No. 18-9053

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

PAUL WILLIAM HILTON
Petitioner,

-v-

UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner pro se

QUESTIONS PRESENTED

1. Whether the Petitioner is entitled to an evidentiary hearing pursuant to Title 28 U.S.C. § 2255, when reasonable jurists have already determined the District Court's assessment of the case to be debatable or wrong, and there remain unresolved factual disputes?

2. Whether, given this Court's decision in Riley v. California, 134 S. Ct. 2493 (2014), a warrantless search of a cell phone seized incident-to-arrest can be justified when (A) the phone was securely in possession of the police for 18 days prior to the search, (B) there were no longer any special needs of law enforcement, and (C) there were no exigent circumstances?

3. Whether the Petitioner should be afforded an opportunity to question former Defense Counsel in open court regarding matters pertaining to ineffective assistance; particularly when the District Court denying the petition was not the Court that presided over the pretrial suppression hearings?

4. Whether, given the specific facts and circumstances of the case, conducting a "voluntariness test" runs afoul of the self-incrimination clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner

Paul William Hilton, Petitioner, is an individual and has no corporate affiliations.

Respondent

United States of America.

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JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its decision on 11 July 2018 denying the Petitioner's application for a Certificate of Appealability. This Court has jurisdiction to review the Sixth Circuit's decision under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals has not been reported but is available at Case No. 18-1293, Docket # 13. The opinion of the Sixth Circuit on direct appeal is available at United States v. Hilton, 625 Fed. Appx. 754 (6th Cir. 2015). The District Court's decision denying an evidentiary hearing and declining to issue a Certificate of Appealability is available at United States v. Hilton, 2018 U.S. Dist. Lexis 22952 (E.D. Mi. 2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, 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.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in a time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and 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.

INTRODUCTION

The Petitioner, Paul William Hilton, respectfully moves this Court to grant certiorari to answer whether a defendant is entitled to an evidentiary hearing pursuant to Title 28, U.S.C. § 2255, when reasonable jurists have found the District Court's assessment of the case to be debatable or wrong, and where there remain unresolved factual disputes of a constitutional magnitude. Mr. Hilton argues that recent changes to the United States Sentencing Guidelines have validated his Fifth Amendment penalty claim. Minnesota v. Murphy, 465 U.S. 420 (1984). See also United States v. Von Behren, 822 F.3d 1139, 1147 (10th Cir. 2016)("The penalty of potential revocation of supervised release and concomitant incarceration is sufficiently severe to constitute compulsion.") The Sixth Circuit's holding on direct appeal; that none of the evidence in the instant case was fruit of the unlawful statement, United States v. Hilton, 625 Fed. Appx. 754, 759 (6th Cir. 2015), was premised on two erroneous findings; (1) the conditions of Hilton's supervised release were still in effect after final revocation, and (2) it's sua sponte application of inevitable discovery.

The Petitioner argues that when a term of supervised release is revoked, "it is annulled, and the conditions of that term do not remain in effect." United States v. Wing, 682 F.3d 861, 868 (9th Cir. 2012). The Sixth Circuit, however, held in the instant case that Mr. Hilton's conditions of supervised release, despite having been revoked four days before the search, would nonetheless have allowed for a warrantless search of a cell phone seized incident-to-arrest. On direct appeal, the panel applied the doctrine of inevitable discovery, sua sponte, when the Government failed to present the issue before the District

Court, and the District Court issued no ruling applying the doctrine to the search in question. The record shows conclusively the search of the cell phone was for the purpose of gathering evidence to be used against the Defendant in a separate criminal prosecution, therefore a warrant was constitutionally required. Riley v. California, 134 S. Ct. 2493 (2014). In the instant case, the phone was securely in possession of the police for 18 days prior to the search, there were no exigent circumstances, and there were no longer any supervisory purposes left to be served to justify a warrantless search of the phone. The Sixth Circuit's finding to the contrary is in direct conflict with this Court's finding in Riley, supra. Furthermore, because the panel on direct appeal tied its sua sponte application of inevitable discovery inexorably to the conditions of Hilton's supervised release, the doctrine ceased to be viable (if ever it were) with the final revocation of his term of supervision. By applying inevitable discovery of its own accord, the Sixth Circuit also unfairly denied Hilton an opportunity to present evidence in his favor. Giordenello v. United States, 357 U.S. 480, 488 (1958).

This Court should also grant certiorari to answer whether the Petitioner should be given the opportunity to question defense counsel in order to fully develop Hilton's claim of ineffectiveness, when the District Court that denied an evidentiary hearing was not the Court which presided over the pretrial suppression hearings.

Finally, the Court should grant certiorari to determine whether, given the particular facts and circumstances of the instant case, conducting a "voluntariness test" runs afoul of the Petitioner's Fifth Amendment privilege against self-incrimination. Mr. Hilton argues that the privilege in this case was self-executing, Minnesota v. Murphy,

465 U.S. 420, 429-30 (1984), and that the alleged statements were thus "irrebuttably presumed involuntary." United States v. Pacheco-Lopez, 531 F.3d 420, 424 (6th Cir. 2008). Hilton asserts, therefore, that the application of any such "voluntariness test" is unconstitutional.

STATEMENT OF THE CASE

On 6 May 2010 information was received by the St. Charles County (Missouri) Sheriff's Department (SCCSD) from an anonymous source alleging the Defendant had a "purple" Blackberry cell phone and was using it to access "pics and videos of underage girls." (Doc. 92-4, Anonymous Email, PGID 488). The following day a detective with the SCCSD contacted U.S. Probation Officer Clint Vestal (Vestal) and notified him about the tip received and informed him the SCCSD had begun an investigation and were "getting a subpoena for [Hilton's] account." (Doc. 96-4, Probation Report, PGID 577). The SCCSD requested that the Probation Office assist them in conducting a search of Hilton's residence. Id. On 11 May 2010, six days after receiving the tip, without conducting any meaningful corroborating investigation and absent the required consent, Vestal and his partner forced their way through Hilton's doorway when he answered the knock on the door. He was immediately restrained in handcuffs and belly-chain, and questioned about the location of a Blackberry cell phone. Having been up most of the night with the flu, feeling dizzy and nauseated, Mr. Hilton responded by saying he was sick and needed to sit down. Hilton was eventually taken outside the residence and placed in the backseat of a government SUV where Vestal interrogated him for over two hours, absent Miranda warnings and while Hilton was subject to penalty revocation, while the police conducted a warrantless search

of Hilton's residence; seizing, among other things, two cell phones. Hilton asked for his medication, some water, and something to eat to settle his stomach. Vestal asked Hilton several more times about the Blackberry and eventually Hilton told him there was one in a kitchen drawer upstairs where his sister and her son resided.

Vestal left the vehicle and entered the house to tell the officers where to find the phone. Vestal later testified that he couldn't remember if he told them where to look before or after the phone was seized. (Doc. 108, Hearing Transcript, PGID 729). The District Court, however, held that the location of the phone was communicated prior to its discovery. (Doc. 120, District Court Opinion - Blackberry search, PGID 870). Vestal then returned to the SUV and resumed his interrogation of the Defendant. Upon completion of the search of his residence, Hilton was transported to the U.S. Federal Courthouse in St. Louis, Missouri.

