No. _____

In the
Supreme Court of the United States

MICHAEL STEVEN BEEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether jurists of reason could debate that a district court must evaluate the merits of a potential motion to suppress where the defendant pled guilty to determine if counsel's pre-plea advice was reasonable and the defendant was prejudiced as a result?

PARTIES

Michael Beeman is the Petitioner; he was the defendant-appellant below. The United States of America is the Respondent; it was the plaintiff-appellee below.

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Petitioner Michael Beeman respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is captioned as *United States v. Beeman*, 754 Fed. Appx. 231 (4th Cir. Feb. 26, 2019) (unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court's memorandum order and opinion is captioned as *United States v. Beeman*, No. 5:14-CR-51, 2018 WL 5116523 (W.D. Va. Oct. 18, 2018), and is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of the judgment below, which was entered on February 26, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

28 U.S.C. § 2255 provides the following:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the united States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is

otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

…

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C. §§ 2255(a)–(b) & (d).

28 U.S.C. § 2253 further provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> …
>
> (c)
>
> > (1) Unless a circuit justice of judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
> >
> > > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court; or
> > >
> > > (B) the final order in a proceeding under section 2255.
> >
> > (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> >
> > (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §§ 2253(a) & (c)(1)–(3).

STATEMENT OF THE CASE

I. The District Court Proceedings

According to the Statement of Facts filed in the district court:

> On January 14, 2014, Beeman was hospitalized for a period of several days following a suicide attempt. During that time, Beeman asked his dog-walker to bring him at the hospital one of Beeman's iPads and a Blackberry mobile phone. The dog-walker, while at Beeman's house, used Beeman's iPad to draft an email on Beeman's behalf. The dog-walker reported to law enforcement officers that while in the email application, he observed some pictures that depicted naked post-pubescent minors. The dog walker also observed several other similar images on Beeman's iPad once he exited the email application . . . . The dog-walker reported these observations to the Fredrick County Sheriff's Office. A deputy viewed the images and agreed that they appeared to depict minors.
>
> A search warrant was executed on January 14, 2014, at Beeman's residence in Winchester, Virginia, resulted in the seizure of over 250 electronic devices, including VHS tapes, DVDs, desktop computer towers, laptop computers, electronic tablets, external hard drives, and thumb drives. All of these electronic devices were manufactured outside of Virginia. Over 50 items seized included depictions of child pornography, within the meaning of 18 U.S.C.

> § 2256(8)(A), or evidence that child pornography had been previously viewed or stored on the device.

Beeman was subsequently charged in the Common Wealth of Virginia with one count of possession of child pornography, in violation of Section 18.2-374.1:1 of the Code of Virginia in *Commonwealth v. Beeman*, Case No. CR14-852. Beeman was represented in the Commonwealth proceedings by attorney Christopher Collins. A preliminary hearing was held on July 15, 2014. The pertinent testimony from each witness is summarized below.

A. The "Dog Walker"

Beeman's dog walker testified that on January 13, 2014, the day of Beeman's suicide attempt and the day before the search, that he went to Beeman's residence. At Beeman's request, the dog walker was to deliver to Beeman three iPads and a Blackberry phone. Beeman had also requested the dog walker send an email on Beeman's behalf from one of the iPads.

According to the dog walker, when sending the email, a questionable image popped up. He then testified that he took the one iPad and phone to his own residence. At his house, he again looked at the photos on the devices and then contacted the police department. When asked what disturbed the dog walker about the photos, the dog walker stated that one in particular showed a young girl in her underwear. The dog walker could not state that he recalled seeing any photographs that depicted genitalia. The dog walker stated that there were only

a few photos, that he did not look that hard at the photos, and that there were other miscellaneous photos on the iPad.

The next morning, the dog walker met Deputies Cheshire and Hazelwood at Beeman's residence. The dog walker stated that he showed the deputies the images he saw on the one iPad. He then turned three iPads and a Blackberry phone over to the deputies.

B. Deputy Hazelwood

Deputy Hazelwood met the dog walker outside Beeman's residence on January 14, 2014. According to Dep. Hazelwood's testimony, the dog walker showed him images on the black iPad. Dep. Hazelwood then asked the dog walker if he was supposed to retrieve an iPad or iPads for Beeman. The dog walker indicated it was iPads. Dep. Hazelwood then testified that he followed the dog walker into Beeman's house to obtain the other devices.

