

SUPREME COURT NO.
10TH CIRCUIT CASE NO. 18-1036
DISTRICT COURT NO. 1:16-CV-02829-RBJ

IN THE
SUPREME COURT OF THE UNITED STATES

PETER VINCENT CAPRA, PETITIONER

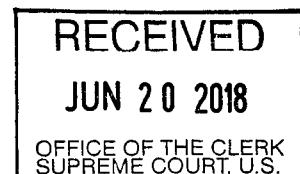
v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for Writ of Certiorari to the
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted by:
Peter Vincent Capra, Pro Se
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(a)

QUESTIONS PRESENTED FOR REVIEW

Question #1:

As Raised by the Petitioner:

Did the Appellate Court lack jurisdiction over the Appeal due to the fact from review of the record that the District Court had not adjudicated all of the issues in the case, which therefore means there was no final order.

In Lieu of:

Question #2:

As Raised by the Petitioner:

Does an appeals court err in failing to issue a certificate of appealability and/or order an evidentiary hearing on a defendant's claim of ineffective assistance of counsel claim where counsel:

(a) Failed to present a defense to the jury, (b) Failed to investigate the fact of the case, (c) Failed to interview witnesses, (d) Failed to hire an expert witness, (e) Failed to subpoenaed any witnesses, (f) Failed to submit a proper theory of defense or argue points (2) and (3) of the "Advice of Counsel" defense, (g) Failed to argue each count of the indictment and the fact that the Government had failed to present evidence as to each count, and (h) Failed to move for the dismissal of the indictment for the breach of the attorney-client relationship.

Question #3:

As Raised by the Petitioner:

Does an appeals court err in failing to issue a certificate of appealability and/or order an evidentiary hearing on a defendant's claim that the Government has criminalized a conduct, and then retroactively imposed a duty on the defendant as a private individual to disclose information when no duty to disclose is demonstrated.

Question #4:

As Raised by the Petitioner:

Does an appeals court err in failing to issue a certificate of appealability and/or order an evidentiary hearing when the Government's response is contested or contradicted by the Petitioner's statement in an affidavit and the opinion set forth in the report of an expert witness, and which testimony would present a debate in which a reasonable jurist could debate.

Question #5:

As Raised by the Petitioner:

Does an appeals court err when it fails to address that the District Court made statements concerning evidence and testimony which does not exist in the record, and then bases its conclusions on these non existence statement and evidence.

Question #6:

As Raised by the Petitioner:

Does an appeals court err when it fails to address that "Good Faith" is not a stand alone defense.

(b)

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

(c)

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(d)

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(e)

OPINIONS AND ORDERS ENTERED IN THE CASE

April 27, 2018, The United States Court of Appeals for the Tenth Circuit issued its order denying the Certificate of Appealability. See Appendix A.

(f)

JURISDICTION

- (i) The United States Court of Appeals for the Tenth Circuit issued its order denying the COA on April 27, 2018. A Copy of the order appears at Appendix A.
- (ii) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

(g)

CONSTITUTION AND STATUTORY PROVISIONS

Amendment 6 Rights of the accused

In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 5 Due Process of Law

No person shall be held to answer for a capital, or otherwise infamous crime, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment 14 Section 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

(h)

STATEMENT OF THE CASE

Peter Capra had over a thirty (30) year working relationship with his Attorney Laurin Quiat (Quiat). Capra used Quiat for all of his business questions, issues, polices and contracts. Quiat breached his attorney-client relationship with Capra, testified before the Grand Jury, and was granted immunity from the Government in exchange for his testimony against Capra.

Following a jury trial before the District Court Judge R. Brooke Jackson, Capra was found not guilty on the only charge in the original indictment, (count one) Obstruction of Justice, and found guilty on the charges put forth in the superseding indictment, 2 counts of Mail Fraud, 14 Counts of Wire Fraud and 10 Counts of Money Laundering. Capra was sentenced to 144 months in prison, three years of supervised release and ordered to pay restitution of \$11,009,914.00. The final judgment was entered on December 22, 2014, Doc 192. Capra appealed the conviction, which was affirmed by the Tenth Circuit. United States v. Capra, 652 Fed. Appx. 632 (10th Cir. June 14, 2016). Capra then filed the §2255 motion on November 18, 2016, which was denied on December 1, 2017. On December 18, 2017, Capra moved the District Court for reconsideration, which was denied by the Court. On March 30, 2018, Capra moved the Tenth Circuit for a Certificate of Appealability, which was denied on April 27, 2018.

Under any reading of this case, past filings, trial transcripts, appeals, and the §2255 Petition, this is a complex case. Court appointed attorney Ronald Gainor (Gainor) did not understand the case, the Court did not understand the case, and of course the Jury did not understand the case and why or what they were tasked to do (as seen from the 3 days of deliberations and 5 questions presented, and statements that they could not reach a verdict).

