No. 20-3122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 27, 2021
DEBORAH S. HUNT, Clerk

KENNETH ROSE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GILMAN, STRANCH, and NALBANDIAN, Circuit Judges.

Kenneth Rose petitions for rehearing en banc of this court's order entered on December 7, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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No. 20-3122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 12, 2021
DEBORAH S. HUNT, Clerk

KENNETH ROSE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GILMAN, STRANCH, and NALBANDIAN, Circuit Judges.

Kenneth Rose petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH ROSE

v.

UNITED STATES OF AMERICA

Case No: 20-3122

REQUEST FOR REHEARING (with Suggestion for Rehearing En Banc)

Petitioner, Kenneth Rose, moves for rehearing (with suggestion for Rehearing En Banc) on the denial of his application for COA, and denial of his motions for appointment of counsel, to stay the proceedings (or extend time to file a more coherent COA application - with or without counsel - due in part to COVID), as well as the request to file a merits brief, and to proceed in forma pauperis.

In accordance with Fed R. App. P. (40) and (35), this request is being filed within 14 days (mailbox rule - see declaration below), and, the attached Memorandum in Support addresses, among other things, how rehearing (with suggestion for Rehearing En Banc) is necessary to: (1) Secure or maintain uniformity of the court's decisions, and/or (2) address the fact that the proceeding involves a question of exceptional importance.

POSTURE SUMMARIZATION: Petitioner alleging that his Due Process rights were violated because he was denied the benefit of having a detached and neutral judge adjudicate his 2255 related motions and proceedings and that the judge found "it difficult to put aside views formed during some earlier proceeding...the central inquiry under 455(a) is the appearance of partiality, not its place or origin." (Liteky, 510 U.S. at 563) and that reasonable jurists could debate that pivotal facts were obfuscated or simply ignored which would have changed the outcome of the proceedings to such a degree to substantiate Liteky's "rarest circumstances" evidencing the degree of favoritism required when no extrajudicial source is involved.

Bias manifested in the fact-finding process of 2255 adjudication is obviously a formidable barrier to a pro se litigate as obfuscation of pivotal facts can denude an otherwise meritorious claim of ineffective assistance of counsel to frivolity, thereby requiring the pro se indigent litigant to substantiate why he shouldn't have to manifest hundreds of dollars to obtain appellate review.

Although Petitioner raises the fact that the underlying affidavit for search warrant (Doc#85) Ex6A explicitly averred "evidence of criminal activity will be found at (1000 Mian Street)..." and that it was therefore ineffective assistance of counsel to have failed to argue that fact rendered the affidavit 'bare-bones' under Leon (i.e. An affidavit to search 1000 Mian Street is bare-bones to a warrant listing Ex6B a completely different address of 709 Elberon). Inexplicably, none of the district court's Orders/Rulings/Findings utter the words '1000 Mian Street'? This is a pivotal fact being simply ignored, and/or obfuscated by the district court because it would disqualify a good-faith finding under Leon and the district court has demonstrated it will absolutely not have no part in following the law where ever it leads, impartially.

The above instance, is just one of many, where the district court demonstrated partiality in adjudicating Petitioner's 2255 claims. Public confidence in the integrity of the judicial system is a question of exceptional importance and these issues deserve encouragement to proceed further.

This filing was delivered to prison authorities for forwarding to the court, as well as a signed and dated form DRC 1004 authorizing postage to be deducted from prison inmate account on this 21st day of December, 2020.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12-21-20.

Kenneth Rose

Kenneth Rose, 655-843
Warren Correctional Institution

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ARGUMENT

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason 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." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). See also Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (certificate required if court "cannot say that the issue lacks substance"); Buxton v. Collins, 925 F.2d 816, 819 (5th Cir.), cert. denied, 498 U.S. 1128 (1991) ("any doubts whether [a certificate of probable cause]...should be issued are to be resolved in favor of the petitioner"). Given that the Petitioner raised Constitutional violations relating to underlying affidavit's (PID 85) use of "1000 Mian Street" as the address where "criminal activity will be found" (PID 85) which was plainly different from the search warrant's "709 Elberon Ave" address-actually-searched (PID 82) and the absence of <u>any</u> factfindings, "A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter" (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593) therefore a COA should be issued. Given that the Petitioner raised Constitution violations relating to prosecutorial misconduct (PID 991-992), aspects of which amounted to fraud-upon-the-court, and the absence of <u>any</u> factfindings, particularly in light of factuality of the offers of proof (PID 969, 991, 992) lacking <u>any</u> rebuttal by the prosecution, "A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter" (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593) therefore a COA should be issued. Given reasons to doubt that the district court fully and fairly adjudicated the matters, its denials of COA (Doc. 200) and continued IFP status on appeal (Doc. 201) should be nulled in Petitioners favor.

Given that the original adjudications of the good-faith exception application were underpinned by the erroneous premise that the underlying affidavit for search warrant (PID 85) failed to specify any address (which would have been a worse factual scenario than that 6th Cir. case Mills, 389 F.3d 586, 577-578, en banc den, granting suppression) the true factual setting was that the underlying affidavit (PID 85), in fact, averred "1000 Mian Street" (PID 85) was the address where "evidence of criminal activity will be found" (PID 85) (which is a factual scenario squarely analogous to the 6th Circuit's precedent in Cline, 745 F. Supp 2d 773, 807, affirmed 6th Cir. 2012 where the address in the underlying affidavit clearly was different from the different address appearing on the warrant, granting suppression), a COA should be issued.

> Smith v. Wainwright, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because "district court refused to hold an evidentiary hearing to develop the true factual setting in which this claim must be judged")
> (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593)

Given that the district 'simply ignored' and 'never reached the heart of' the 'central question' the plea-ineffective-assistance-claim, which was that trial counsel "induced my guilty plea..." (3-count plea, over 1 count plea) "based on the assurance...multi-count sentence would be entirely concurrent..." (PID 723, sworn unopposed offer of proof) because "his review of the Sentencing Guidelines did not subject the Defendant to a sentencing range including the word 'life'...(thus enabling consecutive sentencing)" (PID 994). Acceptance of the 3-count plea hinged on counsel erroneous assurance the sentence would be fully concurrent, which if true, would have resulted in the PSR's 17 year sentence, therefore a COA should be issued.

Given that the district court didn't address 'one of Petitioner's central contentions' of the franks-ineffective-assistance-claim, which was that "Had trial counsel properly developed the trial court record with (Doc. 184)...the results of the suppression hearings would have clearly and plainly been favorable to granting suppression..." (PID 995) if prepared/presented at trial, thus, a COA should issue as the court never denied it would have granted suppression, or a franks hearing, had (Doc. 184) been presented to the trial court at the original trial proceedings

MATERIAL FACTS RAISED IN 2255 PROCEEDINGS DEMONSTRATE RELIEF WARRANTED AS A MATTER OF LAW

Cline v. City of Mansfield, 745 F. Supp. 2d 773, Affirmed, 2012 FED App. 913N (6th Cir 2012)

*804-*805 Applicable Law...

*See [**66] United States v. Johnson*, 558 F. Supp. 2d 807, 812 (E.D. Tenn. 2008) ("The Supreme Court and the Sixth Circuit have recognized that despite best efforts, inaccurate information, such as a wrong address, may get into the affidavits for search warrants. . . ." (citing *United States v. Pelayo-Landero*, 285 F.3d 491 (6th Cir. 2002)). This principle, however, does not apply to major discrepancies. *See Knott v. Sullivan*, 418 F.3d 561, 569 (6th Cir. 2005) ("[I]n this case, the errors in the search warrant and affidavit were so extensive that there was a reasonable probability that the wrong vehicle could have been mistakenly searched.").

*805-*806 Depravation of a Constitutional Right...

Since the factual **allegations in the affidavit** listed above appear to [**68] **refer exclusively to** 618 Burns Street and the affidavit on its face contains **no information relating to** 347 South Main, the court agrees with Plaintiffs that the affidavit does not show that there was probable cause to conduct a search of 347 South Main. . . . Defendants do not allege, and it does not appear to the court, that an exception to the warrant requirement applies in this case. Accordingly, the search in this case violated Plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures.

*807-*808 Analysis...

In determining whether a police officer's reliance on the warrant was objectively reasonable, the court must decide "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. Weaver*, 99 F.3d 1372, 1380 (6th Cir. 1996). This case presents a different scenario from Laughton, Frazier, and the cases cited therein. In those cases, the facts contained within the affidavit tended to reflect that there was probable cause to search the place listed in the warrant but fell short of actually establishing probable cause. The issue in those cases was the sufficiency of the facts asserted in the affidavit and whether a reasonable officer would have known whether those facts in fact did not establish probable cause. In this case, by contrast, [**74] **it is clear that any reasonable officer** who: (a) read the affidavit, and (b) happened to discover that it referred exclusively to 618 Burns Street **would know that the affidavit did not reflect probable cause** to search 347 South Main.

MATERIAL FACTS MAY NOT BE IGNORED TO DENY DEFENDANT FOR THE PURPOSE OF APPLYING LEGAL PRINCIPLE FAVORABLE TO GOVERNMENT

United States v. Brown, 819 F.3d 800 (6th Cir. 2016)

The dissent would have us ignore the facts of this case in order to apply *Sherer* regardless of its appropriateness. However, *[HN17]* each of our decisions "must necessarily be based upon application of relevant **law to the unique facts** before the [C]ourt." *Local 120, Int'l Molders & Allied Workers Union, AFL-CIO v. Brooks Foundry, Inc.*, 892 F.2d 1283, 1289 (6th Cir. 1990); *see also United States v. Cunningham*, 679 F.3d 355, 375 (6th Cir. 2012) ("[I]n every case[,] application of a legal principle turns on **the presence of particular facts**.") (citation and quotation marks omitted). In other words, we are charged with "considering not only how well-established is the general legal principle involved but also **how precisely the facts coincide with the cases applying that principle.**" *United States v. Savoca*, 761 F.2d 292, 298 n.10 (6th Cir. 1985). In the instant appeal, the only cases propounding the principle enunciated in *Sherer*, including *Sherer* itself, are distinguishable on the facts. Thus, *Sherer*'s holding carries little force to the extent that it fails to account for the unique [**69] facts before us.

APPOINTMENT OF COUNSEL

A reasonable jurist would understand the importance of assistance of counsel, particularly at the stage where a COA application to the district court is fashioned (see Doc. 194), based on publications such as the American Bar Association's 2009 book: A Guide to Section 2255 Motions (ISBN 978-1-60442-268-9, Bergmann, pg. 219) which informs that "A COA application should make a 'substantial showing of the denial of a constitutional right" as to each issue for which a COA is requested. **Without guidance from counsel, the district court may overlook issues on which an appeal is warranted."**

A reasonable jurist would understand why the United States Supreme Court opined about the importance of assistance of counsel when it said: 1) 'Constitutional and other claims will be articulated more ably and presented more thoroughly by counsel', McFarland v. Scott, 512 U.S. 849, 855-56 (1994), and 2) "[T]he right to be heard [will] be of little avail if it d[oes] not comprehend the right to be heard by counsel.", Powell v. Alabama, 287 U.S. 45, 68-69 (1932). A reasonable jurist would find that based on caselaw like this, and considered in concert with Movant's pleas to the court for appointment of counsel, which among other things, claimed Movant suffered impairments resulting from OCD (Doc. 194 & 130) and "Movant lacks the expertise to present and demonstrate the needs, and issues to be presented, to show the need for an evidentiary hearing...Counsel is necessary to properly articulate and amend the legal issues presented..." (Doc. 125, PageID: 669), that the district should have appointed counsel and this issue deserves encouragement to proceed as a reasonable jurist could reach a different outcome than that of the judge.

A reasonable jurist would understand that a Movant's submissions in 2255 proceedings should demonstrate a prima facie showing (or self-evident showing) of facts constituting constitutional violations that if proven at an evidentiary hearing would entitle Movant to relief. Proof is not required before the evidentiary hearing: "If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof", Aron, 219 F.3d at 715 n.6.

Among other things, the Movant alleged he received ineffective assistance of counsel during plea deal negotiations when counsel made representations that either one of the two simultaneously offered plea deals (1-count or 3-count) would result in the same total time of incarceration (fully concurrent with the state and not exceeding the state sentence) via counsel's erroneous appraisal that the 3-count sentence **'would'** be concurrent as instructed by the 2004 Sentencing Guidelines (as opposed to 'could' be concurrent with newer Sentencing Guidelines). Reasonable jurists could find that at minimum an evidentiary hearing was warranted on this claim. Reasonable jurists could find that the district court was wrong to deny appointment of counsel where Movant sufficiently sketched out this claim and appointment of counsel would have made this claim clearer to the court, and/or counsel would have been able to more clearly demonstrate the need for an evidentiary hearing on this or other claims because the fact that the court stated generally, at the plea change hearing, that it 'could' sentence multiple counts consecutively **was not the beginning and end of adjudication of this claim of plea-deal-ineffective-assistance** as clarified by the following example: *had, for instance, the total guideline points equaled, say 35, as a first-offender with no priors under the 2004 guidelines, the guidelines would have directed the sentencing court to use concurrent sentencing on the multiple counts of this case.* This claim was clearly not adjudicated under the 'strongest argument suggested' as guided by Kerner and a reasonable jurist could have found that counsel should have been appointed in the furtherance of this claim (or an evidentiary hearing held) and/or its present adjudication creates an appearance of bias under Bias-Evincers 1 through 6 (see above Bias-Evincer sections)

Among other things, the Movant alleged he received ineffective assistance when his appellate counsel erroneously stated in appellate proceedings that the 709-Elberon-address-actually-searched (as opposed to the "1000 Mian St.", PageID# 85, location of evidence averred in the underlying affidavit for search warrant) was listed in the underlying affidavit. This was clearly deficient performance because **'709 Elberon' NEVER appears in the underlying affidavit.**

CERTIFICATION OF SERVICE

This filing, Request For Rehearing (With Suggestion For en banc), was delivered to prison authorities for forwarding to the court, as well as a signed and dated form DRC 1004 authorizing postage to be deducted from prison inmate account on this 21st day of December, 2020.

Appellate, Kenneth Rose, further certifies that a copy of this filing was mailed on the same date and manner above to Christy Muncy, Assistant United States Attorney, at 221 East Fourth Street, Suite 400, Cincinnati, OH 45202.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 12-21-20

Kenneth Rose

Kenneth Rose, #655-843
Warren Correctional Inst.
5787 State Route 63
P.O. Box 120
Lebanon, OH 45036

No.

STATE OF OHIO
SS:
HAMILTON COUNTY

AFFIDAVIT FOR SEARCH WARRANT

Police Officer Chris Schroder, being first duly cautioned and sworn, deposes and says that there are items within the jurisdiction of the Hamilton County Court of Common Pleas at: **1000 Main Street Cincinnati, HAMILTON COUNTY, OHIO. 45202**

and that based upon the attached affidavit and the investigation I have conducted, I have probable cause to believe that evidence of criminal activity will be found at the above listed places and the following items contained therein are requested to be searched and/or seized:

1) Computers-defined as central processing units, computer motherboards, hard drives, floppy drives, removable and re-write able media, tape and digital drives, internal and external storage devices, video display units or receiving devices, scanners, printers, modems, any and all connecting cables and devices, input devices such as "web cams" video cameras, audio recording devices, disc's both audio, video and digital, any memory devices such as smart media, memory sticks, or any other form of memory or device utilized by the computer or it's devices. Any computer software, programs and source documentation, computer logs. (This description constitutes the definition of a computer system as that term may be used throughout this document.) And all computer related accessories not specifically mentioned herein, all equipment having been used in violation of 2907.02, Ohio Revised Code.

2) Any documentation and/or notations referring to the computer, the contents of the computer, the use of the computer or any computer software and/or communications. All information within the above listed items including but not limited to machine readable data, all previously erased data, and any personal communications including but not limited to e-mail, chat capture, capture files, correspondence stored in electronic form, and/or correspondence exchanged in electronic form as indicative of use in obtaining, maintenance, and/or evidence of said offense.

