No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Pro-se, Reginald Hough -- PETITIONER

VS

United States of America -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Reginald Hough
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QUESTIONS PRESENTED

1. Based on the totality of the circumstances was there probable cause for the search warrant to issue?

2. Is it permissible for a lay witness to offer testimony based on scientific, technical, or specialized knowledge, so long as he does not offer opinion, and without being qualified as an expert by the court?

3. Are accusatory statements made by law enforcement via a recording, offered in evidence to prove the truth of the matter, testimonial and, therefore, a violation of the Confrontation Clause?

4. Did the withholding of evidence, and the use of false statements, deny petitioner a fair trial, violating his Fifth Amendment?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR THE WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition, and is unpublished.

The findings and recommendations on motion §2255 by the United States magistrate judge appears at Appendix C, and is unpublished.

STATEMENT OF JURISDICTIONAL GROUNDS

On Sept 30,2011, in a cause then pending in the United States District Court for the Western District of Kentucky, entitled United States V Reginald Hough, Criminal Case No 3:06-cr-39-JHM, Petitioner was found guilty by a jury on an indictment of one count each, charging violations of 18 USC §2252A(a)(2)(A) and 18 USC §2252A(a)(5)(B) for the year 2005.

On Nov 14, 2011, the district court entered judgement dismissing count 2, 18 USC §2252A(a)(5)(B).

On Dec 14, 2011, the district court entered judgement and Petitioner was sentenced to 210 months. This judgement and sentence was affirmed by the United States Court of Appeals for the Six Circuit, United States V Reginald Hough, Case No 11-6510 on Feb 13, 2013(unpublished). A petition to this Court for a Writ of Certiorari was denied on Apr 15, 2013.

On Apr 11, 2014, Petitioner filed the motion in the case at bar under 28 USC §2255 to vacate and set aside the judgement of conviction, Case No 3:06-cr-39-JHM. Briefs in support and opposition were filed by each of the parties. No hearing was held.

On Jan 10, 2017, the United States magistrate judge issued findings and recommendations on motion §2255. Appendix C.

On Mar 21, 2017, the district court entered its order denying the motion, and certificate of appealibility, were denied with prejudice. Appendix B. Petitioner filed an appeal.

On Feb 07, 2018, the Sixth Circuit Court of Appeals upheld the district court's conclusions, and denied the appeal of §2255 motion and COA in Reginald Hough V United States, Case No 17-5519. Opinion and Order at Appendix A.

On June 29, 2018, the Sixth Circuit court denied petition for an en-banc hearing. Appendix D.

On July 16, 2018, petition for rehearing en-banc denial was reaffirmed. Appendix E.

The jurisdiction of this Court is involked under 28 USC §1254(1).

TABLE OF CITED AUTHORITIES

Cases **Page**

Rules

Federal Rules of Evidence
Rule 403

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Federal Rules of Evidence
Rule 701 - Opinion Testimony by Lay Witnesses

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Rule 702 - Testimony by Expert Witnesses

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the tier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of relable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case."

Rule 801(c)

"Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Federal Rules of Criminal Procedure

Rule 16(a)(1)(G) - Expert Witnesses

"At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial.If the government requests discovery under subdivision(b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules, 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IV

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

28 USC §1254(1)

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari grant upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree."

The statute under which Petitioner sought post conviction relief was 28 USC §2255. "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. 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 judgement was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

The court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgement on application for a writ of habeas corpus. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant had failed to apply for relief by motion, to the court which sentenced him or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

18 USC §2252A(a)(2)(A)

"Any person who knowingly recives or distributes any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer."

I. Based on the totality of the circumstances, was there probable cause for the search warrant to issue?

The Sixth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. In considering the totality of the circumstances, the district court concluded: "Maurer provided specific details concerning the type and amount of material that she discovered on Hough's computers." The district court also concluded, "the search warrant affidavit ... was not 'bare bones' because it provided some underlying factual circumstances regarding veracity, reliability, and bases of knowledge." (Appendix A at 3) . This conclusion is contradicted by the record.