The indictment alleged that Capra engaged in a scheme to defraud real estate lenders (no lenders testified at trial that they were defrauded) "through the submission of false loan applications" and "structuring transactions to allow buyers to receive significant

amounts of lenders money after the time of closing without the knowledge of the lenders." (Again, no lenders testified that the lenders money was used without their knowledge). Count 1 charged a violation of 18 U.S.C. §1503 prohibiting obstruction of justice. (Capra was acquitted of this charge). Counts 2-15 charged violations of 18 U.S.C. §1343 prohibiting wire fraud on 14 homes purchased in a single subdivision. Counts 18-27 charged violations of 18 U.S.C. §1957(a) prohibiting money laundering on the same 10 homes in the same subdivision. Counts 16 and 17 charged violations of 18 U.S.C. §1341 prohibiting mail fraud on the same homes purchased in the same subdivision. (Capra had over a 30-year history building quality homes in Colorado, and completed 100's of subdivisions. This entire case is over 2 streets in a single subdivision). The evidence presented at trial was that Capra never saw a loan application, never filled out a loan application for any buyer, never had any involvement in any loan transaction. Capra was the builder, he built homes and sold homes through sales programs designed by the buyers, then given approval by Quiat who was the only person responsible for all contractual documentation. (Tr. p. 443).

Throughout the trial, sentencing, appeal and in this §2255 Petition, everyone gets lost in the complex nature of the methods used to get cash back to the buyers, which was designed by the buyers and by Attorney Quiat. Method One: Cash back directly to buyer after closing, and disclosed on the HUD-1. Method Two: Building Warranties Waivers to protect against construction defect litigation, and disclosed to title. And, Method Three: Statutory Mortgage Liens, paid to 3rd party, who paid funds to the buyers, which was also listed on the HUD-1. Each of these methods was developed and approved by Attorney Quiat, and was found at trial not to be illegal on their own, but could create a illegal action and defraud the lender if the buyers did not inform their lenders of the cash back during the loan process and the title process. Attorney Quiat was the paid legal representative tasked to protect Capra and the company, to make sure that all legal requirements were followed and that all parties were informed and protected. NO lenders were called to testify at trial, and no evidence was presented that any lender was

defrauded. The majority of the home loan applications charged in this action had the method for the cash back listed on the actual HUD-1 statement and the lenders were informed and aware of the cash back, and in fact Countrywide Mortgage in fact reviewed and approved the methods used connected to their loan approvals. The Buyers and the Buyers representatives were responsible for and supplied the methods to Countrywide for approval, which Quiat also approved.

Court appointed counsel Gainor did not understand the complex nature of the government's case, and planned on putting forward an "Advice of Counsel" defense. With this understanding, Gainor did not interview a single witness including the main witness he based his entire defense on, attorney Quiat. Capra and Quiat had a thirty year working relationship. Quiat either approved and or drafted every method presented in this case, and approved every cash back document on every home listed in the indictment. (Tr.p.297-391). Each and every time any question was presented to Capra concerning how or what a buyer wanted to do, or changes to any purchase agreement, Capra would state, "refer it to the lawyer" Quiat. (Tr.p.297). "We do what the corporate attorney says to do" Exhibit 40J, (Tr.p.403). "The corporate attorney said it was legitimate and legal". (Tr.p.416). The government did not present any evidence or dispute that Quiat was in fact the person who drafted, reviewed and approved every document in this case, which the government alleges are somehow illegal. Capra hired legal counsel, relied upon that counsels direction and advice, and made it the policy that all documents would be reviewed and approved by counsel prior to his signing of the documents, and then his attorney enters into an immunity agreement with the government and breaches the attorney-client relationship by testifying in front of the Grand Jury which results in charges and conviction of Capra for the actions, content and concepts developed by his attorney Quiat, all to protect Quiat from prosecution.

The only witness that Gainor put any effort in cross-examining was attorney Quiat. Gainor's entire and sole defense was "Good Faith Reliance on Counsel", which the Courts have held since 1967 is not a complete defense. On a Advice of Counsel Defense, the defense counsel

must show a 3 point test. (1) that the client honestly and in good faith sought the advice of counsel, (2) that the client fully and honestly laid all facts before his counsel, (3) and the client in good faith and honesty followed the counsels advice, believing it to be correct and intending that his acts be lawful. Court appointed counsel Gainor spent his entire time focused on point (1) only, hitting home that Capra sought the advice of counsel. Gainor failed to understand that his defense was not complete on its own, and failed to understand that he was required to prove points (2) and (3), and failed to understand that this was still not a complete defense. The District Court and the Tenth Circuit Court of Appeals have both failed to address this clear and overwhelming fact.