3) Any financial records, or receipts kept as a part of and/or indicative of the obtaining, maintenance, and/or evidence of said offense; financial and licensing information with respect to the computer software and hardware.

4) All of the above records, whether stored on paper, on magnetic media such as tape, cassette, cartridge, disk, diskette or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", personal digital assistants, smart media, memory cards, memory sticks, calculators, or any

Exb A

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO
CRIMINAL DIVISION

IN THE MATTER OF THE
AFFIDAVIT FOR SEARCH WARRANT
RE: THE INVESTIGATION OF

NO. 9510

Kenneth Rose
709 Elberon Av;
Cincinnati,
HAMILTON COUNTY, OHIO 45205

SEARCH WARRANT

To the **Police chief of Cincinnati**, greetings. Whereas an affidavit for a search warrant having been made under oath by Police Officer **Chris Schroder**, a peace officer of the **Cincinnati Police**, of the State of Ohio the Court finds;

1. There is probable cause to believe that **Kenneth Rose**, and others yet known, have committed and are committing offenses in violation of the Ohio Revised Code Section **2907.02**.

2. There is probable cause to believe that evidence pertaining to the aforementioned offenses will be obtained through the search and seizure of computers, computer data and other electronic data in storage as well as other items detailed below.

3. In particular the evidence seized will reveal the details of the involvement of the participants, identities of victims, evidence of the alleged violations, records of the alleged transactions or transmissions, and places that criminal activity occurred as well as other information concerning the ongoing criminal conspiracy, the object of which is stated above.

Said affidavit is attached hereto and incorporated herein, and these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime into the residence located at: 709 Elberon Avenue apartment number one, Cincinnati, Hamilton County, Ohio 45205. Further described as a two story, multi unit building, reddish brick construction, with nine windows facing Elberon Avenue. The building has a white two story awning covering the red front door. The front door has twelve individual windows. The building does not have the street address: however I have included a printout from the Hamilton County Auditors identifying the

Exb B

No. 20-3122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH ROSE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Kenneth Rose, an Ohio prisoner proceeding pro se, appeals an order of the district court denying his Federal Rule of Civil Procedure 60(b) motion for relief from judgment, motion for appointment of counsel, and motion for disqualification of the district court judge. Rose's Rule 60(b) motion arose out of the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. This court construes Rose's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. 22(b)(2). Rose has filed a motion for appointment of counsel and to stay the proceedings, a motion for appointment of counsel and to file a merits brief, and a motion to proceed in forma pauperis.

Rose pleaded guilty to three counts of production of child pornography in violation of 18 U.S.C. § 2251. The trial court sentenced Rose to a total of 612 months of imprisonment to be followed by a life term of supervised release. On appeal, Rose challenged the district court's rulings on his motion to suppress, motion for a suppression hearing, and motion to dismiss. This court affirmed, and the Supreme Court denied Rose's petition for a writ of certiorari. *United States v. Rose*, 714 F.3d 362, 364 (6th Cir.), *cert. denied*, 571 U.S. 910 (2013). Rose is currently confined in state prison on related state convictions.

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In his § 2255 motion, Rose raised the following grounds for relief: (1) the district court improperly denied his motion to suppress; (2) the district court abused its discretion by refusing to reopen the suppression hearing when presented with new evidence; (3) the district court erred in denying his motion to dismiss the superseding indictment because all his activities were intrastate; and (4) trial and appellate counsel provided ineffective assistance. The district court denied Rose's motion, finding that claims one through three were previously raised on direct appeal and rejected by this court and that Rose's ineffective-assistance claims lacked merit. This court denied Rose's application for a COA. *Rose v. United States*, No. 18-4109 (6th Cir. July 10, 2019) (order). Rose filed a petition for panel rehearing, which this court denied. *Id.* (Sept. 16, 2019) (order).

While his rehearing petition was pending in this court, Rose filed a Federal Rule of Civil Procedure 60(b) motion in the district court, raising the following arguments: (1) the ruling on his § 2255 motion was premature because "the 6th Circuit oral arguments had not yet been reviewed"; (2) "[t]he affidavit . . . from the librarian at [his] place of confinement[] provided a sworn statement regarding the technical difficulties related to [his] ability to review oral arguments on CD's"; (3) the district court's rulings were based on "inadequate fact[ ]findings"; (4) the district court's rulings were based on "overlooked critical material facts"; (5) the district court's rulings were based on "overlooked contentions"; (6) the district court failed to consider his claims of prosecutorial misconduct and "fraud upon the court"; and (7) the district court's rulings never referenced the address "'1000 Mian [sic] Street' as the location of 'evidence of criminal activity,'" evincing an inadequate consideration of his claims. Rose also filed a motion for appointment of counsel and a motion for disqualification of the district court judge.

In a single order, the district court denied Rose's Rule 60(b) motion, his motion for appointment of counsel, and his motion for disqualification. Finding that the first two arguments Rose raised in his Rule 60(b) motion did not add new grounds for relief or address the merits of his § 2255 claims, the district court considered the arguments under Rule 60(b) and concluded that they did not warrant relief. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). With respect to Rose's remaining arguments, the district court found that they sought to either relitigate the merits

of his § 2255 motion or add new claims for relief and therefore transferred them to this court for consideration of whether to authorize the filing of a second or successive § 2255 motion. *See Gonzalez*, 545 U.S. at 532; *see also In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). The transferred claims were docketed as a motion for an order authorizing the district court to consider a second or successive § 2255 motion in case number 19-4137. In an order entered on May 11, 2020, this court found that the transfer of claims three through seven to this court for consideration of whether to authorize a second or successive § 2255 motion was proper and denied authorization. *In re Rose*, No. 19-4137 (6th Cir. May 11, 2020) (order).

Rose now appeals the district court's denial of Rule 60(b) relief. A prisoner seeking to appeal the denial of a Rule 60(b) motion in a habeas corpus proceeding must first obtain a COA. *Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010). A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Rule 60(b) provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud . . . misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Rose brought his motion under subsection (6). A district court's discretion to grant or deny relief under Rule 60(b)(6) is especially broad. *McDowell v. Dynamics Corp. of Am.*, 931 F.2d 380, 383 (6th Cir. 1991). "Rule 60(b)(6) provides relief 'only in exceptional and extraordinary circumstances,' which are defined as those 'unusual and extreme situations where principles of equity mandate relief.'" *Export-Import Bank of U.S. v. Advanced Polymer Sciences, Inc.*, 604 F.3d 242, 247 (6th Cir. 2010) (quoting *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001)).

As his first ground for relief under Rule 60(b) Rose argued that the district court's ruling notified the court that oral arguments from this court had not yet been reviewed due to "technical issues at [his] place of confinement." And in his second ground for relief, Rose asserted that the affidavit from the facility librarian that he submitted before the ruling on his § 2255 motion documented these technical issues. The district court concluded that these arguments did not warrant relief under Rule 60(b)(6), explaining that Rose failed to "connect" why access to unspecified oral arguments justified relief from the denial of his § 2255 motion. Reasonable jurists would agree that an alleged lack of access to oral argument transcripts does not rise to the level of an extraordinary circumstance that would warrant relief from the judgment.

To the extent Rose seeks to appeal the denial of his motion for appointment of counsel and motion for disqualification, no COA is warranted. The district court explained that Rose's affidavit supporting his motion for disqualification under 28 U.S.C. § 144 was insufficient because it set forth only legal disagreements with the court's prior rulings in his case and did not provide any basis for finding that the district court judge held a bias that arose out of his personal background and association. *See United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983). And to the extent Rose sought disqualification under 28 U.S.C. § 455, the court explained that nothing in Rose's motion presented an adequate reason for disqualification. Indeed, his motion expressed nothing more than his disagreement with the court's denial of his motion to suppress, which does not constitute a basis for disqualification. *See Liteky v. United States*, 510 U.S. 540, 554 (1994).

Reasonable jurists could not disagree with the district court's denial of Rose's motion for disqualification.

Jurists of reason also could not disagree with the district court's denial of Rose's motion for the appointment of counsel. Defendants do not possess a right to appointed counsel "when mounting collateral attacks upon their convictions." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). District courts are permitted to appoint counsel for financially eligible persons seeking relief under § 2255 when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2). When evaluating whether appointment of counsel is warranted, courts generally examine the nature of the case, the movant's ability to prosecute the case in a pro se capacity, and the "complexity of the factual and legal issues involved." *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). The district court considered these factors and the arguments put forth by Rose in his motion. Reasonable jurists would not debate the district court's conclusion that the interests of justice did not require appointment of counsel to prosecute Rose's attempt to reargue his § 2255 claims.

Accordingly, Rose's application for a COA is **DENIED**. His motions for appointment of counsel, to stay the proceedings, to file a merits brief, and to proceed in forma pauperis are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

(1 of 4)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH ROSE

v.

UNITED STATES OF AMERICA

Case No.: 20-3122

MOTION FOR LEAVE TO FILE MERITS BRIEF

Appellant, Kenneth Rose, requests leave to file merits brief demonstrating issues deserve encouragement to proceed. Appellant prays that the court will appoint counsel to assist in fashioning of a merits brief or otherwise permit Appellant 180 days to submit such brief in light of COVID-19 related issues, such as temporary closure of institution's law library where Appellant's legal documents are saved.

Appellant hereby incorporated by reference the filings in case no.: 19-4137 and SCOTUS filings under case no.: 19-7173 - noting the substance of the allegations were never contested by the prosecution thereby effectively conceding that United States Supreme Court precedent was not applied to all of the critical material facts necessary for proper assessment under Leon's third scenario in which good-faith will not be granted. The trial judge's failure to address this claims in the original 2255 proceedings is material to the adjudication of judicial bias claims. See Doc 130, 1:09-CR-047. 1:09-CR-047 filings are hereby incorporated by reference.

Attached Memorandum in Support is not fully completed due to COVID-19 closing access to law library word processor access but Appellant pray the court will see the merit in permitting the claims to be more fully developed (hopefully with the assistance of appointed counsel) as a prima facie case has been made undermining the trial court's appearance of fairness in the proceedings before it.

Appellant declares under the penalty of perjury that this motion was delivered to prison authorities for forwarding to the court on this 30th day of Sept. 2020. (Mailbox Rule)

Kenneth Rose

Kenneth Rose, 655-843
Warren Correctional Inst.
5787 State Route 63
Lebanon, OH 45036

CERTIFICATE OF SERVICE

I, Kenneth Rose, further declare that a copy of this filing was mailed on the same date and manner above to Christy Muncy, Assistant United States Attorney, at 221 East Fourth Street Suite 400, Cincinnati, Ohio 45202.

Kenneth Rose

Kenneth Rose

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MEMORANDUM IN SUPPORT

INITIAL MATTER

Reasonable jurists would comprehend that judicial bias inherently undermines the integrity of the proceedings and appearance of fairness (See Liteky, 510 U.S. at 565 noting the importance of "preserving both the appearance and reality of fairness). Reasonable jurists would understand that there are circumstances, although rare, where the judge has demonstrated sufficient appearance of bias (See Liteky, 510 U.S. at 555 'only in the rarest circumstances evidence the degree of favoritism or antagonism required'). If judicial bias is found to be substantiated in this case it could undermine all of the pre-sentence and post-sentence adjudications, particularly in this matter where the same judge: 1) self-adjudicated claims of bias (disqualification motion, Doc. 195), 2) denied appointment of counsel which would have assisted with the preparing a formal COA application to demonstrate how reasonable jurists would have reached different results than those reached by the judge (appointment of counsel motion, Doc. 194), and denying the 60(b) motion for 2255 relief based on, among other claims, that: had the judge not overlooked critical material facts and/or assertions, the outcome would have been favorable to the Movant (motion for relief 60(b), Doc. 206), therefore, it makes sense to start with sketching out what a reasonable jurist might perceive as constituting the 'appearance of bias' (See Factors Evincing 'Rare Circumstance' Indications of Judicial Bias, below):

BIAS-EVINCERS: TACTICS EVINCING 'RARE CIRCUMSTANCE' INDICATIONS OF JUDICAL BIAS

A reasonable jurist could find that judicial-bias-substantiations encompass the fact that a biased adjudicator, having predetermined to deny any substantial relief and/or having a motivation to fashion hurdles for any potential future reversal of his predetermined-denials-of-relief, would employ any combination of the following tactics (and therefore the denial of the disqualification motion is deserving of encouragement to proceed):

1) Judge weakly interprets a prisoner's assertions and/or cherry-picks underlying facts to effectuate a premeditated-denial-of-relief (see also number 2, below);

2) Judge interprets prisoner's assertions/facts in such a way that is inconsistent with Haines v. Kerner, 404 U.S. 519, 520-21 (holding that Pro Se pleadings are to be liberally construed and interpreted to raise the **strongest argument they suggest**);

3) Judge partially quotes prisoner's assertions (and/or underlying facts) truncating critical parts to effectuate a predetermined-denial-of-relief;

4) Judge averts any mention (on the record) of prisoner's outcome-changing-underlying-facts (and/or self-evident-outcome-changing-underlying facts) in order to effectuate a premeditated-denial-of-relief,

5) Judge denies appointment of counsel to impede any refinement/reframing/re-posturing of prisoner's constitutional claims via counsel's assistance to address any ambiguity/vulnerability of otherwise-meritorious-claims;

6) Judge treats the movant's- judicially-weakened-claims as frivolous to impede potential appellate review by effectively denying pauper status which then would require indigent prisoner to pay filing fee he likely doesn't have;

7) Judge purports to quote the ***averred***-street-address-location-of-evidence from a search-warrant's-underlying-affidavit when in fact the address quoted by the court exists only on the warrant's face page (this occurring despite Movant's protestations that the warrant's-address-to-be-searched is **belied** by the underlying affidavit's '1000 Mian St.'-averred-location-where-evidence-would-be-found (PageID#1009, FN1, as compared to actual underlying affidavit: PageID#85)

A reasonable jurist could find that the above tactics could constitute an appearance-of-bias and that they appear to have been employed by the district court judge in the instant case and therefore the Judicial-bias issues deserves encouragement to proceed. See throughout this document where the above tactics appear to have been used.

APPOINTMENT OF COUNSEL

A reasonable jurist would understand the importance of assistance of counsel, particularly at the stage where a COA application to the district court is fashioned (see Doc. 194), based on publications such as the American Bar Association's 2009 book: A Guide to Section 2255 Motions (ISBN 978-1-60442-268-9, Bergmann, pg. 219) which informs that "A COA application should make a 'substantial showing of the denial of a constitutional right" as to each issue for which a COA is requested. **Without guidance from counsel, the district court may overlook issues on which an appeal is warranted."**

A reasonable jurist would understand why the United States Supreme Court opined about the importance of assistance of counsel when it said: 1) 'Constitutional and other claims will be articulated more ably and presented more thoroughly by counsel', McFarland v. Scott, 512 U.S. 849, 855-56 (1994), and 2) "[T]he right to be heard [will] be of little avail if it d[oes] not comprehend the right to be heard by counsel.", Powell v. Alabama, 287 U.S. 45, 68-69 (1932). A reasonable jurist would find that based on caselaw like this, and considered in concert with Movant's pleas to the court for appointment of counsel, which among other things, claimed Movant suffered impairments resulting from OCD (Doc. 194 & 130) and "Movant lacks the expertise to present and demonstrate the needs, and issues to be presented, to show the need for an evidentiary hearing...Counsel is necessary to properly articulate and amend the legal issues presented..." (Doc. 125, PageID: 669), that the district should have appointed counsel and this issue deserves encouragement to proceed as a reasonable jurist could reach a different outcome than that of the judge.

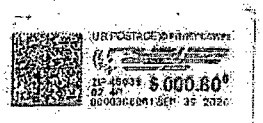
A reasonable jurist would understand that a Movant's submissions in 2255 proceedings should demonstrate a prima facie showing (or self-evident showing) of facts constituting constitutional violations that if proven at an evidentiary hearing would entitle Movant to relief. Proof is not required before the evidentiary hearing: "If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof", Aron, 219 F.3d at 715 n.6.

