ORIGINAL

No. 18-8247

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Kofalt — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Patrick Kofalt (Reg # 33029-068)
(Your Name)

Po Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

n/a
(Phone Number)

TRULINCS 69123061 - COX, ANDREW - Unit: ELK-F-A

FROM: 69123061
TO:
SUBJECT: Questions Presented
DATE: 02/20/2019 09:21:24 AM

QUESTIONS PRESENTED

I. Are all ineffective assistance of counsel waivers per se invalid because they violate the Sixth Amendment's right to conflict-free representation?

II. Did the Third Circuit egregiously err by considering (i.e., summarily "rubber-stamp" denying) constitutional issues not passed upon below which -- under controlling authority -- must be addressed by the district court in the first instance?

III. Did both lower courts err by completely ignoring controlling authority from this Court in Lee v. United States, 137 S.Ct. 1958 (2017) regarding Petitioner's plea agreement not being knowing and voluntary?

IV. Did both lower courts err by completely ignoring a staggering amount of uncontested new evidence and controlling authority conceded by the United States regarding Petitioner receiving ineffective assistance of counsel in violation of the Sixth Amendment?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 01
DATE: 02/20/2019 09:23:44 AM

PETITION FOR A WRIT OF CERTIORARI

Patrick Kofalt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in United States v. Kofalt, No. 18-2401 (3d Cir. 2019)(McKee, Shwartz, and Bibas, Circuit Judges).

OPINIONS BELOW

The opinion of the district court appears at Appendix A and is unpublished.

The opinion of the court of appeals appears at Appendix B and is unpublished.

JURISDICTION

The Court of Appeals decided this case on 16 January 2019. A petition for rehearing was denied on 08 February 2019, and appears at Appendix C. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution requires that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV.

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

On 30 November 2009, 6-year-old "Justin" allegedly disclosed to school officials that while he was at Kofalt's house, Kofalt would tickle his private area and take nude pictures of him.

Based solely on this unfounded allegation, at 2:30pm on 02 December 2009, a forensic interview was conducted by Jan Wilson and Lawrence County Children and Youth Services at the Children's Advocacy Center at Jameson South. See Appx D 1-3.

During the interview, Wilson asked Justin "if he ever saw any movies at [Kofalt's] house where people didn't have their clothes on, and he said yes -- on the computer." Appx D-2.

Wilson asked Justin "if anyone ever took his picture while he was at [Kofalt's] house, and he stated that [Kofalt] took pictures of Jonathan, Brandon, Michael, Billy, and him." Id.

Wilson asked Justin "what he was wearing in these pictures, and he stated his underwear." Id.

Wilson "asked if [Kofalt] ever took any pictures without his underwear, and Justin stated that he does sometimes." Id.

Importantly, Wilson

> "asked Justin if anyone ever touched him in a way that made him uncomfortable. He stated that Michael [Justin's 15-year-old brother] does.
>
> He also demonstrated early in the interview (unresponsive to any question or prompt) that he and Michael masturbate and say, 'Look how big it gets.'
>
> Justin stated that Michael has touched his private more than one time, outside his clothes.

> Justin did not provide any additional information regarding Michael touching his private, in spite of repeated attempts by this interviewer to elicit additional information."

Id.

Thus, not only did the minor, Justin, affirmatively discount the initial baseless hearsay allegation regarding Kofalt "tickling his private area," but he also directly contradicted it by explicitly stating that his brother Michael is the one who touched him in a way that made him uncomfortable, masturbated with him, and repeatedly touched his private area outside of his clothes.

Immediately following the conclusion of Justin's forensic interview, at 4:00pm on 02 December 2009, Jan Wilson conducted a second forensic interview with Justin's brother Michael. See Appx D 4-5.

Wilson "asked Michael if he had ever seen any pictures of naked people at [Kofalt's son] Jonathan's house -- either on the computer, TV, or magazines. He stated that Jonathan watches ladies, pornography, on line. He had never seen [Kofalt] watching pornography." Appx D-4.

Wilson also

> "asked Michael if he had ever seen anyone taking pictures of Justin, and he stated that [Kofalt] did.
>
> Michael stated that Justin was always asking someone to take his picture.
>
> I [Wilson] asked Michael if he ever saw anyone taking pictures of Justin without any clothes on, and he stated that [Kofalt] did.
>
> Michael stated that Justin would come running into the room after getting out of the bath tub and say, "Take my picture," and Patrick [Kofalt] would."

Appx D-5.

During the interview, Michael also admitted to touching his brother Justin's private area "six or seven times." Id.

"Michael stated that he had never seen anyone else do anything to Justin that concerned him." Id.

Based on the scant and contradictory information disclosed during the two forensic interviews on 02 December 2009, Pennsylvania State Police Trooper Harry S. Gustafson, Jr., immediately (6:50pm) swore out an Affidavit of Probable Cause to obtain a search warrant for Kofalt's residence. See Appx D 6-8.

Trooper Gustafson's affidavit states in relevant part:

> "On 12/02/09 I was assigned to attend a forensic interview of a 6 yr old male at the Children's Advocacy Center at Jameson South.
>
> This interview was being conducted by Jan Wilson and Lawrence County Children and Youth Services following the juvenile disclosing to school officials at Brighter Visions on 11/30/09 that while he was at Patrick Kofalt's house, the subject would tickle his private areas and take nude pictures of him.
>
> During the interview, the juvenile confirmed that

> Kofalt took pictures of him in his underwear and without his underwear.
>
> He also stated that Kofalt showed him pictures of nude people on his computer.
>
> Based on your affiant's knowledge, training in various sex crimes, and experience, your affiant knows that child pornographers generally prefer to store images of child pornography in electronic form as computer files."

Appx D-8.

Thus Trooper Gustafson made at least one material omission regarding the minor (Justin) directly contradicting the allegation that Kofalt "would tickle his private areas" by explicitly stating that his brother Michael repeatedly molested him; and Trooper Gustafson made affirmative misrepresentations by stating: "He also stated that Kofalt showed him pictures of nude people on his computer."

Justin said no such thing; Justin said he saw movies (not pictures) at [Kofalt's] house (not shown to him BY Kofalt) where people did not have their clothes on. Appx D-2. Further, Justin's brother Michael explicitly stated that Kofalt's son Jonathan was the one watching pornography online, and that he had never seen Kofalt watching pornography. Appx D-4.

A search warrant was executed at Kofalt's residence on the evening of 02 December 2009.

On 12 July 2011, the United States returned a two-count indictment alleging receipt of child pornography in violation of 18 USC 2252(a)(2), and possession of child pornography in violation of 18 USC 2252(a)(4)(B). WDPA 11-cr-155 at Dkt 01.

Kofalt was arrested on 15 July 2011. Dkt 20.