C. Deputy Cheshire

Deputy Cheshire arrived at Beeman's residence after Dep. Hazelwood. According to Dep. Cheshire's testimony, the dog walker and Dep. Hazelwood were discussing the images on the one iPad the dog walker had in his possession outside the residence. Dep. Cheshire indicated that the three walked inside the house because it was raining and removed a total of the other two iPads and a Blackberry cell phone from the residence. When questioned about what he saw on the iPad, Dep. Cheshire testified that he viewed a picture of a male between the age of 14 and 17 that exhibited the nude genitalia area. Dep. Cheshire then

reconfirmed that the dog walker only had one iPad in his possession outside the house when the deputies arrived.

D. Lieutenant Galbreath

Lieutenant Galbreath testified that he did not respond to the call to Beeman's residence on January 14, 2014. Nor did the lieutenant view any images on the iPads or Blackberry phone. Lt. Galbreath filed the search warrant affidavit based upon the information relayed to him by Deputies Cheshire and Hazelwood. Lt. Galbreath confirmed that the deputies seized a total of three iPads, two black and one white, and a Blackberry phone prior to issuance of a warrant.

On November 12, 2014, Beeman, through counsel, filed a motion to suppress the evidence obtained from the January 14, 2014 search of Beeman's residence. According to Beeman's motion the facts of the case are as follows:

> On January 14, 2014, deputies arrived at the defendant's home where Mr. Robertson meet [sic] them outside and showed the deputies the photo he found on the iPad. Deputies then inquired whether there were more electronic devices in the home and Mr. Robertson advised that there were. Deputies, without a warrant, then entered the home and collected those items which were two more iPads.
>
> Deputies then took all electronic devices to Investigator Galbreath of the Frederick County Sheriff's Office for him to review the images. Based upon what was found on the iPads,

> investigator Galbreath sought a search warrant and it was executed on January 14, 2014. The defendant was still hospitalized at the time.

On November 12, 2014, Beeman was initially named in a two-count federal Indictment which charged Beeman with: Count One– knowing transport of visual depictions involving a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(1) and 2252(b)(1); and Count Two–knowing possession of at least one matter which contained a visual depiction of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Beeman's Commonwealth case was subsequently dismissed by *nolle prosequi* on December 4, 2014.

Thereafter, Beeman waived federal indictment agreed to plead guilty to a five-count Superseding Information which charged Beeman as follows: Count One–Transport of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(1) and 2252A(b)(1); Counts Two through Four–Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2); and Count Five–Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). Beeman appeared before a magistrate judge on October 6, 2015, and entered guilty pleas to all five counts pursuant to a plea agreement.

Beeman proceeded to sentencing on April 14, 2016. United States District Judge Michael F. Urbanki sentenced Beeman to a total term of 360 months imprisonment followed by a lifetime term of supervised

release. Written judgment was entered on April 15, 2016.

On April 28, 2017, Beeman filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255. Beeman alleged that his attorney, Mr. Cook, was ineffective by failing to file a motion to suppress and for failing to adequately discuss the merits of a motion to suppress with Beeman prior to Beeman pleading guilty. On September 7, 2017, the Government filed its Response and argued that Cook's failure to file a motion to dismiss was reasonable.

The district court held an evidentiary hearing on October 3, 2018. On October 18, 2018, the district court issued a Memorandum Opinion granting the Government's motion for summary judgment and denying Beeman's § 2255 motion. [Appx. B]. The court concluded that "[i]n order to resolve Beeman's claim of ineffective assistance of counsel, the court need not, of course, resolve the Fourth Amendment claim on the merits, but need only determine whether Cook's decision not to litigate the motion to suppress was reasonable." [Appx. B. at 10]. The court found that "Beeman has provided no evidence that Cook's failure to file motions to suppress was based on anything besides his reasonable, strategic judgment that pursuing this course would redound to his client's benefit in terms of the sentence he would receive." [Appx. B. at 14]. In addition, the district court declined to issue a certificate of appealability. [Appx. B. at 15].

II. The Appellate Court Proceedings

Beeman filed a timely notice of appeal from the district court's denial of his § 2255 motion to the United States Court of Appeals for the Fourth Circuit. On December 17, 2018, Beeman submitted his Application for Certificate of Appealability and Informal Brief in Support. The Fourth Circuit issued its unpublished opinion on February 26, 2019, denying a certificate of appealability. [Appx. A].

REASON FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the important federal question as to whether a district court is required to determine the merits of a potential motion to suppress in order to decide whether counsel's advice to plead guilty was reasonable. The Fourth Circuit found the claim not to be debatable among reasonable jurists, and denied Beeman a certificate of appealability. But a district court cannot accurately assess a defense attorney's advice to forgo a motion to suppress in favor of a plea agreement without analyzing the merits of the potential suppression motion.