Gainor actually advised Capra not to testify, which means that Gainor could never complete the test for advise of counsel, because point (3) requires testimony from Capra that he followed the advice of counsel, and believed it to be correct and lawful. The ~~District~~ Court and the Appellate Court both failed to address this undisputed fact. The record in this case is undisputable that Gainor failed to put on a complete defense, (a fact that both the District Court and the Appellate Court failed to address), and Gainor before closing realized his error, so then decided to change his defense before the jury went to deliberate, and withdrew the "Advice of Counsel" instruction, which was the basis to attack Quiat, and instead asked the Court for a template good faith instruction. (A fact the District Court and the Appellate Court has failed to address). The Court was shocked, Capra was shocked, the Jury was confused. The District Court Judge should have called for a mistrial, but failed to do so. (A Fact that the District Court and the Appellate Court failed to address.) Judge Jackson stated "you put 90 of your 100 eggs in the Quiat advice basket. . . Now you are not doing that???" It is undisputed and clear, that the Court knew at that point that Gainor was in fact ineffective. The Court was confused, Capra was confused, and it is undisputed that the jury was confused, and could not reach a verdict for 3 days. It is undisputed that Gainor did not in fact put on any defense for Capra, he put 90% of his case in the Quiat basket, and then at the last moment, withdrew that defense. As Gainor stated "at the end of the day, we all got exposed, at least I did. . .".

(i)

ARGUMENT / REASONS FOR GRANTING THE WRIT

Question #1:

DID THE APPEAL COURT LACK JURISDICTION OVER THE APPEAL DUE TO THE FACT FROM THE REVIEW OF THE RECORD THAT THE DISTRICT COURT HAD NOT ADJUDICATED ALL OF THE ISSUES IN THE CASE, WHICH THEREFORE MEANS THERE WAS NO FINAL ORDER.

Under the final judgment rule, appellate jurisdiction is customarily limited to final decisions of the district courts. 28 U.S.C.S. §1291.

Before the Appellate Court could consider the merits of the Capra appeal, the Court was required to act in an independent review "to verify the existence of appellate jurisdiction." *Palmer v. City Nat'l Bank of W. Va* 498 F.3d 236 240 (4th Cir 2007). And that jurisdiction generally is limited to appeals from "final decisions of the district courts," 28 U.S.C. 1291 - decisions that "end[] the litigation on the merits and leave[] nothing for the courts to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 US 463 467 98 S Ct. 2454 57 L Ed. 2d 351 (1978).

"Ordinarily, a district court order is not 'final' until it has resolved all the claims as to all parties." *Fox v. Baltimore City Police Dept*, 201 f.3d 526 530 (4th Cir. 2000). In making that assessment, the Court looks to substance, not form. Regardless of the label given a district court decision, if it appears from the record that the district court has not adjudicated all of the issues in a case, then there is no final order. See *Witherspoon v. White* 111 f.3d 399 402 (5th Cir. 1997); *C.H. ex rel. Hardwick v. Heyward* 404 F. App'x 765 768 (4th Cir. 2010); ("[A]" district court mislabeling a non-final judgment 'final' does not make it so." (quoting *Stillman v. Travelers Ins Co* 88 F 3d 911 914 (11th Cir 1996)).

The same rule applies in habeas cases. See *Prellwitz v. Sisto* 657 F.3d 1035 1038 (9th Cir. 2011) (dismissing habeas appeal for lack of jurisdiction where the district court failed to adjudicate

all claims). And just as the label attached to a district court order does not end the inquiry into finality, the issuance of a certificate of appealability cannot by itself establish that the district court actually has resolved every claim between the parties.

In short, even if a district court believes it has disposed of an entire case, the appellate court still lacks jurisdiction where the court in fact has failed to enter a judgment on all claims. That is what has happened here. The district court did not rule on all of Capra's claims, and as such the appellate court should have dismissed the request for an Certificate of Appealability for lack of jurisdiction, and remanded the case back to the district court to address the remaining open claims.

The Petitioner presented nonfrivolous arguments that a reasonable jurist could have debated, and the District Court should have responded to these arguments and more fully explained its decision. See Rita 551 US at 356-57; see also Poulin 745 F.3d at 801 (holding that the district court was required to consider arguments and then provide reasons explaining acceptance or rejection of them). The District Court in this case did not do so. The following issues were presented and were adequate to deserve encouragement to proceed further:

(1) The District Court failed to address the fact that Gainor failed to subpoena any witnesses.

(2) The District Court failed to address the fact that Gainor at the last moment changed from an "Advice of Counsel" defense to a simple template "Good Faith" instruction, which in fact was no defense at all, because Gainor never put forth good faith during the trial.

(3) The District Court failed to address all of the issues presented around the "Advice of Counsel" defense and the issues with not interviewing Quiat, the Government's exhibit 40J, the letter from Quiat confirming the fact that Quiat was responsible for each method used for cash back, that Quiat was responsible for and approved each form used for the cash back, That Quiat testified that the cash

back methods were legal, that Gainor failed to detail the hundred's of emails and letters to and from Quiat.