Kofalt sought suppression of evidence derived from the search of his home, arguing that (1) information in the affidavit -- the uncorroborated allegations of a six-year-old child with behavioral problems -- was insufficient to establish probable cause to believe evidence of a crime would be located at Kofalt's house, and (2) if probable cause existed, the affidavit omitted material facts in violation of Franks v. Delaware, 438 US 154 (1978), in particular, that the child "had rather severe behavioral problems" and displayed erratic or frenetic behavior during the interview. Dkt 37.

The District Court held a suppression hearing on 08 August 2012. Dkt 46 (Transcript).

During the hearing, defense counsel ineffectively stated "we're not alleging that in the affidavit of probable cause that there are any affirmative misrepresentations." Dkt 46, pg 07.

Defense counsel failed to raise Trooper Gustafson's affirmative misrepresentation regarding the minor not stating "that Kofalt showed him pictures of nude people on his computer."

Defense counsel also failed to raise Trooper Gustafson's material omission regarding the minor directly contradicting the allegation that Kofalt "would tickle his private areas" by explicitly stating that his brother Michael masturbated with him and repeatedly molested him. Dkt 46, pgs 12-13.

Defense counsel further failed to object when the District Court summarized the affidavit and stated: "He [Justin] also stated that Kofalt showed him pictures of nude people on his computer," Dkt 46, pg 21, when that is NOT what Justin said; that is what Trooper Gustafson falsely stated that Justin said.

Finally, during the hearing the District Court explicitly asked defense counsel "to my knowledge, Mr. Kofalt has no relationship with this child; right?" -- to which defense counsel replied: "There's a whole story of evidence that's not on this record that would maybe be saved for another day." Dkt 46, pg 43.

At no time during the suppression hearing, or in the supplemental briefing on the issue, did defense counsel describe the extensive -- and case law relevant -- relationship between Kofalt, Justin, and Justin's entire family.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 02
DATE: 02/20/2019 09:25:00 AM

On 15 August 2012 -- in direct response to the District Court's concerns -- Kofalt wrote defense counsel a letter graphically explaining his relationship to Justin and his family, and explicitly voicing concerns regarding the redacted forensic interview (Appx D 1-3) appearing to refer to him as the one masturbating and molesting Justin, instead of Justin's brother Michael. See Appx D 9-11 (letter from Kofalt to defense counsel).

Kofalt's letter to defense counsel was stamped received by the Federal Public Defender's office for the Western District of Pennsylvania (Pittsburgh) on 17 August 2012. Appx D-9.

Defense counsel ineffectively failed to utilize the material information that Kofalt explicitly brought to his attention.

In the Government's supplemental briefing regarding Kofalt's motion to suppress, the United States -- via AUSA Soo C. Song -- fraudulently capitalized on the exact issue of the heavily redacted forensic interview appearing to refer to Kofalt as the one masturbating and molesting Justin, by stating "the child witness, who disclosed having been sexually victimized by the defendant over a sustained period of time ...." Dkt 45, pg 07.

Again, Justin disclosed no such thing; the original allegation was that Kofalt "tickled his private areas," and Justin directly contradicted that baseless allegation by explicitly naming his brother Michael as the one who was molesting him.

More egregiously, the District Court then relied upon AUSA Soo C. Song's fraudulent and justice obstructing lie to deny Kofalt's motion to suppress, finding: "After being asked if anyone ever touched him in a way that made him uncomfortable Minor, without being questioned or prompted, demonstrated that Defendant would masturbate and say, '[l]ook how big it gets.'" Dkt 47, pg 07.

Justin did NOT say defendant Kofalt would masturbate him; Justin explicitly stated his brother Michael masturbated and molested him.

The District Court thus relied on AUSA Soo C. Song's affirmative fraud to Kofalt's detriment to deny his motion to suppress, and defense counsel ineffectively failed to bring this material fraud to the Court's attention -- even after Kofalt explicitly voiced this exact concern in writing to his defense attorney (!).

After Kofalt's motion to suppress was wrongfully denied because of the Government's fraud on the Court (Dkt 48), Kofalt entered a negotiated plea to Count One of the Indictment, while reserving his right to appeal the denial of his suppression motion. Dkt 91.

Kofalt's plea agreement -- containing the collateral rights waiver at issue below-- was accepted by the District Court on 14 December 2012. Dkt 143, Ex. 02.

Count Two of the indictment was dismissed upon the Government's motion at sentencing. Dkt 85, pg 65.

Kofalt's total offense level was thirty-five (35), with a criminal history category of II, resulting in an advisory guideline range of 188-235 months.

On 09 July 2013, the District Court sentenced Kofalt to 235 months imprisonment and a lifetime of supervised release. Dkt 80.

On 26 August 2016, the Third Circuit issued an Order and Opinion denying the merits of Kofalt's direct appeal -- without analysis of any kind -- and summarily affirmed the District Court's 09 July 2013 judgment. United States v. Kofalt, No. 13-3258 (3d Cir. 2016).

This Court denied Kofalt's petition for a writ of certiorari without comment on 06 March 2017. Kofalt v. United States, No. 16-7789 (US, 2017).

On 05 February 2018, Kofalt filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 USC 2255. See WDPA 11-cr-155 at Dkt 131.

On 16 April 2018, the United States filed a Motion to Enforce Collateral Rights Waiver. Dkt 143.

Telling to the weakness of its position in trying to enforce a blatantly unethical collateral rights waiver, the Government alternatively addressed the merits of Kofalt's 2255 motion. See Dkt 143, pgs 09-18.

However, in 10 pages of stupidly frivolous and shamelessly mischaracterized tripe -- apparently meant to preemptively inflame the District Court against Kofalt -- the Government failed to dispute ANY of Kofalt's claims, including his ineffective assistance of counsel claims.

By failing to dispute any of Kofalt's new evidence, under FRCivP 56(e)(2) and controlling Third Circuit authority, the United States effectively conceded Kofalt's 2255 motion, thus rendering it legally uncontested.

On 27 April 2018, Kofalt filed a Response to the Government's motion to enforce collateral rights waiver, and a Motion for Summary Judgment of his -- now Government conceded -- motion to vacate under 28 USC 2255. Dkt 145.

On 08 June 2018, the District Court entered an Order (1) granting the Government's blatantly unethical motion to enforce collateral rights waiver, (2) dismissing Kofalt's uncontested motion to vacate under 28 USC 2255, and (3) summarily denying Kofalt a certificate of appealability. Appx A-14.

The District Court's Memorandum Opinion completely ignored controlling authority from this Court in Lee v. United States, 137 S.Ct. 1958 (2017) regarding why Kofalt's entire plea agreement (including the collateral rights waiver) is invalid because it was not knowing and voluntary. Appx A-9.

