

MEMORANDUM IN SUPPORT OF JURISDICTION  
IN THE SUPREME COURT OF OHIO

State of Ohio	:	On Appeal from the Belmont
Appellee,	:	County Court of Common Pleas,
	:	Court of Appeals, Seventh
v.	:	Appellate Dist.
	:	Supreme Court Case No. 23-1498
Andre M. Lanier,	:	C.P. Case No. 15 CR 28
Appellant	:	Appeals Case No. 22 BE 0070
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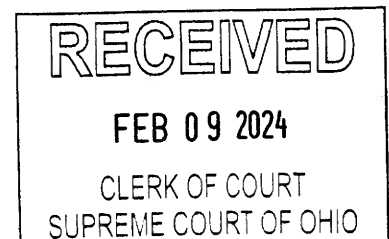
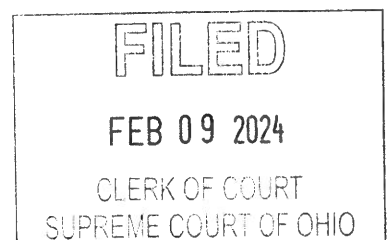
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ANDRE M. LANIER

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Prosecuting Attorney  
By  
(COUNSEL OF RECORD)  
Dave Yost, Ohio Attorney General  
30 East Broad Street 14th Floor  
Columbus, Ohio 43215  
Attorney Andrea K. Boyd, Special Prosecuting  
Attorney  
Assistant Prosecuting Attorney  
30 East Broad Street 23rd Floor  
Columbus, Ohio 43215  
COUNSEL FOR APPELLEE, STATE OF  
OHIO

Andre M. Lanier, Inmate No. 787833  
15708 McConnellsville Road  
Caldwell, Ohio 43724

COUNSEL FOR APPELLANT,  
ANDRE M. LANIER, PRO SE



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Opinion of the Belmont County Court of  
Appeals Seventh Appellate District

1

August 31,2023

**IN THE SUPREME COURT OF OHIO**

<b>State of Ohio,</b>	:	<b>On Appeal from the Belmont Court of</b>
<b>Appellee</b>	:	<b>Appeals, Seventh Appellate District</b>
	:	
<b>V.</b>	:	<b>Ohio Supreme Court Case No. 23-1498</b>
	:	
<b>Andre M. Lanier,</b>	:	<b>C.P. Case No. 15 CR 28</b>
<b>Appellant</b>	:	
	:	<b>Appeals Case No. 22 BE 0070</b>

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ANDRE M. LANIER**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL  
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

This case presents several Critical and substantial issues for the future of those of citizens in the State of Ohio.

- (1) Whether appellate courts abused their discretion by allowing the trial court to abuse its discretion. When a case is vacated, remanded and reversed under certain conditions the defendant should be given a new trial.
- (2) Whether Defendants can receive a fair trial or plea bargain when Judicial and Prosecutorial vindictiveness exist.
- (3) Whether a search warrant has validity when there is no evidence to substantiate the allegations in the affidavits and indictment.
- (4) Whether a status hearing conference can be held if defendants counsel is not informed nor present at hearing.
- (5) Whether a Suppression Hearing once granted and Scheduled, that hearing should take place, the timeliness issue arguably becomes moot once the trial court scheduled and conducted an evidentiary hearing; thus, it acted unreasonably in denying the motion on the procedural grounds that the motion was untimely.
- (6) Whether multiple issues of ineffective assistance counsel exist when the defendants first trial attorney withdraws a motion to suppress on a search warrant that is clearly defective and invalid because its basis is a bare bones affidavit, and second attorney on remand failed to file to motion to of leave to file motion out of rule.
- (7) Can appellants second counsel be effective when the trial court prevents that counsel from properly defending the defendant in trial or plea bargain.
- (8) Whether a defendant can enter a plea Knowingly, intelligently, and Voluntarily because his counsel is improperly informed and discovery is prevented from getting to

defendant's counsel on time or in a timely manner because of MATRIX functional issues with the Ohio Attorney General system.

The Interest of Justice will always be the foundation of the justice system in the State of Ohio and in America. Living in a place that is governed by law and we are a people that must abide by the law therefore, we are in the interest of justice and justice has interest in all people. The Pledge of Allegiance States, "with life, liberty and justice for all", This clearly suggest that all people has an interest in justice and justice has interest in them.

Even though law is open to interpretation and discretion. That discretion must not be abused and used only to benefit one side, or when it is only convenient for the prosecutor or convenient judicially. When only one side is able to benefit from judicial economy or judicial discretion it can and will always prejudice to the defendant harming the outcome of their case and maybe even their life.