Two weeks later, on 25 May 2010, the Defendant's term of supervised release was finally revoked by the District Court in St. Louis, and he was sentenced to 10 months incarceration and 40 months additional supervised release. (Doc. 38, Judgment of Violations, PGID 48-49).

Four days later - 18 days after the seizure - Det. Todd Roth (Roth) with the SCCSD, upon request of the U.S. Attorney's Office in St. Louis, executed the search of the Blackberry cell phone. (Appendix A, Examiner Notes, PP. 1-2). When applying for the warrant to search the phone, Roth used as the sole means of establishing probable cause an alleged statement which he either knew or was reckless in not knowing was unlawfully obtained. (Doc. 1, Blackberry Warrant, PGID 8). The alleged statement was later suppressed by the District Court in Detroit, Michigan. (Doc. 107, Order Granting Suppression, PGID 626).

On 8 July 2013 the Defendant entered what he believed at the time to be an Alford "best-interest" guilty plea to two counts of conspiracy to produce child pornography in which he reserved his right to appeal the District Court's denial of two pretrial motions: (Doc. 93, Motion to Suppress - Residence, PGID 508-523)(Doc. 113, Motion to Suppress - Blackberry Search, PGID 805-828).

On 17 April 2014 Hilton was sentenced to 480 months for each count; to run concurrent. (Doc. 144, Judgment). His direct appeal was filed by counsel, Harold Gurewitz, on 15 October 2014. Around this same time, Mr. Hilton filed a motion for leave to the Sixth Circuit for permission to file a pro se supplemental brief in support of his appeal. Hilton cited the specific issues Counsel failed to raise. Among these were the issues of contract law and the Fifth Amendment act of production. The motion for leave was denied. (Case No. 14-1571, Doc. 35-1).

On 9 September 2015 a panel from the Sixth Circuit issued its opinion affirming the District Court's denial of both motions. United States v. Hilton, 625 Fed. Appx. 754 (6th Cir. 2015)(unpublished). On 10 February 2016 the Defendant's petition for certiorari was filed in this Court and on 4 April 2016 that petition was denied. Hilton v. United States, 136 S. Ct. 1527 (2016). In September of 2016 Mr. Hilton filed a motion to recall the mandate with the Court of Appeals, arguing the errors on direct appeal resulted in a manifest injustice. On 28 December 2016 the panel, without addressing any of the claims of the Defendant, denied the motion. (Appendix B, Order Denying Recall).

On 6 December 2016, Hilton filed a petition with the District Court to vacate or set aside the sentence pursuant to U.S.C. § 2255. (Doc. 196, Habeas Petition, PP. 1-95).

On 13 February 2018, without conducting an evidentiary hearing, the District Court denied the habeas petition and declined to issue a certificate of appealabilty. (Doc. 201, Order Denying Habeas Petition). Hilton then filed a motion with the Sixth Circuit Court of Appeals, asking the Court to reverse the lower court's finding and remand for an evidentiary hearing, or in the alternative, to issue a certificate of appealability. On 11 July 2018 that motion was denied. (Case No. 18-1293, Order Denying Certificate of Appealability, Doc. 13). Hilton next filed a petition for rehearing and rehearing en banc. On 24 September 2018 that petition was also denied. (Appendix C, Order Denying Rehearing). The Petitioner now moves this Honorable Court to vacate the above Orders and remand for a full evidentiary hearing.

It is important to point out there were two separate and distinct searches at issue here; the warrantless search of Mr. Hilton's residence on 11 May 2010 and weeks later, the search of the contents of the cell phone, which was executed on 29 May 2010. (There were additional warrants later issued; based "almost exclusively on the information found on the Blackberry." United States v. Hilton, 625 Fed. Appx. 754, 760 (6th Cir. 2015)). These searches were separate in that they occurred weeks apart and were authorized by two different governmental agencies. They were distinct in that they each had a specific governmental purpose justifying the search. The search of Hilton's residence was governed by the "special needs" of the U.S. Probation Office; requiring reasonable suspicion and consent. The later search of the contents of the cell phone was solely for the purpose of gathering evidence to be used against the Defendant in a separate criminal prosecution, therefore, a warrant was constitutionally required.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Determine Whether The Petitioner Is Entitled To An Evidentiary Hearing Pursuant To 28 U.S.C. § 2255, When Reasonable Jurists Have Already Found The District Court's Assessment Of The Case To Be Debatable Or Wrong.

A. The Courts In The Sixth Circuit Have Sanctioned The Government's Breach Of The Contract It Had With The Petitioner.

The certificate of appealability inquiry is to determine whether the Petitioner has shown that "reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 137 S. Ct. 759, 773 (2017)(emphasis added)(citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2013)). This threshold question does not require the Court to bestow its full consideration of the factual or legal bases adduced in support of the claims. Here, the Petitioner asserts that "reasonable jurists" have already determined the District Court's decision to be debatable or wrong, and there are additional unresolved factual disputes.

(1) Principles Of Contract Law

Because plea agreements' constitutional and supervisory implication raise concerns over and above those present in the traditional contract context, interpreting such agreements the Sixth Circuit holds the Government to a greater degree of responsibility than the defendant (or possibly would be either of the parties to commercial contracts)

for any imprecisions or ambiguities in the plea agreement. United States v. Harris, 473 F.3d 222, 225 (6th Cir. 2006). The language in a statute is the "starting point for interpretation, and it should also be the ending point if the plain meaning of the language is clear." United States v. Choice, 201 F.3d 837, 840 (6th Cir. 2000). Language lies at the very heart of Mr. Hilton's petition.

In the instant case, the Government breached the terms of the plea agreement (contract) it had with the Defendant. The decisions rendered by the courts in the Sixth Circuit cannot be squared with the plain meaning of the statutory language. Hilton has challenged three specific conditions of supervised release, but the Sixth Circuit addressed only one. The District Court ignored them all together. The one condition the Court of Appeals did address was Standard Condition of Supervised Release # 3, which at the time read:

> The defendant shall answer truthfully all inquires by the probation officer, and follow the instructions of the probation officer. (Doc. 93-3, PGID 523).

Mr. Hilton has argued this condition, because of its precise language, would have placed him in violation of his terms of supervised release were he to invoke his Fifth Amendment privilege against self-incrimination. In support of this argument he has cited, among others, the following caselaw in both lower courts:

United States v. Saechao, 418 F.3d 1073, 1079 (9th Cir. 2005):

> In requring answers to all inquiries, the condition makes no exception for the invocation of the Fifth Amendment and thus, by implication, forecloses a probationer's ability to exercise the right by remaining silent. (Emphasis in the original).