The Opinion also completely failed to acknowledge -- let alone address or analyze -- why Kofalt's defense counsel was ineffective in failing to properly litigate his motion to suppress (Dkt 131, pgs 05-11) -- instead summarily stating: "Defendant's argument is nothing more than an attempt to re-litigate the suppression issue which previously was decided by this Court and affirmed on appeal." Appx A-11.

On 16 January 2019, a panel of the Third Circuit issued an Order summarily denying Kofalt's application for a certificate of appealability. Appx B.

The Court stated:

> "In pleading guilty, Kofalt waived his right to collaterally challenge his sentence.
>
> Even assuming arguendo that enforcement of the waiver is debatable among jurists of reason, Kofalt has not made a substantial showing of the denial of a constitutional right because jurists of reason would not debate the merits of his underlying ineffective assistance of counsel claims or his other constitutional claims."

Id.

The Circuit panel -- like the District Court -- also completely ignored controlling authority from this Court in Lee v. United States, 137 S.Ct. 1958 (2017), completely failed to acknowledge -- let alone address or analyze -- why Kofalt's defense counsel was ineffective in failing to properly litigate his motion to suppress, and inexplicably considered (i.e., summarily "rubber-stamp" denied) constitutional issues not passed upon below which must have been addressed by the district court in the first instance.

That is not justice; that is a witch-hunt and a railroad job.

The Third Circuit denied Kofalt's petition for rehearing on 08 February 2019. Appx C.

This appeal followed.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 03 (LRA #21-1)
DATE: 02/20/2019 09:31:14 AM

REASONS THE WRIT SHOULD BE GRANTED

I. All ineffective assistance of counsel waivers are per se invalid because they violate the Sixth Amendment's right to conflict-free representation.

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

"[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant[.]" Wheat v. United States, 486 US 153, 159 (1988).

The "assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 US 475, 489 (1978)(quoting Chapman v. California, 386 US 18, 23 (1967)).

As the Supreme Court has held, "criminal defendants require effective counsel during plea negotiations," and the Sixth Amendment demands it. Missouri v. Frye, 132 S.Ct. 1399, 1407-1408 (2012).

"The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial." Bonin v. California, 494 US 1039, ___ (1990). See Holloway, 435 US at 490 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters").

For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial; prejudice is presumed. Cuyler v. Sullivan, 446 US 335, 348-350 (1980).

The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 US 60, 76 (1942).

"The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" Cuyler, 446 US at 349 (quoting Glasser, 315 US at 76).

Where an attorney labors under an actual conflict of interest, the public interest "in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them" requires disqualification of the attorney. Wheat, 486 US at 160.

And representation by an actually conflicted attorney is ineffective and violates the Sixth Amendment without any need to show prejudice. See Mickens v. Taylor, 535 US 162, 166 (2002)(quoting Strickland v. Washington, 466 US 668, 694 (1984)).

Here, any attorney who counsels a criminal defendant to accept a plea agreement containing a collateral rights waiver of ineffective assistance of counsel claims is per se ineffective in violation of the Sixth Amendment, and labors under an actual conflict of interest requiring disqualification and automatic reversal without a showing of prejudice.

"A lawyer cannot ethically seek a waiver of their client's rights and claims against the attorney because of the conflict between the lawyer's and the client's interest." McCamey v. Epps, 696 FSupp2d 667, 707 (NDMS 2010).

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." United States v. Schwarz, 283 F3d 76, 91 (2d Cir. 2002).

> "This argument for barring waivers as unethical goes like this.
>
> First, to advise a client about any agreement by which the client would abandon a potential claim based on that attorney's deficient representation, the attorney's duty of loyalty to the

> client is impaired.
>
> The waiver creates an inherent conflict of interest, an intolerable risk the lawyer's advice about the waiver would be compromised by his interest in avoiding a claim of ineffective assistance."

Pequeno v. United States, 2013 US Dist Lexis 191092 (SDTX 2013).

"She [defense counsel] had an actual conflict of interest -- what was best for her ... a waiver of the ineffective assistance of counsel, and what was best for her client ... pursuit of a strong claim for ineffective assistance of counsel. These interests were irreconcilable." McCamey, 696 FSupp2d at 707.

"It is absurd to fantasize that [a] lawyer might effectively or ethically litigate the issue of his own ineffectiveness." Read v. State, 430 So.2d 832 (Miss 1983).

"It is equally absurd to think they may effectively or ethically counsel their clients leading to a valid waiver of the claim." McCamey, 696 FSupp2d at 708.

"When [the defendant] waived the ineffectiveness of assistance of counsel claim, he was as unrepresented with [defense counsel] by his side as if he had been standing alone." Id.

* * *

There is an almost universal "trend among state bar ethics committees to recognize a criminal defense lawyer's personal interest in avoiding ineffective assistance of counsel claims may create a conflict of interest for the lawyer in advising his client regarding a plea agreement that would waive such claims." United States v. Deluca, 2012 US Dist Lexis 166982 (EDPA 2012).

See, e.g., N.C. State Bar, RPC 129 (Jan. 15, 1993); Vt. Bar Ass'n Comm. on Prof'l Responsibility, Advisory Ethics Op. 95-04 (1995)(concluding a lawyer's advice to enter a plea agreement that waives an ineffective assistance claim is an unethical attempt to limit liability for personal malpractice); Bd. of Comm'rs on Grievances & Discipline of the Sup. Ct. of Ohio Op. 2001-6 (2001)(same).

In 2009, the Missouri Supreme Court's Advisory Committee found it unethical for prosecutors to seek waivers of ineffective assistance of counsel and prosecutorial misconduct:

> "It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel.
>
> Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel.
>
> Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant.
>
> It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding the ineffectiveness of defense counsel's representation of the defendant.
>
> Therefore, under Rule 4-1.7(b)(1), this conflict is not waivable.
>
> ...

> We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct. See, Rules 4-3.8 and 8.4(d).
>
> We note that at least three other states have issued opinions consistent with our view."

Advisory Comm. of the S. Ct. of Mo., Formal Op. 126 (May 19, 2009).

These opinions reasoned that such "advice would violate state ethics rules, either because of the risk the lawyer's advice would be materially limited by his personal interest in avoiding ineffective assistance of counsel claims or because such advice would run afoul of the prohibition against lawyers attempting to limit their liability for personal malpractice." Deluca, supra.

In 2011, bar ethics committees in at least three additional states issued opinions taking similar views. See Ala. State Bar Formal Ethics Op. RO 2011-02 (2011)(concluding "a conflict of interest exists where a lawyer must counsel his client on whether to waive any right to pursue an ineffective assistance of counsel claim against himself"); Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 48 (2011)(same); Va. State Bar Legal Ethics Op. No. 1857 (2011)(same).

