NO. 23-6203

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN VINCENT SMITH

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN VINCENT SMITH
Pro Se Inmate
Federal Corrections Inst.
FCI-Marianna
P.O. Box 7007
Marianna, FL 32447

QUESTIONS PRESENTED

1. Does the determination that a warrant is void ab initio, rendering the resultant search of the Petitioner's residence warrantless (and thus unreasonable pursuant to the Fourth Amendment), mandate suppression of evidence recovered in that search? (Question of First Impression)

2. Can good faith be granted to the officer who prepared the warrant application leading to an invalid warrant, as well as preparing the invalid warrant for signature, committing perjury in the process, resulting in a warrantless search? (Lower Court decision contrary to Supreme Court precedent)

3. Can the application for a warrant be used to validate a facially deficient warrant, found to be violative of the Fourth Amendment and void ab initio, in an effort to find good faith on the part of the officer who prepared and submitted the facially deficient warrant? (Lower Court decision contrary to Supreme Court precedent)

4. Does Stone v. Powell, 428 U.S.465, 49 L.Ed. 2d 227, 96 S.Ct. 3037 (1976) overturn the Supreme Court's decision in Kaufman v. United States, 394 U.S. 217, 22 L.Ed. 2d 227, 89 S.Ct. 1068 (1969), as it pertains to raising questions of Fourth Amendment violations in cases filed under 18 U.S.C. 2255? (Circuit conflict)

5. Can the claim of "public record" be used to excuse the failure of the Prosecution to provide Brady material, when the public record is unknown to the Defendant and contained in another Defendant's file in another Circuit?
(Question of First Impression)

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PETITION FOR CERTIORARI

Petitioner, Steven Vincent Smith, respectfully prays for a Writ of Certiorari to review the judgment of the District Court for the Northern District of Alabama in his Section 2255 Motion and, subsequently, the judgment of the Circuit Court of Appeals on the Petitioner's Petition for a Certificate of Appealability.

OPINIONS BELOW

The judgement of the District Court on the Petitioner's Section 2255 Motion was entered on June 10, 2022. A Petition for Certificate of Appealability was filed in the Eleventh Circuit Court of Appeals on July 22, 2022 .

Judge Stewart issued her order denying the Certificate of Appealability on August 1, 2023. A Motion for Reconsideration was filed by the Petitioner on August 17, 2023 and that Motion was denied on September 6, 2023.

JURISDICTION

On August 1, 2023, Judge Stwart of the Eleventh Circuit denied the Petitioner's Petition for Certificate of Apealability on grounds that the Petitioner "could not show that reasonable jurists would debate the denial of his §2255 motion."

On August 17, 2023 the Petitioner filed his Motion for Reconsideration citing Miller-El v. Cockrell, 123 S. Ct. 1029, 154

L.Ed. 2d 931, 931, 537 U.S. 332 (2003) and Johnson v. Dretke, 394 F.3d 332 (5th Cir. 2004), among others, which conflicted with the Court's Order of Denial.

On September 6, 2023 the Court denied the Petitioner's Motion for Reconsideration, changing the reason for denial to "no meritorious arguments."

This Court has jurisdiction to review the Eleventh Circuit's decision pursuant to 28 U.S.C. 1254, and do so de novo pursuant to Brecht v. Abrahamson, 113 S.Ct. 1710, 123 L.Ed. 2d 353, 507 U.S. 619, 642 (1993).

STATEMENT OF CASE

On or about February 20, 2015, Agent Douglas MacFarlane of the FBI sought a warrant in the Eastern District of Virginia (see Exh. 1), knowing, by his own admission in a later case involving that warrant (U.S. v. Matish, Cr. Dkt. 4:16-16, Eastern District of Virginia, Newport News Division), that the **intended search would occur outside of that district**, in violation of Federal Rules, the Federal Code, and, further, because the warrant application and warrant were not particularized to the location of the actual intended search, in violation of the U.S. Constitution.

By submitting the warrant application, **under penalty of perjury**, and listing the location of the search as a "server located at a government facility in the Eastern District of

Virginia," Agent MacFarlane did, in fact, knowingly commit perjury in the application and affidavit for the warrant.

Upon receiving the warrant signed by Magistrate Judge Teresa Buchanan (Exh. 2), which also listed the location of the authorized search as "the server located at a government facility in the Eastern District of Virginia," Agent MacFarlane proceeded to use the warrant as a general warrant of the ilk forbidden by the Constitution, to search worldwide for information on various personal and business computers, for use in his criminal investigation.