(4) The District Court failed to address the fact that the government did not prove mail or wire fraud, that Count 2 had no cash back to the buyer, that Count 3 had the cash back listed on the HUD-1 and approved by the lender, that Count 4, the cash back was listed on the HUD-1, and the cash was paid to the lender, that Count 5, the cash back was listed on the HUD-1 as "cash to buyer", that Counts 6 & 7 the Government presented no evidence of wire fraud, that Counts 8, 12, 13, 14, 15 & 16, no witnesses were called to testify and no evidence was presented that Capra had any involvement in these loans, and as such, no wire fraud, that Count 9, the cash back was disclosed to the lender, and the cash back was used for the detailed home improvements, That Counts 17 & 18, the Government failed to prove mail fraud, as the homes in question disclosed the cash back methods to the lenders.

Therefore, the District Court's order was not final because it did not dispose of the action as to all claims between the parties. See also Fed. R. Civ. P. 54(b).

See Questions #2 to #6 for detailed arguments concerning other issues not adjudicated by the District Court, which remain open, which therefore mean there was no final order in this case.

Question #2:

DOES AN APPEALS COURT ERR IN FAILING TO ISSUE A CERTIFICATE OF APPEALABILITY AND/OR ORDER AN EVIDENTIARY HEARING ON A DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL:

(a) FAILED TO PRESENT A DEFENSE TO THE JURY.

The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. In this case, Capra was denied his Sixth Amendment right to counsel, his right to a fair trial, and his right to have the evidence subject to adversarial testing before it was submitted to the jury. In this case, Court appointed counsel Gainor was not effective, thus violating Capra's Sixth Amendment right. Gainor did not perform the 3 part test to prove the "Advice of counsel" defense, then withdrew the only defense presented to the jury, which so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result, and fell below an objective standard of reasonableness under prevailing professional norms.

The Appellate Court and the District Court failed to address this clear constitutional violation.

(b) FAILED TO INVESTIGATE THE FACTS OF THE CASE.

Court appointed counsel Gainor failed to investigate the basic facts of the case, "Were the cash back methods legal", "Who prepared the contract documents for each of the cash back methods", "Were each cash back detailed on each of the HUD-1 statements, and were the lenders in fact informed of the cash back to the buyers", "Did Countrywide actually approve the cash back methods used by Capra

through Quiat", "Did Quiat in fact approve each and every buyers documents , and send those documents to the title company", "Was Quiat in fact working with Countrywide's legal department on the approval of each of the cash back methods", "Was any lender defrauded", "Did Quiat in fact breach the attorney-client privilege", "To prove an advice of counsel defense, what must you do as a matter of law", "Did Capra seek the advice of counsel", "Did Capra present all facts to Quiat", "Did Capra follow the advice of Quiat", "Who prepared each of the loan documents", "Did Capra ever see any of the loan documents", "What are the industry standards for builders and third party lenders, and who is responsible for what".

The Government, the District Court and the Appellate Court failed to address the fact that Gainor failed to investigate the facts of Capra's case, which is a clear Constitutional violation.

(c) FAILED TO INTERVIEW THE WITNESSES.

Capra had a Constitutional right to effective counsel, and a Constitutional right to have witnesses called in his defense. Not interviewing witnesses, and not subpoenaing witnesses to support the defenses theory (If any) is a clear denial of Capra's Constitutional Rights and any reasonable jurist could debate the District Court's conclusions and the correctness of those conclusions. Gainor "entirely failed to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 US 648, 80 L Ed 2d 657, 659 104 S Ct 2039 (1984). Gainor's shortcomings included a complete failure to interview any of the witnesses who could have provided mitigating evidence. To not interview the sole witness that you plan to base your only defense theory on (Quiat) is the definition of ineffective counsel and prejudiced Capra's defense.

Gainor failed to interview Pat Patterson, who was the accountant for Capra's company GDG, and was present when Capra and Quiat discussed the cash back methods and Capra's concerns about Quiat's legal concepts in using these methods, and was a witness to Quiat's statements that these methods were in fact legal, and that Quiat would stand behind his legal work.

Gainor failed to interview Helen Lynn Savolt, the Executive Assistant at GDG, who personally sent and received 100's of letters, Faxes, and emails to and from Quiat, who personally sent every form of cash back in question, on each and every home charged in this case, and would testify that each and every document and contract was in fact drafted and approved by attorney Quiat, before being presented to the title company.

Gainor failed to interview Peter Capra Jr, the GDG office Manager, who also sent and received communications from Quiat.

Gainor failed to interview Quiat's legal staff, who received and sent 100's of letters, faxes and emails for Quiat.