Among other things, the Movant alleged he received ineffective assistance of counsel during plea deal negotiations when counsel made representations that either one of the two simultaneously offered plea deals (1-count or 3-count) would result in the same total time of incarceration (fully concurrent with the state and not exceeding the state sentence) via counsel's erroneous appraisal that the 3-count sentence **'would'** be concurrent as instructed by the 2004 Sentencing Guidelines (as opposed to 'could' be concurrent with newer Sentencing Guidelines). Reasonable jurists could find that at minimum an evidentiary hearing was warranted on this claim. Reasonable jurists could find that the district court was wrong to deny appointment of counsel where Movant sufficiently sketched out this claim and appointment of counsel would have made this claim clearer to the court, and/or counsel would have been able to more clearly demonstrate the need for an evidentiary hearing on this or other claims because the fact that the court stated generally, at the plea change hearing, that it 'could' sentence multiple counts consecutively **was not the beginning and end of adjudication of this claim of plea-deal-ineffective-assistance** as clarified by the following example: *had, for instance, the total guideline points equaled, say 35, as a first-offender with no priors under the 2004 guidelines, the guidelines would have directed the sentencing court to use concurrent sentencing on the multiple counts of this case.* This claim was clearly not adjudicated under the 'strongest argument suggested' as guided by Kerner and a reasonable jurist could have found that counsel should have been appointed in the furtherance of this claim (or an evidentiary hearing held) and/or its present adjudication creates an appearance of bias under Bias-Evincers 1 through 6 (see above Bias-Evincer sections)

Among other things, the Movant alleged he received ineffective assistance when his appellate counsel erroneously stated in appellate proceedings that the 709-Elberon-address-actually-searched (as opposed to the "1000 Mian St.", PageID# 85, location of evidence averred in the underlying affidavit for search warrant) was listed in the underlying affidavit. This was clearly deficient performance because **'709 Elberon' NEVER appears in the underlying affidavit.**

(4 of 4)

Rose 055-748
WCF
P.O. Box 120
Lebanon, OH 45036



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 E. 5th STREET, Room 540
Cincinnati, OH 45202

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH ROSE,

Defendant.

CRIMINAL CASE NO. 1:09-cr-047
CIVIL CASE NO. 1:14-cv-809

Judge Michael R. Barrett

ORDER

Before the Court are Defendant's Motion to Alter or Amend Judgment (Doc. 208, PAGEID 1104–06) and accompanying Motion for Amended or Additional Findings of Fact and Law (*Id.* at PAGEID 1107–09).[1] Defendant seeks to alter or amend the Order of this Court entered on November 21, 2019 (Doc. 207), which denied his motions for appointment of counsel, to disqualify, and for relief under Federal Rule of Civil Procedure 60(b) (Docs. 194, 195, 206). In that Order, the Court transferred several of the Rule 60(b) claims, including those regarding "inadequate factfindings" and "overlooked contentions," to the Sixth Circuit for authorization as a second or successive petition under § 2255(h). (Doc. 207, PAGEID 1098, 1103).

Though he purports to challenge the Court's November 21, 2019 Order, Defendant's arguments focus on the Court's September 6, 2018 Order denying § 2255 relief (Doc. 191). (*See* Doc. 208, PAGEID 1105 at ¶¶ 4–7, PAGEID 1108 at ¶¶ 4–7

[1] The motions are each accompanied by identical, seven-paragraph "ENUMERATED LIST OF PROPOSED ADDITIONAL FINDINGS[.]" (*Id.* at PAGEID 1105, 1108).

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(specifically referencing perceived errors in the § 2255 Order)).[2] The deadline for moving to alter or amend that judgment has long since passed. Fed. R. Civ. P. 59(e) (Such a motion "must be filed no later than 28 days after the entry of the judgment."). Even assuming the relief requested timely targets the Court's most recent Order (Doc. 207), Rule 59(e) permits altering or amending only in the event of: "1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citation omitted). Such a motion "cannot be used to 'relitigate old matters'" or to resuscitate rejected arguments. *J.B.F. by and through Stivers v. Ky. Dep't. of Educ.*, 690 F. App'x 906, 907 (6th Cir. 2017).

Defendant offers an "ENUMERATED LIST OF PROPOSED ADDITIONAL FINDINGS" as support for both his Rule 59(e) motion as well as his Motion for Amended or Additional Findings of Fact and Law (*see* Doc. 208, PAGEID 1105, 1108). These proposed additional findings concern the adequacy of the search warrant given its reference at one point to "1000 Mian (sic) Street," whether trial counsel was ineffective for failing to properly advise as to consecutive sentences, and whether additional affidavits of Defendant or case citations would have altered the suppression decision in his case. They repeat arguments made in connection with Defendant's 60(b) motion (*see,*

[2] In the first three "proposed additional findings," paragraphs 1–3 in support of his motions, Defendant echoes the complaints made in his Rule 60(b) motion. He charges that "a material fact" has been "overlooked[,]" that prosecutors effectively obfuscated this fact, and that it was plain error for the Court to have "never made any factfindings whatsoever[.]" (Doc. 208, PAGEID 1105 at ¶¶ 1–3, PAGEID 1108 at ¶¶ 1–3). The "fact" referred to in each of these allegations is that the affidavit for search warrant referenced the address of the Hamilton County Court of Common Pleas: 1000 Main Street. (*See* Doc. 44-1, PAGEID 85). The fact that the Court did not explicitly reference "1000 Mian (sic) Street" in its prior Orders does not mean that Defendant's related argument was not considered. The Court explicitly referenced Defendant's filings (*e.g.*, Doc. 190) that raised his concerns over the inclusion of this address in its prior Orders. (*See, e.g.*, Doc. 191 at PAGEID 997, Doc. 207 at PAGEID 1098).

e.g., Doc. 206, PAGEID 1089)—arguments that the Court has already considered and determined warrant prior authorization as a second or successive petition because they challenge the Court's prior merits determinations related to his § 2255 motion. (*See* Doc. 207, PAGEID 1096–97, 1100–01). Defendant's disagreements with the outcome of his trial and his § 2255 motion, however creatively characterized, do not raise the types or error or injustice contemplated by either Federal Rule of Civil Procedure 60(b) or 59(e).

Defendant also makes a short statement regarding the portion of the Court's November 19, 2019 Order that denied his motion to disqualify. In an effort to correct an omission noted by the Court, Defendant certifies, under penalty of perjury, that the motion "was/is made in good faith." (Doc. 208, PAGEID 1104). The Court's decision on the motion to disqualify, however, turned on the inadequacy of the affidavit in support and not on the lack of such a certification. (*See* Doc. 207, PAGEID 1093–95).

In sum, "re-hash[ing] old arguments," short of demonstrating any of the scenarios enumerated in *Henderson*, cannot justify the relief sought. *Wren v. United States*, No. 17-2054, 2018 WL 4278569, at *3 (6th Cir. Sept. 6, 2018) (quoting *Gulley v. Cnty. of Oakland*, 496 F. App'x 603, 612 (6th Cir. 2012)). Defendant's Rule 59(e) motion is accordingly **DENIED** (Doc. 208). The Court likewise finds no basis to grant his Motion for Amended or Additional Findings of Fact and Law (*Id.*); it is also **DENIED**.

IT IS SO ORDERED.

s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

ENUMERATED LIST OF PROPOSED ADDITIONAL FINDINGS

1. The district court has not uttered the words "1000 Mian Street" in any of its rulings/order/responses, including the 60(b) Order (Doc. 207) despite Movant's assertion #7 of a material fact having been overlooked (Doc. 206, PageID:1035)

2. The prosecutor has not uttered the words "1000 Mian Street" in any of its answers/responses despite the material relevance demonstrated in Movant's submissions asserting, among other things, that the prosecutor's failure to discuss the materiality of "1000 Mian Street" in the underlying affidavit for search warrant would support a fraud-upon-the-court finding warranting either recall of the mandate or 'extraordinary circumstances' to relitigate.

3. The district court appears to have never made any factfindings whatsoever regarding the 1000 Mian Street location-of-evidence-address listed in the underlying affidavit for search warrant (PageID:85) despite its plain error nature to have never factored it in Leon's good-faith-exception-analysis.

4. The district erroneously claimed that this quote appeared in the underlying affidavit for search warrant:"The building does not have the street address: . . . 709 Elberon Avenue. . ." (PageID:1009, FN1, Order denying 2255 relief) when, in fact, that quotation could only have been made from the warrant (PageID: 82 & 83), which could, among other things, support a finding that the court has effectively demonstrated a "'motivation to vindicate a prior conclusion' when confronted with a question for the second or third time" in accord with Liteky v. United States, 510 U.S. at 560, 562-563.

5. The district court denied relief by misappraising Movant's claim as: "Petitioner argues that his trial counsel was ineffective because he failed to inform Petitioner that he could be sentenced to consecutive sentences." (PageID: 1004, Doc. 191) when, in fact, Petitioner conveyed that trial counsel made representations that the 3-counts "would be entirely concurrent" (PageID: 1089) therefore this claim did not get adjudicated on the merits of the true-factual-setting. There appear no factfindings on the 1 versus 3 count offers.

6. The district court denied relief by misappraising Movant's Franks claim as: "Petitioner has not explained in any detail how the information in his affidavits would have changed the results of the appeal." (PageID: 1010, Doc. 191) when, in fact, Petitioner conveyed that "Had trial counsel properly developed the trial court record with (Doc.184)...the results of the suppression hearings would have clearly and plainly been favorable" (PageID: 1089), and the district court has not refuted that "it would have granted suppression, or a franks hearing, had Doc. 184) been presented to the trial court at the original trial proceedings" (PageID: 1089, Doc. 206) therefore this claim has not been adjudicated on the merits of the true-factual-setting.

7. The district court never made any factfindings on counsel's failure to argue Mills and/or Cline mandated suppression in the correct factual setting of this case in its Order denying 2255 relief (Doc. 191) despite it having been conveyed in the amended 2255 motion (Doc. 190), as well as the 60(b) Motion (Doc. 206, PageID: 1088), particularly, after factoring "1000 Mian Street" was, in fact, the averred location of evidence in the underlying affidavit (PageID: 85)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kenneth Rose,
Movant

v

United States of America

Case No: 1:09-CR-47

Motion for Relief 60(b) from Order Denying Relief (Doc. 191)

Petitioner-Movant asserts that the Order denying Relief (Doc. 191) is subject to relief under one or more sub-sections of 60(b) as demonstrated herein and within the attached Memorandum in Support, including, but not limited to 60(b)(6).

As an initial matter, other motions for relief under 60(b) have also been contemporaneously filed, which, may make this motion moot, or effectively nullify the Doc. 191 Order should they be granted, and the Petitioner-Movant respectfully requests that the factfinding resulting from any of these 60(b) motions reach back fully and fairly to consider not only the appellate stage factfinding and rulings, but to the extent permitted by law, *the earliest point* in the adjudications that the Constitutional violations asserted may have tainted the proceedings, even if the Constitutional violations asserted effectively warrant revisiting trial level factfinding and rulings under the lens of 'but for the Constitution violation at that earlier stage' Petitioner would/wouldn't have been granted relief.

Under 60(b)(6) (and other relief), Petitioner-Movant asserts here, and elaborates on in the Supporting Memorandum, that:

1) Ruling on 2255 motions was premature, as Superseding Reconsideration of Stay (Doc. 189) had put the district court on notice that the 6th Circuit oral arguments had not yet been reviewed due to technical issues at the Petitioners place of confinement.
2) The affidavit (Doc. 192) from the librarian at the Petitioner's place of confinement, provided a sworn statement regarding the technical difficulties related to, among other things, the Petitioner's ability to review oral arguments on CD's, and although docketed after Doc. 191 Order, that affidavit's notarization date **pre-dated** the order denying 2255 relief (Doc. 191).
3) The district court appears to have based its reasoning for denial, at least in part, on **inadequate factfindings** (i.e. did not effective reach merits founded on true factual setting), as demonstrated in the contemporaneously filed Memorandum in Support
4) The district court appears to have based its reasoning for denial, at least in part, on **overlooked critical material facts** (i.e. did not effectively reach merits founded on true factual setting), as demonstrated in the contemporaneously filed Memorandum in Support
5) The district court appears to have based its reasoning for denial, at least in part, on **overlooked contentions** (as evidenced by lack of **any** factfindings on those contentions (i.e. did not effectively reach merits on true factual setting), as demonstrated in the contemporaneously filed Memorandum in Support (see also offers of proof within Doc. 194 and/or Doc.195)
6) Despite the allegations of prosecutorial misconduct and prosecution's Fraud-Upon-The-Court (Doc. 190, among other motions), the words "prosecutorial misconduct" and "fraud upon the court" **appear nowhere** in the district courts rulings, orders, responses, evincing any or all of the following: inadequate factfindings, overlooked critical material facts, overlooked contentions raised by Movant, lack of full and fair adjudication of proceedings
7) Despite the arguments relating to the underlying affidavit's (PID 85) use of "1000 Mian Street" as the location of "evidence of criminal activity" (PID 85) raised in Doc. 190, among other documents, the words "1000 Mian Street" **appear nowhere** in the district courts rulings, orders, responses, evincing any or all of the following: inadequate factfindings, overlooked critical material facts, overlooked contentions raised by Movant, lack of full and fair adjudication of proceedings

Respectfully Submitted,

Kenneth Rose #465-843

WCI
P.O. Box
Lebanon, OH 45

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CERTIFICATE OF SERVICE

This document was electronically filed on 9/6/19 which should forward copies to all parties of record

Kenneth Rose

Kenneth Rose, #655-843

Memorandum in Support

As an initial matter, the Movant requests a Stay on this motion as: 1) There are motions pending before the Court of Appeals related to this case, and 2) This motion would otherwise reinvest jurisdiction to this court to adjudicate the Motion for Disqualification and Appointment of Counsel before adjudicating this motion, therefore a stay is requested on adjudication of all three motions until the Sixth Circuit adjudicates the motions pending before them.

As demonstrated - in the arguments section which follows - critical material facts were overlooked in the adjudication of the 2255 motions. Movant wishes to submit a complete list of the overlooked material facts within 14 days (with the appointment of counsel if possible) of the Sixth Circuits adjudication of the motions now pending before it, should those adjudications result in an unfavorable ruling.

ARGUMENT

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason 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." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). See also Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (certificate required if court "cannot say that the issue lacks substance"); Buxton v. Collins, 925 F.2d 816, 819 (5th Cir.), cert. denied, 498 U.S. 1128 (1991) ("any doubts whether [a certificate of probable cause]...should be issued are to be resolved in favor of the petitioner"). Given that the Petitioner raised Constitutional violations relating to underlying affidavit's (PID 85) use of "1000 Mian Street" as the address where "criminal activity will be found" (PID 85) which was plainly different from the search warrant's "709 Elberon Ave" address-actually-searched (PID 82) and the absence of <u>any</u> factfindings, "A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter" (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593) therefore a COA should be issued. Given that the Petitioner raised Constitution violations relating to prosecutorial misconduct (PID 991-992), aspects of which amounted to fraud-upon-the-court, and the absence of <u>any</u> factfindings, particularly in light of factuality of the offers of proof (PID 969, 991, 992) lacking <u>any</u> rebuttal by the prosecution, "A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter" (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593) therefore a COA should be issued. Given reasons to doubt that the district court fully and fairly adjudicated the matters, its denials of COA (Doc. 200) and continued IFP status on appeal (Doc. 201) should be nulled in Petitioners favor.

Given that the original adjudications of the good-faith exception application were underpinned by the erroneous premise that the underlying affidavit for search warrant (PID 85) failed to specify any address (which would have been a worse factual scenario than that 6th Cir. case Mills, 389 F.3d 586, 577-578, en banc den, granting suppression) the true factual setting was that the underlying affidavit (PID 85), in fact, averred "1000 Mian Street" (PID 85) was the address where "evidence of criminal activity will be found" (PID 85) (which is a factual scenario squarely analogous to the 6th Circuit's precedant in Cline, 745 F. Supp 2d 773, 807, affirmed 6th Cir. 2012 where the address in the underlying affidavit clearly was different from the different address appearing on the warrant, granting suppression), a COA should be issued.