The (emphasis on "the") Interest of Justice must be applied fairly and equally. Justice is blind, and because it is blind it should have no respect of person of whom it chooses to serve. Justice must serve everyone whether it be in a criminal or civil matters. It must be equal and distributed fairly and legally. We ensure this when matters come before the courts a judge should not look for a technicality that is harmful to a defendant, for the same should apply from the law of ambiguity. When the conflict Ambiguity exist it should be construed for the defendant, especially when the defendant is asking for more time to prepare his or her defense. Especially when the Judge can allow it because it's in the rules. By allowing a discretion clause to shut out a defendant and the defendants counsel when it is clear that for the "Interest of Justice" a Judge may extend time. That discretion should be liberally granted.

Everyday there are procedures that must be followed because of the interest of justice. When those procedures fail, according to the courts, they must start all over again.

There is a hierarchy of the courts in the land such as the court of common pleas, the appellate courts, the supreme court and the on to the federal courts and if people feel they have not been given granted proper relief there, it is the highest court in the land, The United States Supreme Court. It is the responsibility and duty of the lower courts to make sure that the opinions judgments of the higher courts are carried out properly. There is also a responsibility and duty incumbent to of the higher courts to ensure that they have plainly given the instruction to what is to be carried after they have rendered a judgement. This is important because when a decision is made by the appellate court and the trial court is left to interpret the ruling it then allows the court to become vindictive, malicious and capricious in the next step of procedural processes. A court when given an order by the higher court cannot be left to use its own opinion, but must make decision consistent with the opinion of the court giving the order. There is no hard and fast rule by which an abuse of discretion may be determined, but in general an exercise of discretion, not to amount to an abuse, must be legally sound; there must be an honest attempt by the court to do what is right and equitable under the circumstances and the law, without the dictates of whim or caprice.

A defendant and or appellant have constitutional rights of due process, when due process is violated a defendant cannot receive a fair unbiased trial or not even a fair plea. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. A defendant is heavily impacted when those rights are violated after the first decision of the appellate court to vacate, reverse and remand. , such as the when an appellate court vacates, reverses and remands a case back to the trial court and the trial court does not carry out the instructions of the appellate court or the trial court misrepresents those instructions choosing to become vindictive along with the prosecutor to prevent the defendant from a fair trial rather intentionally or unintentionally.

An appellate court's review of a trial court's decision under Crim. R. 32.1 is limited to a determination of whether the trial court abused its discretion. In order to find an abuse of that discretion, an appellate court must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. The good faith, credibility and weight of the movant's assertions in support of the Crim. R. 32.1 motion are matters to be resolved by the trial court. *State v. Thomas*, 2023-Ohio-3903, 2023 Ohio App. LEXIS 3747, 2023 WL 7040295 (Ohio Ct. App., Ashland County October 26, 2023). In this case mentioned above the appellant's case was reversed, remanded and vacated along with the plea. As such the applicant was taken back to court and re-arraigned and it was at least set for a new trial.

When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. However, even when that instruction is not given in the opinion verbatim a trial court should presume that the decision consistent with the opinion is to set the case for retrial, an appellate courts record is reasonable in that most minds might reach that conclusion without the direct or verbatim instruction. If the trial court was unclear to the instructions given it should have asked the court to clarify the instruction not to make an assumption as to what the opinion was by the appellate court

When a case is remanded, vacated and reversed at minimum for the reason set forth in herein it should be set for retrial, not just resentencing , the court of appeals functions as the thirteenth juror, and after reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial must be ordered. In determining whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weight the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury or trier of fact clearly loses its way and thereby creates such a manifest miscarriage of justice that the

conviction must be reversed and a new trial must be ordered. *City of Norwalk v. Giannini*, 2023-Ohio-4133, 2023 Ohio App. LEXIS 3978, 2023 WL 7899980 (Ohio Ct. App., Huron County November 9, 2023) In this case the plea was remanded, vacated and reversed. Thus suggesting that there was a clearly a manifest of injustice.

A defendant in any case has a right to a strong and vigorous defense, and effective counsel. When defendant counsel fails to raise even the most basic arguments in a case the Defendants counsel should be rendered ineffective. A person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. **Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 1984 U.S. LEXIS 79, 52 U.S.L.W. 4565 (U.S. May 14, 1984).**

In this case, the first trial, the attorney chose to withdraw the motion to suppress, the motion to suppress is the first fundamental key to proving defective indictment. A motion to suppress is a vehicle for getting a pretrial ruling regarding the admissibility of evidence. The specific goal is to have certain evidence excluded from being admitted at trial. The most common reasons for the exclusion is that the evidence was obtained by the prosecution as a result of a violation of one or more of the defendant's constitutional rights, most commonly the rights associated with the Fourth, Fifth and Sixth Amendments to the United States Constitution and their counterparts in the Ohio Constitution.