The search warrant provided the following information:

> Rhonda Hough (Maurer) contacted the Crimes Against Children office to advise that while looking at e-mail on the computer located at the residence she shares with her husband, Reginald Hough, she discovered numerous still images of child pornography and at least 8 video images of children engaged in sexual acts electronically stored on the computer. Ms Hough also discovered screen names of "Hoosier_Daddy33@Hotmail.com" and "Reggie467@Yahoo.com" that had been used to proposition a 15 year old female for the purposes of sexual activity and/or child pornography. Ms Hough saw the e-mails and images as recently as 0930 AM on 04-18-2005.

When the prosecutor had shown the warrant affidavit to Ms Maurer at trial she testified as follows:

Q- Did you ever see the affidavit in support of the search warrant?

A- No, ma'am.

Q- Did anyone ever bring it to you to review it before they took it to the judge?

A- No, ma'am.

After taking the time to read the affidavit the questioning continues:

Q- Did you tell Detective Kemper all of those things? Or is there anything, now that you've seen everything that has been written out, that you need to change for purposes of this trial as to what you recall telling Detective Kemper?

A- In reading this I don't recall stating anything about the the content of anything of his e-mails.

Q- Okay. Did you see communications between him and people portraying themselves as underage?

A- No ma'am.

Q- So you didn't give that information?

A- No ma'am. (Tr 178 at 95)

The false information included in the warrant affidavit was provided by the affiant to mislead the county judge into believing there was probable cause for the warrant to issue. According to the sworn testimony at trial:

(1) the affiant was not told anything about the content of Hough's e-mails;

(2) the affiant was not told about seeing communication between him and people portraying themselves as underage;

(3) there were no videos; (Lamkin testimony)

Q- You did not find any videos; is that correct?

A- That's correct. (Tr 180 at 252-53)

(4) No numerous images were seen as early as 0930 AM on 04-18-2005.

Q- There were no suspected child pornography images in any file; is that correct?

A- Not in the active files, no.

"Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." Franks V Delaware, 438 US 154,155-56(1978). The affiant provided this information in an affidavit to the county judge knowing these statements were false, and with reckless disregard for the truth. "The district court concluded that because there was no indication that the

affiant intentionally misrepresented any of the facts provided to him [her] by Maurer, there was no need for a Franks hearing, and counsel thus did not perform deficiently. Reasonable jurist would not debate the district court's ruling on this issue." (Appendix A at 4) This decision is contradicted by the record, and clearly in error. Hough's Fourth Amendment rights were violated. The affidavit was offered into evidence for the truth of the matter asserted, triggering Hough's Sixth Amendment right to confront witnesses against him. Kemper, the affiant, was not availible for cross-examination at trial about the discrepencies between her affidavit and Ms Maurer's sworn testimony.

An affidavit "must provide the magistrate with a substantial basis for determining the existance of probable cause" in light of the totalitily of the circumstances. "His action cannot be mere ratification of the bare conclusions of others." Illinois V Gates, 462 US 213,238-39 (1983). The warrant affidavit states, "she [Ms Maurer] discovered numerous still images of child pornography." Although the affidavit did not, and was not required to, include any images or video, the issue at hand is whether it contained a sufficiently detailed description of the images and video for the issuing judge to independently determine probable cause. In this matter there was essentially no description of the images or video other than they were child pornography. Kemper's conclusory opinion that the images were of young children, or child pornography, is not sufficient for the county judge to establish probable cause. Even with the false statements, the affidavit's two sentences are bare bones."For the magistrate to be able to properly perform his official function, the affidavit presented must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant." Whiteley

V Warden, 401 US 560,564(1971). The warrant affidavit: (1) was bare bones; (2) contained false statements by the affiant necessary to the finding of probable cause; (3) based on the conclusory opinion of the affiant; (4) and Kemper was unavailable for cross-examination about these issues at trial.

