PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: WESTERN
Name (under which you were convicted): RIAN T. SMITH	Docket or Case No.: 2012-089 15CV0712A
Place of Confinement: COLLINS CORRECTIONAL FACILITY	Prisoner No.: 12-B-3748
Petitioner (include the name under which you were convicted): RIAN T. SMITH, Pro Se	Respondent (authorized person having custody of petitioner): v. JAMES THOMPSON, SUPERINTENDENT OF COLLINS CORR. FAC.
The Attorney General of the State of NEW YORK	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: NIAGARA FALLS CITY COURT, COUNTY COURT PART. Located at: 1925 main Street Niagara Falls N.Y. 14305

   (b) Criminal docket or case number (if you know): 2012-089

2. (a) Date of the judgment of conviction (if you know): May 3rd, 2012

   (b) Date of sentencing: November 29th , 2012

3. Length of sentence: 4 years, 2 years post-release supervision

4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No

5. Identify all crimes of which you were convicted and sentenced in this case: criminal possession of a controlled substance in the Fifth degree

6. (a) What was your plea? (Check one)

   ☐ (1) Not guilty ☐ (3) Nolo contendere (no contest)

   ☒ (2) Guilty ☐ (4) Insanity plea

7. I did not testify at a pretrial hearing, trial, or a post-trial hearing.

8. I did appeal from the judgment of conviction.

9.

(a) Name of court: Appellate Division, 4th Judicial Department

(b) Case number: 1075, KA 13-00441.

(c) Result: Unanimously affirmed.

(d) Date of result: 11-14-14.

(e) Citation to the case: 995 N.Y.S.2d 881, 122 A.D.3d 1300, People v. Smith, (N.Y.A.D. 4 Dept. 2014).

(f) Grounds raised: Ineffective Assistance of Counsel, Personal Expectation of Privacy, Illegal search and seizure, Absence of Probable Cause to search the Defendant's person and premises.

(g) I did seek further review by a higher court.

(1) Name of court: STATE OF NEW YORK, COURT OF APPEALS.

(2) Case number: 1075, KA 13-00441

(3) Result: Pursuant to Defendant's CPL§460.20 Application for Leave to Appeal to the Court of Appeals, the application was denied by the Court of Appeals, decided by the Honorable Judge; Shelia Abdus-Salaam, Associate Judge.

(4) Date of result: 6-29-2015.

(5) I do not have the citation to this case.

(6) Grounds raised: The same grounds that were raised on my CPL§440.10 motion to vacate the judgment and my Direct Appeal.

(h) I did not file a petition for certiorari in the United States Supreme Court.

(10) I have filed other motions concerning this judgment of conviction in State Courts.

(11)

(a) (1) Name of court: Niagara Falls City Court, County Court Part. Also; Appellate Court of the Fourth Judicial Department.

(2) Case numbers: SCI No. 2012-089(City Court), and KA 13-02046 with SCI No. 2012-089 for a CPL§460.15 Motion to Grant Leave to Appeal.

(3) Date of filings: 6-3-2013(City Court), and 11-12-2013

(4) Nature of proceedings: CPL 440.10 Motion to Vacate the Judgment (City Court), and CPL§460.15 Motion to Grant Leave to Appeal denial of 440 Motion.

(5) Grounds raised: Ineffective assistance of counsel, Illegal Search and Seizure, Absence of Probable Cause to Search the person and the premises of the Defendant, and Legitimate Personal Expectation of Privacy.

(6) I did not receive any hearings where evidence was given on my motions.

(7) Result: They were both denied.

(8) Date of results: 10-30-2013(City Court) and 12-19-2013.

(b) I did not file any second or third motions whatsoever.

(12) Grounds that I state which are the very reasons why my incarceration is in violation of my Constitutional Rights by Constitutional Law.

GROUND ONE: On February 2, 2012; for my Preliminary hearing, my former attorney; James J. Faso Jr. appeared in court and without any

established investigation proceeded to pre-plea bargain in open court without ever attempting to move with a Motion to Dismiss or an Omnibus Motion prior to this action.

On March 22, 2012; for my Arraignment, my former attorney: James J. Faso Jr. appeared in court and coerced me into signing a waiver of indictment pursuant to CPL§195.10 and CPL§195.20 without ever making any defense from his investigation of the evidence by way of moving with any types of motions to Dismiss, Motions to Suppress, and or an Omnibus Motion.

On May 3, 2012; for my SCI plea, my former attorney James J. Faso Jr. appeared in court and coerced me into signing a Waiver o Appeal and Post-Judgment Review Rights, and a Judicial Diversion Contract (drug court) without ever moving with any motions in my defense from a investigation that would have revealed a obvious Constitutional Rights violation from an illegal search and seizure of my person and premises due to a warrantless search of my person and premises.

Counsel rendered Ineffective Assistance of Counsel due to the facts that he never made any investigation to find a defence or defense that would be in my favor and where counsel failed to move to have the only evidence against me suppressed and if he would have done so the outcome of the case would have been totally different.

(a) Supporting facts: The Defendant's name was never on the face of the warrant nor was there any probable cause to search the person and the premises of the Defendant due to the description of the warrant and the absence of any probable cause to warrant a strip search, arrest, or any form of search that requires a warrant. Also counsel was ineffective by not making any investigation whatsoever without an explanation as to why he chose not to do so, which in turn severely prejudiced the Defendant who was and is innocent due to these deficient acts performed by counsel.

(b) I exhausted my state remedies and argued these issues on direct appeal.

(c) I raised these issues through post-conviction motions.

Type of motions: CPL§440.10 Motion to vacate the judgment, and CPL§460.15 Motion to Grant Leave to Appeal.

Name and location of the courts where these Motions were filed: Niagara Falls City Court (County Court Part), and Supreme Court of The State of New York Appellate Division, Fourth Department.

Case numbers: SCI No. 2012-089 and KA 13-02046, SCI No. 2012-089.

Date of Decisions: 10-30-2013 and 12-19-2013.

Results: See attached.

I did not receive any hearings on either motion.

I did appeal from the denial of my CPL§440.10 Motion to vacate judgment.

I did raise those same issues on appeal.

Name and location of the court where appeal of denial of CPL§440.10 motion was filed: SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION FOURTH DEPARTMENT, in the form of a CPL§460.15 motion.

Case number: KA 13-02046

Date of courts decision: 12-19-2013

Result: See attached.

GROUND TWO: Illegal search and seizure due to the fact that there was no probable cause for the search of the Defendant's person or his premises.

(a) Supporting facts: The Defendant's name was never on the face of the warrant, there was no probable cause to conduct a strip search and or

to arrest the Defendant due to the clear and convincing documentary evidence provided by the face of the warrant and the warrant application, proof of Social Services rental support and payments provided from the Niagara County Department of Social Services, which shows that the Defendant had a "Legitimate Personal Expectation of Privacy" and any search that was conducted without probable cause which revealed contraband in the Defendant's possession becomes illegal and the evidence becomes "Fruit of The Poisonous Tree" and must be suppressed.

I have exhausted my State remedies concerning this issue on Direct Appeal after I had moved with my Post-conviction motion of a CPL§440.10 where I was denied and I then moved with a CPL§460.15 motion for the denial of the motion to vacate the judgment, and that to was also denied.

The name, locations of the courts where I filed these motions, and dates of decisions are on page 6 of this Petition and are attached to this Petition.

GROUND THREE: LEGITIMATE PERSONAL EXPECTATION OF PRIVACY.

(a) Supporting facts: Clear and convincing documentary proof provided from The Department of Social Services which particularly displays clear separation of apartments within the residence of a multi-dwelling unit, where the Defendant was renting apartment A-1 of 1951 Falls Street, Niagara Falls, N.Y., through the rental support of Social Services.

I have used the same remedies to argue these very issues in State Courts using the same motions I filed in the same courts that I established on this page and page 6 of this Petition.

GROUND FOUR: LAW ENFORCEMENTS VIOLATIONS OF PRCEDURE DUE PROCESS AND THEIR VIOLATIONS OF THE EXCLUSIONARY RULES.

(a) Supporting facts: The defendant's counsel failed to investigate the clear violations of the procedure due process that was thoroughly

performed by Law Enforcement who chose to disregard the Exclusionary Rules set forth, and executed an illegal strip-search on the Defendant where the warrant clearly displays and shows them that they had no probable cause whatsoever to conduct such a search on a person who was not described on the face of the warrant, and also where the Defendant never displayed any acts or was to be found in possession of any weapon upon a procedural pat-frisk that would of justified their actions.

I have exhausted my State remedies raising the same issues and moved with the same motions, which were all filed in the same courts as I have established on pages 6, and 7 of this Petition concerning ground #four.

13. All of the grounds for relief were raised and presented to the highest court in the state; STATE OF NEW YORK COURT OF APPEALS.

14. I have previously filed a 28 U.S.C.A. 2254 WRIT OF HABEAS CORPUS with this court.

Name and location of the court, Case number, type of proceeding, issues raised, and the date of the courts decision: U.S. DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, address; United States Courthouse, Buffalo, N.Y. 14202-3350, Docket No. 1:13-cv-00349-RJA-HBS, Type of proceeding: 28 U.S.C.A. 2254 WRIT OF HABEAS CORPUS, the issues raised are the same issues raised in this petition along with further exhaustion of State remedies, Result: Dismissed without prejudice pending Petitioner's exhaustion of State remedies. See attached.

15. I do not have any other motions, appeals, or petitions pending at this time.

16. These are the names and addresses of the following attorney's who represented me in the following stages of the judgment I am challenging:

(a.) At preliminary hearing: James J. Faso Jr. of 1520 Pine Avenue, P.O. Box 2127 NMS, Niagara Falls, New York 14301, telephone: (716) 282-3276, Facsimile (716) 282-3283.

(b.) At arraignment and plea: James J. Faso Jr., Supra.

(c.) At trial: James J. Faso Jr., Supra.

(d) At sentencing: James J. Faso Jr., Supra.

(e) On appeal: Patricia M. McGrath, esq., PO Box 293, Lockport, N.Y. 14095-0293: Address for Overnight Delivery Services: 37 East Ave., Lockport, N.Y. 14095;(716) 438-7575--office, (716) 625-1535—fax, pmmcgrath@hotmail.com

(f) In any post-conviction proceedings: Self.

(g) On appeal from any ruling against me in any post-conviction proceedings: Self.

17. I do not have any future sentence(s) to serve after the completion of the judgment that I am challenging.

18. TIMELINESS OF PETITION: My judgment of conviction became final on June 29th, 2015, which clearly shows that I am not time barred from the statute of limitations as contained in 28 U.S.C.A. § 2244(d).

Therefore, Petitioner asks that the Court grant the following relief: Reverse the judgment of conviction, Suppress; all tangible and testimonial evidence, Dismiss; the Indictment, Expunge this conviction off my record, and or any other relief to which Petitioner may be entitled.

I declare under the penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on (8-9-15) Aug. [redacted] 9th, 2015

Executed and signed on (8-9-15) Aug. 9th [redacted], 2015

Brian J. Smith

Signature of Petitioner

STATE OF NEW YORK
COUNTY COURT COUNTY OF NIAGARA

THE PEOPLE OF THE STATE OF NEW YORK

DECISION
CPL 440 MOTION

VS.

SCI No. 2012-089

RIAN T. SMITH,

Defendant

HON. ANGELO J. MORINELLO, Acting County Court Judge

The Defendant moves, *Pro Se*, to vacate the judgment of conviction on the ground that he was deprived of the effective assistance of counsel under the United States and New York State Constitutions (CPL §440.10[1][h]). The People oppose the Motion.

The Defendant was charged in a felony complaint on November 26, 2011, with Criminal Possession of Controlled Substance in the Third Degree (PL §220.16[1]) and Criminal Possession of a Controlled Substance in the Fourth Degree (PL §220.09[1]). On February 2, 2012, he waived his right to a Preliminary Hearing, and thereafter on March 22, 2012, he waived indictment and consented to be prosecuted by a Superior Court Information (SCI) charging him with Criminal Possession of a Controlled Substance in the Third Degree (PL §220.16(1). He entered a plea of Not Guilty and requested consideration for the CPL Article 216 Judicial Diversion Program (JDP).

