, it turns on The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. (United States) 104 – 132, 110 Stat. 1214, enacted April 24, 1996 and on 18 U.S.C. 2255.

Reasons for Granting the Writ of Certiorari

Procedural Posture and Factual Background

On June 4, 2019, a Grand Jury in the United States District Court, Northern District of Ohio, Eastern Division, indicted Benjamin Ross ("Ross") for Attempting to Possess with Intent to Distribute Fentanyl, as specified under 21 U.S.C. Sections 841(a)(1), (b)(1)(B), and 846. [R.E. 10, PageID# 47-48.] Ross entered a guilty plea, and the Court sentenced him to 120 months in prison. [R.E. 48, PageID# 433 – 461.] The Clerk entered the judgment on February 10, 2020. [R.E. 39, PageID# 250 – 256.] One day later, Ross appealed to the Sixth Circuit. [R.E. 41, PageID# 271.]

Before the indictment, Special Agent Paul Stroney, Jr. of the DEA filed a Criminal Complaint against Ross on May 16, 2019. [R.E. 1; R.E. 1-1.] Stroney's Affidavit provided the basic points of the charge. Among them: Ohio State Highway Patrol (OSP) Sergeant Dunbar stopped Ross's BMW for excessive window tinting, noticed "criminal indicators," and initiated a canine search that led to the discovery of pills suspected to be Fentanyl. [R.E. 1, PageID# 1 – 8.] Authorities arrested Ross at the scene.

Subsequent events unfolded rapidly. The Court held initial and subsequent hearings, found probable cause, and ordered the Grand Jury to proceed. [R.E. 4; R.E. 6; R. 16, PageID# 71-116.] The Court detained Ross. [R.E. 7, PageID# 42 – 43.] Ross, despite pleading not guilty initially [R.E. 14, Page ID# 56 – 67], later changed his plea to guilty [R.E. 47, Page ID ## 406-432]. He did so while reserving the right to appeal specific issues. [R.E. 31, Page ID# 180-189.]

To that end, on August 30, 2019, Ross had filed a Motion to Suppress, arguing a constitutional violation in the initial stop. [R.E. 24, PageID# 136 – 139.] Folowing the government's response [R.E. 26, PageID# 141 – 155; R.E.

26-1, PageID# 156, R.E. 26-2, PageID# 157 – 164; R.E. 26-3, Page ID# 165; R.E. 26-4, PageID# 166] and a hearing [R.E. 46, Page ID# 277 – 403], the Court denied the Motion [R.E 30, PageID# 175 – 179].

Sentencing took place on February 4, 2020. [R.E. 48, PageID# 433 – 461.] The Court also addressed Ross's supervised release violation, which stemmed from a prior Felon in Possession of a Firearm charge. The Court imposed a 120-month sentence for the drug charge, an upward variance of 15 months. [R.E. 48, Page ID#449 – 451.] A 24-month consecutive sentence followed for the supervised release violation. [R.E. 48, Page ID # 458.] Ross appealed, but the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction and sentence. [R.E. 51.]

Ross then took the matter *pro se* to this Court—i.e. U.S. Supreme—on a search-and-seizure issue [R.E. 55], this Court denying, then, the direct petition for certiorari. A Section 2255 petition for review before the District Court followed [R.E. 57, PageID# 478 – 509; R.E. 58, PageID# 506 – 509]. The District Court refused the review and denied a Certificate of Appealability. [Id.] A Motion for a Certificate of Appealability ensued before the Sixth Circuit, which denied same. This appeal now follows urging this Court to assume jurisdiction on the theory that Ross's 2255 petition asserted at-the-least a plausible question for review, as he supplanted it by way evidence *dehors* the record.