There was no probable cause to issue the search warrant. The fruits of the search should have been suppressed. Counsel was not effective and Hough was prejudiced. Hough's Fourth Amendment rights were violated. Hough should have been afforded a Franks hearing to determine whether probable cause existed without the affiant's false statements. A COA should have been issued.

II. Is it permissible for a lay witness to offer testimony based on scientific, technical, or specialized knowledge so long as he does not offer any opinions and without being qualified as an expert by the court?

The decision by the Sixth Circuit Court of Appeals is in conflict with other US Courts of Appeals, as well as its own previous decisions and it sanctioned a lower court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In the instant case the government attempted to circumvent the year 2000 changes made to Fed R Evid 701 in order to foreclose expert testimony being provided by a lay witness, by telling the court that Detective Lamkin" is going to testify based on specialized training but not offering an opinion." (Tr 179 at 157) "The district court concluded that Lamkin [a Louisville Metro Police detective] properly provided technical and scientific testimony concerning the forensic examination of Hough's computer because that testimony was based on

his specialized knowledge as a computer forensic examiner." (Appendix A at 5) This conclusion contradicts Fed R Evid 701 and 702, previous Sixth Circuit decisions, and the decisions of other US Courts of Appeal. Fed R Evid 701(c) states,"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Lamkin was not qualified as an expert by the court.

> Court: "It is my understanding we are having no expert witnesses here. I have no expert witness instruction [for the Jury].

Ms Lawless:"That's correct." (Tr 178 at 110-11)

and later:

> Court: "I do wish to remind you [the jury] that he [Lamkin] is a fact witness, not an opinion witness." (Tr 180 at 205)

"A witness who is qualified as an expert by knowledge, skill, experience training or education may testify in the form of opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed R Evid 702(a).

The Sixth Circuit conclusion in Hough contradicts its own previous decisions as well as that of other US Circuit Courts of Appeals. In United States V White,492 F.3d 380,403(6th Cir,2007),"The district court erred when it allowed the Fiscal Intermediary witnesses to testify without being qualified as an expert." In United States V Cruz,363 F.3d 187,189(2d Cir,2004), the Second Circuit held that the district court improperly admitted expert testimony of a Special Agent for the Drug Enforcement Administration (DEA), who was called as a fact witness at trial. However, the district court permitted the DEA agent to proceed as though qualified as an expert. (quotations omitted) In United States V Peoples,250 F.3d 630,641(8th Cir, 2000), testimony in the form of

lay opinions must be rationally based on the perception of the witness. When a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only."

Hough's case is nearly identical to Ganier. The government argued that the computer specialist would offer "lay testimony available by 'running commercially-available software, obtaining the results, and reciting them.'" "We rejected this claim, finding that 'such an interpretation would require [the witness] to apply knowledge and familiarity with computers and the particular forensic software well beyound that of the average layperson." United States V Ganier,468 F.3d 920,925(6th Cir, 2006). The court concluded,"a computer specialist's testimony could be offered only persuant to Rule 702." Id at 927. Lamkin's testimony should be excluded and Hough should be granted a new trial.

The district court erred in its conclusion that the government gave notice of Lamkin's intention "to offer expert testimony regarding his specialized training and experience in the area of computer forensics and factual, lay testimony regarding other aspects of the investigation of Hough." (Appendix A at 13). As Hough has shown earlier, this is contadicted by the record. "The district court noted that the United States complied with its duty under Fed R Crim P 16 to provide the defendant with a summary of Lamkin's testimony." (Appendix A at 5) Fed R Crim P 16(a)(1)(G) states," The summary provided under this sub paragraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." It is unreasonable for the court to conclude the government complied with this Rule when:

(a) the report was not provided to, or seen by, the court for it to be able to make a determination as to the report's contents;

(b) the government told the court there were no expert witnesses;

(c) the report provided to Hough is a forensic report, not a summary of testimony.