### **STATEMENT OF CASE AND FACTS**

This cases arises on January 14, 2015 when a Law enforcement of Belmont County presented a bare bones in insufficient Affidavit to search a local property not belonging to the defendant. Law presented the case for indictment to the Belmont county grand jury and an Indictment was handed down. The charges and sentence were as follows: one count of possession of drugs, a violation of R.C. 2925.11(A)(C), a felony of the first degree (cocaine); one count of trafficking in drugs, a violation of R.C. 2925.03(A)(2)(C)(4)(f), a felony of the first degree (cocaine); one count of possession of drugs (ethylone, a substituted cathinone), a violation of the R.C. 2925.11(A)(C)(1)(c), a felony of the second degree; and one count of trafficking in drugs (ethylone, a substituted cathinone), a violation of R.C. 2925.03(A)(2)(C)(1)(d), a felony of the second degree. At the sentencing hearing, the trial court merged counts one and two, and counts three and four, and imposed an eleven-year sentence on counts one and two, and an eight-year sentence on counts three and four, to be served concurrently.

On or about January 14, 2015, Appellant was arrested following the execution of a search warrant. On March 5, 2015, Appellant was indicted and bound over to the Belmont County Court of Common Pleas. Appellant was arraigned on March 5, 2015.

The original motion to suppress and dismiss challenging the sufficiency of the warrant was filed on July 29, 2015. The motion challenged the establishment of probable cause for the search warrant, based on the underlying affidavit. Appellant argued that the warrant was based entirely on information from a confidential informant, and the affidavit did not provide the informant's basis of knowledge or establish his veracity and lacked any additional corroborating evidence. Next, Appellant argued that the warrant lacked specificity as it identified an entire apartment, without limiting the search to a specific room. Finally, Appellant asserted that the good faith exception did not apply.

However, shortly after the motion to suppress and dismiss was filed, Appellant first attorney withdrew the motion as a part of a plea deal with the state unknowingly to the appellant. The withdrawal of the motion in exchange for his plea is memorialized in the judgment entry on the plea filed on August 10, 2015. Pursuant to Appellant's agreement with the state, Appellant pleaded guilty to the amended charges of possession of drugs in violation of R.C. 2925.11(A)(C)(4)(d), which reduced count one from a first-degree felony to a second-degree felony, and trafficking in drugs in violation of R.C. 2925.03(A)(2)(C)(1)(c), which reduced count four from a second-degree felony to a third-degree felony. The state dismissed the other two counts.

At the April 19, 2021 hearing, Appellant requested a one-month continuance in order to retain counsel. The motion was granted and Appellant was held without bond until May 19, 2021, when he and his counsel appeared in court to review the PSI. At the sentencing hearing on June 17, 2021, the trial court imposed an eight-year sentence on the amended first count and a three-year sentence on the amended fourth count, to be served concurrently.

Appellant filed a timely appeal. On June 10, 2022, Appellant entered our opinion and judgment entry, which reversed and vacated Appellant's convictions and sentence, based on the trial court's failure to inform Appellant that by entering his plea he was waiving his right to jury trial, as opposed to a "speedy and public trial." *State v. Lanier*, 7th Dist. Belmont No. 21 BE 30, 2022-Ohio-2024. A status conference was held on July 25, 2022 at which time the public defender's office was appointed as counsel for Appellant. Appellant's original trial counsel had accepted a position with the prosecutor's office in the interim between Appellant's original sentencing hearing and the pendency of the appeal. A plea hearing was scheduled for August 8, 2022 and a trial date was set for August 18, 2022.

However, on August 8, 2022, Attorney Adam Burke appeared on behalf of Appellant at the plea hearing. That same day, Attorney Burke filed a limited notice of appearance, having been retained by Appellant, and a motion to continue the plea and trial dates. Attorney Burke requested additional time to review the case due to his trial schedule. Attorney Burke indicated that he would file a standard notice of appearance if the trial court granted his motion to continue the trial. The trial court continued the plea hearing to October 17, 2022 and the trial to October 27, 2022.

On September 19, 2022, Attorney Burke filed the standard notice of appearance, captioned "notice of appearance of co-counsel," and a twelve-page motion to dismiss/suppress. The reference to co-counsel appears to be a typographical error.

Like the original motion to suppress and dismiss, the second motion to dismiss/suppress challenged the sufficiency of the affidavit provided in support of the search warrant. Appellant further asserted that the good faith exception did not apply, insofar as it should have been clear to a reasonably well-trained officer that the affidavit was insufficient. The search warrant and the accompanying affidavit are not a part of the record.

At the motion hearing on September 22, 2022, which was conducted three days after the motion was filed, the state argued that the motion to dismiss/suppress was untimely pursuant to Crim. R. 12(D) and that defense counsel did not seek leave to file the untimely motion. The state cited our decision in *State v. Sutton*, 7th Dist. Mahoning No. 15 MA 0121, 2017-Ohio-732, where defense counsel was appointed two days after the motion deadline had passed. Twenty-six days later, he filed a motion to suppress. Recognizing that the motion was untimely, the trial court invited defense counsel to file a motion for leave. However, no motion for leave was filed so the motion was overruled as untimely. On appeal, we refused to "second-guess" defense counsel's reasoning in eschewing the opportunity to request leave to file the untimely motion, and affirmed the trial court.