On May 3, 2012, as a result of further discussion of the Defendant's counsel and the People, the charge of Criminal Possession of a Controlled Substance in the Third Degree (PL §220.16(1) was reduced to Criminal Possession of a Controlled Substance in the Fifth Degree (PL §220.06). Upon a determination by this Court pursuant to CPL §216.05 (3)(b), that the Defendant should be offered judicial diversion for alcohol or substance abuse treatment, the

Defendant entered into a negotiated plea agreement. Pursuant to its terms, the Defendant signed a Waiver of Appeal and Post-Judgment Review Rights, pleaded guilty to Criminal Possession of a Controlled Substance in the Fifth Degree (PL §220.06), executed a JDP Contract, and was received into the JDP Drug Court Treatment Program in lieu of being sentenced to prison. The JDP Contract provided, *inter alia*, that if the Defendant successfully completed the JDP, the Felony charge would be dismissed and the Defendant would plead guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (PL §220.03) and receive a Conditional Discharge. If the Defendant failed to successfully complete the Program, he would be sentenced on the charge of Criminal Possession of a Controlled Substance in the Fifth Degree (PL §220.06], to a term of imprisonment of 4 years, with Post-Release Supervision of 2 years.

During the Defendant's participation in the JDP, he violated the terms of his Contract, was sanctioned on several occasions, removed from the drug treatment program on November 29, 2012, and sentenced to four (4) years imprisonment, with Post-Release Supervision of two (2) years. A copy of the Notice of Appeal to the Supreme Court, Appellate Decision, Fourth Department, dated November 30, 2012, was filed in this Court on December 4, 2012 by the Defendant's counsel.

The Defendant now moves pursuant to CPL §440.10, to vacate his judgment of conviction on the basis of ineffective assistance of counsel, and in support thereof, submits his own affidavit, along with Exhibits "A" through "G, " alleging that his counsel was ineffective in that he failed to move to suppress evidence; failed to investigate the search warrant, and when Defendant provided him with relevant information and asked about a suppression hearing, counsel advised that the Defendant would lose, and that he should take part in the drug program or go to prison. The Defendant also alleges that counsel coerced him into pleading guilty; advised him to sign a plea agreement which waived his right to appeal and post-judgment review rights, and failed to fully inform him of the meaning of the waivers or to explain the consequences of the plea. The Defendant further claims that counsel failed to render objective representation; failed to provide Defendant with speedy trial rights; and failed to communicate with him except for brief periods during court appearances. The Defendant

alleges that while he was attempting to withdraw his plea, he was sentenced on November 29, 2012, , and on that same day, he placed the facts of ineffective assistance of counsel on the record.

The People submit an affirmation in opposition, requesting that the Motion be denied, and alleging that the advantageous plea agreement negotiated by defense counsel for the Defendant demonstrates counsel's effectiveness, and that the Defendant has failed to substantiate the claims of ineffective assistance of counsel.

The right to effective counsel under the New York State Constitution (N.Y. Const. Article 1, §6) guarantees a defendant meaningful representation (People v Baldi, 54 NY2d 137, 147 [1981]). When a defendant has been convicted on a guilty plea, he has been afforded meaningful representation when he receives an advantageous plea and "nothing in the record casts doubt on the apparent effectiveness of counsel." (People v Ford, 86 N.Y.2d 397, 404 [1995]).

The plea minutes reflect that a highly beneficial disposition was negotiated for the Defendant that would have eliminated his exposure to incarceration. Even with the Defendant's failure to successfully complete the JDP, his sentence of four (4) years imprisonment and two (2) years post-release supervision, was a substantial reduction from his exposure on the original charge to a determinate sentence of up to twelve (12) years, and post-release supervision up to three (3) years.

Although the Defendant contends that counsel failed to request a suppression hearing, such failure to make a pretrial motion generally does not, by itself, establish ineffective assistance of counsel. (People v Rivera, 71 N.Y.2d 705, 709 [1988]). The Defendant must show that the motion, if made, would have been successful. People v. Matthews, 27 A.D.3d 1115 (4th Dept. 2006), and must also demonstrate the absence of strategic or other legitimate explanations for counsel not pursuing a hearing (People v Garcia, 75 N.Y.2d 973, 974 [1990], citing People v Rivera, *supra*, at 709). Here, the Defendant failed to make a sufficient showing that the motion would have been successful, or to demonstrate that there was no legitimate reasons for not pursuing the motion, or that counsel otherwise failed to provide meaningful representation (People v Leeper, 254 A.D.2d 754 (4th Dept. 1998); People v Claitt, 222 A.D.2d 1038 (4th Dept. 1995), lv. denied 88 N.Y. 2d 982 (1996). Absent such showings,

it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing the motion. (People v Rivera, *supra* at 709)

Although the Defendant has submitted his own affidavit, he has not submitted other corroborating affidavits or evidence, the absence of which is particularly relevant here where a number of the Defendant's claims are contradicted by minutes of the proceedings

For example, the Defendant's allegation that his counsel coerced him to plead guilty claim is contradicted by the plea allocution minutes of May 3, 2012, wherein he stated to the Court that he was pleading guilty freely and voluntarily, and in response to the specific question asking him if "anyone, including the Court, or the District Attorney, your attorney or the police threatened or forced you or influenced you against your own free will to get you to plead...is anybody forcing you?" the Defendant answered "No, Your Honor."

In addition, his contention that counsel did not explain the full extent of his waiver of rights to appeal and post-judgment review is contradicted by his statements during the plea allocation. When asked by the Court if his counsel had explained the Waiver of Appeal and Post-Judgment Review Rights, and whether he understood the waivers, the Defendant answered "Yes. Yes, Your Honor." He also answered in the affirmative when asked whether he had sufficient time to consult with his counsel and if he was satisfied with counsel's services.

Further, the Defendant's claim that his counsel did not explain the consequences of the plea is controverted in the plea allocution, when the Court articulated its promise to the Defendant with respect to the benefits and consequences of the plea. The Court explained that if the Defendant successfully completed the JDP, he would be allowed to withdraw his plea to the Felony, which would be dismissed, and would be permitted to plead guilty to an A Misdemeanor for which he would be given a Conditional Discharge, and that if he didn't successfully complete the Program, he would be sentenced to 4 years in state prison and 2 years Post-Release Supervision. When the Defendant was asked if he understood this, he replied "Yes, Your Honor."

Finally, the remaining claims of the Defendant, including his allegation that counsel did not provide him with speedy trial rights, are not supported with factual allegations.

As such, there is nothing in the record or in the unsupported nonrecord facts alleged by

the Defendant which demonstrates that the Defendant received anything other than an advantageous plea, or that casts doubt on the apparent effectiveness of counsel. Accordingly, the Defendant is not entitled to a hearing on his claims under the New York Constitution.

Under the United States Constitution (U.S. Const. 6th Amendment), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense (Strickland v Washington, 466 U.S. 668 [1984]). To satisfy the second requirement in the context of a guilty plea, a defendant must make factual allegations showing that "there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Hill v Lockhart, 474 U.S. 52, 59 [1985]).

As discussed above, the Defendant's allegations do not show that counsel's performance was deficient. Moreover, the Defendant's conclusory statement that there was a reasonable probability that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial, without further supporting evidence, is not sufficient to show the requisite prejudice to the Defendant. (*See* CPL § 440.30[4][b]). In the absence of evidentiary facts showing the context of the alleged errors of counsel and how the errors would have caused him to reject the plea and to proceed to trial, the Defendant has failed to demonstrate that he was prejudiced by counsel's representation. People v McDonald, 1 N.Y.3d 109 (2003); People v Ford, 46 N.Y.2d 1021 (1979). The Defendant has not alleged that he is innocent or asserted any facts that might constitute a legal defense to the charges. Under such circumstances, there appears to be no reasonable possibility that he would have insisted on going to trial and risked a harsher sentence.

In light of these findings, the Court concludes that the unsupported nonrecord facts alleged by the Defendant fail to demonstrate that counsel's performance was deficient and that the alleged deficiencies prejudiced his defense, and as such, the Defendant is not entitled to a hearing on his claims under the United States Constitution.

In sum, the Defendant has not shown that the nonrecord facts he seeks to establish to support his contention that he was deprived of the effective assistance of counsel under the New York and United States Constitution are material and would entitle him to relief. People v.

Satterfield, 66 N.Y.2d 796, 799 (1985)

In accordance with all of the above, upon consideration of the submissions of the parties, the minutes of the proceedings, and the official court file; and viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, and upon due deliberation thereon, this Court concludes that the Defendant received meaningful assistance of counsel and the constitutional requirements have been met. (see generally People v Satterfield, *supra*; People v Baldi, *supra*, at 147).

Therefore, the Motion of the Defendant is denied in its entirety without the necessity of conducting a hearing, as the allegations essential to support of the Motion are contradicted by the court record, or are made solely by the Defendant and are unsupported by any other affidavit or evidence, and under these and all the other circumstances of this case, there is no reasonable possibility that such allegations are true. CPL §440.30(4)(d).

NOW, it is hereby

ORDERED, that the Motion be and the same is hereby denied in all respects.

This constitutes the Decision and Order of the Court.

Dated: October 30, 2013
Niagara Falls, New York

Angelo J. Morinello

HON. ANGELO J. MORINELLO
Acting County Court Judge

NOTICE AS TO FURTHER APPEAL

The Defendant is hereby advised pursuant to New York Rules of Court, Supreme Court, Appellate Division, Fourth Department, of his right to appeal or to move for permission to appeal, as the case may be, and of the right to move for permission to proceed on appeal as a poor person. If the Defendant so requests, the clerk shall promptly prepare, file and serve a notice of appeal on behalf of the Defendant. (22 NYCRR 1039.3[a]).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

KA 13-02046

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

RIAN T. SMITH, DEFENDANT-APPELLANT.

SCI No.: 2012-089

I, Edward D. Carni, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that upon the motion of defendant for a certificate granting leave to appeal pursuant to CPL 460.15 from an order of the Niagara County Court dated October 30, 2013, there is no question of law or fact which ought to be reviewed by this Court, and permission to appeal is hereby denied.

DATED: December 19, 2013

Edward D. Carni

Hon. Edward D. Carni
Associate Justice

Other Orders/Judgments

1:13-cv-00349-RJA-HBS Smith v. Graham

HABEAS,HBS,ProSe

U.S. DISTRICT COURT

U.S. District Court, Western District of New York

Notice of Electronic Filing

The following transaction was entered on 3/3/2014 at 4:12 PM EST and filed on 3/3/2014

Case Name: Smith v. Graham

Case Number: 1:13-cv-00349-RJA-HBS

Filer:

Document Number: 16(No document attached)

Docket Text:

-CLERK TO FOLLOW UP- TEXT ORDER: Adopting Magistrate Judge Hugh B. Scott's Report and Recommendation as filed on February 4, 2014. Respondent's motion to dismiss the Petitioner's petition is granted without prejudice pending the petitioner's exhaustion of his state court remedies. The Clerk of Court shall close the case. Signed by Hon. Richard J. Arcara on 3/3/2014. (Staff, Lisa)

1:13-cv-00349-RJA-HBS Notice has been electronically mailed to:

Thomas Benjamin Litsky thomas.litsky@ag.ny.gov

1:13-cv-00349-RJA-HBS Notice has been delivered by other means to:

Rian T. Smith
12-B-3748
AUBURN CORRECTIONAL FACILITY
Box 618
Auburn, NY 13021

Other Orders/Judgments

1:13-cv-00349-RJA-HBS Smith v. Graham

HABEAS,HBS,ProSe

U.S. DISTRICT COURT

U.S. District Court, Western District of New York

Notice of Electronic Filing

The following transaction was entered on 3/4/2014 at 11:58 AM EST and filed on 3/4/2014

Case Name: Smith v. Graham
Case Number: 1:13-cv-00349-RJA-HBS
Filer:
WARNING: CASE CLOSED on 03/04/2014
Document Number: 17

Docket Text:
JUDGMENT in favor of Harold D. Graham against Rian T. Smith. Signed by the Clerk of the Court on 3/4/2014. (DLC)

1:13-cv-00349-RJA-HBS Notice has been electronically mailed to:

Thomas Benjamin Litsky thomas.litsky@ag.ny.gov

1:13-cv-00349-RJA-HBS Notice has been delivered by other means to:

Rian T. Smith
12-B-3748
AUBURN CORRECTIONAL FACILITY
Box 618
Auburn, NY 13021

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1042579058 [Date=3/4/2014] [FileNumber=2663881-0]
[83511b3f90a447bb552a829bff13fb1579b22ea00b16ab2e7f17b841e43a17a129f8
2484d4d44e5a5092662fcadd66072f3099ce126b4f872b707f8fdd4d5ad6]]

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

WESTERN DISTRICT OF NEW YORK

Rian T. Smith

v.