See also Minnesota v. Murphy, 465 U.S. 420, 435 (1984):

> A state may require a probationer to appear and discuss matters that effect his probationary status, such a requirement, without more, does not give rise to the self-executing privilege...the result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

On direct appeal, the Government argued that such an "expansive interpretation [of Murphy] would frustrate the basic functioning of the the supervised release system." (Case No. 14-1571, Doc. 38, Appeal Response, PP. 54). The Government went on to say "far from making an idiosyncratic complaint, Hilton is arguing that the United States Sentencing Commission has been recommending, and district courts have been imposing an unconstitutionally coercive release condition upon hundreds of thousands of releasees for almost three decades." Id. at PP. 56. That is precisely what Mr. Hilton has argued all along, and the United States Sentencing Commission agrees with him.

On 1 November 2016 the Sentencing Commission changed the wording of the condition in order to avoid the exact scenario warned of in Murphy and brought to fruition in the instant case. It now reads:

> The defendant shall answer truthfully the questions asked by the probation officer. (USSG 5D1.3(c)(4)).

Gone is the unconstitutionally coercive requirement for a probationer to choose between violating the terms of supervision or incriminating

himself or herself in a pending or future criminal prosecution. In fact, the Sentencing Commission included Application Note # 1 in order to address head-on the new statutory language and the argument Hilton has asserted all along:

> Application of Subsection (c)(4). Although the condition in subsection (c)(4) requires the defendant to "answer truthfully" the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.

Obviously, the U.S. Sentencing Commission recognized enough of a threat to a probationer's Fifth Amendment rights they changed the language in the condition and added an Application Note to address the unconstitutionally coercive language in its previous incarnation. These changes by the Commission have validated the Defendant's Fifth Amendment claim as it applies to the penalty situation in which he was placed. Surely the United States Sentencing Commission is comprised of perfectly reasonable men and women - indeed, men and women with an extraordinary knowledge of the law. Put another way; reasonable jurists have already determined the District Court's assessment of the constitutional claims of the Defendant to be "debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The touchstone of the Fifth Amendment is "compulsion," Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977), and the "penalty of potential revocation of supervised release and concomitant incarceration is sufficiently severe to constitute compulsion." United States v. Von Behren, 822 F.3d 1139, 1147 (10th Cir. 2016)(citing Cunningham, supra).

Because the compelled statement in the instant case led directly to the discovery and seizure of the cell phone, (Doc. 120, PGID 870), and was later used by the Government to secure a search warrant for the search of the contents of the phone (thereby placing the Government in a much better position than they would have been absent the constitutional abuses), the Defendant was clearly prejudiced. The United States Sentencing Commission itself renders the Courts' findings there was no "per se" or "inherent" coercion in error. (It should be noted that the Defendant filed a request for Judicial Notice to inform the Court about these changes).

As detailed above, Mr. Hilton has challenged three (3) specific conditions of supervised release thus, the Sixth Circuit's analysis is not only in error; it is incomplete.

(i) Additional Supervised Release Term # 10

> The defendant shall submit his person, residence, office, or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; **failure to submit to a search may be grounds for revocation:** the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition. (Emphasis added)(Doc. 93-3, Terms of Supervision, PGID 523).

Employing the principles of contract law (and common sense), the implication is clear; the Defendant had the option to submit or not to submit to a search. Indeed, the term clearly spells out what the punishment may be were he choose not to submit to a search: **failure to submit to a search may be grounds for revocation**. It is the very

presence of this sentence within the condition that breathes life into the implication of choice. In other words, had Mr. Hilton no choice in the matter, there is no need for this sentence to exist. The expression of one thing is the exclusion of another. The principles of contract law and statutory construction require a statute be construed so that meaning is given to all its provisions; so that no part will be "inoperative or superfluous, void or insignificant." Gillie v. Law Offices of Eric A. Jones, LLC., 785 F.3d 1091, 1104 (6th Cir. 2015).

Moreover, PO Vestal testified that he knew he was required to obtain the Defendant's consent before entering his home and conducting a search, but he chose to ignore it. (Doc. 108, Hearing Transcript, PGID 728):

Q. If he did not open the door, you don't believe that you had authority to break it down, did you?
A. No.
Q. If he had refused to submit, as the term provides for, that would have been a violation of his terms of supervision, right?
A. Correct.
Q. But to submit required his concurrence or agreement, right?
A. Correct.
Q. You didn't give him that option, did you?
A. No.

If there is an ambiguity here, it exists solely by virtue of the Sixth Circuit's failure to apply the principles of contract law and statutory construction. Under those circumstances, any imprecision or ambiguity must be resolved against the drafter (the Government). Harris, 473 F.3d at 225. United States Probation Officer Vestal, by his own word, violated Mr. Hilton's Fourth Amendment protection against unreasonable

searches and seizures by, among other things, failing to obtain the Defendant's consent to search his residence.

(ii) Additional Supervised Release Term # 12

> The defendant shall consent to his probation officer or probation service representative conducting random or periodic unannounced examinations of any computer(s) equipment to which he has access, other personal computers and electronic storage devices to which you have access, including web enable[d] cell phones. The examination may include retrieval and copying of all data from the defendant's computer(s), or any computer(s) to which the defendant has access, and any internal and external peripherals to insure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; the defendant shall, at the direction of his probation officer, consent to having installed on the computer(s), at the defendant's expense, any hardware or software systems to monitor or filter his computer use. Prior to installation of any such hardware or software systems, the defendant shall allow the U.S. Probation Office to examine the computer and/or electronic storage device. The defendant shall pay for the costs associated with monitoring based on a co-payment fee approved by the U.S. Probation Office. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents, employers, or family members that the computer(s) and any related equipment may be subject to searches pursuant to this condition. (Doc. 93-3, PGID 522-23).

Not only is there the same implication of choice: Failure to submit to a search may be grounds for revocation, but the plain language within the condition clearly identifies a specific purpose or "special need" for searching the contents of a cell phone: to insure compliance with this condition. The principles of contract law do not allow for the selective picking and choosing (or ignoring) of the individual phrases, clauses, or words specifically included in a

contract or agreement; so that no part will be "inoperative or superfluous, void or insignificant." Gillie, 785 F.3d at 1104.

Hilton has argued the conditions of his supervised release, because they had already been revoked prior to the search of the phone, were no longer in effect; that when a term of supervised release is revoked, it has "been annulled, and the conditions of that term do not remain in effect." United States v. Wing, 682 F.3d 861, 868 (9th Cir. 2012).

However, despite the final revocation of Hilton's term of supervised release, and despite the fact officials in Missouri actually obtained a warrant, both courts in the instant case relied upon the specific conditions of his revoked term of supervised release to justify their findings that a warrant was not required. See (Doc. 120, District Court Opinion-Blackberry Search, PGID 872):

> There was no need for law enforcement to seek a search warrant given Hilton's special conditions of supervised release 10 and 12.

See also Hilton, 625 Fed. Appx. at 760:

> Riley contemplates that "other case specific exceptions may still justify a warrantless search of a particular phone"...Hilton's supervised release terms surely provide one of these exceptions.