Third, Appellant argued that "applying pre-appeal deadlines in a case in which Appellant's convictions were vacated and his cause remanded would place [Appellant] entirely at the mercy of the [state] and [the trial court] and leave him with few options." Appellant continued:

Those extraordinarily limited options include: presenting a hobbled case with defense counsel's ability to defend [Appellant] and file substantive pretrial motions and filings barred by long-expired deadlines. [Appellant's] defense would thus be stymied not just from filing suppression motions, but from filing any number of pretrial motions and filings that defense counsel would otherwise be able to file in any other case.

(10/4/22 Omnibus Motion, p. 3. Finally, defense counsel alleged "the prosecution pleaded with the [trial] court [at the September 28, 2022 suppression hearing] to overrule [Appellant's] motion by referencing [Appellant's] successful exercise of his appellate rights." Defense counsel argued that the trial court and the state were motivated by "vindictiveness."

On October 19, 2022, the trial court conducted a hearing on the omnibus motion. At the conclusion of oral argument, the trial court indicated that the omnibus motion would be overruled in its entirety and the jury trial would commence one week later on October 26, 2022. (10/19/22 Hrg. Tr., p. 33.) As a consequence, Appellant entered pleas of no contest to all four of the charges in the indictment that same day.

At the sentencing hearing on November 14, 2022, the trial court imposed the maximum sentence on each count to run concurrently, as it had at the first sentencing. However, Appellant's original sentence was shorter than the sentence currently on appeal due to the fact that Appellant had entered his original guilty plea to two amended charges, which reduced count



one to a second-degree felony (from a first) and count four to a third-degree felony (from a second). The appellant was given an even harsher sentence of three additional years with no Judicial explanation on the second phase of proceedings.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of law No I.: THE APPELLATE COURT FAILED WHEN IT DID NOT SUSTAIN THE APPELLANTS FIRST ASSIGNMENT OF ERROR.**

**THE TRIAL COURTS MOTION TO [DISMISS/] SUPPRESS] AND ERRED AGAIN WHEN IT SUBSEQUENTLY DENIED LEAVE TO FILE THE MOTION OUT OF RULE WAS A CLEAR ABUSE OF DISCRETION.**

Appellant submits that it was an abuse of discretion for the trial court to deny his motion to suppress as untimely and thereafter deny him leave to file it instant where: (1) The withdrawal of the appellants first motion to suppress was pursuant to a guilty to plea that was later vacated by this court; (2) This courts reversal of the trial courts earlier judgment effectively reset the case deadlines upon remand; (3) The trial court twice set the case for evidentiary hearings without regard the issue of timeliness; (4) The trial court expressed unequivocally on the record that it had time to get to the merits of the motion but elected not to anyway; (5) Appellant was required to obtain new counsel after his previous counsel trial attorney was conflicted by taking a position with the Belmont County Prosecutors office. The same attorney that withdrew the suppression motion after filing it; (6) And discovery was only provided to new counsel on September 2, 2022 due to internal issues with the States discovery system ( MATRIX) that it later "rectified".

A defendant's failure to timely file a motion to suppress results in a waiver of that issue, but the court for good cause shown may grant relief from the waiver. Ohio R. Crim. P. 12(H). The decision as to whether to permit leave to file an untimely motion to suppress is within the sound discretion of a trial court. Thus, an appellate court will not reverse a trial court's decision regarding an untimely filed motion to suppress absent an abuse of discretion. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.

State v. Garrett, 2005-Ohio-4832, 2005 Ohio App. LEXIS 4371 (Ohio Ct. App., Greene County September 16, 2005)

The appellant draws the court attention and focus to the clause "The court in the interest of justice may extend the time for making pretrial motions".

In the instant case, under the belief that case being reversed, vacated and remanded had suggested to the defendant and his attorney that due process was to start over again. This process would have equipped the defendant to file all the necessary motions and documents needed to properly defend his client.

In this matter the court clearly abused its discretion when it did not allow the appellant to refile or be heard on the motion to suppress and be heard on the motion. Abuse of judicial

discretion, within the rule that an appellate court will not disturb the discretionary action of the court below unless the discretion was abused, is an exercise of discretionary power to an end or purpose not justified by, and clearly against, reason and evidence.

In this case the appellant's previous attorney made the motion, withdrew the motion upon a deficient plea agreement that was eventually overturned by the 7th district appellate court. The appellant never even knew that a motion was filed. Here the appellate court clearly and convincingly abused its discretion by allowing the trial court to abuse its discretion by not sustaining the appellants first assignment of error.