Harold D. Graham

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 13-CV-349 - A

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, adopting Magistrate Judge Hugh B. Scott's Report and Recommendation as filed on February 4, 2014. Respondent's motion to dismiss the Petitioner's petition is granted without prejudice pending the petitioner's exhaustion of his state court remedies.

Date: March 4, 2014

MICHAEL J. ROEMER,
Clerk of the Court

By: s/Denise Collier
Deputy Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1075

KA 13-00441

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RIAN T. SMITH, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

RIAN T. SMITH, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Angelo J. Morinello, A.J.), rendered November 29, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). We reject defendant's contention that his waiver of the right to appeal was invalid. Here, County Court's plea colloquy and defendant's execution of a written waiver of the right to appeal demonstrate that defendant's " 'waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Kemp*, 255 AD2d 397, 397). In addition, we conclude that defendant was "adequately apprised . . . that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882 [internal quotation marks omitted]). We further conclude that defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Raynor*, 107 AD3d 1567, 1568, *lv denied* 22 NY3d 1090).

To the extent that defendant contends in his main brief that defense counsel was ineffective for failing to challenge the search warrant, we note that such contention "does not survive [his] plea or [his] valid waiver of the right to appeal because [he] failed to demonstrate that the plea bargaining process was infected by [the]

allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). To the extent that defendant contends in his pro se supplemental brief that the plea bargaining process was infected by defense counsel's allegedly ineffective assistance, we further note that defendant's specific claims, i.e., that defense counsel failed to investigate and failed to make a suppression motion, are "not properly before us because [they] involve[] matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440" (*People v Monaghan*, 101 AD3d 1686, 1686, *lv denied* 23 NY3d 965; *see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896).

Finally, we reject defendant's contention that the court erred in denying his motion to withdraw his guilty plea without an evidentiary hearing. " 'The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court' " (*People v Falaro*, 284 AD2d 972, 972; *see People v Burroughs*, 224 AD2d 1034, 1034, *lv denied* 88 NY2d 845), and where, as here, a defendant's motion to withdraw is "patently insufficient on its face," the court may summarily deny the motion (*People v Mitchell*, 21 NY3d 964, 967).

Entered: November 14, 2014

Frances E. Cafarell
Clerk of the Court

State of New York
Court of Appeals

BEFORE: HON. SHEILA ABDUS-SALAAM, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

RIAN T. SMITH,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: JUN 2 9 2015

Sheila Abdus-Salaam

Associate Judge

*Description of Order: Order of the Appellate Division, Fourth Department, entered November 14, 2014, affirming a judgment of the Niagara County Court, rendered November 29, 2012.

UNITED STATES DISTRICT COURT
WESTEN DISTRICT OF NEW YORK STATE

In the Matter of,

RIAN T. SMITH
Petitioner,

-vs-

JAMES THOMPSON; SUPERINTENDENT OF COLLINS CORRECTIONAL FACILITY

Respondent.

BREIF IN SUPPORT OF 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS

SUBMITTED BY:
RIAN T. SMITH, PRO 'SE
Collins Correctional Facility
P.O. Box 340
Collins. New York 14034-0340

To:
New York State Attorney General
The Capitol, Dept. of Law,
The Executive Bldg.,
Albany, New York 12224-0332

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

QUESTIONS PRESENTED:

Question: Was evidence obtained Illegally?

Answer: Yes. Due to the fact that police officers were not warranted to make a search of Petitioner.

Was Petitioner convicted on illegally obtained evidence?

Answer: Yes. Due to the fact that the evidence was illegally obtained in a warrantless search which, makes it "fruit of the Poisonous Tree" and must be suppressed.

Question: Did Petitioner receive effective assistance of counsel?

Answer: No. Due to the fact that his counsel failed to investigate and make a defense of the Petitioner, by failing to move to have the only evidence against the Petitioner suppressed, which was illegally obtained in an illegal search of his person.

PRELIMINARY STATEMENT:

BACKGROUND

On November 26th, 2011 at approximately 12:30a.m. The Niagara Falls Police Department executed of a search warrant for the premises at 1951 Falls Street apartment #1 lower, the person named on the face of the warrant; Justin J. Thornton, who's physical description: black male, 5'-5" tall and weighing 130Lbs and who's date of birth was listed as 5/22/1976 (See Exhibit "B"), clearly established the premises and target of said warrant. The Petitioner was present during this execution and was detained with his hands zipped tied behind his back, and was complying with the police officers basic questions in a calm manner. Police officers asked him who he was and whose house was this? The Petitioner responded; "Rian Smith", I pay rent for this room and that guy you just escorted through the door pays rent for the other room, I'm apartment "1A"(Smith was nodding his head towards the labeling on his apartment/room's door as he explained this) and he is apartment "1B". Police officers then performed a pat-frisk of Mr. Smith, which revealed nothing incriminating, and then 10 minutes later an additional pat-frisk was performed on Mr. Smith, which again revealed nothing incriminating. Right after this a detective approached Mr. Smith and demanded the police officers to take the zip ties off of him, the detective demanded Mr. Smith to disrobe himself in order to do a visual body cavity search. As Petitioner complied with these demands, the detective was thoroughly going through every item of clothing that Mr. Smith was handing to him. After Petitioner handed him his jeans/pants the detective allegedly made a discovery of a knotted plastic bag in Mr. Smith's front pants pocket. A field test of a portion of the substance that was in the

plastic bag was conducted later and the results were a positive for the presence of cocaine. Mr. Smith was arrested and charged with criminal possession of a controlled substance in the 3rd and 4th degrees.

PERFORMANCE OF RIAN T. SMITH'S COUNSEL

On February 2, 2012: my former attorney; counsel appeared in court and without any established investigation proceeded to pre-plea bargain in open court without ever attempting to move with a Motion to Dismiss or a Omnibus Motion prior to this action. (See. Exhibit "E").

On March 22, 2012: my former attorney; appeared in court and coerced me into signing a waiver of indictment pursuant to CPL§195.10 and CPL §195.20 without ever making any defense from his investigation of the evidence by way of moving with any types of Motions to Dismiss, Motions to Suppress, and or a Omnibus Motion. (See Exhibit "F").

On May 3, 2012: my former attorney; counsel appeared in court and coerced me into signing a Waiver of Appeal and Post-Judgment Review Rights, and a Judicial Diversion Contract (drug court) without ever moving with any motions in my Defense from a investigation that would have revealed a obvious constitutional rights violation from an illegal search and seizure of my person due to a warrantless search of my person. (See Exhibit "G"), also (See Exhibits "E" and "F")

The Petitioner personally sent a copy of the search warrant (See Exhibit "B") and a copy of the information from the Department of Social Services that proves that they were paying for my rent at 1951 Falls Street apartment "1A" and not 1 lower as a whole (See Exhibit "A") to my former attorney James J. Faso Jr. Petitioner requested to counsel to see if there was any way to defend against the charges against him by way of a suppression motion in light of the information he had sent him? Petitioner appeared in court on May 3rd, 2012 where, counsel directed and advised him to just take the plea, because, as he said; "we'll lose the suppression motion". He also stated that I would go home that day if he took the plea bargain. Petitioner, following the advice of learned counsel took the plea bargain and, was not released until the following week on Mat 10th, 2012. After approximately six months of participation in the Judicial Diversion Program, Petitioner was removed due issues while in that program, and was sentenced to four years of incarceration and two years of post-release supervision. I am currently incarcerated at Collins Correctional Facility.

POINT 1: PETITIONER CLEARLY HAD STANDING TO CHALLENGE THE ILLEAGL SEARCH OF HIS PERSON AND PREMISES DUE TO HIS MERITORIOUS LEGITIMATE PERSONAL EXPECTATION OF PRIVACY CLAIM.

LEGITIMATE PERSONAL EXPECTATION OF PRIVACY:

STATE AND FEDERAL HOLDINGS:

The Petitioner had a legitimate, personal expectation of privacy in his rented apartment/room, which gave him standing to challenge the illegal search of his room and his person where his arrest was not warranted. People v. Lott, 102 A.D.2d 506(N.Y.A.D. 4 Dept. 1984) Absent exigent circumstances, a person is deemed to have exclusive possession and control over the premises so as to prohibit a warrantless entry when he or she occupies a room in a hotel, (People v. Bossett, 124 A.D.2d 740(2d dep't 1986), motel, (People v. Bowers, 126 A.D.2d 897(3d Dep't 1987), or rooming houses. People v. Lott, 102 A.D.2d 506 (4th Dep't 1984) The Petitioner has clearly, by both the New York State Constitution and United States Constitution has established that he had a Legitimate Personal Expectation of Privacy, (People v. Ponder, 54 N.Y.2d 160(1981), (People v. Ramirez-Portoreal, 88 N.Y.2d 99(1996), (People v. Hardy, 77 A.D.3d 133 (2010), and (Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421(1978). As articulated by Justice Harlan in his "Katz" concurrence, the proper test under the Amendment is whether "a person has exhibited an actual (subjective) expectation of privacy... that society is prepared to recognize as reasonable" Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). If in the interest of justice this is considered, then absent exigent circumstances, warrantless searches and seizures inside a dwelling are presumptively unreasonable and unconstitutional. Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284 (2004). **Also see Petitioner's 28 U.S.C. 2254 Petition: page 7 for Ground Three.**

POINT II: THE PETITIONER: MR. SMITH WAS ILLEGALLY SEARCHED ABSENT ANY PROBABLE CAUSE THAT WOULD WARRANT POLICER OFFICERS CONDUCT AS LAWFUL, THE CONSTITUTIONAL RIGHTS OF PETITIONER WERE CLEARLY VIOLATED BY THE ACTIONS OF POLICE OFFICERS DURING THEIR UNAUTHORIZED STRIP SEARCH OF HIM.

ILLEGAL SEARCH AND SEIZURE:

FACTS AND BACKGROUND:

The Defendant was illegally searched and strip searched where Police Detective searched through every clothing item of Defendant's as he was commanded to do so in that situation to undress himself and hand every item of clothing to the Detective absent any probable cause to arrest the Defendant or to search/strip search the Defendant at that time. Police Officers were in possession of a search warrant that did not give them the probable cause to perform such a search on the Defendant or his premises. The warrant clearly establishes that the target of the warrant execution was a person by the name of Justin J. Thornton, date of birth: 05/22/1976, a black male whose attributes were approximately: 5'-5" in height and 130Lbs, who was at the Premises of, 1951 Falls Street Apartment #1 (lower), being a two family dwelling with apartment #1 on the complete first floor in the City of Niagara Falls, New York all of which being under the control of JUSTIN J. THORNTON, DOB 05/22/1976. The Defendant at that time was renting out a room on the same premises, through the Department of Social Services who were paying the rent for the Defendant during the duration of the Defendant's stay at that apartment. Tangible proof of this latter fact can be found at Exhibit A. Additionally physical characteristics of the Petitioner were dramatically and significantly different from those of the target of the search, "Justin J. Thornton". The Petitioner is five foot, seven inches tall (5'-7") and at that time was weighing in at a muscular build of 255Lbs,

a black male born on April 13th, 1982 (4/13/82). The Petitioner was renting out the well documented Apartment/room address as understood by his landlord at the time and Social Services at; 1951 Falls Street Apartment 1A, located in the City of Niagara Falls, New York. This clearly establishes that police officers did not have any probable cause to search the Petitioner. Granting he had an "Legitimate Personal Expectation of Privacy" and should have been protected of his rights of the Fourth Amendment and Fourteenth Amendments to the United States Constitution, and Article 1 section of the New York State Constitution. Instead, the Petitioner was subjected to an illegal search and seizure of and then was found to be in possession of a controlled substance. Ironically the target of the warrant, "Justin J. Thornton" was also renting out his own apartment/room of the premises through the Department of Social Services which was described as; 1951 Falls Street Apartment 1B.