The above holdings are not only in conflict with the Ninth Circuit's decision in Wing, supra, but also in direct conflict with this Court's decision in Riley v. California, 134 S. Ct. 2493, 2495 (2014), that in the absence of exigent circumstances, a warrant is required to search the contents of a cell phone seized incident-to-arrest. Moreover, as detailed above, these holdings are undermined by the plain language

included in Hilton's conditions of supervised release. The above rulings also raise a host of additional questions. For example, can one be said to be serving two or more terms of supervised release (past, present, or future) at the same time? See United States v. Cross, 2017 U.S. App. Lexis 867 (6th Cir. 2017). What if the specific conduct proscribed in one term of supervised release differs from that in another term? When does one term of supervised release end and a new term begin? What is the definition of the word "final?" Why was Mr. Hilton never charged with additional supervised release violations? Could he still be charged? (The linguistic verisimilitudes are infinite).

Title 18 U.S.C. § 3583 provides a district court the authority to impose, modify, terminate, delay, or revoke a term of supervised release. Subsection 3583(i) provides the court the power to revoke a term of supervised release past its expiration if a warrant or summons based on an allegation of a violation of a condition of supervised release has been issued before the expiration of that term. As the Ninth Circuit explained:

> It would make little sense for Congress to restrict the circumstances under which a district court can revoke an expired term of supervised release if the courts have the authority to punish any belatedly discovered supervised release violation, however ancient, by revoking the terms of supervised release that are ongoing or have yet to begin [or, as in the instant case, have already been revoked]. Wing, 682 F.3d at 869.

To put an even finer point on the argument here, Mr. Hilton would submit that the very fact there exists a statutory device for delaying the final revocation hearing, for any reason, strongly implies that the final revocation hearing is indeed final. Expressio unius est exclusio alterius; the expression of one thing is the exclusion of another.

This Court, in Johnson v. United States, 529 U.S. 694, 707 (2000), explained it was applying an "unconventional" definition of the word "revoke" based on the language of 3583(e)(3) as it existed before the Congress amended the statute in 1994:

> As it was written before the 1994 Amendments, subsection (3) did not provide (as it does now) that a court could revoke the release term and require service of a prison term equal to the maximum authorized length of a term of supervised release. Id. at 705.

The Defendant here argues that Congress rendered obsolete this Court's earlier "unconventional" definition with application of the 1994 Amendments, and there is "no reason to believe that Congress [then] used the term 'revoke' in anything other than its ordinary sense." Wing, 682 F.3d at 868. Indeed, to do so would alter the plain meaning of the word "final." Black's Law Dictionary, Ninth Edition, Bryan A. Garner, Editor in Chief (2009) defines the following:

Final: (of a judgment of law) not requiring any further judicial action by the court that rendered judgment to determine the matter litigated; concluded.

Revocation: Annulment, cancellation, or reversal, usu. of an act or power.

Words either have meaning or they don't. One cannot be a "little bit" pregnant. Furthermore, in the instant case, Mr. Hilton has no need to challenge the jurisdiction or supervisory power of the District Court. Even if the Court retains its supervisory powers after the final revocation hearing; even if the word "revoke" doesn't really mean "revoke," there simply were no longer any supervisory purposes left to

be served that would justify conducting a warrantless search of the phone. Hilton had already been found guilty of every possible condition pertaining to the phone prior to the search of its contents. (Doc. 38, Judgment of Violations, PGID 48-49). The revocation hearing was not bifurcated, or held in abeyance, and again, Mr. Hilton was never charged with any additional supervised release violations; which can only mean one of two things; (1) there was no contraband found on the phone, or (2) the purpose of the search was not to establish additional supervised release violations. The search of the cell phone in the instant case was clearly for the sole purpose of trolling for evidence to be used against the Defendant in a separate criminal prosecution thus, a warrant was constitutionally required.

(2) Fourth Amendment Warrant Requirement

The supervision of a person on federal supervised release is in itself "a 'special need' of the state permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." United States v. Lifshitz, 369 F.3d 173, 179 (2nd Cir. 2005) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)). Even a citizen who has been convicted of a crime, though they may enjoy a diminished expectation of privacy compared to the ordinary citizen, is nonetheless still protected by the Fourth Amendment's reasonableness clause. That same citizen also retains a significant possessory interest in the property seized by the Government; particularly where it involves a computer or smart phone; if for no other reason than the sheer volume of non-contraband information stored on such devices. Riley, supra.

In a special needs context, even if Hilton's conditions of supervised release survived the final revocation hearing, the search of the Blackberry could not have been to "insure compliance" with Term # 12, because he had already been found guilty of not being in compliance with Term # 12; had already been sentenced; and was serving the sentence imposed prior to the search. There were no longer any "special needs" of law enforcement that would justify a warrantless search of the phone. Again, most telling is the fact that Hilton was never charged with any additional supervised release violations. Why?

The touchstone of the Fourth Amendment is "reasonableness." United States v. Knights, 534 U.S. 112, 118 (2001). While it may be true that subjective intent does not ordinarily factor into the traditional Fourth Amendment totality of the circumstances analysis, it is equally true (A) a probationer's specific search condition (special need?) is a "salient circumstance" when assessing the reasonableness of a probation search, Id. at 120; (B) the specific language included in the terms of supervised release restricts who may conduct a search, the time and manner in which a search can be conducted, and the purpose (special need?) for conducting a forensic search of a cell phone; and (C) contract law principles require a court to take into account the purpose of the contract or agreement.

The record shows conclusively that immediately following the search of Hilton's residence, the case was handed over to the U.S. Attorney's Office by PO Vestal for the prosecution of separate criminal charges. (Doc. 96-4, Probation Report, PGID 579: "PO contacted AUSA Reginald Harris - they [U.S. Attorney] are applying for a search warrant for the Blackberry and it will be analyzed for child pornography.")

Furthermore, the warrant was applied for, and the search was conducted by, Det. Todd Roth with the St. Charles County Sheriff's Department, upon request of the U.S. Attorney's Office. (Appendix A, Examiner Notes, PP. 1-2). The fact that officials in Missouri were reckless in obtaining the warrant (Doc. 196, PP. 66-78) cannot be cured by the courts in the Sixth Circuit holding retroactively a warrant was not required.

(i) The Inevitable Discovery Doctrine

The core rationale underlying the exclusionary rule is deterrence of unlawful police conduct. "The corollary to this principle is that the prosecution must not be put in a better position as a result of the police illegality." United States v. Zavala, 541 F.3d 562, 578 (5th Cir. 2008). That is precisely what occurred in the instant case.

Inevitable discovery requires a court to determine, viewing affairs as they existed the instant before the unlawful search, what would have happened had the unlawful search never occurred. United States v. Kennedy 61 F.3d 494, 498 (6th Cir. 1995)(citing United States v. Eng, 971 F.2d 854, 961 (2nd Cir. 1992)). Proof of inevitable discovery involves no speculative elements but "focuses on demonstrated historical facts capable of ready verification or impeahment and does not require a departure from the usual burden of proof at suppression hearings." Eng, 971 F.2d at 859. It is the Government's burden to prove by a preponderance the evidence would have (not could have or might have) been discovered by other, lawful means. Nix v. William, 467 U.S. 437, 444 (1984). In the instant case, the Government was never even held to their burden by the Courts.