In June of 2012, the Professional Ethics Committee of the Florida Bar published a proposed advisory opinion in which it concluded that offering and recommending acceptance of a "plea offer in which a criminal defendant waives past or future ineffective assistance of counsel" is improper. See Professional Ethics Committee of the Florida Bar, Proposed Advisory Opinion 12-1 (dated June 22, 2012).

The Middle District of Florida immediately stated

> "that opinion has not been adopted as an advisory ethics opinion by the committee or the Board of Governors of The Florida Bar.
>
> ...
>
> Nevertheless, the Court can envision, should The Florida Bar adopt a binding ethics opinion in which its members -- and, by extension, the members of the bar of the Middle District -- are prohibited from advising criminal defendants with regard to plea offers containing appeal waivers, criminal defendants being deprived of their Sixth Amendment right to counsel.
>
> ...
>
> The Court has difficulty understanding how counsel could comply with their ethical obligations (as defined by the proposed advisory opinion) yet provide effective counsel to a criminal defendant while negotiating a plea containing an appeal waiver."

Guillen-Rivera v. United States, 2012 US Dist Lexis 115002 (MDFL 2012).

Florida Bar Proposed Advisory Opinion 12-1 was affirmed by the Board of Governors on 07 December 2012.

During this time, the Department of Justice began instructing prosecutors to exempt ineffective assistance of counsel claims from appeal waivers in certain cases. See Nancy J. King, Plea Bargains That Waive Claims of Ineffective Assistance -- Waving Padilla and Frye, 51 Duq.L.Rev. 647, 672 (citing DOJ Memo to Prosecutors: Department Policy on Early Disposition or "Fast-Track" Programs, 25 Fed. Sent. R. 53, 56 (2012)(containing the DOJ policy for fast-track agreements, which exempts claims of ineffective assistance of counsel from plea waivers)).

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 04 (LRA #21-2)
DATE: 02/20/2019 09:31:24 AM

In October of 2012, the Ethical Advisory Committee of the National Association of Criminal Defense Lawyers ("NACDL") issued formal advisory opinion 12-02 stating "it is NACDL's position that defense counsel has an ethical and constitutional duty to object to and refuse to sign any plea agreement provision that amounts to a waiver of post-conviction remedies. This protects the rights of the client to later challenge the representation of the lawyer."

In December of 2013, the American Bar Association passed Resolution 113E stating:

> "This resolution shows American Bar Association opposition to provisions in plea agreements where a criminal defendant waives the right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct not known to the defense at the time of the plea.
>
> It urges judges in all jurisdictions to reject plea agreements that include such provisions.
>
> It urges criminal defense attorneys, whether retained or appointed, to advise their clients that provisions in plea agreements waiving the client's right to raise a claim of ineffective assistance of counsel or of prosecutorial misconduct have been found to be unethical in various jurisdictions and are arguably unconstitutional."

By the end of 2013, some jurisdictions, including the Fifth Circuit, refused to enforce appeal waivers that do not exempt ineffective assistance of counsel claims, and the "majority of states that have examined this issue have concluded that such an offer is impermissible for the criminal defense lawyer, the prosecutor, or both, for varying reasons." King, Plea Bargains, 51 Duq.L.Rev. at 672, n.53.

> "The Court has profound reservations about the ethics of plea agreements in which a criminal defendant, on the advice of his counsel and at the initiation of the Government, agrees to waive post and prospective ineffective assistance claims against the advising attorney.
>
> ...
>
> The Court doubts that such a waiver would be knowing, informed, and enforceable.
>
> The Court also doubts that the pro forma collateral attack waiver contained in [defendant's] plea agreement would not be narrowly construed so as to not encompass any waiver of questionable ethics and constitutionality."

Edwards v. United States, 2016 US Dist Lexis 45221 (DCT 2016).

In 2014, the Kentucky Supreme Court held it was professional misconduct for an attorney defending a client in federal court to advise a client to accept a plea agreement containing a waiver of the right to file ineffective assistance of counsel claims and for a prosecutor to include such a waiver in a plea agreement. United States ex rel. United States Attorneys for the Eastern and Western Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 153-158 (Ky. 2014).

As for defense lawyers, the Kentucky Supreme Court agreed with that state's bar "that the use of IAC waivers in plea bargain agreements (1) creates a nonwaivable conflict of interest between the defendant and his attorney, (2) operates effectively to

limit the attorney's liability for malpractice, and (3) induces, by the prosecutor's insertion of the waiver into plea agreements, an ethical breach by defense counsel." Nelson v. United States, 2015 US Dist Lexis 44755 (SDGA 2015).

In United States v. Grimes, 739 F3d 125, 130 & n.3 (3d Cir. 2014), the Third Circuit "acknowledge[d] the ethical concerns noted by the National Association of Criminal Defense Lawyers and at least eight states' legal ethics arbiters," and stated that it "undoubtedly will have occasion to address that issue in another case."

After the Third Circuit issued its opinion in Grimes, the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee issued an advisory opinion addressing the issue.

PBA Formal Opinion 2014-100, Conflicts of Interest and Other Misconduct Related to Waivers of Claims for Ineffective Assistance of Counsel, states in pertinent part:

> "[A] criminal defense lawyer is ethically precluded from advising a client to enter into a plea agreement requiring the client to waive the right to file a post-conviction claim asserting IAC [ineffective assistance of counsel] at any time in the future, [and therefore] a prosecutor is prohibited from requiring such a waiver in a plea agreement under PA RPC 8.4(a), which prohibits a lawyer from inducing or assisting another lawyer to violate the Pennsylvania Rules of Professional Conduct."

In the opinion, the PBA Committee concluded that it is an unconstitutional conflict of interest for a lawyer to advise a client to accept a plea agreement that includes a waiver of ineffective assistance of counsel claims concerning his or her representation. Id at 1.

The PBA Committee opined that a prosecutor should not offer an agreement that includes such a waiver because it is "prejudicial to the administration of justice," and would assist the defense attorney in unethically limiting his liability to his client. Id at 1-2.

The PBA Committee's thorough opinion also notes that the "majority of state bar ethics opinions that have addressed the ethical propriety of a plea agreement that contains a provision waiving the defendant's right to later bring a claim of [ineffective assistance of counsel] share the view that a criminal defense lawyer may not advise a client to enter into such a plea agreement" and cites to ethics opinions issued in Missouri, Florida, Ohio, Vermont, Tennessee, North Carolina, and Alabama, and by the National Association of Criminal Defense Lawyers to that effect. Id at 3-6.

After the PBA Committee Opinion was issued, the USAO for the Western District of Pennsylvania removed the language requiring a defendant to waive the right to collaterally attack his or her sentence from its written plea agreements. Williams v. United States, 2014 US Dist Lexis 112624 (WDPA 2014).