STATE CASES:

The Honorable judge: DYE of The Court Of Appeals explained the purpose of satisfying the State and Federal Constitutional requirements: "For purposes of satisfying the State and Federal Constitutional requirements, the searching of two or more residential apartments in the same building is no different from the search of two or more residential houses. Probable cause must be shown in each instance (see People v. Rainey, 14 N.Y.2d 35(1964). The Petitioner asserts that the search warrant was invalid to allow the search of his person and premises (see People v. Martinez, 80 N.Y.2d 549 (1992). The search warrant failed to meet Constitutional and statutory requirements with particularity, with respect to description of place to be searched when investigating officers possessed information concerning drug activity at particular apartment within multi- family dwelling, but warrant identified areas to be searched as the entire premises, including all it's storage area and curtilage, and thus failed to identify particular apartment by number or occupant (see Exhibit B), and (see People v. Fulton, 49 A.D.3d 1223 (2008). The facts made known to the Magistrate and the reasonable inferences to which they give rise, must create a substantial probability (see

People v. Baker, 30 N.Y.2d 252, 259) that the authorized invasions of privacy will be justified by discovery of the items sought from all persons present when the warrant is executed. If this probability is not present, then each person subject to search must be identified in the warrant and supporting papers by name or sufficient personal description. (People v. Nieves, 36 N.Y.2d 396, 405 (1975). The Fourth Amendment requirement that warrants particularly describe the things be seized demands that an executing officer can reasonably ascertain and identify the persons or places authorized and the things authorized to be seized. People v. Nieves, supra 36 N.Y.2d 396 (1975), People v. Henley, 135 A.D.2d 1136 (1987) and People v. Rainey, supra. Here the search of the Defendant's person after two pat-frisk that revealed that the Defendant was unarmed and detained to secure Law Enforcements safety exceeded the scope of the warrant when Law Enforcement executed a strip search and visual body cavity search of Defendant absent any sort of probable cause to support their conduct (People v. Mothersell, 14 N.Y.3d 358 (2010) People v. Hall, 10 N.Y.3d 303 (2008) and (People v. More, 97 N.Y.2d 209 (2002).

FEDERAL ANALYSIS:

Due to the description of the warrant police officers overstepped their boundaries and authority to pursue a warrantless search of the Defendant and his premises. (Groh v. Ramirez, 540 U.S. 551(2004). For these reasons, although a warrant should be interpreted practically, it must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain it's scope. (Groh v. Ramirez, 54 U.S. 551(2004).

So, where police possessed a warrant to search a tavern, it was illegal to conduct a pat search of patron seated at the bar, simply because he was present on the premises when the warrant was executed: "A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63. Where the standard is probable cause, a search of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy"

of persons, not places. See Rakas v. Illinois, 439 U.S. 128, 138-143, 148-149;Katz v. United, 389 U.S. 347, 351-351". Also see: Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

"Probable cause to search must be based on particularized information about the place to be searched, not only on a target's "mere propinquity to others independently suspected of criminal activity"(walczyk v. Rio, 496 F.3d 139, 163[2d Cir. 2007] quoting United States v. Martin, 426 F3d 83, 88[2d Cir. 2005]).

Thus, absent exceptional circumstances, that present a need for immediate response, the warrant requirement cannot be dispensed with (Johnson v. United States, 333 U.S. 10, 14-15 (1948).The purpose of this has been explained by Mr. Justice Jackson, writing for the United States Supreme Court:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. It's protection consists in requiring that those inferences 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. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent"

(Johnson v. United States, 333 U.S. 10, 13-14 [1948].

EXCLUSIONARY RULES

Due to police officer's clear police misconduct that they have grown accustomed to as far as overstepping the "Exclusionary Rules", they have violated the Defendant's Fourth, Fifth, and Fourteenth Amendment's Equal Protection and Due Process Clauses, which was motivated by the mere fact that average citizens of the United States do not truly know, and or fully understand their constitutional rights, which places them in a situations of a condition of unawareness, and the mercy of law enforcement. **Also see Petitioner's 28 U.S.C. 2254 Petition: pages 7-8 for Ground Four.**

Mr. Justice GOLDBERG delivered the opinion of the Court, in the case of Escobedo v. State of Illinois, 378 U.S. 478, 490 (1964).

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for it's continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

The Petitioner was illegally searched without an arrest warrant, proper search warrant, incriminating statements, or any criminal offense committed in the presence of any police officer which would justify and support the police officers conduct, and the evidence that was illegally obtained should and must be suppressed due to a Payton violation, which is supported by Article One Section Twelve of the New York State Constitution (Payton v. New York State, 445 U.S. 573 (1980), where probable cause was completely absent.

In, Murray v. United States, 487 U.S. 533, 536, 537(1988), another proactive analysis, Justice Scalia delivered the opinion of the Court: That The "Exclusionary Rule prohibits the introduction into evidence of tangible materials seized during an unlawful search, (Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341(1914), and of testimony concerning knowledge acquired during an unlawful search, Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679(1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint" Nardone v. United States, 308 U.S. 338, 341(1939), Wong sun v. United States, 371 U.S. 471, 484-485(1963).

In the United States District Court, Eastern District of New York case of; United States v. Valentine, 591 F.Supp.2d 238(2008), District Judge, Dora L. Irizarry determined that:

It is well-settled that evidence obtained pursuant to an unlawful seizure or search must be suppressed as "Fruit Of The Poisonous Tree". See (Wong Sun v. United States, Supra).

Police detectives allegedly reported that the Petitioner made a spontaneous oral statement after they allegedly reported that they made a discovery of drug contraband in his front pants pocket of the Petitioner.

In the United States District Court, Western District of New York, United States v. Marchese, 966 F.Supp.2d 223,238,239(W.D.N.Y. 2013), the Honorable Kenneth Schoeder, Jr., United States magistrate Judge, when discussing and analyzing statements made by a Defendant that are "Fruit of the Poisonous" Tree quoted:

Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' actions in the present case is no less fruit of official illegality than the more common tangible fruits of unwarranted intrusion. See Nueslein v. District of Columbia, 73 App.D.C. 85, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct; by federal officers, Rea v. United States, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233, or, of closing the doors of federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669, the danger in relaxing the exclusionary rules in the of verbal evidence would seem to great to warrant introducing such a distinction Id. At 485-486, 83 S.Ct. 407. **Also see Petitioner's 28 U.S.C. 2254 Petition: pages 6-7 for Ground Two.**

PURSUANT TO: PEOPLE V. MOTHERSELL, 14 NY.2d 358 (2010) AND KIMMELMAN V. MORRISON, 477 U.S. 365 (1986); ALL ILLEGALLY OBTAINED TANGIBLE AND TESTIMONIAL EVIDENCE MUST BE SUPPRESSED DUE TO IT BEING "FRUIT OF THE POISONOUS TREE".

POINT III: COUNSEL'S OMISSIONS, AND LACK OF LEGAL KNOWLEDGE, INADEQUATE INVESTIGATION AND LACK OF PRATICIAL APPLICATIONS OF BASIC CRIMINAL PRACTICE DEPRIVED PETITIONER OF CONSTITUTIONALLY PROTECTED RIGHTS TO EFFECTIVE ASSISTANCE. PURSUANT TO KIMMELMAN V. MORRISON, 477 U.S. 365(U.S.N.J. 1986), NEITHER STONE V. POWELL, 428 U.S. 465 (1976), NOR WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), SHOULD NOT BE EXTENDED TO BAR CONCIDERATION OF THE PETITIONER'S SIXTH AMENDMENT RIGHTS BASED ON HIS TRIAL COUNSEL'S FAILURE TO ADVANCE HIS FOURTH AMENDMENT CLAIM.

INEFFECTIVE ASSISTANCE OF COUNSEL

NEW YORK STATE CASES:

Pursuant to: People v. Baldi, 54 N.Y.2d 137(N.Y. 1981), Petitioner has satisfied the **Baldi test** that is required in the State of New York for claims of ineffective assistance of counsel, due to the fact that counsel's performance was so deficient to the point that it was a farce and mockery of justice, making it impossible to say or argue that the defendant's counsel rendered meaningful representation. People v. Benevento, 91 N.Y.2d 708, 712 (1998); People v. Baldi, 54 N.Y.2d 137, 147 (1981). As said by New York State Court of Appeals Judge; R.S. Smith in the case of People v. Turner, 5 N.Y.2d 476, 156 (N.Y. 2005):

It is well established that these constitutional rights are violated if a Defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure (Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); People v. Baldi, [5 N.Y.3d 480] 54 N.Y.2d 137 (1981). (See, People v. Turner, 5 N.Y.2d 476, 156 (N.Y.2005).

Petitioner suffers surely of this due to the fact that he was coerced into making an unfavorable plea bargain that still harbored the strong possibility of being incarcerated if he was not successful in a Drug Court Diversion Program where it was extremely difficult for anybody to complete such a stringent treatment plan like that one. After Mr. Smith was removed from the program for posting bail on a two week drug court sanction he now suffers as a result of his counsel's poor performance, where he had furnished his counsel with documentation from the Department of Social Services that clearly proves that Petitioner not only was renting residence not described on the face of the warrant, (see Exhibits "A" and "B") the documentation also shows clearly that Petitioner had standing to challenge the search of his person and premises due to his documentation that effectively established that he had a legitimate personal expectation of privacy in that premises. With that proven this shows that the warrant was facially defective (See Exhibit "A" and "B"). In the case of (People v. Bennett, 29 N.Y.2d 462(N.Y. 1972), Counsel was found ineffective for his lack of investigation or preparation on issue of defendant's insanity, which was only possible defense available to defendant. In the case of (People v. LaBree, 34 N.Y.2d 257(N.Y. 1974), Counsel was found ineffective for his lack of investigation and poor performance which was made out to be a farce and mockery of justice. Also see People v. Droz, 39 N.Y.2d 457(N.Y. 1976), People v. Brown, 45 N.Y.2d 852 (N.Y. 1978). It is well established that according to the New York State Constitution, Petitioner has been prejudiced by his former defense counsel's poor performance, which was deficient and seriously compromised his right to a fair trial. In the lower Court, had Petitioner counsel had done an investigation of the evidence and decided to move for a suppression hearing for the alleged illegally obtained evidence, the outcome would have been totally different, in fact two things would have happened: (1.) The evidence would have been suppressed, and (2.) The evidence would have not been suppressed due to the discretion of the lower court and it would have more than likely due to the circumstances been suppressed when properly presented to the Appellate Division in the Fourth Department, or The Court of Appeals due to the fact that the issues presented would have been on the record and properly in front of both respected Courts who have the

discretion to rule in the interest of justice (see NY CRIM PRO Sec. 470.05 and NY CRIM PRO Sec. 470.15) to properly suppressed such illegally obtained evidence.

FEDERAL ALLITERATION

Foundationally in Kimmelman v. Morrison, 477 U.S. 365(U.S.N.J. 1986) Jusice Brennan delivered the opinion of the Court:

"Be cause that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary." Strickland v. Washington, 466 U.S. 668, at 691, 104 S.Ct., at 2066(1984) But, we observed, "a particular decision not to investigate must be assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." see (Strickland v. Washington, 466 U.S. 668(U.S.Fla. 1984)."

Counsel's conduct In failing to investigate the State's case against the Defendant through discovery was constitutionally deficient under the Sixth Amendment, where due to such failure, counsel failed to timely move for the suppression of certain evidence allegedly seized in violation of the Fourth Amendment (Kimmelman v. Morrison, 477 U.S. 365(U.S.N.J. 1986). Where a Defendant is represented by counsel during the plea process and enters a plea upon advice of counsel, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorney's in criminal cases. Hill v. Lockhart, 474 U.S. 52(U.S.Ark. 1985). The advice of competent counsel in plea bargaining proceedings is a serious responsibility and quality that is needed to provide defendants with their Constitutional Rights to reasonable and adequate assistance of competent counsel during all proceeding. Due to the facts as so quoted by the Supreme Court, Justice Kennedy: "The simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate

assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process." Missouri v. Frye, 132 S.Ct. 1399(U.S.Mo. 2012).