DISCUSSION

This Court has recently readdressed the standard for issuance of a certificate of appealability. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court held that the certificate of appealability "inquiry, we have emphasized, is not coextensive with a merits analysis." *Id*. at 773. As the Court explained:

> That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean that he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court [. . .] inverts the statutory order of operations and 'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El v. Cockrell*, 537 U.S. [322], 336-337 (2003). *Miller-El* flatly prohibits such a departure from the procedure described by § 2253.
>
> The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then–if it is–an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every state case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of this inquiry.

Id. at 774 (alterations added).

In denying Beeman's § 2255 motion, the district court concluded:

> In order to resolve Beeman's claim of ineffective assistance of counsel, the court need not, of course, resolve the Fourth Amendment claim on the merits, but only need to determine whether Cook's decision not to litigate the motion to suppress was reasonable.

[Appx. B at 10].

Thus, the district court did not evaluate the merits of Beeman's potential motion to suppress. Instead, the court relied on Mr. Cook's interpretation of the merits of the motion to suppress which Mr. Cook provided "[w]ithout wading into the specific reasons[.]" [Appx. B at 13]. Reasonable jurists could disagree with the district court's conclusion. First, in order to determine whether counsel's failure to file a motion to suppress was ineffective, the court must determine whether the motion would have been successful. In *Kimmelman v. Morrison*, this Court held:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principle allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

Further, the Fourth Circuit has noted:

> We have further refined the *Strickland* [*v. Washington*, 466 U.S. 668] analysis as it applies in cases, like this one, where an ineffectiveness claim is based on counsel's failure to file a motion to suppress. Under the deficient performance prong of *Strickland*, it is enough to call into question counsel's performance that an unfiled motion would have had "some substance." And the prejudice prong in such

> cases has two distinct components, with the petitioner required to show both (1) that the motion was meritorious and likely would have been granted, and (2) a reasonable probability that granting the motion would have affected the outcome of his trial.

Grueninger v. Dir., Virginia Dep't of Corr., 813 F.3d 517, 524-25 (4th Cir. 2016) (citations omitted).

But because Beeman pled guilty, to establish prejudice from the failure to file a motion to suppress, a defendant must show not only that the motion would have been successful, but also that there is a reasonable probability that, but for counsel's failure to file the motion to suppress, he would not have pleaded guilty. See *Premo v. Moore*, 562 U.S. 115, 130 (2011)).

Beeman's claim for § 2255 relief was that defense counsel inadequately advised him of the merits of a pretrial motion to suppress the evidence from the January 14, 2014 search of his residence. Beemen further claimed that had he been advised of the merits, he would not have pled guilty and would have instead proceeded to trial. Thus, Beeman's claim necessarily turns on whether counsel's advice as to the merits of a potential suppression motion was reasonable.

In its Response and Motion for Summary Judgement to Beeman's § 2255 motion, the Government argued that Beeman's suppression motion would have failed on the merits because 1) private searches do not violate the Fourth Amendment; and 2) if the search was illegal, the independent source

exception to the exclusionary rule would apply. Beeman will address each in turn.

A. The Private Search Doctrine

"The Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as instruments or agents of the Government." *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003) (internal quotations and alterations omitted). The Fourth Amendment "does not provide protection against searches by private individuals acting in a private capacity. *Id.*; see also, *United States v. Jacobsen*, 466 U.S. 109 (1984). "Thus, evidence secured by private searches, even if illegal need not be excluded from a criminal trial." *Id.*

However, the private search doctrine is inapposite where the private individual is acting as an agent of the Government. *Jacobsen*, 466 U.S. at 113-14. The private search doctrine is also inapplicable where the Government's search exceeded the scope of the private search. *Walter v. United States*, 447 U.S. 649, 659 (1980) ("The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of the exception of all Fourth Amendment protection.").

1. Agent of the Government

In determining whether a private individual is acting as an "agent" of the Government, the Fourth Circuit has held:

> Determining whether the requisite agency relationship exists necessarily turns on the degree of the Government's participation in the private party's activities … a question that can only be resolved in light of all the circumstances. This is a fact-intensive inquiry that is guided by common law agency principles.

Jarrett, 338 F.3d at 344 (internal quotations and citations omitted).