In August of 2014, the Chief Judge for the Western District of Pennsylvania, USDJ Joy Flowers Conti, issued the opinion in Williams, supra, stating "this court is of the opinion that it would not be in the interests of justice to enforce [collateral attack] waivers now that the PBA Committee has indicated that such waivers should never have been included in written plea agreements in the first instance." Id.

Finally, on 14 October 2014, the United States Department of Justice -- via Deputy Attorney General James M. Cole -- issued a memorandum to all federal prosecutors concerning the DOJ's policy on waivers of post-conviction rights.

The memorandum states in pertinent part:

> "in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.
>
> Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of

> ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal.
>
> For cases in which a defendant's ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises a serious debatable issue that a court should resolve."

* * *

"These ethics opinions do not purport to address the legality or enforceability of waivers of ineffective assistance of counsel claims, in some instances recognizing these issues are for the courts." Deluca, supra.

See N.C. State Bar, RPC 129 ("Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts").

"This Court has found scant case law addressing ineffective assistance of counsel claims predicated upon defense counsel's asserted conflict of interest in advising a defendant regarding a collateral review waiver." Deluca, supra.

In a few cases, courts have characterized defense counsel's putative conflict in such circumstances as "theoretical" or "speculative" -- see, e.g., Washington v. Lampert, 422 F3d 864, 873 (9th Cir. 2005) -- but these cases do not take into account the state bar ethics opinions to the contrary, many of which were decided only since 2011.

Cf. Watson v. United States, 682 F3d 740, 744 (8th Cir. 2012)(declining to decide whether a collateral review waiver that expressly encompassed ineffective assistance of counsel claims would be enforceable in light of ethics opinions regarding defense counsel's conflict of interest with respect to such a waiver, which had not been addressed by the parties).

"As an initial matter, the Court notes that advisory opinions from ethics committees and decisions by state courts are not binding on federal courts." United States v. Gardner, 2015 US Dist Lexis 103762 (WDPA 2015).

See United States v. Joseph, 2014 US Dist Lexis 66605 (WDPA 2014)("Ethics Advisory Opinions are not binding on federal courts."); United States v. Shebetich, 2015 US Dist Lexis 59310 (WDPA 2015)("decisions by ... a State Court in Kentucky are not binding on this Court.").

"Moreover, the majority of courts in this district have continued to enforce knowing and voluntary collateral attackers waivers despite the ethical considerations raised in the advisory opinions." Gardner, supra.

Generally, in the Third Circuit, waivers of the right to collateral attack are valid if entered into knowingly and voluntarily, and will divest the district court of jurisdiction over a collateral attack. United States v. Khattak, 273 F3d 557, 558 (3d Cir. 2001); United States v. Goodson, 544 F3d 529, 536 (3d Cir. 2008).

Although the attorney ethics surrounding such ineffective assistance of counsel waivers has been called into question, the Third Circuit has since affirmed their enforceability as a legal matter. Muller v. Savers, 523 Fed Appx 110, 111-112 (3d Cir. 2013).

Khattak remains in force in the Third Circuit generally, and in the collateral attack context specifically. See, e.g., United States v. Murray, 483 Fed Appx 690 (3d Cir. 2012).

"Although our Court of Appeals may someday declare collateral attack waivers per se invalid in light of the ethical dilemmas they present, it has not done so to date. Cf. United States v. Grimes, 739 F3d 125 (3d Cir. 2014)." Gardner, supra.

"The Rules of Professional Conduct are more than window dressing for the profession. In many ways, they represent the floor, not the ceiling, of lawyer responsibility." Barnes v. District of Columbia, 266 FSupp2d 138, 141 (DDC 2003).

As for the effect of state bar disciplinary rules, the Supreme Court has yet to "define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth

Amendment, in defining the proper scope and limits on" attorney conduct for Strickland purposes. Nix v. Whiteside, 475 US 157, 165-166 (1986).

The Supreme Court has, however, suggested that when "virtually all of [those] sources speak with one voice" as to what constitutes reasonable attorney performance, departure from ethical canons and ABA guidelines "make[s] out a deprivation of the Sixth Amendment right to counsel." Id at 166, 171.

Therefore, since virtually all ethical canons, state bars, ABA guidelines, and the Department of Justice (!) have spoken with one voice regarding collateral rights waivers creating an unconstitutional conflict of interest for defense attorneys, all ineffective assistance of counsel waivers are per se invalid because they violate the Sixth Amendment's right to conflict-free representation.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 05
DATE: 02/20/2019 09:32:24 AM

II. The Third Circuit egregiously erred by considering (i.e., summarily "rubber-stamp" denying) constitutional issues not passed upon below which -- under controlling authority -- must be addressed by the district court in the first instance.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 US 106, 120 (1976).

In Slack v. McDaniel, 529 US 473, 484 (2000), this Court held:

> "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
>
> The purpose of this rule is to effectuate judicial efficiency as it would be a waste of the courts' and the litigants' resources to grant a COA on a procedural issue without a preliminary review of the underlying claims, for if the claims are obviously without merit and dismissal of the petition inevitably would be the result even if the petitioner overcame the procedural hurdles facing him, then further review of the procedural issue would be pointless.
>
> For this reason, we must make a preliminary review of the underlying claims even if we are granting a COA on the procedural issue only.
>
> But certainly in such situations we are not granting review of the merits of the petition, and should we find in favor of the applicant on the procedural issue, we would remand the matter to the district court to address the merits of the case."

The Third Circuit has a "policy of allowing the District Court to first address the merits of a claim," Peachlum v. City of York, Pa., 333 F3d 429, 439-440 (3d Cir. 2003), and generally, in the absence of "exceptional circumstances," it declines to "consider an issue not passed upon below." Selected Risks Insurance Co. v. Bruno, 718 F2d 67, 69 (3d Cir. 1983).

Here, the District Court granted the Government's blatantly unethical motion to enforce Kofalt's collateral rights waiver, dismissed Kofalt's uncontested motion to vacate under 28 USC 2255, and summarily denied Kofalt a certificate of appealability (COA). Appx A-14.

Thus, the District Court summarily denied Kofalt's 2255 motion on procedural grounds -- enforcement of the collateral rights waiver -- and never addressed the underlying merits of Kofalt's constitutional claims.

On appeal, the Third Circuit essentially found in favor of Kofalt on the procedural issue -- "Even assuming arguendo that enforcement of the waiver is debatable among jurists of reason" (Appx B) -- then, instead of granting a COA for further briefing or remanding the case to the district court to consider the merits of Kofalt's constitutional claims in the first instance -- inexplicably addressed (i.e., summarily "rubber-stamp" denied) the merits and stated only: "Kofalt has not made a substantial showing of the denial of a constitutional right because jurists of reason would not debate the merits of his underlying ineffective assistance of counsel claims or his other constitutional claims." Id.