(d) Lamkin was not to provide opinion testimony because he was a fact witness. Court: "I do wish to remind you [the jury] that he [Lamkin] is a fact witness, not an opinion witness." (Tr 180 at 205)

Lamkin provided testimony as an expert without being qualified by the court, and the government failed to comply with Fed R Crim P Rule 16 (a)(1)(G). His testimony should have been excluded, and Hough was prejudiced by the court allowing Lamkin's testimony based on scientific, technical, or specialized knowledge. "We conclude that permitting officers to testify as experts in their own investigations and give opinion testimony on the significance of the evidence they have collected, absent any cautionary instruction, threatens the fairness integrity, and public reputation of the judicial proceedings, regardless of whether the defendant is actually innocent." Lamkin was one of the officers who executed the search warrant, as well as the forensic examiner. "The district court must specifically instruct the jury as to the dual nature of any witnesses who gives both fact testimony and expert testimony." United States V Lopez-Medina,461 F.3d 724,745(6th Cir, 2006). As the court record shows, this did not happen.

Mr Renn: "We're not going to give the jury instruction? [The dual fact and expert witness testimony cautionary instruction.]

Court: "No, I'm not going to give the instruction because I'm just going to tell them [the jury] he's [Lamkin] not here to give opinions." (Tr 180 at 205-06)

Hough was prejudiced, once again, by the court refusing to provide the jury instruction - Counsel was not effective by allowing this testimony to go unchallenged, and appellate counsel was not effective because it was not brought up on direct appeal. Lamkin's testimony based on scientific, technical, or specialized knowledge was improper - Hough was denied a fair trial violating his Fifth Amendment rights. A Certificate of Appealibility should have issued.

III. Are accusatory statements by law inforcement via a recording, offered in evidence to prove the truth of the matter testimonial, and therefore, a violation of the Confrontation Clause?

The Sixth Circuit of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this court. The government played at trial a video of Hough's interrogation conducted by Detectives Jayme Schwab and Leigh Kemper. First, it should be noted the video played for the jury was originally an audio tape that was at some point converted to a video without prior approval by the court. (See Appendix F) In the unredacted transcript p 33 states "(END OF SIDE A OF TAPE) (BEGINNING OF SIDE B OF TAPE)." Then on p 41, "END OF TAPE". Any mention of there being a tape was omitted from the redacted transcript of Hough's interrogation.

Hough relied on Davis V Washington,547 US 813,822(2006), which held that statements "are testimonial when ... the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution." "The district court concluded that Hough's reliance on Davis was misplaced" because the officers statements are not testimonial. In all criminal prosecutions,"the accused shall enjoy the right to be confronted with the witnesses against him." US Const Amend IV "The Framers [of the Constitution] would not have

allowed the admission of testimonial statements of a witness who did not appear at trial unless he was anavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford V Washington,541 US 36,53-54(2004). Kemper's statements are testimonial, as well as false.

Kemper: "There's stuff on there, like I said earlier, of 12, 13, 14 year olds naked and they're touching themselves."

Kemper: "You've sent -- you're receiving them, and you're forwarding them. I mean, you know, you -- the -- the evidence doesn't lie." (Tr 179 at 38)

Kemper: "Well, I know that you sent and received those pictures on your Yahoo! account. I mean, I'm just trying to give you a -- you can't dispute the evidence."(Tr 179 at 39).

Kemper: "Does -- does a GoBack program ring a bell? Cause there's tons and tons of kiddy porn. I mean, little -- not teenagers -- children engaged in sexual acts."

Kemper: "No. I'm talking about the child, the teeny little kids, little -- little children obviously."(Tr 179 at 51).