The information obtained was then used to procure warrants in the individual locations to further investigate various individuals and businesses targeted.

On March 16, 2016, the Petitioner was arrested by federal authorities as a result of one of these unconstitutional searches, and later pled guilty to one count of violating 18 U.S.C. 2252A, withe the caveat that he reserved "the right to contest in an appeal or post-conviction proceeding the following: (a) An adverse ruling on the motion to suppress filed by the Defendant in this case on July 28, 2017;..." (Exh. 3).

On or about August 28, 2019, the Eleventh Circuit Court of Appeals, in a 2-1 decision, decided that, although the warrant was "void ab initio" as it failed to comply with Rule 41, F.R.Cr.P. and 28 U.S.C. 636's jurisdictional limit-

ations, the officers were afforded "good faith" pursuant to Leon because "the application and affidavit sufficiently disclosed the bounds of the intended search." This ruling was in complete contrast and contrary to established Supreme Court precedent.

In researching case law for his §2255 Motion, and post-direct appeal, the Petitioner discovered, in an obscure district court case from South Carolina, involving an unknown defendant, that Agent MacFarlane has testified, in a separate case in Newport News, Virginia, regarding this same warrant, and that he testified in that suppression hearing that he knew that the search would occur outside of the Eastern District of Virginia. (U.S. v. Knowles, 207 F.Supp. 3d, 585, 594 (Dist. S.Car., 2016).

This testimony was never disclosed to the Defendant or his counsel as required by Brady, and not reasonably discoverable by Petitioner's counsel, (1) because the testimony occurred in an unknown case in another state, in a different circuit; and (2) evidence of the testimony was discovered on Lexis/Nexis, and there is no evidence that that court's ruling had been published at any time prior to the Petitioner's suppression hearing or plea. Had he been made aware of the testimony of MacFarland, the Petitioner would not have pled in this matter, as MacFarlane's testimony is evidence of

"bad faith", and clearly indicates his intentions to deceive the magistrate in obtaining the warrant, and his intent not to abide by the bounds of the warrants permitted search.

The Petitioner filed is §2255 Motion on in a timely manner and within the time frame permitted by Federal Rules. In that Motion, the Petitioner requested a Franks hearing. After the Government filed its Response, the Petitioner filed his rebuttal, and followed with Motions for Discovery, an Evidentiary Hearing, and Judgment on the Pleadings.

Some fourteen months later, the Petitioner requested a Writ of Mandamus from the Eleventh Circuit Court of Appeals requiring the District Court to address the $2255 Motion and accompanying motions. That writ was granted by the Eleventh Circuit, and on June 10, 2022 the District Court issued its Order denying the Petitioner's $2255 motion and denying a Certificate of Appealability (Exh. 4).

The Petitioner then Requested a Certificate of Appealability from the Eleventh Circuit which was denied by Judge Stewart, first because "the Petitioner could not show that reasonable jurists would debate...." (Exh. 5), and then, upon Motion for Reconsideration because the Petitioner "presented no meritorious arguments," making no reference to her previous reasoning, but contrary to the mandates of Miller-El v. Cockrell, Infra.

This Petition for Writ of Certiorari now follows.

STATUTORY PROVISIONS

Rule 41, Federal Rules of Criminal Procedure	Exhibit 8
28 U.S.C. 636	Exhibit 9

1. Does the determination that a warrant is void ab initio, rendering the resultant search of the Petitioner's residence warrantless (and thus unreasonable pursuant to the Fourth Amendment), mandate the suppression of evidence recovered in that search?

> "To justify a search of a home in this case the government relies exclusively on the claim that it had a warrant. But - and by its own concession - the magistrate who issued the warrant lacked statutory authority to do so...the government asks us to overlook this defect and declare the warrant somehow valid all the same for Fourth Amendment purposes. A sort of phantom warrant, then, disappearing whenever you look to positive law and manifesting itself only before the Constitution. It's certainly a bold claim - but one I find no more persuasive for it."
> Judge Neil Gorsuch (concurrence) U.S. v. Krueger, 809 F.3d 1109, 1118 (10th Cir. 2015

In the matter before this Court, the government makes the same argument, with the additional caveat that the officer who prepared the application and warrant for signature, and further presented it to the magistrate, then enforced the warrant, should be afforded "good faith", a claim that they abandoned in Krueger but resume here.

a.) The warrant was void ab initio and thus the search was warrantless.