> Smith v. Wainwright, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because "district court refused to hold an evidentiary hearing to develop the true factual setting in which this claim must be judged")
> (Federal Habeas Corpus Practice and Procedure, 4th Ed., Hertz and Liebman, p.1593)

Given that the district 'simply ignored' and 'never reached the heart of' the 'central question' the plea-ineffective-assistance-claim, which was that trial counsel "induced my guilty plea..." (3-count plea, over 1 count plea) "based on the assurance...multi-count sentence would be entirely concurrent..." (PID 723, sworn unopposed offer of proof) because "his review of the Sentencing Guidelines did not subject the Defendant to a sentencing range including the word 'life'...(thus enabling consecutive sentencing)" (PID 994). Acceptance of the 3-count plea hinged on counsel erroneous assurance the sentence would be fully concurrent, which if true, would have resulted in the PSR's 17 year sentence, therefore a COA should be issued.

Given that the district court didn't address 'one of Petitioner's central contentions' of the franks-ineffective-assistance-claim, which was that "Had trial counsel properly developed the trial court record with (Doc. 184)...the results of the suppression hearings would have clearly and plainly been favorable to granting suppression..." (PID 995) if prepared/presented at trial, thus, a COA should issue as the court never denied it would have granted suppression, or a franks hearing, had (Doc. 184) been presented to the trial court at the original trial proceedings

Townsend, 372 U.S. at 313 ("merits of the **factual dispute were not resolved**");

Perillo v. Johnson, 79 F.3d 441, 446 & n.6 (5th Cir. 1996) (court factfindings on ineffective assistance did not address **factual issues that was critical to assessment** of counsel's possible conflict of interest);

Armstead v. Scott 37 F.3d 202, 208-09 (5th Cir. 1994), cert denied, 514 U.S. 1071 (1995) (court's factual findings did not address one of petitioner's **central contentions**);

Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994) (court's rulings in ineffective assistance of counsel did not include finding on **central question** of historical fact);

Schmidt v. Hewitt, 573 F.2d 794, 801 (3rd. Cir. 1978) (facts suggesting that confessions secured by coercion were **"simply ignored"** by factfinder));

United States Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 717 (1983) (remanding because "we cannot be certain that [lower court's] finding of fact ... were not **influenced by** its mistaken view of the law");

Sullivan v. Cuyler, 723 F.2d 1077, 1084-85 (3d. Cir 1983) (court "never reached **the heart of** the conflict of interest inquiry");

Bishop v. Rose, 701 F.2d 1150, 1155 (6th Cir. 1983) ("It is clear to us that in this case [lower court] did not make a factual determination on the **critical issue**"

DISTRICT COURT'S ABUSE OF DISCRETION IN RESOLVING MOTION FOR LEAVE TO FILE COA WITH ASSISTANCE OF APPOINTED COUNSEL (DOC. 196)

On 11/3/18, Petitioner filed Motion For Leave to File For COA (Doc. 196) which, among other things, requested an extension of time for the Movant to assert the COA issues for review, either with the assistance of appointed counsel or, in the alternative, pro se. This motion brought to the court's attention that a motion for appointment of counsel had been filed the day before and, incorporated that document (Doc. 194), by reference. The motion also raised the concern that adjudication of the other "November 2018 motions presently before the court" may alter the court's denial of relief once the court recognized it had **overlooked critical material facts** outlined in those motions as well as their offer of proof (Doc. 194 and/or 195). In other words, the district court, clearly noticing that a motion for disqualification had been filed demonstrating critical material facts were overlooked by the court in its denial of 2255 relief, should have, in the interests of justice and/or the appearance of full and fair litigation, sua sponte reconsider its denial of 2255 relief in light of the overlooked critical material facts having been brought to the court's attention (Doc. 194 and 195), or alternatively, not oppose, months after the denial of 2255 relief, the granting of a COA and/or IFP status on appeal. Reasonable jurists would find the courts resolution of the COA and IFP on appeal debatable and deserving encouragement to proceed.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH ROSE

Movant

v.

UNITED STATES OF AMERICA

Case Nos: 1:09-cr-047
1:14-cv-809

MOTION TO DISQUALIFY (28 U.S.C. § 144)

ORAL ARGUMENT REQUESTED

Hearing Date:_____

Hearing Time:_____

Courtroom:_____

Relief Sought

Movant, Kenneth Rose, moves this court under Section 144 of Title 28 of the United States Code for an order to disqualify Judge Barrett in the above-captioned case and assign another judge to the case.

Grounds For Relief

The court should disqualify Judge Barrett in this matter because of the appearance of lack of impartiality and/or bias as demonstrated herein.

Record on Motion

This motion is based on this document, Certificate of Service, the Affidavit of Kenneth Rose, the Supporting Memorandum of Law, attached to this motion, and all of the pleadings, papers, and other records on file in this action.

Dated: 11-2-18

Kenneth Rose

Kenneth Rose, #655-843
Warren Correctional Institution
5787 State Route 63
Lebanon, OH 45036

CERTIFICATE OF SERVICE

I hereby certify that this document was submitted for ECF filing on 11/2/18, which should forward copies to parties of record.

Kenneth Rose

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MEMORANDUM OF LAW

INTRODUCTION / FACTUAL BACKGROUND

Despite defendant's difficulties and disabilities (see concurrently filed Motion to Appoint Counsel), defendant recognizes that meritorious facts - which would mandate relief as a matter of law - were not previously before the trial and appellate courts (or *properly* before the courts) due to fraud upon the court and/or ineffective assistance of counsel (see Amended 2255, Doc. 190), and material facts alone, without proper legal argument[1] can be *obscured* into a seemingly well founded adverse ruling. Defendant's understanding of what constitutes actionable 'evidence' in support of judicial disqualification for bias and/or impartiality has been formed primary on the following caselaw examples and defendant believes Judge Barrett is acting in accord (see also Affidavit of Bias or Prejudice):

1.) Kaeding v. Warden, 2012 U.S. Dist. LEXIS 144379

.....The standard applied in evaluating recusal motions is an objective one. **"[W]hat matters is not the reality of bias or prejudice, but its appearance."** Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). A federal judicial officer must recuse himself or herself where "a reasonable person with knowledge [*3] of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is not based 'on the subjective view of a party,'" no matter how strongly that subjective view is held...

2.) Parham v. Johnson (1998, WD Pa) 7 F Supp 2d 595

Court recuses itself upon remand of inmates 1983 action due to court's abuse of discretion in **denying the inmate appointment of counsel**, where findings of Third Circuit based on inaccurate factual premise formed because highly relevant portions of case record were **not included in appellate record**, because court's "impartiality might reasonably be questioned" in future by counsel or party...

3.) Liteky v. United States, 510 U.S. at 560, 562-63 (Federal Habeas Corpus Practive and Procedure, Fourth Edition, 2001, Section 41.4c FN 45)

(recognizing importance of appellate consideration of need to disqualify trial judges "based upon a judge's prior participation, in a judicial capacity, in some related litigation," given judges' "**'motivation to vindicate a prior conclusion' when confronted with a question for the second or third time"** and given that judges sometimes **"find it difficult to put aside views formed during some earlier proceeding**...[and] through obduracy, honest mistake, or simply inability to attain self-knowledge ... fail [] **to acknowledge a disqualifying predisposition or circumstance" (citation omitted)**

[1] In evaluating objective good faith, we consider "not only how well-established is the general legal principle involved but also how precisely the facts coincide with the [**28] cases applying that principle' United States v. Smith, 1986 U.S. App. Lexis 22288 at **28. That the officer may have convinced the magistrate, district judge, or members of the appellate panel that probable cause existed to support the warrant does not establish the officer's objective good faith...such an analysis would give the magistrate the last word on the exclusion question. Footnote 4

4.) *In re* United States, 441 F.3d 44 (1st Cir. 2006)

(test for recusal is whether an objective, **reasonable member of the public**, fully informed of all the relevant facts, would fairly question the trial judge's impartiality)....

5.) *In re* Moody, 755 F.3d 891 (11th Cir. 2014)

(recusal turns on whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality).

6.) United States v. Adams, 722 F.3d 788 (6th Cir. 2013)

(district court judge must recuse himself where a reasonable person with knowledge of the all facts would conclude that the judge's impartiality might reasonably be questioned, and this is an objective standard).

ANALYSIS

Considering the facts outlined in the Affidavit of bias or Prejudice, the arguments put forth in the 2255 motions, and the prima facie evidence presented in the record expansions, including but not limited to the letter from Georgetown Law School demonstrating plain manifest errors exist (Doc.186) a reasonable member of the public, fully informed of all relevant facts, would fairly question the trial judge's impartiality in the adjudication of the 2255 proceedings.

Further, it is "clearly established that police officer cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentation to the court" Westly v. Campbell, 779 F.3d 421, 2015 U.S. App. Lexis 3239 at **29, citing Gregory, 444 F.3d at 758 (citing Yancey v. Carroll Cnty, 876 F.2d 1238, 1243 (6th Cir. 1989) (see also prima facie evidence in Doc. 184).

HAD COUNSEL ARGUED CORRECT PRECEDENT(MILLS, 389 F.3d 568, (6th Cir. 2004)), EVEN UNDER *WEAKER* POSTURE THAT AFFIDAVIT *'MERELY OMITTED'* THE ADDRESS-ACTUALLY-SEARCHED, SUPPRESSION WAS MANDATED AS A MATTER OF 6TH CIRCUIT LAW, NO GOOD-FAITH EXCEPTION UNDER FACT PATTERN PRESENTED AT TRIAL

The underlying affidavit neither connects the searched residence to any illegal activity nor states that a person engaging in illegal activity away from the residence lives at the searched residence. The affidavit contains no statement or other evidence that the [V1/M1] actually observed contraband on the premises of the place to be searched, no statement or evidence that [Defendant], the person named in the affidavit as the one from whom [V1/M1 was "forced" into sex], lives at [address-actually-searched, *nor*, affidavit's *only* averment "1000 Mian Street"]., nor any other statement or evidence that ties plaintiff to the place to be searched. The affidavit does not indicate that Officer [Schroder] performed any investigation to determine whether plaintiff lived at [address-actually-searched, *nor*, affidavit's *only* averment "1000 Mian Street"].

> Mills v. City of Barbourville, 389 F.3d 568 (6th Cir., Nov. 12, 2004), 2004 U.S. App. LEXIS 17836 ** | 2004 FED App. 0276P (6th Cir.) ***,Rehearing denied, Rehearing, en banc, denied by Mills v. City of Barbourville, 2005 U.S. App. LEXIS 3837 (6th Cir., Mar. 3, 2005)
>
> .....
>
> The underlying affidavit neither connects the searched residence to any illegal activity nor states that a person engaging in illegal activity away from the residence lives at the searched residence. The affidavit contains no statement or other evidence that the male juvenile (Leo Cox) actually observed contraband on the premises of the place to be searched, no statement or evidence that plaintiff Lisa Mills, the person named in the affidavit as the one from whom Cox purchased the marijuana cigarette, lives at 801 North Allison Avenue, nor any other statement or evidence that ties plaintiff to the place to be searched. The affidavit does not indicate that Officer Broughton or Chief Smith performed any investigation [**18] to determine whether plaintiff lived at 801 North Allison Avenue. .....
>
> ***HN6*** Under an "objective reasonableness" test, the officers "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341. The proper inquiry, therefore, is whether a reasonably competent investigator [**21] armed with Officer Broughton and Chief Smith's knowledge and experience could have believed that probable cause existed to search 801 North Allison Avenue. **Because the officers presented absolutely no information in the affidavit presented to the magistrate indicating that the place to be searched was connected** to Lisa Mills, either through a sworn statement that Cox had identified the residence as the place of the drug purchase or through independent investigation corroborating that it was the home of Lisa Mills, the affidavit was "so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable."

No.

STATE OF OHIO
SS:
HAMILTON COUNTY

AFFIDAVIT FOR SEARCH WARRANT

Police Officer Chris Schroder, being first duly cautioned and sworn, deposes and says that there are items within the jurisdiction of the Hamilton County Court of Common Pleas at: **1000 Mian Street Cincinnati, HAMILTON COUNTY, OHIO. 45202**

and that based upon the attached affidavit and the investigation I have conducted, I have probable cause to believe that evidence of criminal activity will be found at the above listed places and the following items contained therein are requested to be searched and/or seized:

1) Computers-defined as central processing units, computer motherboards, hard drives, floppy drives, removable and re-write able media, tape and digital drives, internal and external storage devices, video display units or receiving devices, scanners, printers, modems, any and all connecting cables and devices, input devices such as "web cams" video cameras, audio recording devices, disc's both audio, video and digital, any memory devices such as smart media, memory sticks, or any other form of memory or device utilized by the computer or it's devices. Any computer software, programs and source documentation, computer logs. (This description constitutes the definition of a computer system as that term may be used throughout this document.) And all computer related accessories not specifically mentioned herein, all equipment having been used in violation of 2907.02, Ohio Revised Code.

2) Any documentation and/or notations referring to the computer, the contents of the computer, the use of the computer or any computer software and/or communications. All information within the above listed items including but not limited to machine readable data, all previously erased data, and any personal communications including but not limited to e-mail, chat capture, capture files, correspondence stored in electronic form, and/or correspondence exchanged in electronic form as indicative of use in obtaining, maintenance, and/or evidence of said offense.

3) Any financial records, or receipts kept as a part of and/or indicative of the obtaining, maintenance, and/or evidence of said offense; financial and licensing information with respect to the computer software and hardware.

4) All of the above records, whether stored on paper, on magnetic media such as tape, cassette, cartridge, disk, diskette or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", personal digital assistants, smart media, memory cards, memory sticks, calculators, or any

Appx. A

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO
CRIMINAL DIVISION

IN THE MATTER OF THE
AFFIDAVIT FOR SEARCH WARRANT
RE THE INVESTIGATION OF

NO. 09-[illegible]

Kenneth Rose
709 Elberon Av
Cincinnati,
HAMILTON COUNTY, OHIO 45205

SEARCH WARRANT

To the Police chief of Cincinnati, greetings. Whereas an affidavit for a search warrant having been made under oath by Police Officer Chris Schroder, a peace officer of the Cincinnati Police, of the State of Ohio the Court finds,

1. There is probable cause to believe that Kenneth Rose, and others not known, have committed and are committing offenses in violation of the Ohio Revised Code Section 2907.02.

2. There is probable cause to believe that evidence pertaining to the aforementioned offenses will be obtained through the search and seizure of computers, computer data and other electronic data in storage as well as other items detailed below.

3. In particular the evidence seized will reveal the details of the involvement of the participants, identities of victims, evidence of the alleged violations, records of the alleged transactions or transmissions, and places that criminal activity occurred as well as other information concerning the ongoing criminal conspiracy, the object of which is stated above

Said affidavit is attached hereto and incorporated herein, and these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter in the daytime into the residence located at: 709 Elberon Avenue apartment number one, Cincinnati, Hamilton County, Ohio 45205. Further described as a two story, multi unit building, reddish brick construction, with nine windows facing Elberon Avenue. The building has a white two story awning covering the red front door. The front door has twelve individual windows. The building does not have the street address, however I have included a printout from the Hamilton County Auditors identifying the

Appx B

Kenneth Rose, #655-843
Warren Correctional Institution
5787 State Route 63
Lebanon, OH 45036

December 20, 2017

Dear Mr. Rose,

Thank you for your letter from September of this year. We always appreciate hearing from those who use the *ARCP*, especially those whose own cases have made it into the publication.