Kemper: "I just dont understand the kiddy porn. That was definitely in the GoBack program."(Tr 179 at 59)

Kemper: "No, you sent out stuff from the GoBack. But you're distributing it. You're sending it out too."(Tr 179 at 61-62)

Kemper's statements were heresay, admitted into evidence for the truth of the matter in violation of Fed R Evid 801(c). "Heresay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Her statements

were false as shown later at trial while Lamkin was being questioned by the defense:

> Q. "GoBack, once it's on the computer, anybody that has access to the computer can use the computer, can't they?
>
> A."Yes"
>
> Q. "There's no suspected child pornography images in any file, is that correct?"
>
> A. "Not in the active files, no."
>
> Q. "The 189 pictures that you found in the unallocated spaces?"
>
> A. "yes"
>
> Q. "You went through all that testimony and you got all those documents infront of you where you have all those web pages. You can't say that any of those 189 photographs are contained in there can you?"
>
> A. "No, I can't -- there's no data that I can put them together, no."
>
> (Tr 180 at 266-67)

There were no images connected to the evidence presented to the jury. According to Lamkin's testimony: (1) there are no images associated with Hough's e-mail account, (2) there were no images associated with the GoBack program, (3) there is no evidence on the record of distribution, or sending out images, (4) the jury would believe there was other evidence they did not see.

Kemper should have been available to:

(a) be questioned about these false statements;

(b) be questioned about the false information she provided to the county judge in the warrant affidavit;

(c) be questioned as to why the Property and evidence Voucher (government exhibit No 4 portrayed as a chain-of-custody) was completed December 2010 when Lamkin finally turned the computer tower in as

evidence, then back-dated to May 2005. Schwab testified:"I think one of the computers was just recently put back in the property room I think in December." (Tr 179 at 111). "I think that the tower computer itself was turned [in] -- I believe the status of it had changed from either in his custody to being in the property room or something like that." (Tr 179 at 112). The property and evidence voucher appeared to have been back dated because all other police reports from Hough's arrest dated May 25, 2005 had her name as Leigh Kemper; the property and evidence voucher had her name as Leigh Mooney. Hough should have had an opportunity to cross-examine her about these discrepancies. "The most important instances in which the Confrontation Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interogation is conducted with all good faith, introduction of the resultant statements [as well as evidence] can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived the opportunity to cross-examine the declarent about statements taken for use at trial." Michigan V Bryant, 562 US 344(2011). Hough has found no cases that makes an exception to this decision for law enforcement.

The Sixth Circuit concluded, "whether or not Kemper's statements were testimonial, and thus admitted in violation of Hough's confrontation rights, Hough cannot show prejudice." (Appendix A at 6). This is in error. Hough was prejudiced because the jury likely considered Kemper's statements for the truth of the matter, and they would have believed there was other evidence they were not shown. The Sixth Circuit, as well as other US Courts of Appeal, have decided in other cases there

resulted significant prejudices: "Regardless of the reason for which the court and prosecutor thought the evidence was being offered, the prejudice inquiry [under Fed R Evid 403] asks whether the jury was likely to consider the statements for the truth of what was stated with significant resultant prejudice." United States V Adams, 722 F.3d 788, 831(6th Cir, 2013); Evans, 216 F.3d 80,88(DC Cir, 2000); and Reyes, 18 F.3d 65,70(2d Cir,1997). "A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgement of the jury ..." Giglio V United States, 450 US 150,154(1972) (quoting Napue V Illinois, 360 US 264,271(1959)). Counsel was not effective and Hough was prejudiced. Kemper's statements are testimonial and the denial of Hough's right to confront her violated his Sixth Amendment.

IV. Did the withholding of evidence and the use of false statements deny Hough a fair trial, violating his Fifth Amendment?