> "I could stop right here and have no trouble concluding that the judge committed misconduct.
>
> It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings

> of the adversary system -- a motion, an opportunity for the other side to respond, A STATEMENT OF REASONS FOR THE DECISION, reliance on legal authority.
>
> These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well.
>
> More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is -- and is seen to be -- based on law, not the judge's caprice."

In re Complaint of Judicial Misconduct, 425 F3d 1179, 1185 (9th Cir. 2005)(Kozinski, Circuit Judge, dissenting)(emphasis added).

"Due process is not satisfied [] by rubber-stamp denials[.]" Chi Thon Ngo, 192 F3d 390, 398 (3d Cir. 1999).

The Third Circuit's "rubber-stamp" denial also failed to state "exceptional circumstances" to justify "considering an issue not passed upon below," as required by Bruno, supra.

Therefore, the Third Circuit egregiously erred by considering constitutional issues not passed upon below which -- under controlling authority -- must be addressed by the district court in the first instance.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 06
DATE: 02/20/2019 09:33:13 AM

III. Both lower courts erred by completely ignoring controlling authority from this Court in Lee v. United States, 137 S.Ct. 1958 (2017) regarding Kofalt's plea agreement not being knowing and voluntary.

When "a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." Lee v. United States, 137 S.Ct. 1958, 1965 (2017).

Instead, "when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

Here, defense counsel's failure to properly litigate Kofalt's motion to suppress -- e.g., by failing to raise Pennsylvania State Trooper Harry Gustafson's affirmative misrepresentations or materials omissions, failing to inform the District Court regarding Kofalt's relationship to the minor's entire family, failing to object to AUSA Soo C. Song's fraudulent misrepresentation regarding the minor's brother masturbating and molesting him instead of Kofalt, failing to utilize a staggering amount of controlling authority directly on point, etc -- led Kofalt to accept a guilty plea, and thus both lower courts cannot simply conclude that the guilty plea bars the ineffective assistance of counsel claim. Id.

It does not appear that the Third Circuit has addressed this Court's decision in Lee, supra, but the Eleventh Circuit stated "a district court's inquiry into trial counsel's performance in advising a client to plead guilty cannot be unmoored from the merits of an alleged Fourth Amendment violation, particularly when, as here ... a motion to suppress may have been outcome-determinative." Spriggs v. United States, 2017 US App Lexis 14676 (11th Cir. 2017).

This Court has said that, as far as performance goes, "[n]o reasonable lawyer would forgo COMPETENT litigation of meritorious, possibly decisive claims." Kimmelman v. Morrison, 477 US 365, 382 n.7 (1986)(emphasis added).

And this Court recently clarified that to establish prejudice when the "decision about going to trial turns on [a defendant's] prospects of success and those are affected by the attorney's error -- for instance, where a defendant alleges that his lawyer should have but did not [effectively] seek to suppress [evidence]" -- the defendant must show that "he would have been better off going to trial," a showing that unquestionably implicates (at least to some degree) the merits of the alleged Fourth Amendment violation. Lee, 137 S.Ct. at 1965.

Consistent with this Court's precedent, the Eleventh Circuit has also said that, "[i]n cases like this one, where a [defendant] faults his lawyer for failing to [effectively] pursue a motion to suppress prior to entering a plea, both the deficient performance and prejudice prongs of Strickland turn on the viability of the motion to suppress." Arvelo v. Sec'y, Florida Dep't of Corr., 788 F3d 1345, 1348 (11th Cir. 2015).

Therefore, since Kofalt's entire plea agreement -- including the collateral rights waiver -- is invalid because counsel provided ineffective assistance in connection with the (motion to suppress) proceedings that led directly to the plea, both lower courts erred by completely ignoring controlling authority from this Court in Lee v. United States, 137 S.Ct. 1958 (2017) regarding Kofalt's plea agreement not being knowing and voluntary.

IV. Both lower courts erred by completely ignoring a staggering amount of uncontested new evidence and controlling authority conceded by the United States regarding Kofalt receiving ineffective assistance of counsel in violation of the Sixth Amendment.

A. Counsel was ineffective by failing to utilize controlling authority directly on point to argue that Trooper Gustafson's search warrant affidavit lacked probable cause, was stale, and was not particularized.

The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV.

Probable cause to search exists where the known facts and circumstances are sufficient to warrant a reasonable person in the belief that contraband or evidence of a crime will be found. Ornelas v. United States, 517 US 690, 696 (1996).

Probable cause requires more than a "mere suspicion" of wrongdoing. Mallory v. United States, 354 US 449, 455 (1957).

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Illinois v. Gates, 462 US 213, 238 (1983).

While the standard for probable cause is less than the standard for conviction, see Michigan v. DeFillippo, 443 US 31, 36 (1979), the Court must still ask the question whether a reasonable officer would have had cause to believe that a crime was being committed. Legal acts cannot be "a ruse for a general rummaging in order to discover incriminating evidence." Florida v. Wells, 495 US 1, 4 (1990).

Here: "No matter the strength of the evidence that [Kofalt] did in fact [tickle the minor or take pictures of him with or without his underwear], the officer could not have had probable cause to believe that a crime was being committed, because [tickling a minor, or even taking unclothed pictures of a minor] is simply not a crime." Johnson v. Campbell, 332 F3d 199, 215 (3d Cir. 2003).

First, allegedly tickling a minor, even in his "private areas," is "simply not a crime." Trooper Gustafson never alleged that Kofalt "grabbed" or "molested" or otherwise maliciously touched Justin, and the original hearsay allegation of tickling from the Brighter Visions school was directly contradicted during the subsequent forensic interview.

Even if "tickling" was meant to infer "molestation," one isolated hearsay allegation of tickling/molesting cannot legally justify searching Kofalt's home for evidence of child pornography.

See directly on point and persuasive:
(1) United States v. Hodson, 543 F3d 286 (6th Cir. 2008)(denial of motion to suppress reversed because it was unreasonable for the officer executing a search warrant to believe that probable cause existed to search defendant's computers for child pornography based solely on a suspicion that defendant had engaged in child molestation); and
(2) United States v. Crespos-Rios, 623 FSupp2d 198 (DPR 2009)(the district judge was unreasonable in authorizing the search for evidence of child pornography because the affidavit contained no allegation nor any evidence that linked Defendant to the crime of child pornography).

Furthermore, even if Justin had confirmed during the 12/02/09 interview that Kofalt "tickled his private areas," that "mere conclusory assertion or single piece of evidence" of tickling/molesting "which the law of the stationhouse shop would recognize as clearly insufficient," still would not have supported a search warrant affidavit seeking authorization to search Kofalt's home for evidence of child molestation -- let alone for evidence of child pornography. United States v. Williams, 3 F3d 69, 74 (3d Cir. 1993).