The Government argued inevitable discovery applied to the search of Mr. Hilton's residence and seizure of the phone, which Hilton also disputes. (Doc. 196, PP. 27-31). The Government did not raise the issue as it applied to the search of the contents of the phone and the District Court issued no ruling regarding application of the doctrine to the search of the phone. (Doc. 120, PGID 865-876). Remember, there were two separate and distinct searches at issue. Hilton argues the issue was waived by the Government in relation to the search of the phone. See Scottsdale Ins. Co. v. Flowers, 513 F.3d 833, 835 (6th Cir. 2008). Furthermore, by applying the doctrine of its own accord, the Sixth Circuit not only relieved the Government of its burden, but also deprived Mr. Hilton an opportunity to argue or present evidence in his favor. Giordenello v. United States, 357 U.S. 480, 488 (1958).

Inevitable discovery is conceptually more difficult to assess than the independent source doctrine from which it spawned; it requires at least some level of speculation. Viewing affairs as they existed the instant before (not four days before, 18 days before, or a month before) Det. Roth's unlawful search of the phone, what would have happened? For starters, the phone in question was illegally seized. As articulated above, the warrantless search of Hilton's residence was conducted without reasonable suspicion and without the required consent.

So as Roth stood before his examination table on the morning of 29 May 2010, the Blackberry had been locked inside an evidence locker for 18 days; eliminating off the top any exigent circumstances. No one was in any peril. The phone itself cannot be used as a weapon or to facilitate an escape, and there were no concerns regarding destruction of evidence. Due in large part to the actions of PO Vestal, there was

no other independent, untainted investigation under way at the time. Hilton's term of supervised release had been revoked days earlier, and there was no longer any supervisory purpose left to be served that would justify conducting a warrantless search of the phone.

In fact, rolling back the film to the instant before his unlawful search, absent the compelled testimonial act of Hilton producing the phone, Roth could not have been certain whose phone he actually had. The phone in question was not found on Hilton's person; it was not found in his apartment (Doc. 108, Hearing Transcript, PGID 74); it was not found at his place of employment, or in his vehicle. The Government had no sales receipts or phone bills in Hilton's name. No one, including the anonymous informant, ever claimed to have seen him in possession of, or even using, any Blackberry device. The phone was not "purple" as alleged and it was not the phone used to take the photograph on the Mocospace social media profile. (Doc. 92-4, Anonymous Email, PGID 488). Furthermore, the Government could not even associate the alleged phone number provided by the anonymous informant with any particular person or any particular device. (Doc. 96-4, Probation Report, PGID 578).

The Sixth Circuit holds that if a defendant shows that police were not following any other routine procedures, "the government's evidence about what police would have done must bow to contrary evidence about what they actually did." United States v. Ford, 184 F.3d 566, 577 (6th Cir. 2008)(emphasis in the original).

The Defendant argues the sua sponte application of the doctrine by the Sixth Circuit was an abuse of discretion, and the demonstrated historical facts show conclusively that (a) the Government waived the issue, and (b) inevitable discovery does not apply to the search of the contents of the phone.

In Eng, the Second Circuit identified the need for reviewing courts to guard against government actions "taken as an after the fact insurance policy to validate an unlawful search under the inevitable discovery doctrine." Id. 971 F.2d at 861. In the instant case, it was the Sixth Circuit Court of Appeals itself that provided the Government with the "after the fact insurance policy." Surely, an abuse of discretion.

(3) Unresolved Factual Disputes

While on direct appeal Mr. Hilton petitioned the Sixth Circuit seeking leave to file a pro se supplemental brief in support of his appeal. He asked for leave because Counsel failed to raise the issues Hilton believed were valid constitutional challenges. Specifically, he asked the Sixth Circuit to allow him to raise the issues of contract law (breach of contract) and the Fifth Amendment act of production. His petition was denied. (Case No. 14-1571, Doc. 35-1).

As a result, we have a situation where a defendant wishes to raise a valid issue that counsel has failed to present on direct appeal. He then seeks the court's permission to raise the issue pro se, but he is denied leave. Then, the defendant is later told that because the issue was not raised on direct appeal, he is now precluded from raising it in a habeas petition. This is just?

An issue that was briefed but never addressed by either court is the Stalking Horse argument. The Sixth Circuit has consistently held it is unlawful for a probation search to serve as a means to evade the Fourth Amendment's usual warrant requirements. United States v. Carnes, 309 F.3d 950, 961 (6th Cir. 2002)("Where the government claims that

'special needs' of law enforcement justify an otherwise illegal search and seizure, a court must look to the 'actual motivations of individual officers.'")(Quoting Knights, 534 U.S. at 122)); United States v. Lykins, 544 Fed. Appx. 642, 647 (6th Cir. 2013)(unpublished)(same); United States v. Martin, 25 F.3d 293, 296 (6th Cir. 1994)("It is impermissible for a probation search to serve as a subterfuge for a criminal investigation.") In fact, in Carnes, the court specifically held that the conditions of supervision in a probation or parole agreement cannot be used by the government to search for evidence to be used in a separate criminal prosecution once that term has been revoked. That is exactly what happened here. Furthermore, Carnes is circuit precedent and cannot be overruled by another panel. United States v. Ossa-Gallegos, 491 F.3d 537, 538 (6th Cir. 2007)("A panel of this [c]ourt cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this court sitting en banc overrules the prior decision.")(En banc).

(4) Collateral Attack

In denying to issue a certificate of appealability, the Appeals Court repeatedly asserts the Defendant cannot challenge any of the constitutional abuses presented in his habeas petition, simply because the previous panel on direct appeal held that his constitutional rights were not violated, but those findings were on entirely different grounds. Moreover, the Defendant doesn't have to prove he would win on remand, only that "reasonable jurists" could disagree with the District Court's

assessment of Mr. Hilton's claims. Miller-El v. Cockrell, 537 U.S. 322, 336 (2013). As detailed above, Hilton has already established as much.

Mr. Hilton acknowledges he has made mistakes when presenting his issues; he is not an attorney (an excellent reason in itself for conducting an evidentiary hearing), hence the "relatively light" burden on a petitioner for establishing entitlement to such a hearing. Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007). Indeed, allegations in a pro se petition are "entitled to a liberal construction" which may require "active interpretation in some cases to construe a pro se petition to encompass any allegations" stating federal relief. Franklin v. Rose, 765 F.2d 82, 85 (6th Cir. 1985).

If one raises an issue on direct appeal, one cannot "relitigate" the issue in a habeas petition. On the other hand, if one (or one's attorney) fails to raise an issue on direct appeal, one cannot raise it in a habeas petition. The Sixth Circuit goes even a step further by holding that any issue raised by the Defendant in his habeas petition before the District Court, but not specifically mentioned in his application for a certificate of appealability is "forfeited," citing an unpublished per curiam opinion to justify its holding. (Case No. 18-1293, Doc. 13, PP. 1-5). Hardly a "liberal construction."