As established in U.S. v. Cronic, 466 U.S. 648(U.S.Okla. 1984). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 466 U.S., at 343, 100 S.Ct., at 1715 (Cuyler v. Sullivan, 466 U.S. 335(U.S.Pa. 1980) In the Supreme Court of the United States case " U.S. v. Cronic, 466 U.S. 648(U.S.Okla. 1984) Justice Stevens delivered the opinion of the Court quoting:

"As Judge Wyzanski has written": "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, nether is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. William v. Twomey, 510 F.2d 634,640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148; 46 L.Ed.2d 109 (1975).

The above cases clearly establishes that Petition was denied his New York State and Federal Constitutional Rights, stemming from police misconduct for their obvious illegal search. And, in that of the Petitioner and the grossly ineffective counsel that deprive Petitioner of his fundamental rights to counsel and a fair trial which has written this horror story for a layman in the law, who was forced to endure it. A man who had built up a great integrity by self educating himself in order to fight for something that should have not been so easily taken from him, due to the above described events. **Also see Petitioner's 28 U.S.C. 2254 Petition: pages 4-6 for Ground One.**

CONCLUSION

It is respectively urged in the interest of justice that all tangible and testimonial evidence against Petitioner be suppressed and the indictment dismissed, due to the clearly established facts that the evidence had been illegally obtained in clear violation of the Petitioner's Fourth and fourteenth Amendments to the United States Constitution, and Article One section Twelve of the New York State Constitution, where Petitioner's former defense counsel's performance fell below professional norms making a farce and a mockery of justice by not investigating the prosecution's case against Petitioner, where if counsel had investigated he would have known that the evidence was illegally obtained by way of a illegal search, and would have moved for a suppression of the evidence where it's suppression would have been granted, which would have changed the outcome of this case.

Respectfully submitted,

Rian T. Smith

DATED: 8-9-15

Rian T. Smith, Pro Se
Din# 12-B-3748
Collins Correctional Facility
P.O. Box 340
Collins, New York 14034-0340

EXHIBIT A

PROOF OF LEGITIMATE EXPECTATION OF PRIVACY DOCUMENTED BY THE DEPARTMENT OF SOCIAL SERVICES

WINQ07 **CASE MAKE-UP** **Date** 04/25/2012 **Page** 1 of 1

Case PA186971 **Type** SN-FNP **Stat** CLOSED **Pend** NO PEND **Auth** 06368348

Dist NIAG **L-Off** 2 **Unit** UC **Worker** **Auth-Period** 09/10/11-12/12/11

Fiscal 29 **SP-Code** CCRS **SCN** B **MA Ext/Sep Det**

Name SMITH RIAN MA:MA186971

Address 1951 FALLS APARTMENT 1A

NIAGARA FALLS NY 14303 **App-Date** 07/28/11

Phone 716-284-9320

INDIVIDUAL INFORMATION

Last Name	First	M	DOB	Sex	SSN	Cin	Status	Relat	SC
SMITH	RIAN	T	04/13/1982	M	8-105669868	AR38443Q	CAS-CL	APP-PY	X
WRIGHT	TEQUITA	M	04/05/1974	F	1-380825323	DF80307F	DEN	APP-PY	

WINQ25 **AUTHORIZATION PAYMENT HISTORY** Date 04/25/2012 Page 1 of 3
Case PA186971 Type SN-FNP Stat CLOSED Pend NO PEND Auth 06368348
Name SMITH RIAN Dist NIAG Auth-Period 09/10/11-12/12/11

Auth No	Action	Type	Meth-Pay	Amount	Issue	Schedule	Pickup
	Period		Ind LN	ClCat	Vend-ID	Check-No	
06368348	AUTH	PRI-RENT	VENDOR	300.00	RECUR	MONTHLY	MAILED
	10/01/11-12/31/11				022998		
06368348	AUTH	RECUR-G	UNREST	20.00	RECUR	SEMI-MO	MAILED
	10/01/11-12/15/11						
06368348	AUTH	FS-ONGNG	UNREST	200.00	RECUR	MONTHLY	MAILED
	10/01/11-12/31/11						
06363589	AUTH	PRI-RENT	VENDOR	300.00	RECUR	MONTHLY	MAILED
	10/01/11-12/31/11				022998		
06363589	AUTH	RECUR-G	UNREST	20.00	RECUR	SEMI-MO	MAILED
	10/01/11-12/15/11						
06363589	AUTH	FS-ONGNG	UNREST	200.00	RECUR	MONTHLY	MAILED
	10/01/11-12/31/11						

EXHIBIT B

SEARCH WARRANT

SEARCH WARRANT

STATE OF NEW YORK)
COUNTY OF NIAGARA) SS
CITY OF NIAGARA FALLS)

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO ANY POLICE OFFICER IN THE STATE OF NEW YORK, COUNTY OF NIAGARA, CITY OF NIAGARA FALLS.

PROOF, BY AFFIDAVIT, having been made by Detectives James Reynolds and Joseph Giaquinto of the Niagara Falls N. Y. Police Department, being assigned to the Narcotics Intelligence Division, that there being probable cause for believing that certain property that constitutes evidence of a crime, or tends to show that a particular crime was committed by a particular person does exist.

YOU ARE THEREFORE COMMANDED, any time of the day or night, to make an immediate search of the person known as JUSTIN J THORNTON DOB 05/22/1976 a black male approx. 5'-5" 130Lbs as well as said premises, 1951 Falls Street apt #1 (lower), being a two-family dwelling with apartment #1 on the complete first floor located on the south-side of Falls Street and located on SBL# 159.49-1-18, in the City of Niagara Falls, New York, and said search to include all rooms, contents of those rooms, including, hallways, stairways, storage areas, basement, attic areas, closets, locked & secured areas, locked safes or containers and porches to said address 1951 Falls Street apt #1 (lower), being a two-family dwelling with apartment #1 on the complete first floor located on the south-side of Falls Street and located on SBL# 159.49-1-18 Niagara Falls, New York all of which being under the control of JUSTIN J THORNTON DOB 05/22/1976, FOR THE FOLLOWING PROPERTY: Cocaine as defined in Article 220 of the Revised Penal Laws of the State of New York, as well as for any implements used to administer same, or prepare same for packaging or sale or other dispensation of aforementioned substances, as well as for any monies, all written papers or articles, or keys, or any other papers that tend to show that crimes relating to violation of Article 220 of the Revised Penal Laws of the State of New York have been committed and if such properties be found that they are brought to the City Court, in the City of Niagara Falls, County of Niagara, State of New York without unnecessary delay.

NOTICE OF AUTHORITY AND INTENT OF PURPOSE BE AND HEREBY ARE DISPOSED OF PURSUANT TO SECTION 690.40 SUB 2 OF THE CRIMINAL PROCEDURE LAW OF THE STATE OF NEW YORK.

DATED: At the City of Niagara Falls,
County of Niagara, State of New York,
This 23rd day of November 2011

CITY COURT JUDGE

(F A C E)

EXHIBIT C

DETAILED POLICE REPORT BY NIAGARA FALLS POLICE DEPARTMENT

Niagara Falls Police Dept 41 Incident Report NY03 10200 Case NF-10475-11 NF-046204-11

NIAGARA FALLS POLICE DEPT 41 INCIDENT REPORT NY0310200 Supp NF-10475-11 NF-046204-11

INCIDENT

7. Report Day	8. Date	9. Report Time	Occurred On/From:	10. Day	11. Date	12. Time	Occurred On/To:	13. Day	14. Date	15. Time
Sat	Nov 26 2011	00:47		Sat	Nov 26 2011	00:47		Sat	Nov 26 2011	01:45

16. Incident Type	17. Business Name	18. Weapon(s)	
WARRANT EXECUTION		DOES NOT APPLY	A.

19. Incident Address(Street No.,Street Name,Bldg. No.,Apt. No.)	20. City,State,Zip(☒C ☐T ☐V)	21. Location Code	
1951 FALLS ST APT #1	NIAGARA FALLS	3202	B.

22. OFF. NO.	LAW	SECTION	SUB	CL	CAT	DEG	ATT	NAME OF OFFENSE	CTS	23. No. of Victims	
1	PL	220.06	-5	D	F	5	O	CRIMINAL POSSESSION OF CONTROLLED	1		C.
2	PL	220.16	-1	B	F	3	O	CRIMINAL POSSESSION OF A	1	24. No. of Suspects	D.
3	PL	220.09	-1	C	F	4	O	CRIMINAL POSSESSION OF A	1		

ASSOCIATED PERSONS

25. Person Type:CO=Complainant OT=Other PI=Person Interviewed PR=Person Reporting WI=Witness NI=Not Interviewed VI=Victim — 26. Victim also complainant ☐Y ☒N — E.

TYPE/NO	NAME(LAST,FIRST,MIDDLE,TITLE)	Date of Birth	STREET NO.,STREET NAME,BLDG.NO.,APT.NO.,CITY,STATE,ZIP	Telephone No.	
				BUS	F.
				RES.	
				BUS	G.
				RES.	
				BUS	H.
				RES.	
				BUS	I.
				RES.	

VICTIM

27. Date of Birth	28. Age	29. Sex	30. Race	31. Ethnic	32. Handicap	33. Residence Status	
/ /		☐M ☐F ☐U	☐White ☐Black ☐Other ☐Indian ☐Asian ☐Unk.	☐Hispanic ☐Unk. ☐Non-Hispanic	☐Yes ☐No	☐Resident ☐Tourist ☐Commuter ☐Military	☐Temp.Res.-Foreign Nat.. ☐Student ☐Other. ☐Homeless ☐Unk/Not Indicated

J.

34. Victim DID receive information on Victim's Rights and Services pursuant to New York State Law ☐Yes ☐No * — K.

SUBJECT/ARRESTEE

35.Type/No	36.Name(Last,First,Middle)	37.Alias/Nickname/Maiden Name(Last,First,Middle)	38. Apparent Condition	
AR	THORNTON, JUSTIN JADE	THORTON,JUSTIN J	☐Impaired Drugs ☐Mental Dis ☐Unk. ☐Impaired Alco ☐Inj/Ill ☐App.Norm.	L.

39.Address(Street No.,Street Name,Bldg.,No., City.,State,Zip)	40.Phone	41. Social Security No.	
17 CRICK CT NIAGARA FALLS NY 14301	Res: (716)243-5729 Bus.:	109-60-5427	M.

42. Date of Birth	43. Age	44. Sex	45. Race	46. Ethnic	47. Skin	48. Occupation	
05/22/1976	35	☒M ☐F ☐U	☐White ☒Black ☐Other ☐Indian ☐Asian ☐Unk.	☐Hispanic ☐Unk. ☒Non-Hispanic	☐Light ☒Dark ☐Unk. ☐Medium ☐Other	UNEMPLOY	N.

49.Height	50. Weight	51. Hair	52. Eyes	53. Glasses	54. Build	55.Employer/School	56. Address	
5 05	130	BLK	BRO	☐Yes ☐Contacts. ☒No	☒Small ☐Large ☐Medium			1

57. Scars/Marks/Tattoos(Describe)	58. Misc.	
NONE		

PROPERTY

59.Victim or Suspect No.	Property Status	Property Type	Quantity/ Measure	Make or Drug Type	Model	Serial No.	Description	Value	
									2
									3
									4

VEHICLE

60. Vehicle Status	61. License Plate No	Full ☐ Partial ☐	62. State	63. Exp. Yr.	64. Plate Type	65. Value	
							5

66. Veh. Yr.	67. Make	68. Model	69. Style	70. VIN.	
					6

71. Color(s)	72. Towed By: To:	73. Vehicle Notes	
			X

NARRATIVE

74. On the above date and time, during the execution of a lawful search warrant signed by the Hon. Judge Vitello, NID Detectives located a quantity of an off white chunk substance in the southwest bedroom of Justin J. Thornton. A field test was conducted on a portion of the said substance and the results were positive for the presence of cocaine. A search of the person of Rian T. Smith, who was present during the execution of the search warrant, revealed a quantity of an off white chunk substance in a knotted plastic bag in his front pants pocket. A field test was conducted on a portion of the substance and the results were positive for the presence of cocaine. Also located were 5 digital gram scales and 4 sublingual Suboxone films. Smith was arrested and charged with criminal possession of a controlled substance in the 3rd and 4th degrees and

8 9 10 11 12 13 12

ADMINISTRATIVE

75.Inquiries(Check all that apply).	76. NYSPIN Message No.	77. Complainant Signature	
☐DMV. ☒Want/Warrant. ☐Scofflaw ☐Crim. History ☐Stolen Property ☐Other			B use cover sheet.