Second, not only is taking unclothed pictures of a minor "simply not a crime," but photographing child nudity is constitutionally protected. This Court has "stated that depictions of nudity, without more, constitute protected expression." Osborne v. Ohio, 495 US 103, 112 (1990). "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment." Id at 127.

See also:
(1) United States v. Kelly, 677 F3d 373, 376 (8th Cir. 2012)(assuming the existence of a "First Amendment interest in viewing and possessing photographic depictions of child nudity"); and
(2) United States v. Doyle, 650 F3d 460, 473 (4th Cir. 2011)(the "mere presence of nudity in a photograph, even child nudity, does not constitute child pornography as that term is defined").

Here, the affidavit only states that Justin allegedly told officials at school that Kofalt would "take nude pictures of him," and "the juvenile confirmed that Kofalt took pictures of him in his underwear and without his underwear." Appx D-8.

That is all. There is absolutely nothing in the affidavit alleging anything more than the possible photographing of child nudity -- which is a constitutionally protected activity.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 07
DATE: 02/20/2019 09:34:31 AM

"Many of the world's greatest artists -- Degas, Renoir, Donatello, to name a few -- have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors." Massachusetts v. Oaks, 491 US 576, 593 (1989)(Brennan, J., dissenting).

In addition, there is an "abundance of baby and child photographs taken every day without full frontal covering, not to mention the work of artists and filmmakers and nudist family snapshots." Id at 598 (Brennan, J., dissenting).

See also Osborne v. Ohio, 495 US 103, 131 n.5 (1990)("[A] parent photographing his naked toddler on a bear rug would be threatened with a prison term ... even though parents ostensibly have the same interests in taking those pictures as they do in keeping a journal or gloating about their children's accomplishments")(quoting State v. Schmakel, No. L-88-300 (Ohio Ct. App., Oct. 13, 1989), pp 10-11).

None of these examples involves "sexual conduct," New York v. Ferber, 458 US 747, 765 (1982), yet all would be subject to search and seizure under Trooper Gustafson's severely lacking affidavit.

Even the District Court explicitly differentiated between: "Obviously, if I would take a picture of my granddaughter standing by her bathtub and she is about to get in her tub, that's one thing. But, to my knowledge, Mr. Kofalt has no relationship with this child, right?" WDPA 11-cr-155 at Dkt 46, pg 43.

Indeed, as defense counsel ineffectively failed to bring to the District Court's attention in supplemental briefing -- even AFTER Kofalt explicitly brought it to counsel's attention in writing in his letter dated 15 August 2012 (Appx D 9-11) -- Kofalt had an extensive relationship with Justin and his entire family.

> "The judge asked who I was since I was not a parent, uncle, cousin to 6yo Justin.
>
> It seemed that I was a stranger to the boy and the family.
>
> I was a trusted friend.
>
> I was responsible to take Justin and his mother to his counseling appointments, Justin and his older brother to their Dentist appointments.
>
> I was the person to pick Justin up from school when he had a "bad day" and school requested he be sent home.
>
> I am the person who drove the older brother to his MD appointments, the mother to her gynecologist and orthopedic appointments, the father to his medical appointments.
>
> I watched Justin when he was too stressful for his father.
>
> I was a caring adult in the life of Justin and his family.
>
> One falsely accused of molesting him."

Appx D 9-10.

All of which Trooper Gustafson could have learned if he had bothered to do any detective work whatsoever, instead of simply jumping to conclusions regarding "pictures in his underwear and without his underwear."

"Evidence of predisposition to do what [is] lawful," take non-nude or even nude pictures of a child, "is not, by itself, sufficient to

show predisposition to do what is [] illegal ...." Jacobson v. United States, 503 US 540, 551 (1992).

Furthermore, even if pictures of the minor "in his underwear and without his underwear" -- nude -- rose to the level of "child erotica," the "Government distinguishes child pornography from child erotica by defining the latter as material that depicts 'young [boys] as sexual objects or in a sexually suggestive way,' but is NOT 'sufficiently lascivious to meet the legal definition of sexually explicit conduct' under 18 USC 2256." United States v. Vosburgh, 602 F3d 512, 520 n.7 (3d Cir. 2010).

Not only is it legal to produce and possess child erotica under the relevant statute, but the Second Circuit has indicated that, as a general matter, possession of child erotica is not even relevant to the crime of child pornography. See United States v. Harvey, 991 F2d 981, 994-996 (2d Cir. 1993).

Third, even if the minor had stated "that Kofalt showed him pictures of nude people on his computer" -- which is absolutely not what the minor said -- showing a minor pictures of nude people on a computer is "simply not a crime" translating to probable cause to search Kofalt's home for evidence of child pornography.

In a case directly on point and controlling -- United States v. Zimmerman, 277 F3d 426, 429 (3d Cir. 2011) -- the Third Circuit stated that "the warrant application did not contain any information indicating that [he] ever possessed child pornography, much less that child pornography would be found in his home on" the day of the search.

"While it did contain information that many months earlier, one video clip of adult pornography was in Zimmerman's home (or at least that Zimmerman had accessed it via the Internet from his home), that information was stale." Id.

Thus, the Third Circuit agreed "with Zimmerman that there was no probable cause to search for pornography -- child or adult -- in his home," and reversed the denial of the suppression motion. Id.

The Third Circuit also agreed "that, under the circumstances evident here, the good faith exception does not apply." Id.

Here, Kofalt is actually in a better position than Zimmerman because he was never alleged to have possessed even legal adult pornography, let alone child pornography, and thus there was no probable cause to search for any pornography -- child or adult -- in his home.

Additionally, even if accurate (which it was not), the isolated allegation that Kofalt showed Justin pictures of nude people on his computer must be considered stale because the affidavit contained no temporal qualifier regarding WHEN this picture viewing allegedly occurred.

See directly on point and persuasive:
(1) United States v. Zayas-Diaz, 95 F3d 105, 114-115 (1st Cir. 1996)("[A] reasonably well-trained law enforcement officer should be familiar with the fundamental legal principle that both the 'commission' and 'nexus' elements of 'probable cause' include an essential temporal component." (citing Leon, 468 US at 920 n.20)); and
(2) United States v. Huggins, 733 FSupp 445, 449 (DDC 1990)(refusing to apply good faith exception where the court could not infer, from the information within "the four corners of the affidavit ... the time during which the criminal activity was observed.").

Without ANY evidence or context to qualify the alleged nude people on the computer, it could have taken place months or even years earlier.

Further, even if the affidavit stated something -- anything -- to save the staleness inquiry, "movies at [Kofalt's] house where people didn't have their clothes on" (Appx D-8), simply does not equate to "child" and/or "pornography."