Law & Discussion

Standard of Review: In the realm of legal pleading standards, the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) stands as a keystone for *civil* litigation, particularly in antitrust cases under § 1 of the Sherman Act. But why would one, relative to a 2255 petition, cite a civil standard? Granted, a habeas petition is not a Civil Rules case; a habeas cause is arguably much more serious—pertaining to liberty rather than property—and one of the few actions that the U.S. Constitution particularizes. The *Twombly* standard addresses the fundamental issue of what a plaintiff needs to allege to sustain a viable claim and to earn a right to further discovery. According to Federal Rule of Civil Procedure 8(a)(2), a claim must present "a short and plain statement of the claim showing that the pleader is entitled to relief," thereby affording the defendant fair notice of the claim's nature and its supporting grounds. *Twombly* further clarifies that while a complaint doesn't necessitate exhaustive factual detailing, it should transcend mere labels and conclusions to present factual allegations that lift the right to relief "above the speculative level." *Supra*. Importantly, *Twombly* calls for allegations that do more than suggest the mere possibility of misconduct; they should plausibly imply illegality, thereby satisfying Rule 8(a)(2)'s stipulation that the complaint must show entitlement to relief with sufficient "heft." Id.

Now, analogizing, but not directly applying, the *Twombly* standard to habeas corpus proceedings, the proposal to use *plausibility* as the standard of review indeed gains intellectual traction. Habeas corpus claims arguably bear even greater gravity than generic civil claims, given

their constitutional underpinning and the severe consequences at stake—most prominently, an individual's liberty. The *Twombly* standard, then, with its emphasis on preventing "largely groundless claims" from occupying judicial time, seems particularly appropriate for filtering out unsubstantiated habeas claims. It ensures that a petitioner must provide more than mere speculative allegations to burden the judicial system and the respondent. In this way, applying the *Twombly plausibility* standard to habeas corpus proceedings not only aligns with the gravity of these constitutionally enshrined claims but also serves the utilitarian goal of judicial efficiency. With this goal in mind, the Petitioner offers the following points of law and fact urging certification.

Issue and Summary of Argument:

The argument, in a sentence, is this: Ross presented at-the-least plausible issues for review to the Sixth Circuit and the District Court, both of which should have allowed appealability, and eventually granted the writ.

Turning to the issue, if Article I, Section 9, Clause 2 of the United States Constitution enshrines the privilege of the Writ of Habeas Corpus as a critical bulwark against arbitrary detention, and if Ross presented at-the-least *plausible* grounds for relief in his appeal, did the Circuit Court's refusal to grant a Certificate of Appealability not only contravene this constitutional safeguard but also undermine the credibility of the appellate process? Moreover, by declining to grant the certificate in the absence of conditions like "Rebellion or Invasion," did the Circuit Court effectively suspend the privilege of Habeas Corpus, thereby violating the Constitution? Lastly, does the Court's decision warrant the scrutiny of the U.S. Supreme Court to affirm the integral principles of justice and due process? This

reformulated question contends that the Circuit Court's denial hamstrung Ross's constitutional right to seek post-conviction relief, thereby subverting the Habeas Corpus Clause.

To provide a further summary of the matter, when a District Court denies appealability, the Sixth Circuit possesses not just the prerogative but also the duty to grant certification if a 2255 petition alleges the infringement of a substantial right. The Sixth Circuit previously acknowledged a procedural course drawn from Rule 22, which stipulates that a district judge "must either issue a Certificate of Appealability or state why a certificate should not issue." App.R 22(b). This judicial interpretation relied significantly on the Second Circuit's analyses in cases like *Lozada v. United States*, which enunciated the sequential obligation—first the district Court, and then the Court of appeals. 107 F.3d at 1017, *infra*.

However, the Sixth Circuit later expressed considerable skepticism regarding *Lozada*'s reasoning, discerning instead that the language of Section 2253(c)(1) seems to endow the circuit judge with the original authority to issue such certificates. The Rule 22 language does not, the Sixth Circuit insisted, compel the conclusion reached by the Second Circuit. Far from it; Rule 22(b)(2) expressly contemplates the issuance of a Certificate of Appealability by a circuit judge even in the absence of a prior denial by a district judge. *Wilson v. United States*, 287 F.App'x 490, 494-495 (6th Cir.2008).

Proceeding from these legal touchstones, Ross, the appellant in the matter at hand, sought certification from the Sixth Circuit following a denial at the district Court level. The appellant contends that the cause involves two issues of substantial rights specifically related to effective assistance and investigation.