From the opinion of the 7<sup>th</sup> district: On the other hand, we completely understand the trial court's frustration towards a defendant who fails to appear. However, the interests of justice, at times, require overlooking this frustration in the pursuit of fairness and due process.

This is particularly true when considering that trial counsel below invested their time and resources in preparation for a hearing on the merits of the suppression motion only to see their efforts disregarded by the trial court on timeliness grounds. If the trial court had simply denied the motion initially without a hearing, as being untimely, it probably would have passed our scrutiny.

In our view, the trial court acted unreasonably in scheduling a hearing on the merits of the motion to suppress and then denying it on procedural grounds. The timeliness of the motion arguably became moot once the trial court accepted evidence on the merits of the motion. *State v. Robson*, 2006-Ohio-628, 165 Ohio App. 3d 621, 847 N.E.2d 1233, 2006 Ohio App. LEXIS 563 (Ohio Ct. App., Jackson County February 7, 2006)

A Decision by whim or caprice, arbitrarily, or from a bad motive which amounts practically to a denial of justice as a clearly erroneous conclusion, one that is clearly against logic and effect of the facts presented. This was an absolute whim when the appellate court did not decide in the appellant's favor, it has been a long standing practice that in the "Interest of Justice" for Judges to allow such an important motion to proceed especially when said motion has foundation and merit. The Ohio Supreme Court has consistently held that "[I]t is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits." *State v. Herzing*, 18 Ohio St. 3d 337, 481 N.E.2d 593, 1985 Ohio LEXIS 454, 18 Ohio B. Rep. 379 (Ohio July 31, 1985) citing *Cobb v. Cobb* (1980), 62 Ohio St. 2d 124 [16 O.O.3d 145]; *DeHardt v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193. *Hawkins v. Marion Correctional Inst.* (1986), 28 Ohio St.3d 4,23. "Fairness and Justice are best served when a court disposes of a case on the merits" *DeHart*, 69 Ohio St.2d 189, 193. It was obvious in this case that the motion had merit when the trial court ordered a hearing on the matter but then flipped in the middle of the hearing dismissing the motion unfairly. On October 19, 2022 the court per the record had time to hear the motion thus acknowledging that there was time set aside to actually hear the motion.

**Per the exact record it was stated: defendant's attorney MR BURKE: Your Honor, the court introduced this case last time as an evidentiary hearing, that was the courts language on the merits of the suppression motion. We don't have evidentiary hearings on procedural**

**grounds. So I would just submit to the court that we're here. We have time today to hear the merits of the suppression issues.**

**THE COURT. We do.**

The court set this matter twice set the matter for the hearings regarding the motions on September 19, 2022 and October 19, 2022 hearing on the motion for leave specifically noted that "if necessary, the motion to suppress ..." would also be heard on that date. (entry of Oct. 5, 2022, R.No.86) All these confirm that the court did in fact have time to get the merits of the appellant's motion. Even if the court were to calculate the thirty -five- day window from new counsels limited appearance on August 8, 2022, Merritt also held that discovery delays and mishaps constitute grounds for extension.

The courts of Ohio have long recognized that the interests of justice are better served when courts address the merits of claims and defenses at issue rather than using procedural devices to resolve pending cases. *Dart v. Combs*, 2018-Ohio-420, 2018 Ohio App. LEXIS 434, 2018 WL 679422 (Ohio Ct. App., Darke County February 2, 2018)

The power of the trial court to prevent undue delays and to control its calendars must be weighed against the policy which favors disposition of litigation on the merits. *Willis v. RCA Corp.*, 12 Ohio App. 3d 1, 465 N.E.2d 924, 1983 Ohio App. LEXIS 11303, 12 Ohio B. Rep. 57 (Ohio Ct. App., Cuyahoga County October 31, 1983).

Here the only evidence that allegedly exist against the defendant is a bare bones affidavit that was granted upon an incredible and unreliable source of information in which the source never details how he reached any of the information they was given to law enforcement, and then law enforcement who relies on that information without any substantial proof like surveillance, no controlled buys or hand to hand transactions these things are typical for a case such as this when trying to obtain a warrant and no other eye witnesses to even attest to the so called facts contained in the affidavit. The state of Ohio indicted the Defendant on several felony drug counts. These felony counts originate from a search warrant executed at the residence of the defendant occupied. On or about January 14, 2015 law enforcement requested and obtained a search warrant leading to his indictment. The affidavit in support of the warrant reads as follows:

**I, Patrolman Rocky Sirianni, being duty sworn assert the following: I have been a narcotics investigator for the last five years and have been involved in numerous investigations.**

**On January 14, 2015 I received from a confidential informant regarding an apartment F6 at the Barnesville Commons apartment complex. The informant stated that there are drug dealers at the apartment. The informant stated that there is a Kenny Carter and a black male known as "boo or D". The informant stated that narcotics including pills, heroin and cocaine were observed in the residence. The informant also stated that there was an amount cash in the residence. The informant stressed an amount of urgency due to the fact that the dealers may leave today.**