We thoroughly reviewed the case that you submitted, as well as all the relevant documents. The case description looks as though it accurately describes the opinion of the Sixth Circuit, although I understand that you disagree with the facts on which the court relies—specifically that the address of 709 Elberon was never included on the affidavit on which the officers relied, thereby precluding the good-faith exception that the court applied. Although it is possible that such facts would have affected the court's decision, thereby making our case description inaccurate, we do believe the current parenthetical accurately reflects the court's decision as written. Additionally, I reviewed the briefs for the Sixth Circuit decision, and the statements of facts on both sides seem to reflect that 709 Elberon was included in the affidavit, so it's hard for us to say that there was an obvious error without looking at the affidavit itself. Although you may disagree about the underlying facts, we are not in a position to remedy that perceived error.

This is all to say that we plan to keep the case in this edition without substantially modifying it—we feel that it is useful to readers as an example where the court found there to be no substantial basis for the magistrate to find probable cause based on the affidavit.

We also are unable to refer you to any attorneys. We are a student-run publication, so we do not have access to attorney services that would be of use to you. We hope that you are able to find assistance in pursuing your claims. Again, we always appreciate receiving concerns and suggestions from readers, and we thank you for reaching out.

Sincerely,

CAPITAL DISTRICT 200

Student Editors
Annual Review of Criminal Procedure
600 New Jersey Ave. N.W.
Washington, DC 20001

1A
105

Kenneth Rose #655-843
Warren Correctional Institution
5787 State Route 63
Lebanon, OH 45036

Appx C

**CONFLICTING U.S. SUPREME COURT AND SIXTH CIRCUIT DECISIONS BEING CONTRAVENED BY 6TH CIRCUIT MANDATE 11-4313

Malley v. Briggs, 475 U.S. 335, 344-45 (1986) applied to similarly situated defendant in 6th Circuit case:

Mills v. City of Barbourville, 389 F.3d 568, 575-578, 2004 U.S. App. LEXIS 23753. at 14 and 21 (6th Cir. 2004)

(at 14) "We reverse and remand because the affidavit (**14) supporting the search warrant for plaintiff's home was not supported by probable cause and a reasonable officer...should have known that there was not probable cause to conduct the search."

(at 21) "The proper inquiry, therefore, is whether a reasonable competent investigator (**21)...could have believed that probable cause existed to search (address in affidavit, in the instant case "1000 Mian Street"). Because the officers presented absolutely no information in the affidavit presented to the magistrate indicating that the place to be searched was connected to (suspect), either through a sworn statement the (victim) had identified the residence as the place of the (crime - in the instant case: alleged forced rape, ORC 2907.02) or through independent investigation corroborating that it was the home of (suspect), the affidavit was "so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable".

Note: The analysis of the good-faith exception in the qualified immunity context similarly applies to the suppression context presented here. See Malley v. Briggs, 475 U.S. 335, 344 (1986)("(W)e hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon...defines the qualified immunity accorded an officer whose request for a warrant allegedly caused caused an unconstitutional arrest.)

Groh v. Ramirez, 540 U.S. at 565 n.9 (2004) applies: ("(T)he Fourth Amendment's particularity requirement assures the subject of the search that a magistrate has duly authorized the officer to conduct a search of limited scope. This substantive right is not protected when the officerfails to take the time to glance at the authorizing document and detect a glaring defect...of Constitutional magnitute."); see also id at 562 ("It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and conducted."); George, 975 F.2d at 77 ("Reasonable reliance does not allow an officer to conduct a search with complete disregard of the warrant's validity because the 'standard of reasonableness...is an objective one...(one that) requires officers to have a reasonable knowledge of what the law prohibits." (quoting Leon, 468 U.S. at 919 n.20))

Groh applies through Hodson, 543 F.3d at 293 as quouted in similarly situated defendant in Cline (6th Cir.):

Cline v. City of Mansfield, 745 F. Supp. 2d 773, affirmed 2012 Fed App. 913N (6th Cir. 2012) at 807:

(at 807) In short, there is little question that the affidavit in this case was 'so lacking in probable cause as to render official belief in its existence entirely unreasonable." McPhearson, 469 F.3d at 522 (citation omitted); see also Hodson, 543 F.3d at 293 ("(A) reasonably well trained officer in the field, upon looking at this warrant, would have realized that the search described...did not match the probable cause described...") ...In this case, by contrast, (**74) it is clear that any reasonable officer who: (a) read the affidavit, and (b) happened to discover that it referred exclusively to (("1000 Mian Street - adapted to the instant case)) would know that the affidavit did not reflect probable cause to search (("709 Elberon Av." - adapted to the instant case)).

Cline at 807 - 808

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Movant

v.

UNITED STATES OF AMERICA

Case Nos: 1:09-cr-047
1:14-cv-809

MOVANT'S AFFIDAVIT OF BIAS OR PREJUDICE (28 U.S.C. § 144)

AFFIDAVIT OF KENNETH ROSE

STATE OF OHIO

COUNTY OF WARREN

Kenneth Rose, being duly sworn, deposes and sworn, deposes and states:

1. My name is Kenneth Rose. I am over 18 years of age. I reside at 5787 State Route 63 in Lebanon, OH. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct.
2. I am the Defendant in this matter. I make this affidavit to disqualify the Honorable Judge Barrett from this case on the basis of his personal bias or prejudice against me.
3. This federal case has been prosecuted despite an agreement with the State prosecutor to "close the case" and seek no indictment related to the search warrant results in exchange for a guilty plea and twenty year sentence as State Judge Mallory already expressed his target sentence range of fifteen to twenty years after factoring in the search result depictions.
4. The underlying Affidavit/Application for search states: "*Affidavit* for Search Warrant", is docketed as PageID#85, and clearly communicates "evidence of criminal activity will be found at...[**1000 Mian Street**]"
5. The Application/Affidavit for search, PageID#85, offers absolutely **no dwelling characteristics.**
6. The Sixth Circuit previously determined the address-actually-searched was *not* in affidavit for search.
7. The Search Warrant, docketed as PageID#82, explicitly and obviously states an address-to-be-searched that does NOT match [**"1000 Mian Street"**]".
8. The discrepancy between the "1000 Mian Street" address on the face page of the Application/Affidavit and the *different address* on the face page of the Warrant is obvious.
9. Judge Barrett erroneously claims "the search warrant ***affidavit***" (emphasis added) *included* and *described* "the place to be searched" [PageID#1009, footnote 1] despite the fact the Affidavit/Application **absolutely does not**, see #4,5,6
10. Judge Barrett does not acknowledge 'Fraud upon Court' (Doc. 190) as extraordinary circumstances, nor at all, despite it's impact on both trial and appellate proceedings.

Sworn To on This 12th day of October, 2018.

Kenneth Rose
Kenneth Rose, 655-843

Notary Public

DAVID C. COMBS JR.
Notary Public, State of Ohio
My Commission Expires August 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that this Affidavit of Bias or Prejudice was submitted for ECF filing on 11/2/18, which should forward copies to parties of record.

Kenneth Rose

Kenneth Rose, #655-843

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kenneth Rose,

Petitioner,

v.

Case No. 1:09cr047
(1:14cv809)

United States of America,

Judge Michael R. Barrett

Respondent.

OPINION & ORDER

This matter is before the Court on Petitioner's Motion to Vacate under 28 U.S.C. § 2255 (Doc. 125); Petitioner's Corrected Supplemental Memorandum (Doc. 130); and Petitioner's Amended Motion to Vacate under 28 U.S.C. § 2255. (Doc. 190). The United States filed a Response. (Doc. 134).

Also pending before the Court are Petitioner's first Motion to Expand the Record. (Doc. 184); Petitioner's second Motion to Expand the Record (Doc. 186); Petitioner's Motion to Take Judicial Notice (Doc. 187); Petitioner's Motion to Alter or Amend Judgment (Doc. 188); and Petitioner's Superceding Motion to Alter Judgment (Doc. 189).

I. BACKGROUND

In the Superseding Indictment, Petitioner was charged with twenty-two counts of production of child pornography (18 U.S.C. § 2251(a)) and one count of possession of child pornography (18 U.S.C. § 2252(a)(4)). Petitioner entered a plea of guilty to three counts of the Superseding Indictment. Petitioner was sentenced to a total term of imprisonment of 612 months, to be followed by lifetime supervised release. (Doc. 106). Petitioner's plea agreement permitted him to appeal certain decisions by this Court. On

Apx I

direct appeal, this Court was affirmed by the Sixth Circuit. *United States v. Rose*, 714 F.3d 362 (6th Cir. 2013). Petitioner's writ of certiorari was denied by the United States Supreme Court. *Rose v. United States*, 134 S.Ct. 272 (2013).

The relevant facts of this case are set forth in the Sixth Circuit's opinion:

> In November 2008, the Personal Crimes Unit of the Cincinnati Police Department began investigating allegations that Kenneth Rose sexually abused three minors. When the police interviewed the minors, they said that Rose had sexually molested and/or raped them and that he had shown them pornographic images on a computer in his bedroom. As a result of the interviews, the police sought to obtain a search warrant for 709 Elberon Ave., Cincinnati, OH. The application for the search warrant asked for permission to search for computers and computer-related materials in support of an investigation under Ohio's rape statute, Ohio Rev.Code § 2907.02.
>
> The front page of the search warrant identified "Kenneth Rose" as the subject of the search, and immediately below Rose's name, it identified the location to be searched as "709 Elberon Av. [sic], Cincinnati, Hamilton County, Ohio 45205." The warrant described the physical attributes of the address, including that the name "Rose" appeared over the doorbell of apartment number one. Attached to the warrant was a photograph of the property taken from the Hamilton County Auditor's website. The supporting affidavit summarized the testimony of the three victims, including testimony that Rose had shown two of the victims pornographic images on a computer "located in his room" or "located in his bedroom." The third victim testified that he engaged in nonconsensual sexual activity with Rose beginning in July 2008. The affidavit explained that the police sought to obtain computers and related documentation.
>
> Nowhere in the affidavit did the affiant, Police Officer Chris Schroder, provide Rose's address. Nevertheless, the magistrate judge granted Officer Schroder's request for the search warrant.
>
> Police executed the warrant on November 12, 2008 and seized, among other items, a laptop computer. Forensic analysis of the computer revealed numerous images of child pornography, several of which included Rose engaged in sexual conduct with several male minors under the age of sixteen.

714 F.3d at 365.

II. ANALYSIS

A. Motions to Expand the Record

Rule 7 of the Rules Governing § 2255 Proceedings states that "[t]he materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record." 28 U.S.C.A. foll. § 2255. In his first Motion to Expand the Record (Doc. 184), Petitioner seeks to expand the record with his affidavit. This affidavit consists primarily of an annotated version of the affidavit for the search warrant for 709 Elberon Avenue. The Court finds Petitioner's first Motion to Expand well-taken and accordingly, the Motion is GRANTED.

Petitioner's second Motion to Expand the Record seeks to expand the record to include a letter dated December 20, 2017 from the student editors at Annual Review of Criminal Procedure. (Doc. 186). This letter does not predate the filing of Petitioner's petition. Therefore, second Motion to Expand the Record (Doc. 186) is DENIED.

B. Petitioner's Motion to Take Judicial Notice

In his Motion to Take Judicial Notice, Petitioner seeks to have this Court take judicial notice of certain facts based on the exhibits attached to the Motion. (Doc. 187).

Federal Rule of Evidence 201 provides:

> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201. The Court determines that the facts enumerated in Petitioner's Motion

do not fall in either category. Therefore, Petitioner's Motion to Take Judicial Notice is DENIED.

C. Motion to Alter or Amend Judgment

In Petitioner's Motion to Alter or Amend Judgment (Doc. 188), Petitioner asks this Court to stay these proceedings to allow the Sixth Circuit to decide motions Petitioner has filed with in his direct appeal case: *U.S.A. v. Kenneth Rose*, No. 11-4313. As this Court has previously explained, on December 22, 2016, the Sixth Circuit denied Petitioner's Motion to Recall the Mandate. (Case No. 11-4313, Doc. 53-1). In subsequent letters from the Clerk for the Sixth Circuit Court of Appeals, Petitioner was advised that his case was closed and therefore the Clerk was returning motions tendered by Petitioner. (Case No. 11-4313, Docs. 54-2, 56-3). The Clerk explained that these motions were not being filed because his case was closed. Accordingly, the subsequent motions tendered by Petitioner were not filed by the Clerk. Therefore, there are no motions pending before the Sixth Circuit, and the Court finds no basis for ordering a stay of these proceedings. Accordingly, Petitioner's Motion to Alter or Amend Judgment (Doc. 188) is **DENIED**.

D. Superceding Motion to Alter Judgment

In Petitioner's Superceding Motion to Alter or Amend Judgment (Doc. 189), Petitioner again asks this Court to stay these proceedings to allow the Sixth Circuit to decide motions Petitioner has filed with in his direct appeal case: *U.S.A. v. Kenneth Rose*, No. 11-4313. This Motion (Doc. 189) is DENIED for the same reasons the Court denied Petitioner's original Motion to Alter or Amend Judgment.

E. Motion to Vacate under 28 U.S.C. § 2255

A prisoner seeking relief under 28 U.S.C. § 2255 must allege either "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003) (citing *Weinberger v. U.S.*, 268 F.3d 346, 351 (6th Cir. 2001), *cert. denied*, 535 U.S. 967).

Petitioner identifies the following grounds for relief: (1) this Court improperly denied his motion to suppress; (2) this Court abused its discretion in refusing to reopen suppression hearing when presented with new evidence; (3) this Court erred in denying Petitioner's motion to dismiss the Superseding Indictment because his acts were wholly intrastate; (4) ineffective assistance of trial counsel; and (5) ineffective assistance of appellate counsel.

Petitioner's first ground for relief is based on this Court's denial of Petitioner's motion to suppress. Petitioner argues that the search warrant affidavit for 709 Elberon Avenue was overbroad and lacked probable cause. Petitioner explains that the search warrant failed to establish probable cause to believe that evidence of the rape described in the warrant would be found on a computer in the apartment. Petitioner also argues that a reasonable officer would not rely on a facially invalid warrant affidavit.

The Sixth Circuit has recently summarized the good-faith exception to suppression as follows:

> "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (en banc) (quoting *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). There is, however, "an exception to the exclusionary rule where 'the officer

> conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid.'" *United States v. Watson*, 498 F.3d 429, 431 (6th Cir. 2007) (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984)); *see also United States v. Leon*, 468 U.S. 897, 922–23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The good-faith exception, however, will not apply where "the affidavit is 'so lacking in [indicia of] probable cause as to render official belief in its existence entirely unreasonable'" or "where the officer's reliance on the warrant was neither in good faith nor objectively reasonable." *Frazier*, 423 F.3d at 533 (quoting *Leon*, 468 U.S. at 923, 104 S.Ct. 3405.)

United States v. Jenkins, No. 17-1377, 2018 WL 3559209, at *6 (6th Cir. July 24, 2018) (footnote omitted). In this case, the Sixth Circuit applied the same analysis and found that this Court did not err in denying Petitioner's motion to suppress. The Sixth Circuit explained:

> Taking into consideration everything within the four corners of the affidavit, the officer conducting the search of Rose's home exercised good faith and acted in objectively reasonable reliance on the warrant's legality. First, the affidavit showed that the case involved three victims who had spent time at Rose's home and provided detailed testimony about the activities that took place therein. Second, the affidavit related that the affiant was a detective in the Personal Crimes Unit and that he had been conducting an investigation into the victims' allegations. Viewing the evidence in the light most favorable to the government, it would be entirely reasonable to conclude that either the testimony of the three victims or the independent investigation by the detective, or both, revealed that Rose lived at 709 Elberon Ave.

714 F.3d at 369.

It is "well settled that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) (citing *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir.1996); *Davis v. United States*, 417 U.S. 333, 345, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)). Petitioner has not identified an intervening change in law or any other exceptional circumstances.

Therefore, Petitioner cannot relitigate his claim regarding the search warrant affidavit in this § 2255 proceeding. Petitioner is not entitled to relief based on his first ground for relief.