On the question of ineffective assistance, the law establishes a fairly stringent criterion. One must show that an attorney's conduct strayed so far from accepted professional norms as to render the assistance constitutionally inadequate. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The *Strickland* test also imposes upon the movant the obligation to demonstrate not just inadequacy but also resultant prejudice. *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008).

This segues naturally into the doctrine concerning failure to investigate. Counsel owes a duty to undertake reasonable investigations or to make informed decisions that render such investigations superfluous. *United States v. Money*, E.D.Ky. No. 6:16-CR-00056-GFVT-EBA, 2021 U.S. Dist. LEXIS 54634, at *6-7 (Jan. 14, 2021). The burden here again lies heavily on the movant to specify what an adequate investigation would have yielded and how this would have influenced the outcome. *United States v. Hassan*, 2014 U.S. Dist. LEXIS 150258, 2014 WL 5361942, at *5 (E.D. Mich. Oct. 21, 2014).

Regarding the appellant's request for discovery or subpoena powers, the Rules for Section 2254 and 2255 Cases contemplate such allowances, albeit only for "good cause." The case law does not provide a habeas petitioner with a general right to discovery; rather, the Court may exercise its discretion to permit discovery if the petitioner presents specific allegations that, if proven true, would entitle them to relief. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2D 97 (1997). This case satisfied the test.

Lastly, focusing on the crux of the first ground for relief concerning the K9 officer's qualifications, the Court must reckon with a gap in the evidentiary record. The record fails to establish the foundational reliability of Rexy, the K9

in question, through any form of documentation, training history, or pedigree. Yet, case law indicates that Courts usually admit such K-9 alerts based merely on evidence of training and certification, thereby sidestepping any *Daubert*-type scrutiny. *United States v. Almeida,* D.Me. No. 2:11-cr-127-DBH, 2012 U.S. Dist. LEXIS 2415, at *31-34 (Jan. 9, 2012).

In sum, the argument contends that the Sixth Circuit possesses both the authority and the obligation to certify appealability in cases implicating substantial rights, especially when district Courts have fallen short. Moreover, this cause lays bare substantive issues concerning effective counsel and proper investigative duties—matters that remain not just constitutionally significant but also jurisprudentially unsettled in their intricate details. Therefore, Ross beseeches the Sixth Circuit to exercise its rightful authority, take up the matter, and lay down clear rulings that would serve not only this case but also jurisprudence at large.

Argument

If a District Court denies appealability, then a Circuit Court may certify appealability, and should do so if a 2255 petition posits at least a *plausible* violation of a substantial right. According to the various Circuits, "[w]e have ... interpreted the language of Rule 22 to require habeas petitioners to seek a Certificate of Appealability from a district Court prior to seeking one from a circuit judge." Infra. This follows under App.R. 22, which directs that—

> If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a Certificate of Appealability or state why a certificate should not issue. The district clerk must

> send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

App.R 22(b), cited infra, lower case in original. The Sixth Circuit took guidance from the Second Circuit addressing *Lozada v. United States.* Infra. The Second Circuit reasoned that—

> Rule 22(b) specifies that the district judge who rendered the judgment shall either issue a COA [Certificate of Appealability] or give reasons for denying one, implying that the district judge is required to be the initial COA decision-maker. If the district judge denies a COA, a request may then be made to a court of appeals the amended Rule simply sets forth the sequence of applications—first to the district court and then to the court of appeals.

107 F.3d at 1017, internal citations and quotations omitted. Likewise, the Sixth Circuit examined the Second Circuit's holding in *Kincade v. Sparkman*, and adopted same. 117 F.3d 949, 953 (6th Cir. 1997).