**I am requesting a no knock warrant so as to keep the element of surprise and safety with the officers and scene and to prevent the destruction of evidence.**

**Proposition of law No II.: APELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT FILE THE MOTION TO SUPPRESS EVIDENCE WITHIN THE TIME PROVIDED IN CRIM. R.12(D).**

Appellants Trial Court Attorney signed an Affidavit concerning his ineffectiveness. Adam Burke: Paragraph 11 states “ **Because the merits or the constitutional violations in the search warrant in question are so clear and obvious, should the court bar defendants motion as untimely on procedural grounds, the result would be ineffective assistance council whether as applied to previous and present counsel**” Paragraph 12 “ **Moreover, should the court determine that the defendant Lanier is barred from filing pretrial motion and/or fillings, including his suppression motion, based upon the courts calendar, the undersigned cannot effectively represent this defendant** . Appellant maintains that the trial court abused its discretion in failing to grant him leave to file the motion to suppress out of rule in light of the compelling and unusual circumstances presented in this case. Assuming *arguendo* that his trial attorney was in fact late or otherwise lacked due diligence in preserving his Fourth Amendment rights, such a failure would necessarily amount to ineffective assistance of counsel. a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel’s performance fell below an objective standard of reasonable representation, and (2) that counsel’s errors prejudiced the defendant, i.e., a reasonable probability that but for counsels errors, the results of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 1984 U.S. LEXIS 79, 52 U.S.L.W. 4565 (U.S. May 14, 1984)

The contraband that forms the exclusive basis of the indictment and subsequent judgment entry of conviction in this case stems from the search that was conducted at Carole Corbin’s residence on or about January 14, 2015. That search was done pursuant to a warrant issued by Belmont County Court- Western Division on that same date. (Search Warrant, Supp.R.No. 106) The warrant was supported by Patrolman Sirianni’s affidavit alleging that drug crimes were occurring at the residence. Id. However, the affidavit’s allegations were predicated entirely on a confidential informant’s tip. Id. Patrol Sirianni’s bare bones affidavit failed to provide any information setting forth the informant’s basis of information failed to provide any information setting forth the informant’s basis of information, nor for believing the information credible.

Appellants first attorney, Joseph Vavra, filled a motion to suppress on July 29, 2015 nearly four months after Crim. R. 12(D)’s thirty-five-day deadline. (1<sup>st</sup> Motion to Suppress, R. No. 22) That motion attacked the warrant for a host of reasons, chief among them that affiant officer did nothing to corroborate the confidential informant’s allegations or provide any additional information to support the warrant. Id at Pgs 3-4. The State filed no objection regarding the timeliness of that motion and it was later withdrawn pursuant to a plea deal without the knowledge of the defendant reached on August 10, 2015. Guilty Pleas, R. No. 24)

After the courts remand, appellants new counsel, Attorney Adam Burke filed a motion to suppress on September 19, 2022.(2<sup>nd</sup> Motion to Suppress, R.No. 79) That motion again argued that all evidence obtained pursuant to search, i.e. all of the evidence supporting the indictment, must be suppressed because the search warrants supporting affidavit relied entirely on information from a confidential informant, and lacks any information supporting a finding on probable cause based on reliability of information, the credibility of the informant, or any other corroborating evidence. Id. At Pgs 3-4.

The trial court never reached the merits of the motion because it deemed it untimely because the 35-day deadline to file motion after the indictment. Defendant's attorney Adam Burke did not file leave to file the motion out of rule. Thus being ineffective by not filing the leave. While at the suppression hearing the prosecutor objected to the motion because of the thirty-five day-rule.

It was also in the discretion of the trial court judge to extend time regardless, due to the interest of justice. However, the defendants Attorney should not have had to even file leave based upon the sentence being vacated, reversed and remanded by the appellate court. The case at that point should have started completely over and all due process should have started completely over, such as a retrial. After the States oral objection at the hearing of September 28, 2022. (Entry of Sept. 28, 2022, R. 81). If it had, there is reasonable probability that the evidence supporting the indictment and subsequent conviction would have been suppressed given the clear and obvious violation of the Fourth Amendment violations. In short, the case would have been dismissed. Due the ineffectiveness of both attorneys and their negligence.

The first attorney for the defendant was Joseph Vavra, **Attorney Vavra is now employed by this same county's prosecutor's office.** This was the foremost reason why Attorney Vavra could not defend t the defendant on the remand portion because of the conflict of interest. It's unclear as to what was promised by the prosecutor's office prior to him taking the job and why he withdrew the plea without disclosing that he withdrew the plea to his defendant when the motion was the most important part of this case. Therefore, rendering him ineffective for not filling the motion to suppress within the thirty – five-day window allowed according to Crim.R.12(D).