Gainor failed to interview Micky Moose, the Sales Manager for Countrywide Mortgage, who expressed concerns with Method #3, money back methods, and then met with one of the buyers of a GDG home, and Countrywide office reviewed and approved the cash back methods based upon Quiat's legal opinions.

The testimony of these witnesses supports the contention that a more thorough pretrial preparation by Mr. Gainor would have uncovered evidence that significantly strengthened Capra's defense. Because Gainor failed to interview these witnesses, Capra was deprived of effective assistance of counsel.

The Government, the District Court and the Appellate Court, all failed to address this claim, which had a prejudicial effect on Capra.

(d) **FAILED TO HIRE AN EXPERT WITNESS**

The ineffective representation of Capra's defense counsel Gainor is also proven by his failure to retain and consult with a forensic expert to testify at trial to demonstrate the fallacies in the government's evidence. In Pruitt v. Neal, 2015 U.S. App. Lexis 9145 (decided June 2, 2015), the Court reversed and remanded the case because defense counsel failed to hire an expert and offered no reason

for failing to do so, just as in this present case. The Court also stated that: ". . . even an isolated error 'can establish ineffective assistance' if it is sufficiently egregious and prejudicial" quoting Murry v. Carrier 477 US 478 496 106 S.Ct 2639 (1986). Gainor's lack of effort to investigate the facts and the failure to engage a forensic expert, is inexcusable. Capra was prejudiced by not having an expert testify as to:

- (1) Each cash back method, and how it was disclosed to each lender.
- (2) Review each count of the indictment and each HUD-1 statement and how the process for the cash back matched the legal process and documents developed by Quiat.
- (3) The flow of the legal documents from the real estate sales person, to the title company, to the lender, and the approval process at each level.
- (4) Track the cash flow of each transaction, and detail industry standards, and other builders and lenders processes using the same systems, and how they are not illegal.
- (5) Show how the government failed to prove each count of the indictment, and the fact that there was no intent to defraud any lender.
- (6) Detail each lenders loan application process, who supplied the information, and the fact that Capra as the builder and seller of the properties would have no knowledge or involvement into what a buyer places on their loan application.
- (7) Explain for the jury why Capra and GDG Homes could not be involved in loan process between the buyers and the buyers loan company, and why such involvement would create liability for Capra and GDG.
- (8) Why a builder would hire outside legal counsel to prepare and review legal sales paperwork.
- (9) Detail each cash back method developed by Quiat, and why each method was legal under the law.
- (10) What if anything Capra would have known about each transaction, based upon industry standards.
- (11) The fact that Capra was acting in "Good Faith" and acting on the "Advice of Counsel".

- (12) How Capra followed the advice of counsel Quiat in directing the disclosures of the cash back on the HUD-1.
- (13) Show how it was Quiat who formed the LLC's and prepared each document to the title companies and the lenders.
- (14) Show that Capra never submitted anything false or fraudulent to any lender.
- (15) Show that Capra never solicited any "unqualified" buyer to purchase a GDG home.
- (16) Show that Capra never convinced any "unwilling" buyer to buy a GDG home.
- (17) Show that Capra never lied or concealed the fact that buyers were receiving cash back as detailed on the HUD-1 statements.

It is overwhelmingly clear that Capra was prejudiced by Gainor's failure to call an expert witness to detail each of the fallacies in the government's claims. It is also clear that the District Court and the Appellate Court failed to address these claims which has violated Capra's Constitutional Due Process rights.

(e) FAILED TO SUBPOENAED ANY WITNESSES

To establish ineffective assistance of counsel based on the fact that Gainor failed to subpoena any witnesses, Capra must meet the two-part test set forth in *Strickland v. Washington*, 466 US 668 104 S Ct 2052 80 L Ed 2d 674 (1984). Under *Strickland*, Capra must prove that his "Counsel's representation fell below an objective standard of reasonableness" and that "any deficiencies in counsel's performance [were] prejudicial to the defense." To establish prejudice, Capra must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." As detailed for the District Court, Capra supplied his counsel the lists of witnesses to be subpoenaed for trial, and the details as to what each witness would testify to, and why their testimony was required to prove that he was not guilty of the crime charged. These witnesses and their testimony is detailed throughout the §2255.

Gainor performance fell below that objective standard of reasonableness

that any defendant would expect "To have witnesses for his defense". Capra then proved that the witnesses had in fact needed testimony as to what and why Quiat had performed, and the fact that Capra did not prepare the documents in which the government claimed were fraudulent. The witnesses also would have shown that each charged count in fact did not have any fraudulent documents, and in fact each lender was in fact informed of each cash back method, as it was denoted on the HUD-1 forms to the lenders. This lack of testimony prejudiced the defense, and kept away from the jury key facts that would have rendered a different outcome. Gainor's unprofessional errors, resulted in a proceedings that were prejudicial to Capra, and would have clearly been different if Gainor had subpoeaned the witnesses.