The Defendant admits he was unaware, as are no doubt the overwhelming majority of pro se petitioners, that he was required to explicitly mention, by name, every single issue in his habeas petition when applying for a certificate of appealability, lest the issue be deemed "forfeited." Hilton asserts that it is ridiculously difficult for any pro se petitioner to navigate these complicated legal waters on his or her own; especially when considering the enormous latitude afforded the

Government. So be it. The Sixth Circuit, however, is factually incorrect. The Defendant, as he has done here, entered his entire brief in support of his habeas petition into the record when applying for the certificate of appealability, and he referenced the petition throughout. He also, as he does here, invited the Court to read the entire brief. He "forfeited" nothing.

It is true that the Defendant, in his habeas petition, challenges the Sixth Circuit's assessment of reasonable suspicion on direct appeal as it applied to the search of his residence. (Doc.196, PP. 1-32). That assessment should be of grave concern to every citizen. However, Hilton makes clear in his petition he is also attacking the constitutionality of the search on breach of contract grounds. (This is also one of the pillars supporting his claim of ineffective assistance of counsel).

Hilton's habeas petition is "an attack on a judgment in a proceeding other than a direct appeal." Black's Law Dictionary, Eighth Edition, (2004). Hilton tried himself to raise these issues on direct appeal but was denied the opportunity. Hilton argues the judgment of the District Court (later upheld on direct appeal) was "ineffective," Id. and thus in violation of his Fifth Amendment right to due process of law.

The Government thrice breached the terms of the contract it had with the Defendant. These breaches resulted in a prejudicial outcome; (a) the unlawful warrantless search of his residence, and (b) violation of his Fifth Amendment priviledge against self-incrimination. Mr. Hilton respectfully submits that the question all along in this case should not have been whether or not the officials in Missouri were required to obtain a warrant to search the contents of the Blackberry cell phone; they in fact obtained one. The question should have focused on the

validity of the existing warrant with the suppressed portions excised. (Doc. 196, Habeas Petition, PP. 66-78).

This Court should also grant certiorari to address the ever-widening split among the circuits regarding supervised release. See United States v. Hilton, 625 Fed. Appx. 754 (6th Cir. 2015)(unpublished); United States v. Cross, 2017 U.S. App. Lexis 867 (6th Cir. 2017)(unpublished); United States v. Winfield, 665 F.3d 107 (4th Cir. 2012); United States v. Johnson, 243 Fed. Appx. 666 (3rd Cir. 2007)(unpublished). But, see also United States v. Wing, 682 F.3d 861 (9th Cir. 2012); United States v. Xinidakis, 598 F.3d 1213 (9th Cir. 2010); United States v. Sullivan, 2018 U.S. Dist. Lexis 149128 (D. Or. 2018).

This split among the circuit courts has the potential to adversely effect thousands of federal inmates and releasees. Indeed, had his case been heard in the Ninth Circuit, Mr. Hilton would have been home with his family six years ago. This Court, pursuant to Rule 10(a) of the Rules of the Supreme Court, should grant certiorari in order to settle this important matter.

II. This Court Should Grant Certiorari To Determine Whether The Petitioner Should Have Been Allowed To Question Counsel Regarding Matters Pertaining To Ineffectiveness.

A. The District Court Denying The Evidentiary Hearing Is Not The Court That Presided Over The Pretrial Hearings.

To obtain relief on a habeas petition on the grounds of ineffectiveness, a petitioner is required to establish (1) counsel's performance was deficient as compared to an objective standard, and (2) there is a reasonable probability that counsel's errors prejudiced the outcome of

the proceedings. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. It is a less demanding standard than "more likely than not." Strickland v. Washington, 466 U.S. 668, 692-93 (1984).

To be clear; Mr. Hilton has nothing but the highest respect and regard for Counsel Gurewitz. Nowhere in the caselaw the undersigned has read is there a requirement that counsel must be a bumbling fool, or that there must be some level of animus between the parties in order to make a successful claim of ineffectiveness. Mr. Hilton asserts it is entirely possible for a defense attorney; even one with extraordinary skill and experience; one who makes the right call more often than not, to nonetheless prejudice a defendant whenever he or she makes the wrong call. No one is infallible and it only takes one iceberg to sink a ship. The argument here is a simple one; errors were made and the Defendant was prejudiced as a result.

The District Court held "the record shows that Hilton's counsel consistently challenged the evidence against Hilton on a variety of constitutional grounds, and in particular mounted a vigorous challenge to the search warrants." United States v. Hilton, 2018 U.S. Dist. Lexis 22952 (E.D. Mi. 2018). However, both courts in this case held that a warrant was not required for either search. It is those findings Hilton is challenging in his habeas petition; and it is on breach of contract grounds as well as ineffective assistance of counsel. Moreover, the District Court is confined to the record, because it was not the Court that presided over either of the suppression hearings. The Court was therefore unable to rely on its own observations and recollections of the events, or the testimony of witnesses.

Furthermore, though the District Court may have access to the record of the case, no court is privy to the communications between counsel and his or her client. In fact, this Court has held that a district court could neither rely on the files and records of the case, nor the personal knowledge or recollection of a district court judge where, like here, the factual allegations "relate primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." Machibroda v. United States, 368 U.S. 487, 494-95 (1962).

Given the opportunity to question Counsel regarding any number of matters, the Court may be enlightened regarding issues of trial strategy and the decision-making process to determine for itself the validity of the Petitioner's claims. For instance, Mr. Hilton would certainly want to question Counsel regarding his innocence claim, and the forensic evidence that could have exonerated him, or at the very least, called into question much of the Government's evidence.

Addressing the Alford claim Mr. Hilton presented in his habeas petition, the District Court first finds that Mr. Hilton's "acknowledgment of the facts demonstrating his guilt during the plea hearing forgoes any claim of innocence." Hilton, supra. However, on the very next page the Court states that "Hilton says his counsel was deficient in the manner in which Hilton attempted to enter an Alford plea...At the plea hearing, Hilton's Counsel specifically cited to Alford when the time came for Hilton to lay the factual basis for his guilt." Id. Obviously, both findings cannot be true. Either Mr. Hilton "acknowledged the facts demonstrating his guilt," or Hilton's Counsel "cited to Alford when the time came to lay the factual basis for his guilt." (For the record; it was the latter).

The District Court's finding, with regard to the factual basis was thus in error, and an insufficient factual basis can never be a harmless error. United States v. Tunning, 69 F.3d 107, 110 (6th Cir. 1995).

It was the word "attempted" which first caused Mr. Hilton to question what type of plea he actually took. The Government used the same word in a sentencing memorandum causing Hilton to question Counsel about the matter. (Doc. 196, PP. 84-87). Hilton is still uncertain as to what type of plea he entered and the above finding only further muddies the water. This may seem trivial to some, but from Mr. Hilton's perspective, he has already served the equivalent of a ten-year sentence for a crime he has insisted from the beginning he did not commit. He only agreed to the Alford plea because it was in his best interest.