78. Reporting Officer Signature(Include Rank)	79. ID No	80. Supervisor's Signature(include Rank)	81. ID No	
	17045 DET REYNOLDS			85. 1 Page of. 2 Pages

82. Status						83. Status Date	84. Notified/TOT
☐Open	☒Closed(if Closed, check box below).	☐Unfounded				Nov 26 2011	
☐Vict. Refused to Coop.	☒Arrest	☐Pros. Declined	☐Warrant Advised				
☐CBI ☐Juv. - No Custody	☐Arrest-Juv.	☐Offender Dead.	☐Extrad. Declin	☐Unknown			

INCIDENT No.: NF-10475-11 BLOTTER/CC No.: NF-046204-11

ADDITIONAL NARRATIVE

Thornton was arrested and charged with criminal possession of a controlled substance in the 5th degree. The remainder of the substances will be submitted to the Niagara County Forensic lab for further analysis. A dynamic entry was conducted by NFPD ERT without incident or injury to police or civilians.

ADDITIONAL SUSPECT/MISSING/ARRESTED PERSON(s)

Type:ARRESTED PERSON Name:RIAN TYON SMITH Address: 1951 FALLS STREET NIAGARA FA
AKA : Condition: SS #:105-66-9868
Home Phone:990-0974 Business Phone..:
DOB.:04/13/1982 Age: 29 Sex:M Race:BLK Ethnic:NON-HISPANIC Skin:DRK
Height:5 09 Weight:250 Hair:BLK Eyes:BRO Glasses:NO Build:MEDIUM
Occupation:UN Employer:
Scars:WARRIOR RIGHT ARM Misc:

EXHIBIT D

FELONY COMPLAINT AGAINST RIAN T. SMITH

No.....:

FELONY COMPLAINT

Blotter/CC No.:NF-046204-11

se Report No:NF-10475-11 Police Serial No:

Return Date...:11/28/2011

pearance Ticket:

Arrest Number....:NF-04354-11 11-03620 Court Docket No.:

Defendant in Custody from: 01:00 November 26, 2011 to

DEFENDAN

D.O.B.:
(1) 04/13/1982

NIAGARA FALLS CITY COURT
1925 MAIN STREET, NIAGARA FALLS, NY 14305
THE PEOPLE OF THE STATE OF NEW YORK
against

RIAN TYON SMITH (29)
1951 FALLS STREET
NIAGARA FALLS, NY 14305

STATE OF NEW YORK SS
COUNTY OF NIAGARA

DET JAMES T REYNOLDS, Shield 17045, being duly sworn, deposes and says that he is a member of the NIAGARA FALLS POLICE DEPT, County of NIAGARA, New York and that on the 26 day of November, 2011, at about 1:00AM at 1951 FALLS ST NIAGARA FALLS in the County of NIAGARA, New York.

RIAN TYON SMITH

OFFENSE
POSS CONT SUBST 3
CLASS B
FELONY

THE DEFENDANT(S) DID VIOLATE NEW YORK STATE PENAL LAW SECTION § PL 220.16-1

§ PL 220.16 Subdivision 1 - Criminal possession of a controlled substance in the third degree. A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses a narcotic drug with intent to sell it.

TO WIT: That on the above date and time while at 1951 Falls Street apt #1 the above named defendant was knowingly/unlawfully in possession of an off white chunk like substance. Said substance was field tested and weighed by Det. Giaquinto thus having positive results for the presence of cocaine, a narcotic drug and weighing approx. 4.1 grams. Said amount is consist with an amount for the purpose to sell and not for personal use.

This complaint is based on personal knowledge and information and belief, the source being, J. REYNOLDS / J. GIAQUINTO
Any false statements made herein are punishable as a Class A Misdemeanor pursuant to Section 210.45 of the Penal Law.

Prepared By
DET J REYNOLDS

17045 17012

Subscribed and sworn to before me
this 26 day of November, 2011

JAMES T REYNOLDS
DETECTIVE

MORRIS ~~SHAMROCK~~ Brian Morris
DETECTIVE CAPT

D.D. No.....:

FELONY COMPLAINT

Case Report No: NF-10475-11 Police Serial No:

Blotter/CC No.: NF-046204-11

Appearance Ticket:

Return Date...: 11/28/2011

Arrest Number....: NF-04354-11

Court Docket No.:

Defendant in Custody from: 01:00 November 26, 2011 to

NIAGARA FALLS CITY COURT
1925 MAIN STREET, NIAGARA FALLS, NY 14305

THE PEOPLE OF THE STATE OF NEW YORK
against

RIAN TYON SMITH (29)
1951 FALLS STREET
NIAGARA FALLS, NY 14305

D.O.B.:
(1) 04/13/1982

STATE OF NEW YORK SS
COUNTY OF NIAGARA

DET JAMES T REYNOLDS, Shield 17045, being duly sworn, deposes and says that he is a member of the NIAGARA FALLS POLICE DEPT, County of NIAGARA, New York and that on the 26 day of November, 2011, at about 0AM at 1951 FALLS ST NIAGARA FALLS in the County of NIAGARA, New York.

RIAN TYON SMITH

OFFENSE
POSS CONT SUBST 4
CLASS C
FELONY

THE DEFENDANT(S) DID VIOLATE NEW YORK STATE PENAL LAW SECTION § PL 220.09-1

§ PL 220.09 Subdivision 1 - Criminal possession of a controlled substance in the fourth degree. A person is guilty of criminal possession of a controlled substance in the fourth degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more.

TO WIT: That on the above date and time the above named defendant was knowingly/unlawfully in possession of an off white chunk like substance. Said substance was field tested and weighed by Det. Giaquinto thus having positive results for the presence of cocaine, a narcotic drug and weighing approx. 4.1 grams, which is an aggregated weight of one-eighth ounce.

This complaint is based on personal knowledge and information and belief, the source being, J. GIAQUINTO / J. REYNOLDS
Any false statements made herein are punishable as a Class A Misdemeanor pursuant to Section 210.45 of the Penal Law.

Prepared By
DET J REYNOLDS

Subscribed and sworn to before me
this 26 day of November, 2011

17045

JAMES T REYNOLDS
DETECTIVE

MORRIS SHAMROCK
DETECTIVE CAPT

ATTACH TO ACCUSATORY INSTRUMENT

(City) (Town) (Village) of Niagara Falls Court Docket No. 11-46204

PEOPLE OF THE STATE OF NEW YORK
-vs-
DEFENDANT Rian T. Smith (04/13/1982)

DISTRICT ATTORNEY
OF NIAGARA COUNTY

NOTICE TO DEFENDANT OF INTENTION TO OFFER EVIDENCE AT TRIAL
Sections 710.30 CPL and 700.70 CPL

THE PEOPLE intend to offer at trial:

I. STATEMENTS BY DEFENDANT: Evidence of a statement made by the Defendant to a Public Servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

☐ 1. Written Statement (attach copy)

☒ 2. Oral Statement (Specify: date, place, content and to whom made)
On 11/26/2011 at approximately 0050 hours, the above defendant did spontaneously state that he had relapsed and that he had already pissed dirty and it was just smoke.

II. **IDENTIFICATION OF DEFENDANT:** Testimony identifying the Defendant as a person who committed the offense charged by witnesses who have identified him/her as such prior to arrest/trial. Specifically:

☐ 1. Confrontation at or near Crime Scene/Hospital
Date _____ Place _____

☐ 2. Photograph Identification
Date _____ Place _____

☐ 3. Line- Up
Date _____ Place _____

☐ 4. Observation of Defendant upon some other occasion relevant to case
Date _____ Place _____

III. **EAVESDROPPING WARRANT:** Contents of an intercepted communication or evidence derived therefrom.

☐ 1. *Eavesdropping Warrant and* accompanying *Application* for Eavesdropping Warrant (attach copies of both)

FOR POLICE USE

Arresting Agency: Niagara Falls Police Department
Arresting Officers: (names) Reynolds / Giaquinto Unit Narcotics

FOR COURT USE

Arraigning Court: _____
Defendant/Attorney(name) _____ served on (date) _____
By:(names) _____

DA#11

EXHIBIT E

TRANSCRIPTS OF NIAGARA FALLS CITY COURT DATED: FEBRUARY 2, 2012

STATE OF NEW YORK
NIAGARA FALLS CITY COURT

PEOPLE OF THE STATE OF NEW YORK

vs. Docket No. 11-03620

RIAN T. SMITH

Defendant

1925 Main Street
Niagara Falls, New York
February 2, 2012

B e f o r e:

HONORABLE ANGELO J. MORINELLO
City Court Judge

A P P E A R A N C E S:

JAMES JOHN FASO, JR., ESQ.
Appearing on behalf of the Defendant

P r e s e n t:

Rian T. Smith
Defendant

THE CLERK: Rian Smith, Docket 11-03620.

THE COURT: This is scheduled for a preliminary hearing.

MR. FASO: Good morning, Judge.

THE COURT: Why is this scheduled for preliminary hearing on a Thursday morning?

MR. FASO: That's a good question, Judge. I don't know. I didn't schedule it.

THE COURT: Was the hearing run on December 2nd?

MR. FASO: No, Judge. No. He's in on a parole detainer.

THE COURT: That's why the 180.80. You reserved your rights for 180.80.

MR. FASO: Yes, Judge. Yes. What we'd like to do, Judge, and what Mr. Smith is asking the Court, and I know, Judge, it's a little early on in this, he'd like to be screened for the diversion program. Whatever he needs to do today to begin that we'd like to --

THE COURT: Well, I think what we should do is this. Until we have a plea, and he's requested it formally through the plea, we can't do anything. So what he might be able to do is ask for drug court today. I can schedule a screen and then once we are -- we have the arraignment, we can then make the request at that point,

because you've got to be -- you've got to make your request between arraignment and disposition.

MR. FASO: Yes, Judge.

THE COURT: Can't be prearraignment.

MR. FASLO: He's done on parole -- he's currently being held on a parole detainer, Judge, until March 16th.

THE COURT: Okay. Then are you requesting a drug screen?

MR. FASO: Yes, Judge.

THE COURT: Drug screen will be February 3rd. Drug court will be February 9th. Now, at this point do you want to waive your right to a preliminary hearing and schedule this for an SCI?

MR. FASO: Yes, Judge, we'd like to do that.

THE COURT: Waive preliminary hearing.

MR. FASO: And, Judge, if you can give us -- if the Court's available sometime close to March 16th or so.

THE COURT: I was thinking of March 22nd.

MR. FASO: That's perfect, Judge. Thank you.

THE COURT: March 22nd for an SCI plea. And we can at least get him pre-started. Mr. Smith, if you had asked for this when you first were in front of me about five years ago maybe you wouldn't be here today.

MR. SMITH: Probably right, Mr. Morinello.

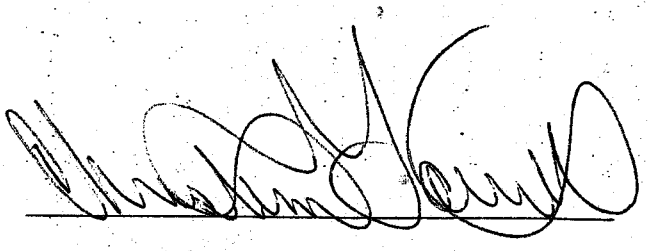
THE COURT: Okay. Have a seat.

MR. FASO: Thanks, Judge.

THE COURT: You're welcome.

* * * * *

This is to certify that the foregoing is a correct transcription of the proceedings recorded by me in this matter.