The District Court and the Appellate Court failed to address this claim, or how not subpoeanaing any witnesses was not ineffective assistance of counsel.

(f) FAILED TO SUBMIT A PROPER THEORY OF DEFENSE

The record in this case is overwhelmingly clear that Gainor failed to develop any discernable theory of defense. Gainor opened the case with the "advice of Counsel" theory of defense, but had failed to understand what was required of him to put on such a defense, such as "Capra would need to testify, to prove that he requested, supplied and then followed the advice of counsel". Gainor had no idea that there was a test to prove to put on an "Advice of Counsel" defense, then at the last minute, before the case went to the jury, Gainor withdrew his only partial defense, and left Capra without any defense at all. As the Court said "You put 90% of your eggs in the "Advice of Counsel" defense, and now your not doing that?" Gainor then put forth a stock "Good Faith" instruction which was incomplete, in violation of the Fifth, Sixth, and Fourteenth Amendments. "A criminal defendant is entitled to an instruction on his theory of defense provided that theory is supported by some evidence and the law". United States v. Haney, 318 F.3d 1161 1163 (10th Cir. 2003). Gainor did not have any testimony or evidence to support his last minute "Good Faith" theory.

The District Court and the Appellate Court failed to address this clear Constitutional violation.

(g) FAILED TO ARGUE EACH COUNT OF THE INDICTMENT AND THE FACT THAT THE GOVERNMENT FAILED TO PRESENT EVIDENCE AS TO EACH COUNT.

To establish a claim for ineffective assistance of counsel, a defendant must show: (1) his counsel's performance was constitutionally deficient; and (2) counsel's deficient performance was prejudicial. Strickland, 466 US at 687. Prejudice is established by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." id at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Again, the District Court and the Appellate Court both failed to address the facts presented that Gainor failed to present a defense to and argue each count of the indictment, and then failed to argue the fact that the government failed to present evidence as to each count of the indictment. Not presenting a defense to each count of indictment is constitutionally deficient. Not presenting a defense resulted in prejudice to Capra. These facts undermined the confidence in the outcome.

(h) FAILED TO MOVE FOR THE DISMISSAL OF THE INDICTMENT FOR THE BREACH OF THE ATTORNEY CLIENT RELATIONSHIP.

Colorado Rules of Professional Conduct 3.8(e), makes it clear that the Grand Jury may only issue subpoenas to attorneys to testify against their clients in a limited number of circumstances, and it is intended to limit the issuance of attorney subpoenas to only those situations in which there is a genuine need to intrude into the client-lawyer relationship. Capra's attorney of 30-years Quiat, was given immunity from his actions, and then testified before the grand jury laying all of the blame for the legal contracts prepared by Quiat, and which Quiat billed and was paid for these services, upon his client Capra.

The District Court and the Appellate Court failed to address this clear Constitutional violation.

(g) FAILED TO ARGUE EACH COUNT OF THE INDICTMENT AND THE FACT THAT THE GOVERNMENT FAILED TO PRESENT EVIDENCE AS TO EACH COUNT.

To establish a claim for ineffective assistance of counsel, a defendant must show: (1) his counsel's performance was constitutionally deficient; and (2) counsel's deficient performance was prejudicial. Strickland, 466 US at 687. Prejudice is established by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." id at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Again, the District Court and the Appellate Court both failed to address the facts presented that Gainor failed to present a defense to and argue each count of the indictment, and then failed to argue the fact that the government failed to present evidence as to each count of the indictment. Not presenting a defense to each count of indictment is constitutionally deficient. Not presenting a defense resulted in prejudice to Capra. These facts undermined the confidence in the outcome.

(h) FAILED TO MOVE FOR THE DISMISSAL OF THE INDICTMENT FOR THE BREACH OF THE ATTORNEY CLIENT RELATIONSHIP...

Colorado Rules of Professional Conduct 3.8(e), makes it clear that the Grand Jury may only issue subpoenas to attorneys to testify against their clients in a limited number of circumstances, and it is intended to limit the issuance of attorney subpoenas to only those situations in which there is a genuine need to intrude into the client-lawyer relationship. Capra's attorney of 20-years Quiat, was given immunity from his actions, and then testified before the grand jury laying all of the blame for the legal contracts prepared by Quiat, and which Quiat billed and was paid for these services, upon his client Capra.

Gainor was ineffective for not moving the Court to dismiss the indictment against Capra for the actions of Quiat and the Government for the clear breach of the attorney-client relationship. It is clear that the argument should have been made. Quiat was singing for his supper, and placing the blame for his actions upon his client in order to save himself. Capra followed industry standards and hired an lawyer to prepare legal documents, paid that lawyer for these documents and was then charged for a crime for using these legal documents prepared, reviewed and approved each time they were used by the lawyer Quiat. This is why we have lawyers, this is why we hire lawyers. If every american can be charged with a crime for using the forms prepared by their lawyers, while their lawyers are able to receive immunity for their actions, and the testify against their own client who they billed and accepted money from, the entire system would come crashing down.