The distinguishing feature of an Alford plea is that the defendant does not confirm the factual basis. United States v. McMurray, 653 F.3d 367, 380-81 (6th Cir. 2011). Mr. Hilton made it known from the start he would only consider a plea on the condition he could declare his innocence on the record, and he is confident Counsel Gurewitz would confirm as much if Hilton were allowed to question him in an evidentiary hearing.

Discussing the anonymous tip, the District Court also erred by holding that "[b]ased on follow up corroboration of [informant's] tip, the probation officer obtained a warrant to search Hilton's residence." First, the search of the Defendant's home was a warrantless search. In fact, authorities with the St. Charles County Sheriff's Department were in the process of obtaining the necessary subpoenas and warrants when Hilton's probation officer put an end to that investigation before it ever left the ground. Second, it is an indisputable fact that no one

did any corroboration of any kind prior to the warrantless search of the Defendant's residence. Only one person even tried.

A United States Probation Officer by the name of Stephen Holmes was the only one to attempt to corroborate anything during the six day period between the anonymous tip and the search. Officer Holmes twice conducted a "Clear search and phone lookup" for the phone number the anonymous informant claimed was Mr. Hilton's, but he was unable to associate that number with any particular person or any particular device; only that it was a "Sprint" number; one of millions. Holmes also visited two webpages belonging to an alleged girlfriend and reported that both webpages refer to her "becoming a sex slave, but doesn't name the offender." (Doc. 96-4, Probation Report, PGID 578) (emphasis added). This is important for two reasons; (i) even this tiny morsel of "investigation" (a mouse-click) provided only evidence in Mr. Hilton's favor, and (ii) Counsel failed to present this to the Court as exculpatory evidence at the suppression hearing; another thing Hilton would want to question Counsel about. This Court should reverse the District Court's decision and remand the case to allow the Defendant to question Counsel in open court.

III. This Court Should Grant Certiorari To Determine Whether, Given The Facts And Circumstances, A Voluntariness Test Runs Afoul Of The Fifth Amendment.

A. Petitioner Has Presented Three Fifth Amendment Claims; One Of Which Has Since Been Validated.

In his habeas petition Mr. Hilton identified three different ways in which his Fifth Amendment rights were implicated. The United States Sentencing Commission has since validated one of them; Hilton's argument

regarding the Fifth Amendment penalty situation. Companion to that argument is the act of production. Mr. Hilton was subjected to a lengthy custodial interrogation, absent Miranda warnings and while subject to penalty revocation. The act of producing the cell phone under those conditions was protected as testimonial self-incrimination because the very fact he may have possessed a Blackberry would have in itself been incriminating. The Government relied solely upon Hilton's testimony and the act of production to establish ownership and justify the seizure and subsequent search of the contents of the phone.

(1) The Act Of Production

The phrase "in any criminal case" within the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against a defendant in a trial. However, it has "long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." United States v. Hubbell, 530 U.S. 27, 37 (2000). See also Baltimore City Dept. of Social Servs. v. Bouknight, 493 U.S. 549, 555 (1990)("The act of complying with the government's demand testifies to the existence, possession, and authenticity of the thing produced."); United States v. Doe, 465 U.S. 605, 612 (1984)("Although the contents of the document may not be privileged the act of producing the document is privileged where it involves testimonial self-incrimination.")

Indeed, this Court, in Boyd v. United States, explained that the compulsory production of one's private papers and effects to be used as

evidence against him is the equivalent to compelling him to be a witness against himself. 116 U.S. 616, 622 (1886). The Fourth and Fifth Amendments both relate to the personal security of a citizen. When the thing forbidden by the Fifth Amendment; compelling him to be a witness against himself, is the object of a search and seizure of his private papers and effects it is an unreasonable search and seizure. Id.

Both searches in the instant case involved not only elements of the Defendant's privacy, property, and possessory rights protected by the Fourth Amendment, but also the "compulsory extortion" of his testimony and production of the cell phone. The act of complying with the Government's demand that Hilton "answer truthfully all inquiries" was by definition compulsory self-incrimination. In other words, by responding to a direct inquiry posed to him by his probation officer, he was not only telling the probation officer where the police could find a Blackberry cell phone; he was also "testifying" to the existence, possession, and authenticity of the "thing produced." Remember, without that single testimonial act, officials had no way of knowing whose phone they had.

This is not a novel concept; it is as old as the republic itself. It has long been held that the courts in the United States "ought never compel a witness to give an answer which would furnish a link in the chain of evidence needed to prosecute him." United States v. Burr, 25 F. Cas. 38 (1807)(Marshall, J.) See also United States v. White, 322 U.S. 694, 698 (1944)("The constitutional privilege against self-incrimination...is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or for him to produce and authenticate any personal documents or effects that might incriminate him.")(Emphasis added).

Unlike the Fourth Amendment, the Fifth Amendment contains its own exclusionary rule. Compulsory police interrogations like the one in the instant case are automatically protected by the self-incrimination clause itself. It is self-executing. Murphy, supra. Any statements made under these conditions are deemed compelled and thus the statements, as well as any evidence derived from those statements, cannot be used by the Government for any reason. Chavez v. Martinez, 538 U.S. 760 (2003). See also Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence so acquired shall not be used before the court but that it shall not be used at all.")

(2) Fifth Amendment Voluntariness Test

In Minnesota v. Murphy, 465 U.S. 420, 429-30 (1984), this Court identified three exceptions to the general rule that the Fifth Amendment's self-incrimination clause is not self-executing. First among these "addresses the problem of confessions obtained from suspects in police custody...the custodial setting is thought to contain inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." See also J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) ("By its very nature, custodial interrogation entails inherently compelling pressure" which can " induce a frighteningly high percentage of people to confess to crimes they never committed.")

The Sixth Circuit has held that any statements made before the administration and voluntary waiver of Miranda are thus "irrebuttably

presumed involuntary." United States v. Pacheco-Lopez, 531 F.3d 420, 424 (6th Cir. 2008). In that case, the Court focused its analysis on the so-called "Miranda-in-the-middle" context; holding that "where a warning is ineffective, the defendant cannot waive his rights. Hence, the issue of voluntariness does not arise." Id. 531 F.3d at 423 n.13 (citing Missouri v. Seibert, 542 U.S. 600, 612 (2004)). Which begs the question; can the warnings be any less effective than to not be administered at all?

Language matters. Murphy stands for the proposition that if one is subjected to custodial interrogation, the self-incrimination clause of the Fifth Amendment becomes self-executing. One is thus excused from invoking the privilege and any statements made by a defendant are deemed compelled, and inadmissible at trial. Id. 465 U.S. at 435.

It is one thing to hold that a person who has been advised of the privilege may choose to waive it and volunteer testimony. But the linguistic machinations necessary to hold that; in the absence of being so-advised, the privilege is self-executing and irrebuttably presumed involuntary, yet somehow still subject to a voluntariness test is not only intellectually dishonest, it is a corruption of everything the Framers sought to achieve when drafting the clause.