As to the second ground for relief, Petitioner argues that this Court abused its discretion in refusing to reopen the suppression hearing when the Court was presented with new evidence that the officer intended to mislead the magistrate into a finding of probable cause. The Sixth Circuit addressed this argument as part of Petitioner's direct appeal and ruled that Petitioner was not entitled to a suppression hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> In support of his argument that he is entitled to a *Franks* hearing, Rose relies on videotaped interviews of the victims and Officer Schroder's unredacted notes, both of which Rose obtained after the district court ruled on his Motion to Suppress. Rose argues that the videotaped interviews and the notes reveal that the victims contradicted themselves over the course of several interviews and that there were inconsistencies among the victims' versions of the events that took place at Rose's residence. Nonetheless, Rose has not established that the statements in the affidavit are in fact false. The evidence seized from Rose's computer establishes that the substance of the allegations were true. Without a showing of falsity concerning the statements in the affidavit, Rose cannot make a substantial showing that the affiant provided statements in the affidavit that he knew to be false. Thus, the district court did not err in denying Rose's motion for a *Franks* hearing.

714 F.3d at 370. Therefore, this was an issue which was raised and considered on direct appeal. Petitioner has not identified an intervening change in law or any other exceptional circumstances. Therefore, Petitioner cannot relitigate his claim regarding the search warrant affidavit in this § 2255 proceeding. Petitioner is not entitled to relief based on his second ground for relief.

As to the third ground for relief, Petitioner argues that this Court erred in denying his motion to dismiss. Petitioner argues that the denial of his motion to dismiss violated the Commerce Clause because his activities were "wholly intrastate."

Relying on *United States v. Bowers*, 594 F.3d 522 (6th Cir. 2010), this Court ruled that "the government here has demonstrated that both the camera used to take the pictures and the computer on which they were found were made and shipped outside the State of Ohio." (Doc. 78, PAGEID# 234). The Sixth Circuit affirmed this Court's decision by stating their "decision in *Bowers* still controls the issue of the intrastate manufacture and possession of child pornography." 714 F.3d at 371. The Sixth Circuit explained further:

> The statute at issue in this case, 18 U.S.C. § 2251, does not force into commerce individuals who have refrained from commercial activity. Rose is not a passive bystander being forced into commerce, but he is actively engaged in an economic class of activities that has traditionally been regulated by Congress pursuant to its powers under the Commerce Clause.

Id. Petitioner has not identified an intervening change in law since the Sixth Circuit's decision, or any other exceptional circumstances. Therefore, Petitioner cannot relitigate his claim regarding the intrastate manufacture and possession of child pornography in this § 2255 proceeding. Petitioner is not entitled to relief based on his third ground for relief.

In his fourth ground for relief, Petitioner argues that his trial counsel was ineffective because he failed to inform Petitioner that he could be sentenced to consecutive sentences.

Claims of ineffective assistance of counsel are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a criminal

defendant must demonstrate both that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 687–88, 694. However, as the Sixth Circuit has explained, this standard is adjusted for an ineffective assistance of counsel claim in the context of a guilty plea:

> In the context of guilty pleas, the first element, the "performance" aspect, of the *Strickland* test remains the same but the second element, the "prejudice" requirement, changes. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987).

The record in this case shows that Petitioner was informed on multiple occasions that he was subject to consecutive sentences. Paragraph one of the Plea Agreement—which was signed by Petitioner—states that "[t]he Court may elect to run each count consecutive (back to back)." (Doc. 79). This term was highlighted by the Assistant United States Attorney during the plea hearing. (Doc. 118, PAGEID# 613). The Court also advised Petitioner at the plea hearing that the sentence could be run consecutively:

> THE COURT: Okay. So it's 2251(a)(1), Production of Child Pornography. Each of those carries a term of imprisonment of not less than 15 and not more than 30. Do you understand that, Ken?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Now, here's the deal. Those sentences, depending on what happens, and we'll talk about the presentence investigation in a minute, they could be served concurrently, which means they could run at the same time, or, if it was appropriate, they could be served consecutively, which means back to back.

> So it's a longer term of imprisonment possible than just the 15 to 30. Do you understand that?
>
> THE DEFENDANT: Yes.

(Doc. 118, PAGEID# 607-608). Therefore, even if his trial counsel failed to inform Petitioner that he could be sentenced to consecutive sentences, the record illustrates that Petitioner knew that the sentences could be served consecutively. As such, Petitioner cannot show on this basis that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Petitioner also argues that had trial counsel properly developed the trial court record, Petitioner's motion to suppress would have been granted. Petitioner argues that counsel should have "presented and argued, with constitutional law and other experts, the critical nature of a warrant affidavit's inclusion of a dwellings address." (Doc. 130, PAGEID #677). As the Sixth Circuit explained, the issue in this case is that the affidavit failed to provide a connection between the evidence sought and the residence to be searched. However, the Sixth Circuit concluded that the officer "exercised good faith and acted in objectively reasonable reliance on the warrant's legality" in conducting the search. 714 F.3d at 369. The Sixth Circuit explained: (1) "the affidavit showed that the case involved three victims who had spent time at Rose's home and provided detailed testimony about the activities that took place therein;" and (2) "the affidavit related that the affiant was a detective in the Personal Crimes Unit and that he had been conducting an investigation into the victims' allegations." *Id.* The court concluded that based on this evidence "it would be entirely reasonable to conclude that either the testimony of the three victims or the independent investigation by the detective, or both, revealed that Rose lived at 709 Elberon Ave." *Id.* Petitioner has not explained how additional

investigation by counsel would have altered the conclusion that it was reasonable to rely on the testimony that crimes occurred in the defendant's home, or the detective's independent investigation which revealed that the defendant lived at the residence to be searched. The Sixth Circuit stated that there was "overwhelming evidence linking Rose and his residence to a crime and to the evidence sought in the search warrant." *Id.* Therefore, counsel was not ineffective for failing to conduct additional investigation.

Petitioner also argues that counsel should have presented other law which would have countered the Sixth Circuit's conclusion that the officer exercised good faith and acted in objectively reasonable reliance on the warrant's legality. Petitioner cites two cases, both which are readily distinguishable.

Petitioner first cites *United States v. Bautista*, No. 5:11-CR-42, 2012 WL 1014995 (W.D. Ky. Mar. 22, 2012). The search warrant affidavit in *Bautista* merely listed the address of the premises to be searched and included allegations from an informant that he had regularly purchased methamphetamine from the defendant at his home. *Id.* at *3. The court explained that there was no evidence linking the criminal activity to the address in the affidavit, and did not state that the defendant lived at that address. *Id.* Therefore, the court concluded that the good faith exception did not apply. *Id.*

Petitioner also cites *United States v. Rice*, 704 F. Supp. 2d 667 (E.D. Ky. 2010). The district court in *Rice* concluded that the officer's reliance on the affidavit was unreasonable because there was no evidence of why the residence to be searched was relevant. *Id.* at 670. The court explained that an officer "would have to first infer that the address was the defendant's and then infer that a person involved in illegal elk hunting would keep evidence in his home." *Id.*

However, in this case, as explained above, the Sixth Circuit found that the evidence linking Petitioner and his residence, and linking his residence to a crime, was "overwhelming." The issue of the good faith exception was raised, considered and finally decided by the Sixth Circuit on direct appeal. Petitioner cannot reargue it here under the guise of an ineffective assistance of counsel claim.

In his fifth ground for relief, Petitioner argues that appellate counsel was ineffective for failing to seek *en banc* review as part of his direct appeal after the Sixth Circuit erroneously held that *United States v. Watson*, 498 F.3d 429, 431 (6th Cir. 2007) does not require a search warrant or search warrant affidavit to include an address. The Sixth Circuit relied on *Watson* as follows:

> If an affidavit lacks probable cause, "[t]he Supreme Court has recognized an exception to the exclusionary rule where 'the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate....' " *United States v. Watson*, 498 F.3d 429, 431 (6th Cir. 2007) (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984)). This is known as the good-faith exception. *Id.*

714 F.3d 367.

In *Watson*, the warrant described the residence "in painstaking detail—listing, among other things, (1) its location; (2) its general size, shape, and orientation; and (3) the color of its exterior walls and trim, roof, shutters, garage door, and even mailbox." *Watson*, 498 F.3d at 432. The warrant also incorporated other documents: maps of the area, a tax-assessment printout, and photographs of the residence. *Id.* at 433. However, the warrant entirely omitted the address. *Id.* Despite this omission, the Sixth Circuit concluded that based on the warrant, the officers reasonably believed that they had authority to search the residence. *Id.* Therefore, any argument by appellate

counsel that under *Watson*, the good-faith exception does not apply when the warrant does not include an address would have been without merit.[1]

A defendant is entitled to effective assistance of counsel during his first appeal of right. *Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008) (citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). Claims of ineffective assistance of appellate counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017). Appellate counsel's performance is neither deficient nor prejudicial where counsel fails to present a legal argument which would have been futile. *See Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000); *see also United States v. Hanley*, 906 F.2d 1116, 1121 (6th Cir. 1990) ("We reject Hanley's first allegation of ineffective assistance of counsel because Hanley's counsel may have wisely decided not to pursue suppression motions that would have likely been futile in view of the government's access to co-defendants' statements following their guilty pleas."). Therefore, Petitioner's appellate counsel was not ineffective for failing to raise the argument that the Sixth Circuit misapplied *Watson*.

Petitioner also maintains that appellate counsel was ineffective for failing to raise the significance of the evidence which he has presented in these Section 2255 proceedings. Petitioner has been permitted to present his affidavit dated June 13, 2015

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[1]The Court notes that the search warrant affidavit in this case did include and address and described the place to be searched as follows:

> The building does not have the street address: however I have included a printout from the Hamilton County Auditors identifying the building as 709 Elberon Avenue. To the right of the front door are four doorbells. Over the doorbell assigned to apartment number one is the name "Rose", the last name of the suspect.

(Doc. 44-1).

(Doc. 141-1); and his affidavit dated March 22, 2018, which consists of an annotated copy of the search warrant affidavit (Doc. 184-1).[2] The Court notes that the information in these affidavits consists of information which was a part of the record in this case, along with legal arguments made by Petitioner.[3]

The failure of appellate counsel "to raise an issue on appeal is ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir.2005) (citing *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2001)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Petitioner has not explained in any detail how the information in his affidavits would have changed the result of the appeal. Moreover, the Supreme Court has held that appointed counsel has no obligation "to raise every 'colorable' claim suggested by a client" and judges should not "second-guess reasonable professional judgments." *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Finally, Petitioner claims that appellate counsel was ineffective for failing to identify and raise issues of ineffective assistance of trial counsel. However, the Supreme Court has held that that "failure to raise an ineffective-assistance-of-counsel claim on direct

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[2]These annotations are made by Petitioner and explain which parts of the affidavit he believes are false. Petitioner also identifies facts which he believes have been omitted and sets forth legal arguments which Petitioner believes are relevant to that part of the affidavit.

[3]However, some of the information and the arguments made by Petitioner are related to his state court proceedings.

appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509, 123 S. Ct. 1690, 1696, 155 L. Ed. 2d 714 (2003). Therefore, Petitioner's appellate counsel was not ineffective for failing to raise ineffective assistance of trial counsel as part of Petitioner's direct appeal.

III. CONCLUSION

Pursuant to 28 U.S.C. § 2255(b), the Court determines that the instant motion and the files and records of this case, in conjunction with review of the files and record, conclusively show that Petitioner is not entitled to relief. Therefore, a hearing is not necessary to determine the issues and make the findings of fact and conclusions of law with respect thereto. *Accord Smith v. United States*, 348 F.3d 545, 550-51 (6th Cir. 2003). The claims raised are conclusively contradicted by the record and the law of the Sixth Circuit and the United States Supreme Court. Based on the foregoing, it is hereby **ORDERED** that:

1. Petitioner's Motion to Expand the Record (Doc. 184) is **GRANTED**;
2. Petitioner's Motion to Expand the Record (Doc. 186) is **DENIED**;
3. Petitioner's Motion to Take Judicial Notice. (Doc. 187) is **DENIED**;
4. Petitioner's Motion to Alter or Amend Judgment (Doc. 188) is **DENIED**;
5. Petitioner's Superceding Motion to Alter Judgment (Doc. 189) is **DENIED**;
6. Petitioner's Motion to Vacate under 28 U.S.C. § 2255 (Doc. 125) and Amended Motion to Vacate under 28 U.S.C. § 2255 (Doc. 190) are **DENIED**; and
7. Petitioner's habeas proceedings, 1:14-cv-00809-MRB, is **CLOSED** and **TERMINATED** from the active docket of this Court.

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett
United States District Judge

May 15, 2018

Supreme Court of the United States
Attn: Case Analyst
Washington, D.C. 20543-0001

RE: Sixth Circuit Mandate Recall (11-4313) Interference by Sixth Circuit Clerk

My submissions to the Sixth Circuit to remedy the plain and reversible errors of fact and law underlying the mandates contrary position to Supreme Court precedent have been kept (but not filed) without even the return of a notification of such. The Clerk has recently informed me: "this case remains and will remain closed. Your submissions have been noted on the docket but there will be no further action." (enc.)

I attempted to address the unanswered questions the court posed in its 12/22/16 order, and even motioned for extension of time. The clerk returned that 1/10/17 motion and the the 4/6/17 affidavit and motion for counsel, with an inference that an active (supplemental) motion to recall mandate would have to be filed before appointment of counsel could be considered. When I refilled a new motion to recall mandate on 7/6/17 I reasonably believed it was pending before the court as it had not been returned nor was any letter sent by the clerk. Not until May, 2018 did I receive written notice that all of my submissions since 7/6/17 will never be acted on by the court.

The mandate denudes the protections of the 4th Amendment, and contravenes Supreme Court precedents which forbid a good-faith exemption where the affidavit was 'so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable." Mills, 389 F.3d 568, 577-578 (6th Cir. 2004) citing Malley, 475 U.S. 335. The instant case actually netted less probable cause than Mills or Cline, 745 F.Supp. 2D 773, 807 if the Sixth Circuit had been informed the instant affidavit at issue stated an entirely different street address which objectively a reasonably well-trained police officer in his position would have known that the Affidavits in support "failed to establish probable cause and that he should not have applied for the warrant." Fry v. Robinson, 2018 U.S. Dist. LEXIS 34105 (same Ohio District Court) citing Malley, 475 U.S. at 345 integrating applicability to Rose, 714 F.3d 362 at *11

[*11] An officer applying for a warrant, however, still must "exercis[e] reasonable professional judgment" so as to "minimize" the "danger of an unlawful arrest." Malley, 475 U.S. at 345-46. Review of whether a warrant was supported by sufficient indicia of probable cause is limited to "the four corners of the affidavit." United States v. Rose, 714 F.3d 362, 367 (6th Cir. 2013)...The deliberate or reckless omission of facts that are material to a probable cause determination is unconstitutional. Wesley v. Campbell, 779 F.3d 421, 428-29 (6th Cir. 2015), Sykes v. Anderson, 625 F.3d 294, 305 (6th Cir. 2010)

[*14] ...a reasonably well-trained police officer in his position would have known that the Affidavits in support "failed to establish probable and that he should not have applied for the warrant." Malley, 475 U.S. at 345

I do not know how to proceed (Mandamus, Extraordinary Writ, etc.) and my Federal Public Defender severed any futher assistance, can you please help me?

Pursuant to 28 U.S.C. 1746, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 5-15-18

Kenneth Rose

Kenneth Rose, 655-843
Warren Correctional Institution
5787 State Route 63
Lebanon, OH

App J

**CONFLICTING U.S. SUPREME COURT AND SIXTH CIRCUIT DECISIONS BEING CONTRAVENED BY 6TH CIRCUIT MANDATE 11-4313

Malley v. Briggs, 475 U.S. 335, 344-45 (1986) applied to similarly situated defendant in 6th Circuit case:

Mills v. City of Barbourville, 389 F.3d 568, 575-578, 2004 U.S. App. LEXIS 23753. at 14 and 21 (6th Cir. 2004)

(at 14) "We reverse and remand because the affidavit (**14) supporting the search warrant for plaintiff's home was not supported by probable cause and a reasonable officer...should have known that there was not probable cause to conduct the search."