It was ineffective of Gainor not to have fought this fight. Was there no other feasible alternative source from which to obtain this information? Was this information relevant to the general subject matter before the Grand Jury? Should not have the Grand Jury been investigating attorney Quiat? What is more likely, that a home builder Capra developed the legal documents in which the Government alleges defrauded the lenders, or is it more likely that attorney Quiat developed these documents? Who was prejudiced by this testimony?

Again, the District Court and the Appellate Court failed to address this issue.

Question #3:

As Raised by the Petitioner:

DOES AN APPEALS COURT ERR IN FAILING TO ISSUE A CERTIFICATE OF APPEALABILITY AND/OR ORDER AN EVIDENTIARY HEARING ON A DEFENDNT'S CLAIM THAT THE GOVERNMENT HAS CRIMINALIZED A CONDUCT, AND THEN RETROACTIVELY IMPOSED A DUTY ON THE DEFENDENT AS A PRIVATE INDIVIDUAL TO DISCLOSE INFORMATION WHEN NO DUTY TO DISCLOSE IS DEMOSTRATED.

Retroactive imposition of a duty to disclose information upon a private individual in a private business transaction as a predicate for criminal liability is a deprivation of due process of law.

Mr Capra argues that he had no duty to disclose any information to his home buyer third party lenders in which he has no contact nor contract, beyond his duty to inform the joint third party title company, which placed such disclosures on the HUD-1 form to be reviewed and approved by these third party lenders. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. *Chiarella v. United States* 445 US 222 235 63 L. Ed. 2d 348 100 S. Ct. 1108 (1980). In this case, the only duty to speak was Capra's duty to inform the title company, which was done, absent that, Capra had no duty to find, contact and communicate with lenders who are not under contract to him. There can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated. *United States v. Irwin* 654 F.2d 671 679 (10th Cir. 1981). The Government completely failed to prove the existence of a known duty on Capra's part to disclose to the third party lenders absent the disclosure to the title companies, which Capra hired attorney Quiat to perform. The Government did not argue any statute, regulation, common law or contractual provision that requires disclosure of the methods.

We must as well look at who is a party to these transactions. From Capra's point of view, he has an contract with a buyer to purchase a home, and he enters into a agreement with a title company to prefect that sale. His contractual agreement are between these 3 parties, and his duty to disclose are to these 3 parties. Now the buyer has agreements with 4 parties, which include the lender, and the buyer has the duty to disclose information to his contracted lender.

The evidence in this case does not support the existence of a duty between Capra and his buyer lenders. Capra hired counsel to create, review and approve all documents submitted to each title company of the sale of each home. Capra's duty was to disclose to each title company. That is where his duty ended.

Capra argues also that criminalizing the conduct at issue in this case violates due process. Criminalizing the conduct at issue in this case retroactively imposed a duty on Capra, as private individuals, to disclose information in a private business transactions to third parties in which he had no contractual duty. Constitutional notice of what constituted criminal conduct was not provided, and therefore Capra's criminal convictions must be reversed.

The District Court and the Appellate Court failed to address this issue.

Question #4

DOES AN APPELLATE COURT ERR IN FAILING TO ISSUE A CERTIFICATE OF APPEALABILITY AND/OR ORDER AN EVIDENTIARY HEARING WHEN THE GOVERNMENT'S RESPONSE IS CONTESTED OR CONTRADICTED BY THE PETITIONER'S STATEMENT IN AN AFFIDAVIT AND ALSO IN THE OPINION SET FORTH IN THE REPORT OF AN EXPERT WITNESS, AND WHICH TESTIMONY WOULD PRESENT A DEBATE IN WHICH A REASONABLE JURIST COULD DEBATE.

A §2255 petitioner is entitled to an evidentiary hearing when there is a disputed factual issue. See *Anderson v. Atty Gen of Kas* 425 F.3d 853 860 (10th Cir. 2005). ("the purpose of an evidentiary hearing is to resolve conflicting evidence."). The Petitioner put forth lists of conflicting evidence, supported by the record together with an expert report detailing the ineffectiveness of attorney Gainor, all of which was not disputed by the Government, hence it is disputed, and conflicting requiring an evidentiary hearing to resolve the dispute. A reasonable jurist could debate the sufficiency of the expert and his findings. This expert had over 30 years working in the federal court system. The fact that the District Court judge did not like or respect the expert, has no bearing as to what a reasonable jurist could debate. There was clearly disputed issues of law and fact in this case, detailed by the expert report. Thus, the District Court was required to conduct an evidentiary hearing because the evidence presented by the petitioner, if accepted as true, warranted the relief as a matter of law. The evidence presented in the expert report provided a firm idea of what the testimony would encompass and how it supported the Petitioner's claims. *United States v. Cervini* 379 F.3d 987 (10th Cir. 2004).