More recently, however, the Sixth Circuit stated, "[t]o be clear, we are extremely skeptical of Lozada's analysis, as the holding in that case contrasts sharply with the statutory language governing certificates of appealability." *Infra*. The Sixth Circuit reasoned that "...Section 2253(c)(1) permits a circuit justice or judge to issue a Certificate of Appealability,

strongly implying that the power to issue such a certificate rests within the original authority of circuit judges." *Infra*., internal quotations and citations omitted. So "[n]othing in the statutory language suggests that a circuit judge's power to issue certificates of appealability is instead the mere power to review a district judge's denial of such a certificate on appeal." Id. Further, according to the Sixth Circuit, "...we see nothing in the language of Rule 22 which compels the decision reached by the Second Circuit in *Lozada*." Id., internal quotations and citations omitted. That is, "Rule 22(b)(2) expressly states that a request for a Certificate of Appealability addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." Id., internal punctuation and emphasis omitted. So "[s]uch language expressly authorizes the judges of any Circuit Court to consider requests for a Certificate of Appealability; it adds no requirement that the certificate issue only if a district Court has first denied a similar request." Id. Concluding, the Sixth Circuit directed that "[w]ere the jurisdictional issue presented in this appeal one of first impression before the Court, we would hold that a single circuit judge has authority to issue a Certificate of Appealability in the first instance." Id. And "[n]either the plain language of § 2253(c)(1) nor that of Rule 22 reduces a circuit judge's authority to issue certificates of appealability to the mere authority to review decisions of the district Court regarding whether a Certificate of Appealability should issue." *Wilson v. United States,* 287 F.App'x 490, 494-495 (6th Cir.2008). In other words, a circuit can and should review *de novo* a district Court's appealability finding.

At any rate, all of the foregoing being established, the appellant filed his writ below, received a denial of appealability from the District Court, and sought certification and review now, for the reasons this brief relates. This cause

presents two matters of substantial rights as far effective assistance and investigation.

Both issues in this cause sound in ineffective assistance. According to the Courts, "[t]o establish that he was denied the right to the effective assistance of counsel, [a] [p]etitioner must establish that his counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2D 674 (1984), internal quotations omitted, quoted in *Moreno v. Davis*, W.D.Mich. No. 1:07-CV-1184, 2010 U.S. Dist. LEXIS 52386, at *17-18 (Apr. 26, 2010). Hence, a 2255 movant "...must demonstrate that his attorney's actions were unreasonable under prevailing professional norms." Id., citing *Strickland* at 688. Granted, though, "[i]n assessing such a claim...the Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [Petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." Id. internal quotations omitted, citing Strickland supra at 689. Further, a movant must "...establish that he suffered prejudice as a result of his attorney's allegedly deficient performance. Prejudice, in this context, has been defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., citing *Mahdi v. Bagley*, 522 F.3d at, 636. this is, by the way, a proposition far below a fifty-percent standard.

Turning to the specific issue of failure to investigate, according the Courts, "[c]ounsel owes his client a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *United States v. Money*, E.D.Ky. No. 6:16-CR-00056-

GFVT-EBA, 2021 U.S. Dist. LEXIS 54634, at *6-7 (Jan. 14, 2021), citing Strickland, 466 U.S. at 691. So "[i]n order to prove the prejudicial prong of *Strickland*, [one] must allege with specificity what the investigation would have revealed and how it would have altered the outcome." Id., citing *United States v. Hassan*, 2014 U.S. Dist. LEXIS 150258, 2014 WL 5361942, at *5 (E.D. Mich. Oct. 21, 2014), quoting *Mahdi v. Bagley*, 522 F.3d at 636. According to the Courts, "...speculation that an alternative strategy would have altered the judicial outcome is not sufficient." Id., citing *Hodge v. Haeberlin*, 579 F.3d 627, 640 (6th Cir. 2009).

One of the reliefs the petition proffered below was a request for a discovery period and/or subpoena power. Rule 6 of the Rules Governing Section 2254 and 2255 Cases provides that, in any habeas proceeding under those rules, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Rule 6(a), Rules Governing Section 2254 and 2255 Cases; see also Rule 1(b), stating, "[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a) [Cases Involving a Petition under 28 U.S.C. 2254]." *McKinney v. United States*, E.D.Mich., 2019 U.S. Dist. LEXIS 174065, at *13 (Oct. 8, 2019), identifying that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). However, a Court, in its discretion, may allow discovery if the petitioner establishes "good cause" demonstrating why such a request should be granted. See Rule 6 of the Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, identifying that "[a] judge may, for good cause, authorize a party to conduct discovery under the

Federal Rules of Civil Procedure and may limit the extent of discovery." Emphasis supplied). Likewise, "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is. . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." *Bracy*, 520 U.S. at 908-09, citing *Harris v. Nelson*, 394 U.S. 286, 299, 89 S. Ct. 1082, 22 L. Ed. 2D 281 (1969). (Notably, the above-referenced document appears to outline standards for both 2254 and 2255 cases, though Courts often refer to it by the applicable statute, only.)