(at 21) "The proper inquiry, therefore, is whether a reasonable competent investigator (**21)...could have believed that probable cause existed to search (address in affidavit, in the instant case "1000 Mian Street"). Because the officers presented absolutely no information in the affidavit presented to the magistrate indicating that the place to be searched was connected to (suspect), either through a sworn statement the (victim) had identified the residence as the place of the (crime - in the instant case: alleged forced rape, ORC 2907.02) or through independent investigation corroborating that it was the home of (suspect), the affidavit was "so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable".

Note: The analysis of the good-faith exception in the qualified immunity context similarly applies to the suppression context presented here. See Malley v. Briggs, 475 U.S. 335, 344 (1986)("(W)e hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon...defines the qualified immunity accorded an officer whose request for a warrant allegedly caused caused an unconstitutional arrest.)

Groh v. Ramirez, 540 U.S. at 565 n.9 (2004) applies: ("(T)he Fourth Amendment's particularity requirement assures the subject of the search that a magistrate has duly authorized the officer to conduct a search of limited scope. This substantive right is not protected when the officerfails to take the time to glance at the authorizing document and detect a glaring defect...of Constitutional magnitute."); see also id at 562 ('It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and conducted."); George, 975 F.2d at 77 ("Reasonable reliance does not allow an officer to conduct a search with complete disregard of the warrant's validity because the 'standard of reasonableness...is an objective one...(one that) requires officers to have a reasonable knowledge of what the law prohibits." (quoting Leon, 468 U.S. at 919 n.20))

Groh applies through Hodson, 543 F.3d at 293 as quouted in similarly situated defendant in Cline (6th Cir.):

Cline v. City of Mansfield, 745 F. Supp. 2d 773, affirmed 2012 Fed App. 913N (6th Cir. 2012) at 807:

(at 807) In short, there is little question that the affidavit in this case was 'so lacking in probable cause as to render official belief in its existence entirely unreasonable." McPhearson, 469 F.3d at 522 (citation omitted); see also Hodson, 543 F.3d at 293 ("(A) reasonably well trained officer in the field, upon looking at this warrant, would have realized that the search described...did not match the probable cause described...") ...In this case, by contrast, (**74) it is clear that any reasonable officer who: (a) read the affidavit, and (b) happened to discover that it referred exclusively to (("1000 Mian Street - adapted to the instant case)) would know that the affidavit did not reflect probable cause to search (("709 Elberon Av." - adapted to the instant case)). Cline at 807 - 808

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH ROSE,

Movant

v.

UNITED STATES OF AMERICA

Case No: 1:09-cr-047
1:14-cv-809

MOVANT'S AMENDED 2255 MOTION

Movant, Kenneth Rose, hereby respectfully requests to submit this attached amended 2255 Motion, incorporating by reference prior 2255 motions.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. 2255 was submitted for ECF filing on 4-12-18. Executed on 4-12-18.

The movant asks the Court grant the following relief: Vacate and set aside the judgement, discharge Defendant, grant Defendant a new trial, resentence Defendant, correct the Defendant's sentence, grant an evidentiary hearing, or any other favorable relief Movant/Defendant may be afforded.

Respectfully submitted,

Kenneth Rose

Kenneth Rose, 655-843
Warren Correctional Institution
P.O. Box 120
Lebanon, OH 45036

CERTIFICATE OF SERVICE

I hereby certify that this document and attachments were submitted for ECF filing on 4-12-18, which should forward copies to parties of record.

Kenneth Rose

Kenneth Rose, 655-843
Warren Correctional Institution
P.O. Box 120
Lebanon, OH 45036

APx K

AMENDED 2255 - HEREBY INCORPORATING BY REFERENCE PRIOR 2255 MOTIONS

I. BACKGROUND (ADDRESSING PRIOR ANSWERS) - CONVICTION VOID: UNCONSTITUTIONAL (1ST/4TH AMEND.) SEARCH WARRANT

Movant, Kenneth Rose, has outlined meritorious arguments (Doc. 125, 129, 130, and 149 - all hearby incorporated by reference), in addition to the related arguments contained herein, despite the Respondent's prior opposing position to the contrary. The evidence was obtained in violation of clearly established law. The detective drafted a 'general' search warrant violating the Movant's 1st and 4th Amendment protections. The author of the search warrant clearly fashioned his affidavit for search in an intentionally vague manner to manipulate the inferences he wanted the magistrate to draw in violation of United States v. Gaines, 2013 U.S. Dist. LEXIS 143853, at 5 (By reporting less that the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning). The affiant effectively intended this inference:

> 'Evidence is believed to have been retained (no substantial basis offered) on a computer (desktop/ laptop?) in suspect's room/bedroom (parent's home, friends home, suspect's home?) that would prove M1's (V1's) allegation that he was forced to have sex against his will "starting" in July, 2008 (presumably continuing up to the time of warrant application?) and since M1 claimed to also observe suspect engage in sex with M2 and M3 (Third parties, not alleging forced sex) and M2 & M3 claimed to self-masturbate to undescribed pornography (ubiquitous adult internet porn/inherently illegal?) sometime between July, 2008 and November, 2008 (non-particular), any pornography found (presumably between July, 2008 to time of warrant execution, as any other scope would be prohibitively overbroad) would inherently prove M1's forced sex allegation (notwithstanding, of course, lack of 4-corner acknowledgment that M2 and/or M3 corroborated M1's presence with them, or 4-corner implication by M1 of pornography involvment isn't averred) in some way the affiant will justify later should plain view contraband be found in process.'

The search warrant was void ab initio. The search warrant affidavit was overbroad, non-particular, lacked a 'substantial basis' to connect address-actually-searched (709 Elberon Ave) to suspect, location of forced sex, or location of a computer in room somewhere, and lacked any semblance of probable cause as it (the 4-corners of the affidavit) explicitly listed "1000 Mian Street" as the location of evidence of forced rape under O.R.C. 2907.02. This search cannot be made legal by what it turns up, contravening United States Supreme Court precedent, namely: Byars 273 U.S. 30. Even before 'proper' Franks violations are demonstrated (Doc. 187, Pgs. 3-5), clearly establish federal law prohibited this kind of rummaging for ubiquitous adult pornography, namely: Zimmerman, 277 F.3d 426. The prosecution has 'used in an evidentiary manner' illegally seized and unlawfully resurrected data otherwise destroyed absent the warrant issued contrary to clearly established law, and/or the affidavits explicit restriction that "only the contents authorized to be seized by this warrant will be printed, disclosed, or otherwise used in an evidentiary manner." (Doc. 44, PAGEID: 87), from a laptop computer that hadn't been powered for at least 2 years prior (2+ years pre-dating scope) and was located in an entirely different 'room'. Absent prosecutorial misconduct and/or ineffective assistance of trial and/or appellate counsel, the present 'subjective' good-faith finding would not be contravening controlling United States Supreme Court precedent mandating an 'objective' good-faith finding, namely: Malley, 475 U.S. 335, 344-355 (1986) and Groh, 540 U.S. at 565 n.9 (2004), see Mills and Cline (6th Cir.) respectively (Mills, 2004 U.S. App. LEXIS 23753 at **14 and **21, and Cline, 745 F.Supp. 2d 773, at 807, affirmed 2012 Fed App. 913N (6th Cir. 2012)) See also sections II through IV and record expansions.

II. DISPUTED FACTS IN PROSECUTION'S FACTUAL BACKGROUND (Doc. 134, PAGEID: 692) - REQUIRING HEARING

The prosecution has continued to engage in prosecutorial misconduct by committing fraud upon the trial and appellate courts by not correcting critical facts such as: "Contained among those images were pornographic photos of the three...previously referenced", erroneously inferring that the warrant yielded a depiction of M1 (V1 - the only minor averred in the warrant's affidavit to have alleged forced sex under 2907.02) as if that would vindicate the warrant as the probable cause finding was reversed in the Sixth Circuit. Erroneous facts continue at: "Other images depicted all the aforementioned minor males...", again the prosecution erroneously intended any reviewing court to believe a depiction of M1 (V1) was yielded by a warrant that lacked probable cause. The graphic descriptions used by the prosecution are clearly intended to taint the impartial application of clearly established federal law, namely: "Nor is it material that the search was successful in revealing evidence of a violation of a federal statue. A search prosecuted in violation of the Constitution is not made legal by what it brings to light...", Byars v. United States, 273 U.S. 28, 1927 U.S. LEXIS 679, at HN2 and HN3, and "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success", United States v. Di Re, 332 U.S. 581, 1948 U.S. LEXIS 2667, at HN7. The Sixth Circuit cited to the Byars principle in: United States v. Freeman, 209 F.3d 464, 2000 U.S. App. LEXIS 4512, **7-**8, "Indeed, as the Supreme Court opined long ago, an illegal search cannot be justified be the potent evidence that it produces." Even if the warrant's affidavit could have justified recovery of computer data from July, 2008 to November, 2008, there was no substantial basis within the affidavit's 4-corners to believe evidence of M1's (V1) allegations of forced sex would exist on a laptop computer that hadn't been powered since 2006, nor was any search warrant explicitly ever seeking evidence depicting minors, see pg. 1, and Doc. 187. The warrant was clearly overbroad (General Warrant) if interpreted to allow scouring of data predating July, 2008, and absent any substantial basis in the 4-corners of the affidavit to infer anything about a laptop in a living room closet inoperable and not powered for years, it must be suppressed. The prosecution's attempts to 'inflame-the-passions' of condemnation of the Defendant - at the expense of objectively unbiased fair adjudication by the trial and appellate courts, should be stricken and admonished. The search warrant's good-faith exception would have been reversed, and the evidence suppressed, absent the the prosecutorial misconduct demonstrated herein and incorporated by reference, therefore the conviction should be vacated and the case dismissed. To the extent the prosecution effectively blames ineffective assistance of trial and/or appellate counsel for the good-faith exception being granted in 11-4313, the trial court should vacate the conviction and dismiss the case, or in the alternative, hold evidentiary hearings, in the interests of justice, to more fully and fairly adjudicate the claims. In any case, it is clear that the facts contained within the 2255 motions affirmatively show facts supporting the contention that the Movant was denied a full and fair opportunity to litigate the claims demonstrated herein, and those hereby incorporated by reference, at the trial level and on appeal, and demonstrate a fundamental defect in the proceedings that inherently results in a complete miscarriage of justice as the extraordinary circumstances demonstrate errors so egregious they amount to a violation of Due Process.

Movant will stipulate to the following 'Factual Background':

Movant/Defendant was brought to the attention of Ms. Christy L. Muncy, Assistant United States Attorney, in 2009, due to the results of computers seized from 709 Elberon Avenue stemming from a search warrant affidavit that explicitly requested permission to search only "1000 Mian Street" The State offered to 'close its case' and not indict defendant on the results of the seizures in exchange for a plea of guilty. The State trial judge was aware of the results of the seizures when he proposed a sentence of 5 years for each minor explicitly named in the search warrant affidavit. When it became apparent that the State wanted to add a charge involving a fourth minor related to the results of the seizures, there was an agreement that the sentence would not increase from that count that stemmed from an 'information' rather than grand jury indictment. However, the court became aware that Ms. Muncy was anticipating a Federal Sentence of 30 years when Defendant would be sentenced in Federal Court, so the State trial judge imposed an additional 5 year sentence for the fourth minor, despite the prior agreement. The search warrant sought evidence proving M1 (V1 – the minor who initiated a complaint alleging the defendant forced him to engage in sex against his will) was forcefully raped under 2907.02. On 11/20/08 M1 effectively refuted the forced sex claim in the Grand Jury proceedings when evidence was presented that M1 voluntarily returned in August, 2008, to Defendant's place (unspecified) to engage in sex – although this information was intentionally omitted from December, 2008 search warrant affidavits. Although the scope of the warrant sought evidence from July, 2008 to November, 2008 because the affidavit erroneously implied sex was recurring up to the time of the warrant's application, data was resurrected from the deleted file structure of an inoperable laptop computer found in a living room closet at 709 Elberon Ave, that hadn't been powered since at least 2 years prior (2006), therefore outside the scope of the warrant. Ms. Muncy expressed her willingness to accept a completely concurrent sentence with the State (that didn't exceed the State sentence) in plea offers. Although the results of the seizures did not depict M1 or prove his initial allegation of forced sex, Defendant was ultimately sentenced to 612 months of imprisonment (R. 106, Judgment).

To the extent that the prosecution disputes this proposed 'Factual Background' an evidentiary hearing should be granted to fairly adjudicate the facts in dispute.

III. STANDARD OF REVIEW CONTENTIONS (also addressing Prosecution's Answers, namely: Doc. 134)

The contentions raised in the 2255 motions demonstrate extraordinary circumstances exist. The contentions raised in the 2255 motions demonstrate fundamental defects in the proceedings that inherently resulted in a complete miscarriage of justice, and the errors were so egregious that they amounted to a violation of due process. The errors are of constitutional magnitude and had a substantial and injurious effect on the proceedings. Additional prima facie evidence hereby incorporated by reference (Movant's motions to expand record) demonstrates this also.

In regards to the plea, a plea is not knowingly and intelligently made when no clarification is made on the record that in the instant case a consecutive sentence would only be possible if the Sentencing Guidelines reflect an applicable sentencing range up to 'life', otherwise the court would be prohibited from sentencing in any consecutive manner. It would then seem appropriate that Defendant was asked if he conferred with defense counsel to determine if the Sentencing Guidelines appeared to subject the Defendant to a sentencing range that included the word 'life' which would enable the Court to sentence in a consecutive manner. Defendant would then have had the opportunity to address, on the record, that defense counsel indicated to Defendant that his review of the Sentencing Guidelines did not subject the Defendant to a sentencing range including the word 'life'. At which time the Court may have suggested to defense counsel the parties might stipulate the applicability of certain sentencing range enhancers before proceeding with the plea. Ternullo, 510 F.2d 844, 847 (2d. Cir.)

To the extent that the Court interprets knowingly and intelligently made pleas do not require the Defendant to be informed of the impact on a sentence becoming eligible for consecutive terms when the Sentencing Guidelines reflect a sentencing range including the word 'life', then trial counsel was ineffective for not properly informing Defendant that the Sentencing Guidelines could, in the instant case, recommend a sentencing range which included the word 'life' (thus enabling consecutive sentencing) to which the Defendant based his acceptance of the plea on counsel's assurance that the Guidelines Sentencing range would not include the word 'life'. Obviously, that conversation with counsel took place off the record and is properly before the court in 2255 proceedings which will require an evidentiary hearing to place it on the record, as well as the fact that Defendant would have considered the prosecutor's alternate plea offer to fewer counts where the Prosecutor demonstrated her agreeability to a 30 year, fully concurrent with the State, sentence, and her willingness to negotiate an agreeable plea between parties rather than proceed to trial, demonstrates a willingness to have considered stipulating against the use of certain Guidelines sentence enhancements, or in the absence of stipulations an alteration to the plea with fewer counts so that Defendant retains right to appeal. Any contested facts are appropriately addressed in a 2255 evidentiary hearing. See also Huff v. United States, 734 F.3d 600, 607 (6th Cir.) in reviewing a 2255 motion in which a factual dispute arises, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.

III. STANDARD OF REVIEW – EXTRAORDINARY CIRCUMSTANCES EXIST

Issues raised and rejected on direct appeal are reviewable when extraordinary circumstances are demonstrated, as has been demonstrated herein, namely: Sections I, II, IV, expansions of record, and subsequent motions filed under Sixth Circuit case 11-4313 since the mandate issued (particularly had the arguments in those motions been presently within 10 days of issuance of the original opinion in 11-4313).