The Eleventh Circuit, as in Krueger, found that the warrant issued by Magistrate Judge Teresa Buchanan exceeded the jurisdictional limitation of Rule 41, F.R.Cr.P. and 28 U.S.C. 636, and thus was void ab initio. This, despite the government's attempt at characterizing the warrant as being one for a tracking device under Rule 41(b)(4) ("To be clear, its not just that the

NIT isn't exactly a tracking device - its that its exactly not a tracking device" U.S. v. Taylor, Smith, 935 F.3d 1279 (11th Cir., 2019)). A disingenuous start to a "good-faith" argument, given that to obtain a tracking device warrant, an officer is required to use an entirely different form, note the exact time and date that the tracking device was attached and removed, and provide that information back to the court.

In fact, the government later admitted that the search was violative of the Petitioner's reasonable expectation of privacy and that the search occurred in Alabama, not in the Eastern District of Virginia, as listed on the warrant application and the warrant. ("The Court has directed the Parties to address whether the government's use of the NIT infringed the Defendant's reasonable expectation of privacy. The United States concedes it did...The United States does not dispute that it obtained Defendant's IP address through its search of Defendant's computer. Defendant thus has Fourth Amendment standing to challenge that search." (Letter to Court of Appeals - February 1, 2019)(exh. 7)

The Eleventh Circuit went on to state that "because the NIT warrant was void at issuance, the ensuing search was effectively warrantless and therefore - because no party contends that an exception to the presumptive warrant requirement applies here - violative of the Fourth Amendment." Taylor, Smith, 935 F.3d at 1288.

b.) If the search of the Petitioner's home was warrantless, and no exception applied, then the search was "per se unreasonable."

"The Fourth Amendment protects 'against unreasonable searches and seizures' of (among other things) the person."

Virginia v. Moore, 553 U.S. 164, 168, 170 L.Ed. 2d 559, 128 S.Ct. 1598 (2008).

> "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment **requires adherence to judicial processes...and that searches outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment** - subject to only a few specifically established and well-dilineated exceptions." Katy v. U.S., 389 U.S. 347, 357, 19 L.ed. 2d 576, 88 S. Ct. 507 (1967)

As now Justice Gorsuch pointed out in Krueger, "Section 636(a)'s territorial restrictions are **jurisdictional** limitations on the power of the magistrate judges, and the Supreme Court has long taught that the violation of a statutory jurisdictional limitation - quite unlike the violation of a more prosaic rule or statute - **is per se harmful.**" 809 F.3d at 1122.

And later,

> "In discussing the Fourth Amendment demands, **the Supreme Court has spoken of the need for a valid warrant an indicated for warrants to be valid they must emanate from magistrates empowered to issue them.'** United States v. Lefkowitz, 285 U.S. 452, 464...Time and again state and circuit courts have explained that this means a warrant issued in defiance of positive law's restrictions on territorial reach of the issuing authority will not qualify as a warrant for Fourth Amendment purposes." Krueger, 809 F.3d 1124.

The government here cannot show consent or any contingent circumstances, and, as noted, have not argued any.

> "As Justice Brandeis explained in his famous dissent, the Court is obligated - as '[s]ubtler and more reaching means of invading privacy have become available to the goverment - to ensure that the 'progress

> of science' does not erode Fourth Amendment protections...Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." Carpenter v. U.S., 138 S. Ct. 2206, 201 L.Ed. 2d 507, 528 (2018)

"Until a valid warrant has issued, citizens are entitled to shield 'their persons, houses, papers, and effects' from the Government's scrutiny. **Exclusion of the evidence obtained by a warrantless search vindicates that entitlement.**" Hudson v. Michigan, 165 L.Ed. 2d 56, 547 U.S. 586, 593 (2006).

No warrant issued from a magistrate authorized to search the Petitioner's home in Alabama, and thus no **valid** warrant was issued. As such, pursuant to Supreme Court precedent, exclusion of the evidence obtained by that search vindicates that entitlement to freedom from unwarranted governmental intrusion.

2. Can good faith be granted to the officer who prepared the warrant application and invalid warrant for signature, committing perjury in the process, resulting in a warrantless search?

> "Suppression therefore remains an appropriate remedy if the magistrate judge, in issuing the warrant, was misled by information that the affiant knew was false or would have known was false except for his reckless disregard for the truth." U.S. v. Leon, 82 L.Ed. 2d 677, 468 U.S. 897, 104 S.Ct. 3405 (1984)
>
> "Our good faith inquiry is confined to the objectively ascertainable question **whether a reasonably well-trained officer would have known that the search**

> was illegal in light of all the circumstances. In making this determination, all of the circumstances - including whether the warrant application had previously been rejected by a different magistrate - may be considered." Leon 468 U.S. at 922, n. 23.