The first ground for relief argues, below, that counsel was ineffective for declining to inquire into the qualifications of the K9 Officer. The discussion of Rexy's ability as an alert K9 was as follows:

- "He is a dual purpose dog. So he trains—he's trained in narcotics, area search, building search, evidence search, and tracking as well, and the apprehension work." [Sup.Tr., R.E. 129, PageID# 352 – 53.]
- Government's counsel inquired, "And is Rexy certified right now, and has he been continuously through the time that you've been working with him?" [Id.]
- To which the officer responded, "Yes." [Id.]

No documentation or discussion of Rexy's abilities, training, history, or pedigree came into evidence. At any rate, reviewing the transcript, based on that colloquy, one can say that there was insufficient foundation to make Rexy's alert admissible. Though the Sixth Circuit does not appear to have taken up the issue, there is some minimal scientific foundation, at least, that the government must proffer to make a K-9 alert admissible. The Honorable Magistrate Judge, John H. Rich III of the United States District Court

for the District of Maine offered the following:

> My research indicates that courts generally have rejected the proposition that a *Daubert*-type scrutiny is appropriate in these circumstances and/or have held that evidence of a drug detection dog's training and certification establishes its reliability.
>
> Although the First Circuit has not addressed the question of the applicability of *Daubert* in this context, it, too, has indicated that evidence of a K-9's training and certification generally suffices to establish its reliability as a drug sniffing dog.

United States v. Almeida, D.Me. No. 2:11-cr-127-DBH, 2012 U.S. Dist. LEXIS 2415, at *31-34 (Jan. 9, 2012), internal citations and quotatiosn omitted, contrasting *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). So a *Daubert* hearing and presumably a full-scale Evid.R. 702 foundation is not necessary, but something to show that the dog is trained and certified is. Notably, here, the only conclusive evidence of Rexy's reliability is the officer's response "yes" to an incredibly leading question, "And is Rexy certified right now, and has he been continuously through the time that you've been working with him?" [Supra.]

Looking to the standard above, the defense suggests that there is sufficient evidence under the *Bracy* standard, supra, to merit discovery. That is, "..specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is. . . entitled to relief[.]" The specific discovery,

here, is simply documentation of Rexy's training and certification, particularly to detect Fentanyl. As the accompanying exhibit [Exh. 1, R.E. 57-1] indicates, counsel has requested these by way of the Freedom of Information Act, prior to the District Court's ruling.

The second ground for relief proffered that counsel was ineffective for neglecting to inquire into the possible adulteration of a video. The traffic stop has video footage outlining the events.

> *State of Pennsylvania*
> *McKean FCP*
>
> *Facts about my video being altered:*
> *If you look on the dashcam around 8:00-15:00 you can see Sargent Dunber and Officer Baker standing on front of the dash cam. You can see the difference in both officers - Sgt. Dunber is wearing a grey Trooper hat with a name tag and Officer Baker is wearing a black hat with no name tag. (The reason I remember this is because Officer Baker and I were talking about why the DEA was looking through my phone. The reason why Officer Baker was in Sgt. Dunber's car was because he was reaching for a black box. At this time I asked Officer Baker why the DEA was looking through my phone, so he looked back to see what I was referring to and he said he didn't know why they were doing that. When I received the video, that portion was missing but I did see where you can see the Sargent on the dash cam at 41:30-41:55 go into the passenger side door of his car and hear it open. If you go back to the video of me being detained in the back of Sgt. Dunber's car at the same time (41:30-41:55) you will see Sgt. Dunber*

> *reach his hand in the passenger side door and then the camera does some sort of jerking motion and then you see Officer Baker appear with a black cap and get the black box. Also if you look at the transcript of my Suppression Hearing, on page 99-104 ID#375-380 you will see where may attorney asked Officer Baker about this video being altered.*
>
> *I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.*
>
> *s/ Benjamin Ross*

[Exh. 2, R.E. 57-2, 501 – 04.]