Fundamental defects in the proceedings inherently resulting in a complete miscarriage of justice, and/or egregious errors that amount to violations of Due Process have been demonstrated herein, namely: Sections I, II, IV, expansions of record, and subsequent arguments and motions filed under Sixth Circuit case 11-4313 since the mandate issued (particularly had the arguments in those motions been presented within 10 days of issuance of the original opinion in 11-4313, the failure of which was due to ineffective assistance of appellate counsel). In light of the arguments and analysis herein, and in sections I, II, IV, expansions of the record, and the 2255 motions filed to date, the record reflects errors of constitutional magnitude that had a substantial and injurious effect on the proceedings.

Had trial counsel properly developed the trial court record with the subsequent expansions to the record, the results of the suppression hearings would have clearly and plainly been favorable to granting suppression, particularly Docs. 141, 158, 161, 163, 165, 170, 171, etc. and appellate counsel's failure to raise their prima facie significance was demonstrative of ineffective assistance of appellate counsel.

IV. MOVANT'S CLAIMS ARE MERITORIOUS AND SHOULD BE GRANTED RELIEF

Extraordinary circumstances exist as previously demonstrated herein in sections I through III.

An appellate advocate may deliver deficient performance and prejudice a defendant by omitting a "dead-bang winner", even though counsel may have presented strong but unsuccessful claims on appeal. Page v. United States, 884 F.2d 300, 302 (7th Cir. 1989). Although courts have not defined the term "dead-bang winner", it can be concluded it is an issue which was obvious from the trial record, see, e.g. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987)(counsel's failure to raise issue which "was obvious on the record, and must have leaped out upon even a casual reading of (the) transcript" was deficient performance), and one which would have resulted in a reversal on appeal. By omitting an issue under these circumstances, counsel's performance is objectively unreasonable because the omitted issue is obvious from the trial record. Additionally, the omission prejudices the defendant because had counsel raised the issue, the defendant would have obtained a reversal on appeal. See also Brown v. United States, 167 F.3d 109, 111 (2d Cir. 1999) and Cook, 45 F.3d 388

Appellate counsel omitted the following 'dead-bang-winners' individually, and certainly under a cumulative prejudicial effect analysis: (Similarly situated habeas defendant's granted relief):

a) United States v. Booze, 293 F.3d 516, 520 (D.C. 2002) Trial counsel was ineffective when he incorrectly estimated likely sentence due to ignorance of applicable law See III.

b) United States v. Soto-Lopez, 475 Fed.Appx. 144, 147 (9th Cir. 2012) Case remanded for evidentiary hearing to determine whether counsel was ineffective in the negotiation of a favorable plea offer. See III.

c) Lenover v. United States, 363 Fed.Appx.400, 401 (7th Cir. 2010) Case remanded for evidentiary hearing on the issue of ineffective assistance of counsel during plea negotiations - See III.

d) Kerr v. Thurman, 639 F.3d 315, 331 (7th Cir. 2010) Case remanded for evidentiary hearing on petitioners plea bargain theory See III.

e) Julian v. Barley, 495 F.3d 487, 496-97 (7th Cir. 2007) Trial counsel was ineffective during plea negotiations by misinterpreting maximum sentence defendant could receive

f) United States ex. rel. Hill v. Ternullo, 510 F.2d 844, 847 (2d. Cir. 1975) Erroneous legal advice about an "ultimately knowable" sentence enhancement may constitute ineffective assistance of counsel See III.

g) Moss v. United States, 323 F.3d 445, 474 (6th Cir. 2003) Failure of defense counsel to provide professional guidance to a defendant regarding his sentence exposure prior to plea may constitute deficient performance. See III.

h) Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984) A defendant who did not receive reasonable effective assistance of counsel in deciding to plead guilty cannot be bound by his plea because a plea is valid only if made intelligently and voluntarily See III.

i) McPhearson v. United States, 675 F.3d 553, 563 (6th Cir. 2012) Failure to raise a viable argument See I, II, III, IV, Motions for reconsideration and relief from judgment, motions to expand the record, Motion to take judicial notice

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH ROSE,

Movant

v.

UNITED STATES OF AMERICA

Case No: 1:09-cr-047
1:14-cv-809

MOVANT'S MOTION TO EXPAND THE RECORD

Movant, Kenneth Rose, hereby respectfully requests to expand the record to include the attached affidavit and facts, per Rule 7 or other rules to clarify the relevant facts and substantiate the claims outlined in the 2255 Motions and supporting documents, and pending 2255 revisions.

The proffered materials deal primarily with the basis of ineffective assistance of counsel, and ineffective assistance of appellant counsel claims outlined in the 2255 Motions and supporting documents and pending 2255 revisions.

Respectfully submitted,

Kenneth Rose

Kenneth Rose
655-843
Warren Correctional Institution
P.O. Box 120
Lebanon, OH 45036

CERTIFICATE OF SERVICE

I hereby certify that this document and attachments were submitted for ECF filing on 3-22-18, which should forward copies to parties of record.

Kenneth Rose

Kenneth Rose

APx L

AFFIDAVIT/SWORN STATEMENT OF Movant, Kenneth Rose, 655-843

Incorporating the search warrant affidavit/application at issue, the following is: (an annotated/supplemented) Affidavit of Movant, Kenneth Rose, demonstrating the required Franks-hearing-substantial-preliminary-showing that information critical to the finding of probable cause was excluded with the intention to mislead as prohibited by Mays v. City of Dayton, 134 F.3d 809, 816 (6th Cir.). Officers violate clearly established law when they make material omissions that are "deliberate...or show...reckless disregard for the truth." Wesley v. Campbell, 779 F.3d 421, 428-29 (6th Cir.)(quoting Gregory v. City of Louisville, 444 F.3d 725, 758 (6th Cir.)

*FF: indicates False Fact
*OF: indicates Material Omitted Fact
*M1: is the complainant, Minor 1, alleging forced rape
*M2: is a third party, Minor 2, mentioned by M1, M2 not alleging forcible rape nor any sex after May
*M3: is a third party, Minor 3, mentioned by M1, M3 not alleging forcible rape nor any sex after May

STATE OF OHIO
SS.
HAMILTON COUNTY

AFFIDAVIT FOR SEARCH WARRANT

Police Officer Chris Schroder, being first duly cautioned and sworn, deposes and says that there are items within the jurisdiction of the Hamilton County Court of Common Pleas at: **1000 Mian Street Cincinnati, HAMILTON COUNTY, OHIO. 45202** *FF1

*FF1 Mian street is a fictitious street name and to the extent it may be read as "Main" it is still a false fact in that M1 (complaintant) never alleged the forcible rape occurred there, M2 never stated "his room" was on Main, and M3 never stated "his bedroom" was on Main.

and that based upon the attached affidavit and the investigation I have conducted, I have probable cause to believe that evidence of criminal activity will be found at the above listed places and the following items contained therein are requested to be searched and/or seized *FF2 *OF1

*FF2 the "above listed places" could not possibly contain evidence of forcible rape (see FF1)

*OF1 "the investigation I have conducted" infers Affiant would have informed magistrate that BMV records indicated suspect has maintained residency at 368 Elberon Avenue for over 20 years, save M3's "Price Ave" implication, and this information would be shared with the magistrate within the 4-corners of the affidavit to allow the magistrate independently to determine temporal likelihood presently that relevant evidence is located at the explicitly cited street address "1000 Mian Street", notwithstanding the fact that had "368" been mentioned within the 4-corners it would still not be a "substantial basis" to find probable cause to search the address only appearing on the warrant's face: "709 Elberon Avenue apartment one"

1) Computers-defined as central processing units, computer motherboards, hard drives, floppy drives, removable and re-write able media, tape and digital drives, internal and external storage devices, video display units or receiving devices, scanners, printers, modems, any and all connecting cables and devices, input devices such as "web cams" video cameras, audio recording devices, disc's both audio, video and digital, any memory devices such as smart media, memory sticks, or any other form of memory or device utilized by the computer or it's devices. Any computer software, programs and source documentation, computer logs. (This description constitutes the definition of a computer system as that term may be used throughout this document.) And all computer related accessories not specifically mentioned herein, all equipment having been used in violation of 2907.02, Ohio Revised Code.

2) Any documentation and/or notations referring to the computer, the contents of the computer, the use of the computer or any computer software and/or communications. All information within the above listed items including but not limited to machine readable data, all previously erased data, and any personal communications including but not limited to e-mail, chat capture, capture files, correspondence stored in electronic form, and/or correspondence exchanged in electronic form as indicative of use in obtaining, maintenance, and/or evidence of said offense.

3) Any financial records, or receipts kept as a part of and/or indicative of the obtaining, maintenance, and/or evidence of said offense; financial and licensing information with respect to the computer software and hardware.

4) All of the above records, whether stored on paper, on magnetic media such as tape, cassette, cartridge, disk, diskette or on memory storage devices such as optical disks, programmable instruments such as telephones, "electronic address books", personal digital assistants, smart media, memory cards, memory sticks, calculators, or any

other storage media, together with indicia of use, ownership, possession, or control of such records.

And that said items are concealed in violation of law, to wit: 2907.02, Ohio Revised Code. *FF3

Such belief is supported by the following facts and probable cause. The Affiant is a Detective assigned to the Personal Crimes Unit which specializes in sexually related investigations involving minors. The Affiant has training and experience in investigations involving the pandering of sexually oriented matter involving minors. The Affiant received a report from P.O. Day (District Three / P880) reporting that Kenneth Rose (white, male, 12/30/71) was engaged in sexual conduct with several minors. The *FF4 Affiant began an investigation into the same.

On 11/04/08 Cecilia Freihofer (Mayerson Center) interviewed *M1 white, male, 95). *M1 disclosed that starting in July 2008 Mr. Rose forced him to engage in *FF5 sexual conduct against his will. *M1 also observed Mr. Rose and *M2 (white, male, '94), and *M3 (white, male, 94) engaged in sexual conduct with Mr. Rose. *OF2, *OF3, *OF4, *OF5

On 11/10/08 the Affiant interviewed *M2 *M2 confirmed that he and *M3 both had a sexual relationship with Mr. Rose. The sexual relationship *OF6 involved masturbation, oral, and anal sex. Mr. Rose would show the victim's (*M2/*M3) pornographic images on his computer located in his room and would watch the victim's and would masturbate himself and the victim's masturbated

On 11/11/05 the Affiant interviewed *M3 *M3 confirmed that he and Mr. *M2 both had a sexual relationship with Mr. Rose. *M3 also confirmed the *OF7 relationship included masturbation, oral, and anal sex. also confirmed that Mr. Rose showed him pornographic movies on his computer which is located in his bedroom. *OF8 *OF9

I am requesting to remove from the premises, any and all computers and computer related media for an examination to be conducted at the Hamilton County Sheriff's Office Computer Forensic Laboratory based on the following:

1. In order to protect the effervescent nature and the originality of the data the examination should be conducted in a controlled environment specifically designed for data recovery utilizing available methods and equipment.

2. Computer Data is stored in a variety of manners and methods depending on software applications as well as operating systems in use by the subject. Data storage on a computer can be voluminous in nature and a complete and thorough search often requires days and even weeks.

ROSE_045

*FF3 "items are concealed in violation of law" is false, evidence that ubiquitous non-contraband adult porn had been accessed within the warrant's range/scope (July, 2008 to November, 2008) could not be evidence sex acts resulted from porn viewing as it is just as likely any porn was viewed alone by suspect, notwithstanding the fact M1 never implicated porn

[redacted]

*FF4 "several minors" is false, P.O. Day's report stated a minor (M1) alleged sexual conduct (see quiet correction in equipment search affidavit PAGEID¢119)

*FF5 "starting" in July is false, M1 alleged forced sex in July, notwithstanding the 11/20/18 grand jury testimony that non-forced sex acts ended in August, 2008, Affiant intended to mislead magistrate to believe sex acts were ongoing to time of warrant

*OF2 Both M2 and M3 denied misconduct to first Mayerson interviewer, Affiant persisted, Magistrate would have liked to be presented with all the facts

*OF3 Neither M2 nor M3 placed M1 with them and suspect

*OF4 Both M2 and M3 denied any sex acts occurred within warrant's scope (July, 2008 to November, 2008)

*OF5 M1 never implicated pornography in accusation, Affiant merely "bootstraped" M2 and M3 statements that they self-masterbated to porn in order to mislead magistrate that M2/M3 observations were M1's observations— to obtain a warrant to rummage for contraband as prohibited by Zimmerman 277 F.3d 426, notwithstanding lack of address/where M1's claims purportedly observed or where forced sex occurred

*OF6 "had a sexual relationship"...that ended May, 2008

*OF7 "had a sexual relationship"...that ended Dec., 2007

*OF8 M3 stated "his bedroom" was on "Price Ave"

*OF9 M3 claimed website "redtube" (ubiquitous adult porn) therefore no probable cause to believe retained, nor relevant evidence per Zimmerman 277 F.3d 426, and Hodson, 543 F.3d 286, although mentioning "redtube" may necessarily limit Affiant's intended rummaging

3. Computers can be "rigged" to destroy evidence and eradicate the contents of the hard drive. Examination of the suspect computer within the controlled confines of the Computer Forensics' Laboratory significantly reduces the risk of losing data.

The storage medium, computer hard drive, removable media or other such storage devices containing records or evidence relating to the crime under investigation will be subject to analysis but only the contents authorized to be seized by this warrant will be printed, disclosed or otherwise used in an evidentiary manner. *FF6

In executing this warrant, I believe the interests of the Electronic Communication Privacy Act 18 U.S.C., the Ohio Revised Code Section 2933.51, and the Privacy Protection Act 42 U.S.C. 2000aa may be affected.

Therefore I ask the court order these items be held for not less than two business days prior to examination to permit possible aggrieved persons as yet unknown to file Challenges with this court based on Electronic Communications Privacy Act 18 U.S.C. 2703 or the Privacy Protection Act 42 U.S.C. 2000aa or 2933.51 et sequitur of the Ohio Revised Code. If there are no objections filed within this allotted period the examination of the material covered by this order shall proceed.

The analysis of the computer used by **Kenneth Rose** is expected to yield:

1. **Pornographic images.** *FF7, *OF10

As soon as reasonably possible, the seized items will be returned to the party from whom they were seized after the approval of the court.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a Search Warrant based on the aforementioned facts and circumstances and that the property be seized, or any part thereof and brought before any court and/or retained subject to order of said court.

Affiant further says there is not the urgent necessity that the search be conducted in the nighttime.

Sworn and subscribed before me and filed in this Court this 12 day of [illegible] 2008

Affiant

Judge Ham Co. Mun. Ct.

ROSE_046

*FF6 "evidence relating to the crime" (forced rape) "...will be subject to analysis" – this is <u>false</u> in that there is <u>no temporal</u> limitation, nor is there any particular distinguishing characteristic given to distinguish 1st Amendment protected (non-contraband alleged) porn which may have been viewed (presumably between July and November, 2008) solely by suspect and that which may allegedly have been observed by M2/M3 with suspect present, which, would still not be evidence of M1 alleged rape per *FF1 to *FF5 and *OF1 to *OF9

*FF7 "pornographic images" is overbroad and prohibited as it permits rummaging for <u>any</u> porn unbound by any temporal limitations whatsoever.

*OF10 "pornographic images." to the extent any reading could infer images 'observed' by M1, there is no substantial-basis within the 4-corners, and to the extent any reading could infer images 'observed' by M2 or M3, there is also no substantial-basis within the 4-corners to believe those observations led to any sex acts per *FF1 to *FF5 and *OF1 to *OF9

THESE FALSITIES AND MATERIAL OMISSIONS WERE KNOWN TO THE AFFIANT AT <u>THE</u> TIME OF APPLICATION FOR WARRANT save M1's partial recantation at the 11/20/08 Grand Jury hearing (see *FF5) although the fact that the Affiant never corrected the later equipment search warrant applications tends to prove intent in the Franks context also. The Affiant's own notes (Rose_001 to Rose_0xx) demonstrate the omissions were known at the time of the warrant's application

Pursuant to 28 U.S.C. 1746, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 3-22-18. Kenneth Rose C55-243