Adam Burke was ineffective for not filling leave to refile the motion to suppress the search warrant. However, there was really no reason for the second attorney Burke to file the leave, being that the case was reversed, vacated and remanded back to the trial court. The appellant reiterates that the due process should have started over. In light of the culmination of these issues both attorneys are rendered ineffective.

**Proposition of Law No. III: THE TRIAL COURT VIOLATED APPELLANTS DUE PROCESS RIGHTS UNDER THE FOURTEENTH ADMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT IMPOSED A HARSHER SENTENCE FOLLOWING A SUCCESSFUL APPEAL.**

While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, the United States Supreme Court recognizes it must not be exercised with the purpose of punishing a successful appeal. Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. In order to assure the absence of such a motivation, the Supreme Court concludes that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for him doing so must affirmatively appear. Otherwise, a presumption arises that a greater sentence has been imposed for a vindictive purpose, a presumption that must be rebutted by objective information justifying the increased sentence. *Ala. v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865, 1989 U.S. LEXIS 2839, 57 U.S.L.W. 4626 (U.S. June 12, 1989). There is a presumption of vindictiveness when the trial court that imposes the first sentence gave an even harsher sentence for the same set of facts on the second sentence, all due to the Judges direct and plain error.

“A trial court violates the Due Process Clause of the fourteenth Amendment when it resents a defendant to a harsher sentence following a successful”, Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. Due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights. To prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact the product of vindictiveness, the Supreme Court in *North Carolina v. Pearce* fashioned what in essence is a "prophylactic rule" that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. This rule has been read to apply a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence. The rationale for requiring that the factual data upon which the increased sentence is based be made part of the record, of course, is that the constitutional legitimacy, of the enhanced sentence may thereby be readily assessed on appeal. *Wasman v. United States*, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424, 1984 U.S. LEXIS 144, 52 U.S.L.W. 5063 (U.S. July 3, 1984) In the instant case the trial court did not state the reason for the appellants increase of the sentence. At the second hearing, appellants counsel requested that the trial court explain the increase in the Appellants sentence from 8 years to 11 years. On the possession of drugs charges count and from 3 years to 8 years on the trafficking with in drugs count. Despite Appellate counsel's mention of the original sentence prior to resentencing, the trial court seemed confused about its harsher sentence. “What is the increase in sentence, sir?” the court asked. *Id.* But rather than explaining the sentenced had increased, the trial court turned to the explanation over to the state, which argued that it was because appellant was now being sentenced on the felony one possession count and the felony two trafficking count. – to the extent there was not a plea bargain in light of the appellant's intent to seek review in the appellate court. The trial court was still confused however and continued to seek rationale for its own decision from counsel for the

state. In others words the judge had no rational as to the harsher sentence so he let the prosecutor do it.

A trial court violates the Due Process Clause of U.S. Const. amend. XIV when it re-sentences a defendant to a harsher sentence, motivated by vindictive retaliation. Further, a presumption of vindictiveness arises when the same judge re-sentences a defendant to a harsher sentence following a successful appeal. In order to overcome the presumption, the trial court must make affirmative findings on the record regarding conduct or events that occurred or were discovered after the original sentencing. This means that a trial court may impose an enhanced sentence, but it must demonstrate that it was not motivated by vindictiveness toward the defendant for exercising his rights.

A trial court must make findings regarding vindictiveness in sentencing based upon objective information concerning identifiable conduct on the part of the defendant. Relevant conduct or events sufficient to overcome the presumption of vindictiveness are those that throw new light upon the defendant's life, health, habits, conduct, and mental and moral propensities. Thus, a court imposing an enhanced sentence on remand must detail the reasons for an increased sentence or charge so that appellate courts may ensure that a non-vindictive rationale supports the increase. *State v. Byrd*, 2012-Ohio-4616, 2012 Ohio App. LEXIS 4057, 2012 WL 4762014 (Ohio Ct. App., Montgomery County October 5, 2012)

THE COURT: So you find the sentencing to be what on count 1

THE STATE: Count 1 was a maximum sentence on an F2 of eight years last time, The court just imposed 11 years. So I thought it was consistent that the court has imposed a maximum sentence on count 1.

The trial court still never mentions or dictates anywhere what is the rationale for the heightened sentence. THE COURT: "Well how much Sir?", THE STATE: "11 years I'm comfortable with", THE COURT: and count 2, THE STATE: I'm comfortable with concurrent on count 2 based upon the representation by defense counsel with whatever number the court chooses. Defense Attorney (AB): Your Honor I just ask that the court to impose 8 years at the maximum. Defense Attorney (AB): Again that is entirely consistent with what the court did last time and again the facts haven't changed. The only thing that has changed is that Mr. Lanier is exercising his rights.