In short, the Petitioner presented sufficient evidence of deficient performance and prejudice to entitle Capra to an evidentiary hearing. This evidence was not contested or contradicted.

This issue was not addressed by either the District Court or the Appellate Court.

Question #5:

DOES AN APPELLATE COURT ERR WHEN IT FAILS TO ADDRESS THAT THE DISTRICT COURT MADE STATEMENT CONCERNING EVIDENCE AND TESTIMONY WHICH DOES NOT EXIST IN THE RECORD, AND THEN BASES ITS CONCLUSIONS ON THESE NON EXISTENCE STATEMENTS AND EVIDENCE.

The District Court making statements in its denial of the Petitioner's §2255, which were not in the evidence/record amounted to plain error. These misstated facts, if believed by the Court, were enough to influence the District Court in its decision to deny the Petitioners §2255, which prejudiced the Petitioner and maintained a conviction on grounds beyond the admissible evidence presented.

To prevail under the plain error standard, the Petitioner must demonstrate "(1) the district court erred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." United States v. Munoz 812.F.3d 809 818 (10th Cir. 2016).

(1) The District Court Erred when it made statements concerning evidence which does not exist such as:

(a) That there was evidence that Capra knew that false information was routinely submitted on loan applications and that money was going back to buyers. (There was no evidence admitted that Capra "Knew that false information was routinely submitted", and the cash back to the buyers was found not to be illegal.) (Order p.11)

(b) "But lenders weren't informed" (There was no evidence or testimony from any lender) (Order p.12).

(c) "the evidence of guilt was overwhelming". (The Court and the Government failed to point to a single piece of evidence that proved Capra's guilt, nor was overwhelming, stating that evidence is overwhelming, does not make it evidence, nor overwhelming.)

(d) "The evidence clearly established that Capra devised and oversaw various means of funneling money back to the buyers without the knowledge of the lenders." (There is no evidence or testimony to support this statement, and no testimony from any lender. The evidence and the testimony clearly showed that Attorney Quiat was the

person who devised and oversaw the various means of cash back to the buyers (which was not illegal), and Quiat was given immunity from prosecution to testify against his client.) (Order p.15).

(e) "The evidence clearly established a duty to disclose those payments to the lenders". (There is no evidence to support this statement, and the evidence clearly showed that the payments were disclosed on the HUD-1 statements to the lenders.) (Order p.15).

(f) "There is no reason to speculate that any juror would have interpreted it as a stipulation of guilt". (There is 3 days of deliberations and 5 questions or reason to speculate that the jurors might have interpreted the stipulations as stating guilt, and no evidence to the contrary.)

The District Erred when it made statements not supported by the record.

(2) The District Court's error was plain.

(3) The District Court's error affected Capra's substantial Constitutional right to a fair process, and his right to be heard.

(4) The District Court's error seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

Question #6:

DOES AN APPELLATE COURT ERR WHEN IT FAILS TO ADDRESS THAT "GOOD FAITH" IS NOT A STAND ALONE DEFENSE.

The District Court and the Appellate Court failed to address the fact that Gainor at the last moment changed from an "Advice of Counsel" defense, to a simple template "Good Faith" instruction, which in fact was no defense at all, because Gainor never put forth good faith during the trial. Capra had a Constitutional Right to a defense and a Constitutional Right to effective counsel to present that defense. Any reasonable jurist could debate the District Court's conclusions.

A specific good faith instruction (Which was not presented in this case) is justified when a defendant has presented evidence capable of rebutting "all evidence of false and misleading conduct, all failures to disclose that which should have been disclosed and all matters that deceive and were intended to deceive another." (Which also was not done in this case) United States v. Chavis 461 F.3d 1201 1209 (10th Cir. 2006). The District Court had a duty to not allow the last minute "Good Faith" instruction, as Gainor had not laid the groundwork during the trial for such an instruction and/or defense.

A defendant is entitled to an instruction on his theory of defense only where some evidence supports the theory. In the case, Gainor put 90% of his eggs into the "Advice of Counsel" defense, then at the last moment, withdrew that defense, and supplied a stock template "Good Faith" instruction without any evidence in the record to support such a defense.

The District Court and the Appellate Court erred when they failed to address this issue.

(j)

CONCLUSION

Peter Capra clearly received ineffective assistance of counsel, and the District Court and the Appellate Court erred when they failed to address all of the issues presented, and the clear facts of this case.

Petitioner moves this Court to remand this case back to the District Court for an evidentiary hearing, so that the witnesses and the experts can testify as to the facts of this case which would have been presented if Capra was in fact represented by an effective counsel.

Respectfully:

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