This Court has described the self-incrimination clause as so fundamental to our freedom, and the giving of warnings so simple, the Court would not pause to inquire in individual cases whether the defendant was aware of his or her rights. "Assessments of the knowledge the defendant possessed based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculations; a warning is a clearcut fact." Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).

And yet, without offering any underlying factual basis whatsoever for its determination, that is exactly what the District Court did in the instant case:

> Hilton was quite used to interrogation by law enforcement personnel, and while he was not provided with Miranda warnings, the Court does not find that he was coerced into making an involuntary statement. (Doc. 120, PGID 875).

This erroneous finding by the Court relieved the Government of its burden of proving any alleged waiver of Mr. Hilton's privilege against self-incrimination. Having dodged one significant constitutional bullet, the Government then turned around on direct appeal and asked the Sixth Circuit to rule the issue of coercion, or "interview tactics" waived. The panel was obliging:

> Hilton has waived [issue of interview tactics] by failing to raise it before the District Court. Hilton, 625 Fed. Appx. at 759

John Adams once famously said that facts are stubborn things. Were one to read the record of this case one will find; in Defense Motion to Suppress Oral Statements, (Doc. 93, PGID 508-523), Mr. Hilton clearly asserted he was "confronted" at his front door in "the early morning hours;" that he was "handcuffed, shackled, and led to a government vehicle" where he was "interrogated by his probation officer." He went on to say he was "shocked by the confrontation" and was suffering other physical "symptoms of distress" and requested medication.

Furthermore, in his contemporaneous notes from that day, PO Vestal (the interrogator) refers to Hilton's "issues with his medication" and "stressors like his mother dying" and "losing his coffee shop. See

(Doc. 96-4, Probation Report, PGID 579). Were one to read the hearing transcripts, one will find that during his testimony PO Vestal was questioned extensively; both by the government (Doc. 108, PGID 665-671), and by the Defense (Id. at PGID 706, 728-29), about the physical, emotional, and psychological distress the Defendant was experiencing at the time of the interrogation. On direct appeal Mr. Hilton made the point that Vestal, as both his interrogator and his probation officer, was in a unique position to exploit any vulnerabilities or weaknesses Hilton had at the time of the interrogation. No other officer would have had the specific, specialized knowledge of the intimate details of Hilton's private life that Vestal was privy to. Swinging a lead pipe is not the only way to compel a person to speak.

The stubborn fact is that the Defendant repeatedly raised the issue of coercion, compulsion, voluntariness, interview tactics (pick your poison) in two separate motions; (Doc. 93, PGID 508-523)(Doc. 113, Motion to Suppress-Blackberry Search, PGID 805-828). The interrogator's contemporaneous notes were entered into the record. There were ten pages of testimony transcripts where the Defendant's physical, emotional, and psychological state at the time is discussed in detail, and the District Court issued a ruling on the matter. (Doc. 120, PGID 875). And yet, he somehow "waived" the issue? This is fair?

Even if Mr. Hilton had failed to raise the issue before the District Court (which is clearly not the case); that the District Court ruled on the matter should allow for a rebuttal argument on direct appeal.

The Court long ago warned that it is "the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis;

[resist the beginnings]." Boyd, 116 U.S. at 635. Actions taken by the Government that today are considered borderline tomorrow become the accepted practice, and therefore immune from challenge. What will be considered egregious enough to justify exclusion will likewise be infuenced, resulting in an ever-increasingly diminished respect for the constitutional rights of every citizen over time. Krause Ex Rel., Estate of Krause v. Jones, 765 F.3d 675, 684 n.1 (6th Cir. 2014)(Marbley, J., concurring).

Two hundred and fourteen years ago, in United States v. Burr, 25 F. Cas. 38 (1807), Chief Justice John Marshall held:

> When a question is propounded, it belongs to the court to consider and decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment...[m]any links frequently compose that chain of testimony which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furish any one of them against himself.

The compulsory extortion of Mr. Hilton's testimony and the act of producing the phone clearly violates the "true sense of the rule that no witness is compellable to furnish any one" of the links in the chain of evidence needed to convict him.

The District Court's finding in the instant case; that "the Court does not find that [Hilton] was coerced into making an involuntary statement," relieved the Government of its burden of proving any waiver of the Defendant's privilege against self-incrimination, and is wholly inconsistant with Justice Marshall's instruction that a defendant be the

"sole judge" of whether his answer (or act of production) would furnish any one of the links in the chain of evidence, or whether he felt compelled under the circumstances to furnish any one of them. "The court cannot participate with him in this judgment." Id. In the instant case, the District Court not only participates, but places itself in the back seat of the police vehicle right next to Mr. Hilton on the morning of 11 May 2010.

If it is true that "due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily foregone the privilege unless he fails to claim it after being suitably warned," Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013), and if it is also true that "the voluntariness test is an inadequate barrier when custodial interrogation is at stake," J.D.B., 131 S. Ct. 2394, and that "no statement obtained from the defendant can truly be the product of his free choice," Maryland v. Shatzer, 175 L. Ed 2d 1045, 1052 (2010), then any statement made by Mr. Hilton on 11 May 2010 was coerced and involuntary. There is simply no other way to reconcile the language. (It should be noted that the cases cited above were rendered after this Court's decision in United States v. Patane, 542 U.S. 630 (2004)).

We are not talking here about a Miranda violation, or a clerical error, or a blunder by the constable. Here is an "investigation" tainted from its very inception; followed by a systematic (and thusfar successful) effort to sweep over the constable's flagrant disregard for the Defendant's constitutional protections. Officials in Missouri, despite having six days with which to do so, did no meaningful corroborating investigation; indeed, the lone attempt led only to excupatory evidence. PO Vestal admitted in open court that he knew he was required by the

conditions of Hilton's supervised release to obtain Hilton's consent before entering and searching his home, but that he simply chose to ignore it. (Doc. 108, PGID 728). Vestal also admitted in open court that he knowingly used his position as Hilton's probation officer to allow the police to avoid obtaining any necessary warrants or subpoenas; indeed, it was his idea. (Doc. 196, PP. 5-9)(Doc. 108, PGID 724-25).

Vestal then conducted a lengthy custodial interrogation (nearly three hours) of a probationer who was chained and cuffed in the back-seat of a police vehicle; absent any Miranda warnings and while the probationer was under the threat of penalty revocation. Moreover, the act of producing the cell phone under those circumstances was protected as testimonial self-incrimination. That testimonial evidence led directly and indirectly to the discovery of incriminating evidence to be used in a criminal prosecution, even if the statement itself would not have been entered into evidence.

The Fifth Amendment contains its own exclusionary rule thus, neither the statement nor any evidence derived directly or indirectly from the statement can be used by the Government for any reason.

CONCLUSION

For the reasons articulated above, the Defendant respectfully submits that he has more than met the "relatively light" burden for entitlement to an evidentiary hearing pursuant to 28 U.S.C. § 2255. The case should be remanded back to the District Court for a full evidentiary hearing. This Court should also grant certiorari to settle the split among the circuits on a matter of national importance.