Pearce, Byrd, Thrasher and Hitchcock establish that the reason for an enhanced sentence affirmatively appears and to be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of thy original sentencing. Pearce at paragraphs 725-726. The forgoing exchange illustrates that trial court did not articulate a single new ground for its more severe sentence, despite appellant's counsel request to do so. Byrd at paragraph 17. Since the record is devoid of any justifiable reason to rebut the Pearce assumption Byrd's first assignment error is sustained.

While counsel for the state posited that the sentence can be harsher because the felonies were higher this time around given the lack of a plea deal. This speaks to the original defense conduct

that occurred before the original sentencing, either way the states rational was endorsed by the trial court in the record such that no explanation was ever put forth by the trial court itself. A review of the first and second sentencing transcripts reveals that appellant resentencing was a mere repeat of his first sentencing in terms of rational provided by the trial court. **The Chief concern in both sentences is that the appellant absconded. But Pearce establishes that that enhanced sentences must be predicated on adverse post appellant conduct just in Byrd and Hitchcock. Counsel pointed out that Lanier's post appellant conduct here could have only benefited him. He was incarcerated between first and second sentencing hearings and related that in a span of a year he had obtained nine certificates, he had received sixty good days and nor any jail infractions.**

Moreover, as appellate counsel pointed out at the time, if it's was the trial courts desired to original sentence the appellant to 11 years it could have easily done so in 2021 by running the sentence concurrently. That it chose not it is proof that it is satisfied with the eight-year sentence at that time. The trial court enhanced sentences after Lanier's successful appeal is presumptive vindictiveness, and was made with full knowledge that he intended to seek review of the trial court decision denying his motion to suppress. That the trial court decision denying his motion to suppress. The trial court did not articulate any objective information concerning identifiable post appellant conduct to warrant the increase. But even if it had appellant post appellant conduct could have only benefited him giving his positive jail record. For all these reasons the harsher sentence raises a presumption of judicial vindictiveness that cannot be rebutted by the record and this court should modify the sentence pursuant to the authority contained in section 3(B)2 article for the Ohio Constitution. Ohio Revised Code 2953.08(G)(2)(b)

**Proposition of Law No. IV: THE TRIAL COURT ERRORED IN SENTENCING APPELLANT TO THE MAXIMUM SENTENCE.**

R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under R.C. 2929.13(B) or (D), R.C. 2929.14(B)(2)(e) or (C)(4), or R.C. 2929.20(I). Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Why Appellant had minor Trafficking and Possession of drug convictions felonies of the fourth and fifth degree. Some 13 and 14 years prior to the instant and above case. His incarceration in this case has been his first prison term, none of these serious factors set forth in R.C. 2929.12(B) apply to the appellant. **(B)** The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

These were drug offences where there was no physical, mental injury suffered by any victims, in this case there are no victims. of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim. There was no physical,



psychological, or economic harm as a result of the offense the appellant had no professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

The trial court heard arguments from counsel and mentioned that it was a familiar with the case and had considered the sentence principles and factors before in fact issuing the maximum sentence. None the less it made no specific findings or references to any of the specific factors or principles it considered in arriving at its maximum sentence. Nor could it have since none of the serious offences or recidivism factors are supported by the record in the case. The trial courts maximum sentence in this case is not supported by the record and should be vacated or modified pursuant to the authority contained in section 3(B)(2) Article 4 of the Ohio Constitution and Ohio Revised Code 2953.01(G)(2)(b).

In the above case there are a host of Plain Errors, Plain errors are errors in the judicial process that are clearly apparent on the face of the record and are prejudicial to the appellant. When applying the plain-error doctrine in the civil context, reviewing courts must proceed with the utmost caution. The doctrine is limited to those extremely rare cases in which exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings. Plain error exists only where the error seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

### CONCLUSION

Under the cumulative error doctrine, a trial court's judgment may be reversed if the cumulative effect of multiple errors prevents a fair trial even though each of the individual errors, standing alone, would not constitute grounds for reversal. Ohio courts have found the extension of the cumulative error doctrine to civil cases is warranted where the court is confronted with several errors, which either are harmless individually or have marginally prejudicial effects, but combine to require a new trial. For the forgoing conclusion and reasons. Appellant Andre Lanier respectfully request that the Judgement of the trial court and Appellant courts be vacated, that his motion to suppress be sustained on the merits and that this matter be remanded or that his sentence modified. Wherefore, we ask that this court, Ohio highest and most honorable court and most esteemed Judges to either vacate, reverse or remand for new trial.

#### **Certificate of Service**

**I, Andre M. Lanier, do hereby certify that a copy of the foregoing motion was sent by ordinary U.S. Mail to the prosecuting attorney. 30 E. Broad St. Columbus, Ohio 43205**

2-4-24

Andre Lanier

Andre Lanier

**Andre M. Lanier, Inmate No. 787833**

**15708 McConnelsville Road**

**Caldwell, Ohio 43724**