In his application to the Court in this matter, Agent Douglas MacFarlane stated unequivocally,

> "I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjurythat I have reasontto believe that on the following person or property - See Attachment A - located in the Eastern District of Virginia there is now concealed..."

However, "Agent MacFarlane knew the NIT would deploy to computers outside the Eastern District of Virginia." United States v. Knowles, 207 F.Supp. 3d 585, 594 (Dist. S.Car. 2016).

The Court in Knowles was referencing the transcript of the suppression hearing in U.S. v. Matish (Cr. No. 4:16-16, Eastern District of Virginia, Newport News Division), and your Petitioner again requests that this Court take Judicial Notice of all proceedings in U.S. v. Matish, but principally the suppression hearing. This information, and especially MacFarlane's testimony, was not made available to the Defendant at any time prior to his direct appeal, and was only discovered subsequent to that appeal. Further discovery was requested at the District Court level in this §2255 motion as to MacFarlane's testimony, but that request was denied.

Applying Leon to this fact alone, it is clear that MacFarlane would have known that the search was illegal, in light of Rule 41 and 28 U.S.C. 636.

Further, MacFarlane, or at the very least, the U.S. Attorney who reviewed the application, would have been aware that a very similar warrant had been denied two years previously, prompting the Justice Department to seek a change in Rule 41.

> "In 2013 - two years before the warrant application in this case - the FBI applied to a magistrate judge in Texas for a strikingly similar warrant. See In Re Warrant to Search A Target Computer at Premises Unknown, 958 F. Supp. 2d 753, 755 (S.D. Tex. 2013. The FBI was trying to identify '[u]nknown persons' who committed bank fraud and identity theft using an unknown computer at an unkown location.' Id. The warrant sought authorization to 'surreptitiously install' software on the target computer that would extract certain information and send it back to 'FBI agents within the district.' Id. The Court explained its decision: 'Since the current location of the Target Computer is unknown, it necessarily followsthat the current location of the information on the Target Computer is also unknown. This means that the government's application cannot satisfy the territorial limits of Rule 41(b)(1).'
>
> Notably, unlike this case, the FBI addressed the jurisdictional issue in its supporting affidavit to the Texas magistrate. See Id at 756. The FBI 'readily admit[ted] that the current location of the Target Computer [was] unknown, but nevertheless maintained that the search would comply with Rule 41(b)(1) 'because information from the Target Computer will be first examined in this judicial district.' Id (quoting the FBI's affidavit). The magistrate rightly rejected the government's argument pointing out that it would 'stretch the territorial limits of Rule 41(b)(1)' to absurd lengths: "By the government's logic, a Rule 41 warrant would permit FBI agents to roam the world in search of a container of contraband, so long as the container is not opened until the agents haul it off to the issuing district.' Id. at 757. That same logic applies to the NIT warrant. The point is there was federal precedent addressing the precise jurisdictional issues raised by the NIT warrant."

Judge Tjoflat (dissent), USS. v. Taylor, Smith, 935 F.3d at 1235.

Your Petitioner apologizes for the lengthy quote, but must admit that he struggled to explain the Texas warrant as suc-

cinctly as Judge Tjoflat.

See also: U.S. v. Glover, 736 F.3d 509, 515 (D.C. Cir. 2013)("Even if we could assume that an imperfect authorizing order could be though facially sufficient, we do not see how a blatant disregard of a judge's jurisdictional limitation can be regarded as only 'technical'...In any event, it is quite a stretch to label the government's actions in seeking a warrant so clearly in violation of Rule 41 as motivated by good faith.")

Interestingly enough, the Glover warrant was just another instance of the FBI attempting to obtain warrants in violation of the Federal Rules. See also the Inspector General's Report on Operation Crossfire Hurricane, for example.

The point, however, is that Agent MacFarlane, or at least the assistant reviewing the application, should have been aware of the difficulties posed in the application, especially since, shortly after the rejection in the Texas matter, the Justice Department began its attempts to Change Rule 41.

In the present matter, Agent MacFarlane sidestepped the "Target Computer at Unknown Location" by stating that the search would occur on "the computer server...located at a government facility in the Eastern District of Virginia."