Justin did not state that he saw nude people hugging, or kissing, or however a 6-year-old might qualify sexual activities; nor did he describe kids or children without clothes, and especially not kids in sexual situations.

The affidavit did not contain ANY information indicating that Kofalt ever possessed child pornography, much less that child pornography would be found in his home on 02 December 2009.

While it did (falsely) contain information that possibly an indeterminate amount of time earlier, legal pictures of nude people were in Kofalt's home (or at least someone had possibly accessed it via the Internet from his computer), that information must be considered stale without any sort of temporal qualifier.

Thus, under controlling authority in Zimmerman, there was absolutely no probable cause to search for pornography -- child or

even adult -- in Kofalt's home.

And under the circumstances evident here, as dictated by Zimmerman, the good faith exception does not apply, and Kofalt is entitled to reversal of the denial of his suppression motion.

Finally, Trooper Gustafson's search warrant affidavit was not particularized.

"Rambling boilerplate recitations designed to meet all law enforcement needs" do not produce probable cause. United States v. Zimmerman, 277 F3d 426, 433 (3d Cir. 2002), quoting United States v. Weber, 923 F2d 1338, 1345 (9th Cir. 1991).

An expert opinion must be tailored to the specific facts of the case to have any value. Id.

"Experience and expertise, without more, is insufficient to establish probable cause." United States v. Loy, 191 F3d 360, 366 (3d Cir. 1999).

See also United States v. Prideaux-Wentz, 543 F3d 954, 960 (7th Cir. 2008), to rely on profiles, a search warrant affidavit must lay a foundation which shows the person is a member of the class.

Here, there is nothing in Trooper Gustafson's delusional "knowledge, training and experience" statements indicating he knew anything about Kofalt whatsoever, and Kofalt's name is never mentioned.

The affidavit contained only "rambling boilerplate" regarding statutory charges Kofalt was not even alleged to have committed, see United States v. Miller, 527 F3d 54 (3d Cir. 2008), but no information tailored to the specific facts of Kofalt's case. Id.

Absolutely no foundation was given to show that Kofalt fit the profile or was a member of the "child pornographer" class described. Id.

Kofalt was never alleged to have received or collected child pornography, used child pornography to exploit juveniles, solicited child pornography from any source, maintained a collection, or corresponded with others regarding child pornography. Id.

See United States v. Vosburgh, 602 F3d 512, 540-541 (3d Cir. 2010)(Judge Barry, concurring), the only purpose of many pages of boilerplate, where [Kofalt's] name was never mentioned, was to assure the warrant issued. "I am deeply concerned when information and innuendo as serious as that seen here is used so inappropriately. Surely the Government wants to win, but it must never forget its obligation to win fairly."

See also United States v. Dennington, 399 Fed Appx 720, 724 (3d Cir. 2010)(citing United States v. Falso, 544 F3d 110, 121 (2d Cir. 2008)), without any specific allegation the defendant accessed, viewed, or downloaded child pornography, the court was unwilling to find probable cause.

Therefore, Kofalt's defense counsel was ineffective by failing to utilize controlling authority to argue that Trooper Gustafson's search warrant affidavit lacked probable cause, was stale, and was not particularized.

FROM: 69123061
TO:
SUBJECT: Kofalt USSC 08
DATE: 02/20/2019 09:36:24 AM

B. In the alternative, counsel was ineffective by failing to raise Trooper Gustafson's material omissions and separate affirmative misrepresentations in arguing for a hearing under Franks v. Delaware, 438 US 154 (1978).

"[A] criminal defendant has the right to challenge the truthfulness of factual statements made in the affidavit of probable cause supporting a warrant subsequent to the ex parte issuance of the warrant." United States v. Yusuf, 461 F3d 374, 383 (3d Cir. 2006)(citing Franks, 438 US at 171).

In Franks, "the Court created a mechanism to allow a defendant to overcome the general presumption that an affidavit of probable cause supporting a search warrant is valid." Id. The Court of Appeals has recognized that the first step under Franks requires the defendant to "make a 'substantial preliminary showing' that the affidavit contained a false statement, which was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause." Id (citing Franks, 438 US at 171).

Further:

> "In order to make this preliminary showing, the defendant cannot rest on mere conclusory allegations or a 'mere desire to cross-examine,' but rather must present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses."

Id at 383, n.8 (quoting Franks, 438 US at 171).

When faced with an affirmative misrepresentation, the court is required to excise the false statement from the affidavit. In contrast, when faced with an omission, the court must remove the 'falsehood created by an omission by supplying the omitted information to the original affidavit.'" Yusuf, 461 F3d at 383-384 (internal citations omitted). If the defendant is able to ultimately meet this burden, "the Fourth Amendment requires that ... the fruits of the search [must be] excluded." Id at 383.

Here, it has already been shown that Trooper Gustafson made a material omission regarding Justin directly contradicting the allegation that Kofalt "would tickle his private areas" -- by Justin explicitly stating that his brother Michael repeatedly molested him. Trooper Gustafson also made affirmative misrepresentations by stating: "He [Justin] also stated that Kofalt showed him pictures of nude people on his computer."

Justin actually stated that he saw movies (not pictures) at Kofalt's house (not shown to him by Kofalt) where people did not have their clothes on. Michael's interview also contradicted Trooper Gustafson's affidavit by confirming that Kofalt's son Jonathan was the one watching pornography online, and that he never saw Kofalt watching pornography.

Regardless, Justin absolutely did not say that Kofalt showed him "images of naked people on his computer," and the District Court relied, at least in part, on Trooper Gustafson's affirmative misrepresentation to deny Kofalt's motion to suppress. See WDPA 11-cr-155 at Dkt 47, pg 12.

When Trooper Gustafson's affirmative misrepresentation regarding the images of naked people on the computer are excised from the affidavit, and his material omission regarding the alleged "tickling" is corrected to reflect that Justin's brother Michael was the one molesting and masturbating him -- all that remains is the hearsay allegation from the school regarding Kofalt taking "nude pictures" of the minor, and the subsequent forensic interview confirming "that Kofalt took pictures of the minor in his underwear and without his underwear."

As graphically detailed in section A., supra, not only is photographing child nudity a constitutionally protected activity, and thus "simply not a crime," but as the District Court explicitly analyzed to deny Kofalt's motion to suppress (see Dkt 47, pg 12 -- "a parent having a few pictures of her children without clothes for various reasons may be innocent.") -- Kofalt was effectively a de-facto parent to Justin, and an almost full-time caregiver to Justin's ENTIRE FAMILY.

Therefore, Kofalt's defense counsel was ineffective by failing to raise Trooper Gustafson's material omissions and separate affirmative misrepresentations in arguing for a hearing under Franks v. Delaware, 438 US 154 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick Hefner

Date: 21 FEBRUARY 2019