If this is, indeed, the case, then, of course, there is an alteration to the video and such would be exculpatory and predicative of habeas relief. For legal support, of course this follows under the basic rule of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2D 215 (1963), evidence that would tend to undermined the truthfulness agents' testimony is subject to disclosure. That is, *Brady* requires the prosecution to disclose to the defense any information that is material to the defendant's guilt or punishment, *Brady*, 373 U.S. at 87, as well as any evidence that can be used for impeachment, *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Given the foregoing, Ross posits that he submitted issues of substantial right below, and the petitioner and appellant offers that a Certificate of Appealability should have issued.

Conclusion

In the legal dispute *Ross v. United States*, the Sixth Circuit Court of Appeals declined to grant Benjamin Ross a Certificate of Appealability regarding his ineffective-assistance-of-counsel claims. They made this determination despite the foundational issues with the evidence obtained from the canine sniff of Ross's vehicle and the alleged manipulation of video footage from the arrest. The District Court and subsequently the Appellate Court thus committed an apparent error in dismissing the Certificate of Appealability request. Ross's claims merit a more nuanced and rigorous examination, particularly since they touch upon significant constitutional issues.

Firstly, concerning the canine's alert, the court's trust in the trainer's testimony as an adequate substitute for physical documentation or records of the canine's qualifications leaves a troubling loophole in the burden of proof. While it is true that a court may consider the testimony of a canine's trainer as potentially sufficient, the present case begs for a more stringent review. The trainer's testimony in Ross’s case was generalized and lacked the detail crucial for establishing the reliability of a search leading to significant criminal charges. Because the canine's sniff and subsequent alert formed the backbone of the probable cause for Ross's arrest, the absence of substantive information about the canine's training, accuracy rate, or false-positive instances poses a constitutional problem. This calls into question not just the suppression of evidence but also the quality of counsel Ross received for not challenging this oversight.

Secondly, with regard to the alleged alteration of the video footage from Ross's arrest, the district court seemed to believe that counsel's cursory inquiry into the matter was sufficient. The Court failed to realize that effective legal

representation entails not just asking the right questions but also understanding their implications. The issue of a potential alteration in video evidence introduces an unsettling element of doubt about the due process. Given the gravity of a federal indictment for fentanyl possession, one would assume that even the faintest hint of impropriety in evidence collection would warrant a deeper investigation. However, this did not occur, and Ross's counsel failed to challenge this problematic evidence meaningfully.

Moreover, it's worth noting that the standards for proving ineffective assistance of counsel, according to *Strickland v. Washington*, supra, require both the showing of counsel's deficient performance and the existence of prejudice resulting from it. In the matter of the canine's reliability and the video footage, these twin pillars seem to be present. Ross's counsel did not adequately challenge the questionable evidence nor dig deeper into the anomalies, and these oversights arguably had an adverse impact on the court's judgment, constituting a fundamental defect.

Lastly, it's crucial to underscore that the Certificate of Appealability is not an ultimate determinant of guilt or innocence, not a rare indulgence or dispensation, but a procedural mechanism to ensure that substantial constitutional questions receive appropriate appellate scrutiny. In denying Ross a Certificate of Appealability, the courts thwarted a necessary reexamination of constitutional issues that have not only immediate repercussions for Ross but also long-term implications for the integrity of the criminal justice system. Thus, reasonable jurists could indeed find the lower court's assessment of Ross's constitutional claims not just debatable but arguably erroneous.

In summary, the refusal to issue a Certificate of Appealability in Ross’s cause runs counter to the principles of thorough judicial review and undermines the

constitutional guarantees provided to Ross. The issues raised in his 2255 motion strike at the very heart of the justice system's credibility and merit further review—thus making the case for the issuance of a Certificate of Appealability unassailable.

The Petitioner urges this Court to assume jurisdiction over this cause and to hear it on its merits.

Respectfully Submitted,

Rhys B. Cartwright-Jones
42 N. Phelps St.
Youngstown, OH 44503-1130
330-757-6609, tel.
866-223-3897, fax
rhys@cartwright-jones.com
Counsel for Petitioner