CHRISTINE I. GARRETT
Court Reporter

EXHIBIT F

TRANSCRIPTS OF NIAGARA FALLS CITY COURT DATED: MARCH 22, 2012 WHERE DEFENSE COUNSEL COERCED MR. SMITH INTO SIGNING A WAIVER OF INDICTMENT PURSUANT TO CPL § 195.10 AND CPL § 195.20

NIAGARA FALLS CITY COURT TRANSCRIPTS, DATED: MARCH 22, 2012, PAGES; 2-6

THE CLERK: Rian Smith, Docket 2012-089, scheduled for arraignment.

MR. FASO: Good morning, again, Judge.

THE COURT: Good morning.

MR. FASO: Judge, we don't have a plea that's been quite worked out yet. We do, however, know that Mr. Smith wants to participate in the 216 program, Judge.

THE COURT: Will we be arraigning him today? He hasn't been screened yet.

THE CLERK: He was screened for drug court, Judge. He couldn't go into drug court until we arraigned him on the County Court --

MR. FASO: He also, Judge, had a parole detainer, which has now been lifted as of last Monday and that may have also been a problem with drug court.

(Discussion held off the record.)

THE CLERK: This is what she told me this morning. He has to be represented on that. If the E felony is reduced --

THE COURT OFFICER: Judge, do you want me to try to get her into here?

THE COURT: Yeah, have her come in.

Mr. Faso, could you approach for a second, please?

(Discussion held off the record.)

THE COURT: Mr. Andrews -- is Mr. Andrews in the room?

THE COURT OFFICER: No, he's not, Judge.

THE COURT: We're going to recall this. I need somebody to sign the Superior Court Information, Mr. Faso --

MR. FASO: That's fine, Judge. Thank you.

THE COURT: -- so we can proceed at this time.

MR. FASO: Judge, I'll go down and get Mr. Andrews.

THE CLERK: I just spoke with him. He's on his way.

(Whereupon, further proceedings were held.)

THE CLERK: Recalling Rian Smith, Docket 2012-089.

THE COURT: Mr. Andrews, I need for you to sign. Now, it's my understanding that we are going to arraign on the SCI and make a formal request for the 216.

MR. ANDREWS: That's my understanding, Judge, however --

(Discussion held off the record.)

THE COURT: Mr. Smith, would you raise your right hand?

R I A N S M I T H, having been duly sworn, testified as follows:

MR: SMITH: I do.

THE COURT: Mr. Faso, I'm going to hand you up Waiver of Indictment and ask if you'd review that with your client and have him sign in the appropriate places.

Mr. Smith, I'm going to show you Waiver of Indictment and ask if that is your signature on the line above defendant?

MR. SMITH: Yes, Your Honor.

THE COURT: Did you just sign this in open court this morning?

MR. SMITH: Yes, I did, Your Honor.

THE COURT: Sir, do you understand that you have a right to be prosecuted by a legally sufficient indictment? What that means, sir, is you have a right to have the People present this matter to a Grand Jury. You can sit in and listen to the testimony being given. You, thereafter, would have a right to testify if you want. Thereafter, the grand jurors would vote as to whether to indict you or not. Do you understand that?

MR. SMITH: Yes.

THE COURT: You can also waive the right to be prosecuted by a legally sufficient indictment and proceed by Superior Court Information, which is what we are here for today. Do you understand that?

MR. SMITH: Yes, Your Honor.

THE COURT: Have you discussed this with your attorney?

MR. SMITH: Briefly.

THE COURT: All right. But do you have any questions as to what this means, waiving your right to be prosecuted by a legally sufficient indictment?

MR. FASO: He understands, Judge.

THE COURT: You understand? Sir, is that a yes?

MR. SMITH: Yes. Yes, Your Honor.

THE COURT: Do you waive your right to be prosecuted by a legally sufficient indictment?

MR. SMITH: Yes, Your Honor.

THE COURT: Waiver is accepted as the Court is satisfied the Waiver complies with the provisions of 195.10 and 195.20 of the Criminal Procedure Law.

By Superior Court Information 2012-089, your client, Mr. Smith, is accused of having committed the crime of criminal possession of a controlled substance in the Third Degree in violation of Section 220.16-1 of the Penal Law of the State of New York, class B felony. Waive a formal arraignment, enter a not guilty plea?

MR. FASO: Yes, Your Honor. Thank you.

THE COURT: Now, Mr. Smith, it's my understanding that you are requesting to be screened for

the 216 diversion program, is that correct?

MR. SMITH: Yes.

THE COURT: Do you understand, sir, that depending on what that result is it will be -- that will determine whether you're eligible for the program or not, do you understand that?

MR. SMITH: Yes.

THE COURT: Sir, do you understand also that you will have to sign waivers to release the information to your attorney, the district attorney and to the Court?

MR. SMITH: Yes.

THE COURT: I will grant his request. We will do a -- so I'm going to schedule this for April the 5th at two o'clock.

MR. FASO: Judge, can I have a different day than that?

THE COURT: Sure. Aren't you on that afternoon or are you away? No, I'm sorry. You're away. I apologize. I'm sorry, Mr. Faso, I didn't look. What I was trying to do is give you a date sooner than May, but it looks like we can't do this until May 3rd. May 3rd, SCI plea.

MR. FASO: Judge, can I be heard on bail?

THE COURT: Yes.

MR. FASO: We had -- Mr. Smith tells me, I

STATE OF NEW YORK : COUNTY OF NIAGARA
NIAGARA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs

SUPERIOR COURT INFORMATION

RIAN T. SMITH

SCI No. 2012-089

Defendant.

COUNT I

I, MICHAEL J. VIOLANTE, the District Attorney of Niagara County, New York, by this Superior Court Information, do hereby accuse the defendant, RIAN T. SMITH, with having committed the crime of Criminal Possession of a Controlled Substance in the Third Degree, in violation of §220.16(1) of the Penal Law of the State of New York, a class "B" felony committed as follows:

The defendant, on or about November 26, 2011, in Niagara County, knowingly and unlawfully possessed a narcotic drug with intent to sell it, that is: the defendant possessed cocaine with intent to sell it.

Dated: March 22, 2012

ADA for Michael Violante

MICHAEL J. VIOLANTE
Niagara County District Attorney

2012 MAR 21 AM 8:45

RECEIVED
NIAGARA FALLS CITY COURT

7

EXHIBIT G

TRANSCRIPTS OF NIAGARA FALLS CITY COURT DATED: MAY 3, 2012 WHERE DEFENSE COUNSEL DIRECTED COERCED AND ADVISED MR. SMITH INTO SIGNING A WAIVER OF: APPEAL AND POST-JUDGMENT REVIEW RIGHTS, AND A JUDICIAL DIVERSION CONTRACT (DRUG COURT)

NIAGARA FALLS CITY COURT TRANSCRIPTS, DATED: MAY 3, 2012, PAGES; 2-11

THE CLERK: Rian Smith, Docket 2012-089 scheduled for SCI plea.

THE COURT: Mr. Faso, good morning.

MR. FASO: Good morning again, Judge. Judge, Mr. -- we may need to wait for Mr. Andrews to get back into the courtroom, Judge. There's a plea that's been extended. He's been screened for diversion. I believe he's eligible.

THE COURT: He is eligible. We have his contract prepared. We have his interim probation documents prepared.

MR. FASO: We'd be ready to go today, Judge, as soon as Mr. Andrews gets back.

THE COURT: Okay. Mr. Smith, I did get a letter from you asking me to give you a different attorney. You're not getting a different attorney.

MR. SMITH: I was just upset, Your Honor.

THE COURT: I figured that. Okay. Listen, you're going through a tough time. I'm sure you're having some withdrawal, okay? This is your chance, all right? And I remember, you were before me on that dog case, okay?

MR. SMITH: Yeah.

THE COURT: Remember where you and your friend had that major situation, okay? That should have been a red flag to you, the violence you showed on that dog,

okay? But we're giving you this chance. We want you to think about it because, if not, you're subject to going to prison for up to nine years.

MR. FASO: Judge, it might be twelve. He's a second felony offender.

THE COURT: Second felony offender, okay. I had him as a first. I thought the other was a YO. So it could be up to twelve. We will go through that later. So what we're telling you is this. That the chance we're giving you, you should use wisely because, you know, you're a pretty smart individual. You're not a dummy, okay? You're a very smart individual. You understand what's happening, you know the Court system and you don't want to spend a lot of time in jail, do you?

MR. SMITH: No, Your Honor.

THE COURT: So with that being said, we're going to recall this and we can go through with it. And I'm glad you're taking this opportunity to try and improve yourself, Mr. Smith.

MR. SMITH: Thank you.

(Discussion held off the record.)

THE CLERK: Recalling Rian Smith.

THE COURT: Mr. Smith, would you raise your right hand, please?

R I A N S M I T H, having been duly sworn, testified as

follows:

MR. SMITH: I do.

THE COURT: Thank you. On March 22, 2012, a not guilty plea was entered on 220.16, B felony, criminal possession of a controlled substance. Subsequent to the not guilty plea and being duly sworn, Mr. Smith did, in fact, request consideration for the 216 diversion program. Mr. Smith was, thereafter, interviewed. He admitted his use of elicit substances. He admitted a history of substance abuse and/or treatment. And he also admitted that the elicit substance has been a contributing factor to his criminal behavior, therefore, judicial diversion would effectively address his sentencing and issues. I find that he is eligible. I am familiar with his history, as I had stated earlier in the proceeding. He reports that his primary drug is cocaine and it began when he was twenty-one, progressed to daily use at approximately a hundred dollars a day. He last used cocaine purportedly on 11/26/2011. He did have a lawyer for that. Mr. Smith is duly sworn. I'm going to hand up to you, Mr. Faso, Waiver of Indictment, Waiver of Right to Appeal. I'll ask you to review those with your client.

MR. ANDREWS: Judge, for the record, we had previously discussed a plea to the sole count of the Superior Court Information, that being a criminal

possession of a controlled substance in the Third Degree. After further discussions with Mr. Faso, the plea offer has changed to that of a criminal possession of a controlled substance in the Fifth Degree pursuant to 220.06, subdivision five, a class D felony. I had provided the Court, this morning, with an amended Waiver of Right to Appeal to reflect that. That would be conditioned upon the defendant signing that Waiver of Right to Appeal, also admitting his status as a second felony offender pursuant to 421. And I have provided the Court with that documentation as well.

THE COURT: All right. Mr. Andrews, so that what was originally presented to the Court, the 220.16, criminal possession of a controlled substance, is not what he's going to be pleading to?

MR. ANDREWS: That's correct, Judge.

THE COURT: All right. What's the plea going to be to?

MR. ANDREWS: 220.06, criminal possession of a controlled substance in the Fifth Degree, class D felony. And I apologize, Judge, that further discussions this morning facilitated the change in the plea offer. Certainly, if we would have known that prior to this morning, we would have notified the Court.

THE COURT: And on that he can do anywhere from

one to twelve years?

MR. FASO: On the B, Judge.

MR. ANDREWS: On the B it would be twelve, Judge.

MR. FASO: Twelve. That's the top end.

THE COURT: The top end because he's got a prior.

MR. FASO: Yes, Judge.

MR. ANDREWS: Judge, we believe that it's four years maximum on what he would be pleading to.

THE COURT: It's how many?

MR. FASO: I think four, Judge. You have the chart though and I left my chart downstairs.

THE COURT: All right. He's pleading to a B felony?

MR. FASO: No, Judge. A D felony.

THE COURT: Oh, that's a D.

MR. ANDREWS: Judge, the SCI is to -- the count is to a D felony. And originally we had told the Court that the offer would be to the B felony.

THE COURT: Right. That's how we prepared all the documents.

MR. FASO: Yes, Judge. We apologize.

THE COURT: It's okay.

MR. FASO: With the arresting officers --

THE COURT: I have to get it straight so we can prepare the correct documents. So he's going to be pleading to the D felony, 220.06, criminal possession controlled substance, Fifth. A D with a prior nonviolent, so it's one and a half to four?

MR. ANDREWS: Yes, Your Honor.

MR. FASO: Four, yes.

THE COURT: And that's a determinate.

MR. FASO: Yes, Judge. That's a determinate sentence.

THE COURT: One and a half to four years plus --

MR. FASO: I think it's two years.