The Sixth Circuit Court of Appeals has decided an important question in a way that conflicts with relevant decisions of this Court. "The district court rejected Hough's challenge to the allegedly improper use of perjured testimony and 'manipulated evidence'. Hough argued that witnesses provided false testimony, that there were images and videos in a folder named 'MINE' ... He also argued that the video of his post [pre]-arrest interrogation had been altered. The district court concluded that Hough failed to present any persuasive evidence to support his conclusory assertions that the challenged testimony was false or that the video had been wrongfully altered." (Appendix A at 8). Hough's assertions were not conclusory, but supported the facts. It was stated Hough should have had, "an acurate copy of the original tape of the police interrogation of Hough on 4/18/2005; not the version that was

presented to the jury [the video CD]- the original. This is to say, an audio tape." Then Hough submitted evidence of there being an audio tape; the top of the first transcript of his interrogation shows" (Taped statement of Reginald Hough [sic], April 25 2005)." In a separate unredated transcript of the interrogation, "(END OF SIDE A OF TAPE)" and "(BEGINNING OF SIDE B OF TAPE)" (p 33), then on p 41, "END OF TAPE." (Appendix F). This audio tape would have shown Hough received his Miranda warning near the end of the interrogation instead of near the beginning, as shown on the video CD. At some point this audio tape became a video and submitted to the jury without the court's permission for it to be altered- Hough should have been provided a copy of this audio tape in its original format. This audio tape was withheld from the defense. The contents of Hough's e-mail account was also withheld. The government allowed the defense to view a copy of Hough's harddrive, but this did not include a copy of the online e-mail account which is not stored on the computer. There were no children or child pornography in Hough's e-mail account. This was impeaching evidence and it was withheld. "Brady V Maryland requires disclosure only if evidence that is both favorable to the accused and 'material either to quilt or innocence.'" United States V Bagley, 473 US 667,675(1985). "Evidence is favorable to the accused if it exculpates him or enables him to impeach witneses." Id at 676. "Evidence is material to guilt or innocence if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" Id at 682. "In order to prevail on a Brady claim, a criminal defendant must show: (1) that the evidence in question is favorable; (2) that the evidence

was suppressed by the prosecutor, and (3) that the evidence is material." Strickler V Green, 527 US 263,281-82(1999).

The video that was played for the jury contained false statements, as shown earlier by Kemper and will show false statements here by Schwab, that went to the jury uncorrected. Schwab; "This is what we've got. We broke down the Yahoo! [e-mail] account, and there is a file, a subfolder called MINE -- that has six videos or pictures of some underage sex, and he [Lamkin] described it as preteen to young teen. And those six files specifically saved under this MINE folder are the ones that apparently have been forwarded on." (Tr 179 at 47, 48). The statements are false, and would have misled the jury into believing there was more evidence they were not shown, (a) No videos were found anywhere, (b) all images were in the unallocated spaces; (c) there were no images associated with the GoBack program; (d) there were no images or videos associated with Hough's YaHoo! e-mail account; and there were no images or videos in an online file called MINE. This false evidence was provided for the truth of the matter and went to the jury uncorrected. The prosecutor was aware of the fact that there were no videos, the 189 images were only in the unallocated spaces (none were in the active files), yet no attempt was made to correct the false information."It is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amend, the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue V Illinois, 360 US 264,269(1959). The Court held, "that the false testimony used by the State in securing a conviction of petitioner may have had an effect on the outcome of the trial." (Napue at 272).

"The Supreme Court has long recognized that due process is denied where the 'state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.'" Mooney V Holohan, 294 US 103,112(1935). "A new trial is required if the false testimony could ... in any reasonable likelihood have affected the judgement of the jury ...." Giglio V United States,405 US 150,154(1972) (quoting Napue at 271). Looking at the totality of the circumstances, Hough was denied a fair trial violating his Fifth Amendment rights. Counsel was not effective and Hough was prejudiced. A Certificate of Appealibility should have issued.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit of Appeals has entered a decision in conflict with other United States Court of Appeals, as well as its own prior decisions, and has sanctioned the district court's departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

Also, the Sixth Circuit court has decided an important question of federal law that has not been, but should be, settled by this Court; and the court of appeals has decided an important question in a way that conflicts with relevant decisions of this Court.

CONCLUSION

The petition for writ for certiorari should be granted.