Further, the court discussed two primary factors to consider in determining whether a private search constitutes a Government search: "(1) whether the Government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation." *Id*. at 344. Finally, the *Jarrett* court discussed three "major lessons" from prior precedent:

> First, the courts should look to the facts and circumstances of each case in determining when a private search is in fact a Government search. Second, before a court will deem a private search a Government search, a defendant must demonstrate that the Government knew of and acquiesced in the private search and that the private individual intended to assist law enforcement authorities. Finally, simple acquiescence by the Government does not suffice to transform a private search into a Government search. Rather, there must be some evidence of the Government participating in or affirmative

> encouragement of the private search before a court will hold it unconstitutional.

Id. at 345-46.

Based upon these factors, Beeman submits that the dog walker's search constituted a Government search, thus triggering Fourth Amendment protection. During his testimony at the preliminary hearing, the dog walker's "private search" resulted in him not looking at that many pictures. The dog walker also stated that he did not look too hard at the pictures. And the one picture that caused him concern was of a young female in her underwear.

This is sharply contrasted by Deputy Cheshire's testimony that he viewed nude images of a young male. Neither law enforcement nor the dog walker know which images were on which of the three iPads. But the dog walker did testify that he only removed and searched one iPad the night prior.

If Deputy Cheshire's statement that the dog walker showed him an image of a nude male on one of Beeman's iPads is true, then it was not a result of the dog walker's "private search" from January 13, 2014, per the dog walker's testimony. Therefore, a subsequent search must have occurred on January 14, 2014, with the presence of law enforcement. This would be a clear indication of law enforcement's knowledge and acquiescence of a warrantless search. As to the second factor, there is no evidence to show that the dog walker had any other motive than to assist law enforcement in the search.

2. The Police Exceeded the Scope of the Private Search

Another exception to the private search doctrine is whether the search effectuated by law enforcement exceeded the scope of the private search. "The additional invasions of [the defendant's] privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115 (alteration added).

> The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Id. at 117-18. Further, this Court has long held that there is no Fourth Amendment implication in a private party producing evidence for Government inspection:

> This does not mean, however, that the Government subsequently may conduct the same kind of search that private parties have conducted without implicating Fourth Amendment interests. The contrary view would permit Government agents to conduct warrantless searches of personal property whenever probable cause exists as a result of a prior private search.

Walter, 447 U.S. at 661. And a private search that merely frustrated the expectation of privacy in part

does not "simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Id.* at 659.

Here, the information contained in the motion to suppress filed in the Commonwealth and the recording of the preliminary hearing show that law enforcement's search exceeded that of the dog walker's private search. As discussed *supra*, the dog walker removed and searched one iPad. Law enforcement removed three. Moreover, the image that "concerned" the dog walker, per his testimony at the preliminary hearing, is not the same image viewed by Deputies Hazelwood and Cheshire, nor the photograph used as reasonable probability contained in the search warrant affidavit. It is evidence based upon these facts that the Government's search far exceeded the dog walker's private search, thus violating Beeman's Fourth Amendment rights.

B. The "Independent Source" Doctrine

Even where an illegal search has resulted in the violation of a defendant's Fourth Amendment rights, evidence may still be permitted in court where the independent source exception applies. The Court has described the independent source doctrine as follows:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred . . . . When the challenged evidence has

> an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

Murray v. United States, 487 U.S. 553, 537 (1988) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

> [F]or a later search pursuant to a warrant to be deemed 'genuinely independent' of a prior illegal entry, the government must demonstrate two things: (1) that the police would still have sought a warrant in the absence of the illegal search; and (2) that the magistrate judge would still have issued the warrant had the supporting affidavit not contained information stemming from the illegal search.

United States v. Runyan, 275 F.3d 449, 467 (5th Cir. 2001) (citing *Murray*, 487 U.S. at 542).

Once again, the information contained in the Commonwealth motion to suppress and recording of the preliminary hearing show that the independent source doctrine does not apply to the instant case. The dog walker's testimony is that he viewed once concerning image, a photo of a young girl in her underwear. This information is not in the search warrant affidavit and it is unlikely that a magistrate judge would have granted said warrant based solely on the findings of the private search as it is not apparent that the picture would have constituted an offense under Code of Virginia § 18.2-372.1:1 nor 18 U.S.C. § 2252.

Given the above, there existed a meritorious argument to move for suppression of the evidence obtained from the illegal search of Beeman's residence on January 14, 2014. Counsel's failure to advise Beeman of these merits constitutes ineffective assistance of counsel. Moreover, Beeman's testimony reflects that had he been advised of these merits, he would not have pleaded guilty and would have proceeded to trial instead. Based on the foregoing, reasonable jurists could debate the district court's denial of Beeman's § 2255 motion.

CONCLUSION

For these reasons, Petitioner asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted this 28th day of May, 2019.

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