THE COURT: One to two years post release. Just so the Court understands, should he successfully complete the program, he'll be allowed to -- this plea will be withdrawn. It will be dismissed. And by prosecutor's information, he will be charged with a criminal possession controlled substance, Seventh Degree, and allowed to plead to that, is that correct?

MR. ANDREWS: That's correct, Your Honor.

THE COURT: And he'll be sentenced on that?

MR. FASO: Correct, Judge.

THE COURT: This way I can explain it all.

MR. FASO: And that's our understanding, Judge.

THE COURT: Okay. Previous to today's date, Waiver of Indictment was explained and signed on March 22, 2012. And at that time is when we proceeded to arraign him on that charge. We are now here for purposes of entering a plea. Before I can do that, Mr. Smith, I'm going to show you page two of Waiver of Right to Appeal and Postjudgment Review Rights and ask if that is your signature on the line above defendant?

MR. SMITH: Yes, Your Honor.

THE COURT: Did you sign that in open court this morning?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Mr. Smith, do you understand that you're giving up your right to have a higher court review what occurred in this matter?

MR. SMITH: Yes, Your Honor.

THE COURT: Except for constitutional speedy trial issues, competency matters or any illegal sentence I might impose, other than those three issues, you're giving up your right to appeal?

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. You're also giving up your right to ask for relief an appeal could accomplish by means of a coram nobis, a Criminal Procedure Law 330 motion or a Criminal Procedure Law 440 motion.

MR. SMITH: Yes, Your Honor.

THE COURT: You understand that?

MR. SMITH: Yes, Your Honor.

THE COURT: Your attorney has explained this to you?

MR. SMITH: Yes, Your Honor.

THE COURT: It's your intent that this plea is to end all litigation on this matter --

MR. SMITH: Yes, Your Honor.

THE COURT: -- is that correct? Now, are you a United States citizen?

MR. SMITH: Yes, Your Honor.

THE COURT: I'm redacting number seven. That shall not be part of this. Now, you're not giving up your rights to anything that has -- that occurs after today's date. If something were to occur after today's date, you can't give up your right to something that is in the future. Do you understand that?

MR. SMITH: Yes, Your Honor.

THE COURT: So you're giving up your right to appeal anything up to this date?

MR. SMITH: Yes, Your Honor.

THE COURT: Also, by case law, the State of New York has stated that there are certain rights you cannot ever give up and those rights will always be protected.

Do you understand that?

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. Sir, I find that the waiver is knowingly signed, that we've explained it. Do you have any questions?

MR. SMITH: No, Your Honor.

THE COURT: Okay. I'm also going to adjust the first page of the waiver that was submitted this morning. Bear with me. No, it is correct. Criminal possession in the Fifth Degree, so everything is correct on that. Now, before we can go any further, by information under Section 421 of the Criminal Procedure Law, it is alleged that you have a prior felony conviction to the count of -- that you were convicted of an attempted criminal possession of a controlled substance in the Fifth Degree, a class E felony, in violation of New York State Penal Law Section 220.06, subdivision five, on or about January 26th, 2005 in the County of Niagara and State of New York. Do you desire a hearing or do you waive your right to a hearing and admit to a prior felony?

MR. SMITH: I admit.

THE COURT: I find that the County Court of Niagara having caused said Rian Smith to be brought before the Court, he then and there having been informed by said court of the allegations contained in the foregoing

information, and of his or her rights pursuant to Section 421 of the Criminal Procedure Law, and that's 400.21, the Court having inquired of said defendant whether he is the same person charged in the information, defendant did say he was the same person, waived his right to a hearing. I find that he has a prior felony conviction that now mandates a second felony conviction sentence on his current charges. Now, there has been considerable discussion this morning regarding what a plea offer would be to this defendant, and it's my understanding, Mr. Smith, that you do intend to avail yourself of the reduced charge, for plea purposes, of 220.06, criminal possession of a controlled substance in the Fifth Degree, is that correct?

MR. SMITH: Yes, Your Honor.

THE COURT: Before I can be satisfied of taking your plea, I must know that you fully understand what is occurring here and what rights you are giving up.

MR. SMITH: Yes, Your Honor.

THE COURT: Give me your full name, address and age.

MR. SMITH: Rian T. Smith. Address, 835 Cleveland Avenue, Niagara Falls, New York. Age thirty. Born 1982.

THE COURT: Can you read and write the English

STATE OF NEW YORK
COUNTY COURT : COUNTY OF NIAGARA

THE PEOPLE OF THE STATE OF NEW YORK

v.

WAIVER OF APPEAL
AND POST-JUDGMENT
REVIEW RIGHTS

RIAN T. SMITH

D.A. CASE FILE NO.
2012-089

Defendant.

I, RIAN T. SMITH, the defendant named above, having conferred with my attorney, James J. Faso, Esq., do hereby knowingly, intelligently and voluntarily state the following:

1. I have been charged by Superior Court Information with the crime(s) of: Criminal Possession of a Controlled Substance in the Third Degree in violation of Penal Law Section 220.16(1), punishable by a maximum sentence of twelve (12) , and a period of post-release supervision of up to two years.

2. The People have offered me the opportunity to plead to: Criminal Possession of Controlled Substance in the Fifth Degree in violation of Penal Law Section 220.06(5) in full satisfaction of the charges against me. There is no promise regarding my sentence.

3. I am accepting the plea.

4. As part of the plea agreement, I hereby waive my rights to appeal, including without limitation any possible claim that the Court's decisions up to this point were in error, any pretrial suppression motions that I may have had, and any possible claim that the sentence imposed by the Court is harsh and excessive (even if the

maximum legal sentence is imposed).

5. Additionally, I am waiving my rights to appeal any resolved or undecided legal issue with the exception of the following:

(1) Constitutional speedy trial issues;

(2) Competency matters;

(3) An **illegal** sentence, if imposed by the Court.

6. Finally, I am also waiving my rights to seek a review of these same issues by means of Coram Nobis, CPL 330 motion or CPL 440 motion. This plea is intended to end all litigation on this case.

7. I acknowledge my understanding that this plea may subject me to Federal deportation (if I am an alien and not a United States citizen), that I may be subject to periods of post-release supervision of up to five years, and that I may be subject to the Sex Offender Registration requirements (if I am pleading to a sexual offense).

Redacted

MAY 03 2012

8. I accept this plea offer and execute this document in open court, freely and voluntarily, after having consulted with my attorney.

Signed: _____ 5/3/12
Defendant Date

Witness: _____ 5/3/12
Attorney for Defendant Date

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NIAGARA

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : **JUDICIAL DIVERSION CONTRACT**

RIAN SMITH BOF RSD : SCI No.:2012-089

Defendant

Date: May 3, 2012

The City of Niagara Falls Drug Court, the Niagara County District Attorney and the above-named defendant acknowledge that the defendant has plead guilty to the following charge(s) in Niagara County Court.

PLEA OF GUILTY TO:	AGREED SENTENCE UPON SUCCESSFUL COMPLETION	AGREED SENTENCE UPON REMOVAL
PL220.06 - D Felony Criminal Possession of a Controlled Substance 5th	Dismissal of Charge	Definite sentence of 1-1/2 - 4 years State Prison And Post Release Supervision of 1-2 years
Will be allowed to plead to an A Misdemeanor - 220.03 Criminal Possession Controlled Substance 7th Degree	Conditional Discharge	N/A

Upon removal from treatment, defendant could serve up to four (4) years in state prison plus one (1) to two (2) years post release supervision.

Defendant: By signing this Contract and agreeing to enter a drug treatment program, I understand and agree to the following:

1. I acknowledge that I have a substance abuse problem and recognize that I need help to treat this disease.
2. I have reviewed the Drug Court Participant Handbook and will follow the rules and procedures set forth therein.
3. I will enter and remain in a drug treatment program and lead a law abiding life until the successful completion of my Treatment Court Mandate.
4. I agree that in the event that I commit any infraction(s) or violation(s) of Drug Court rules that would result in a sanction, as outlined in the Drug Court Participant Manual, the Court may immediately make necessary changes in my treatment plan and may impose sanctions that will result in revocation of my bail or release status and result in my incarceration. I also understand that any intermediate jail sanction or series of jail sanctions may not exceed the maximum penalty for the crimes with which I was originally charged. I also knowingly and voluntarily waive my rights under CPL §§170.70 and 30.30(2) should the Court revoke my bail or release status as part of a

sanction for infractions to program rules. This waiver of my statutory rights will remain in effect for as long as I continue to participate in the Drug Court Diversion Program.

5. I understand that if I violate the terms of this Contract and/or fail to work diligently towards the goals of this program, that my case may be returned for prosecution outside Drug Court and I agree that there is no right to appeal to any other court a judicial determination of dismissal from the Drug Court Diversion Program.
6. I understand that if I abscond from my treatment program, the Court issues a warrant for my arrest and I am brought back to court involuntarily by law enforcement personnel, this may result in my immediate termination from the Drug Court Diversion Program.
7. I understand that any new arrest may result in immediate termination from my treatment program and the Drug Court Diversion Program.
8. I understand that if I successfully complete my Court Mandate, the felony charges against me are dismissed and the plea of guilty to the felony(ies) is vacated, that I will stand convicted of the Class A Misdemeanor, Petit Larceny, only.

Drug Court Participant/Defendant

Attorney: By signing this Contract, I hereby certify that I am the attorney of record (or authorized to appear on behalf of the attorney of record) for the above-named defendant and that I have explained the defendant's statutory and constitutional rights affected by this Contract to the defendant and that the defendant has freely and knowingly executed the waivers contained in this Contract.

Attorney for the Defendant

Judge: By accepting your plea of guilty and promise to enter a drug treatment program, the Drug Court agrees to the following:

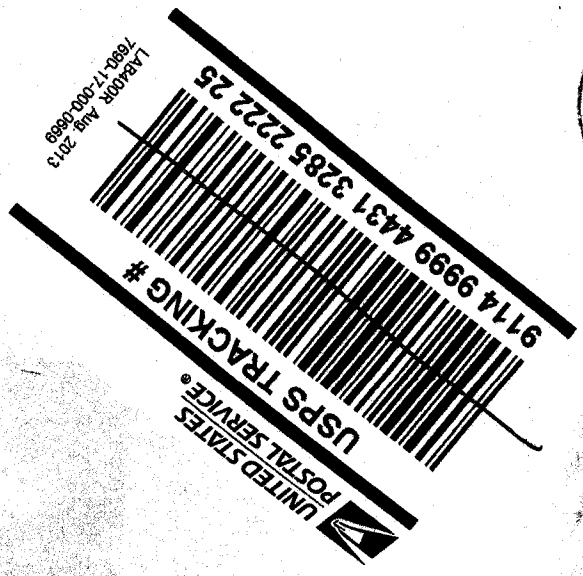
1. Drug Court will assist you to overcome your addiction.
2. The clinical staff will assess your treatment needs, refer you to an appropriate provider and meet with you regularly to discuss your recovery.
3. The clinical staff will refer you to necessary mental and physical health services.
4. The Drug Court will hold you accountable for your actions. Sanctions, including jail time, will be imposed for failure to comply with the Court's rules and directions as outlined in the Drug Court Handbook. Achievements in recovery will be rewarded and acknowledged through the different phases.
5. The Court will terminate your participation in the Drug Court Diversion Program if you fail to complete the Mandate.
6. Drug Court will hold to the agreed upon sentence upon your successful completion of the Court's Mandate.

HON. ANGELO J. MORINELLO
Acting County Court Judge,
County of Niagara

11

RYAN T. SMITH DIN. # 12-B-3748
COLLINS CORRECTIONAL FACILITY
P.O. BOX 340
COLLINS, NEW YORK 14034-0340

CLERK, UNI
UNITED ST
BUFFALO



LEGAL MAIL

4 of 4

496

ED STATES DISTRICT COURT
FTES COURTHOUSE
NEW YORK 14202-3350

UNITED STATES POSTAL SERVICE

U.S. POSTAGE
PAID
COLLINS,NY
14034
AUG 10, 15
AMOUNT
$0.00
00098085-06

WDNY
AUG 11 2015
BUFFALO

PRIORITY MAIL
UNITED STATES POSTAL SERVICE®
www.usps.com
Label 107R, February 2006