This was no more true than if he had listed the location of the search as 1600 Pennsylvania Avenue. He knew the search would occur at unknown locations "outside the Eastern District of Virginia", so naming an arbitrary address only served to

to muddy the water just enough, but also serves to show that MacFarlane intentionally set out to deceive the magistrate, or, in the very least, had a reckless disregard for the truth.

"The affidavit continues the charade." Judge Tjoflat continues,

> "It mentions repeatedly that the server is located in the magistrate's district...The repeated emphasis of the server's location is especially suspicious given that the location of the server was completely irrelevant. The search was of the user's computers, not of the server.
>
> Why then, did the affidavit repeatedly mention the server's location? It smacks of desparation, and it appears calculated to lull the magistrate into a false sense of jurisdictional security. I can think of no other reason to include so irrelevant a piece of information so many times...In other [similar] warrant applications, law enforcement officials were not nearly so stingy with information about jurisdiction. See In Re Warrant, 958 F. Supp. 2d at 756. Courts should expect nothing less. Here, in contrast, where there was a major problem with jurisdiction, any mention of jurisdiction is conspicuously absent...It is hard to escape the conclusion that the officials seeking the warrant aimed to conceal the issue...The comparisons with these other examples illustrate why the officials in this case did not do what 'we hope and expect' of law enforcement. Maj. Op. at 29. The disclosure in the affidavit was woefully inadequate."

U.S. v. Taylor, Smith, 935 F.3d at 1299-1300.

Which then harkens back to Justice Gorsuch's comments in Krueger.

Not only does the application, and ultimately the warrant (also prepared by MacFarlane), fail due to jurisdictional problems, but where, in the application or the warrant, does it say that he "has reason to believe that on the following person or property....located in the Northern District of Alabama"?

"No warrants shall issue, but upon probable cause, supported by Oath or affirmation, and **particularly describing the place to be searched and the person or thing to be seized.**" U.S. Constitution, Fourth Amendment.

Therefore, the warrant application and warrant fail for particularity as well as the jurisdictional issue.

In addition, "MacFarlane knew the search would occur outside the Eastern District of Virginia."

A review of all cases published on Lexis/Nexis involving this warrant show no evidence that MacFarlane's testimony was brought before **any** court, save the Matish and Knowles courts, (and even there, not the Circuit Court in those cases), and thus it appears that no court had the benefit of the positive knowledge of MacFarlane's clear and knowing perjury on the application and warrant.

As stated in Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 2d 271, 106 S.Ct. 1092 (1986), "The analogous question [to Leon] ...is whether a reasonably well-trained officer in [the Agent's] position would have known that his affidavit failed to establish probable cause and he should not have applied for the warrant."

Stopping there, first, MacFarlane did not know the ultimate location of the search (as the officers did not in the Texas matter). He knew that the search would occur outside of the district in which he was applying for the warrant, but he didn't know the "where" (the particular location), and he didn't know the "who" (the particular person). Therefore the application fails for particularity and probable cause to search.

Continuing in Malley,

> "If such was the case, the officer's application was not objectively reasonable, because it created the danger of unlawful arrest...If the magistrate issues a warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate."

This was later confirmed in Groh v. Ramirez, 540 U.S. 551, 157 L.Ed. 2d 1068, 124 S. Ct. 1284 (2004).

> "Because [the officer] himself prepared the invalid warrant, he may not argue that he reasonably relied on the magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid."

See also: U.S. v. Rosa, 634 F.3d 639, 640-41 (2nd Cir, 2010) ("The police errors that resulted in the unconstitutional search were not attenuated from the search. They were committed by the officer who drafted and then helped execute the deficient warrant and by the officers who assisted in executing the warrant notwithstanding its patent facial invalidity. Groh and George held that exclusion is appropriate where, as here, a reasonable officer could not have presumed the warrant to be valid. Here, the deterrent benefits of exclusion - namely encouraging police to take greater care in drafting and executing warrants - are greater and outweigh the costs."); U.S. v. Herrera, 444 F.3d 1238 (10th Cir. 2006)("Application of the good faith exception to the exclusionary rule turns to a great extent on whose mistake produces the Fourth Amendment violation. And because the purpose underlying this good faith

exception is to deter police conduct, logically Leon's exception most frequently applies where the mistake was made by someone other than the officer executing the search that violated the Fourth Amendment. The Supreme Court has never extended Leon's good faith exception beyond circumstances where an officer has relied in good faith on a mistake made by someone other than the police; that is, on someone outside the police officers' 'often competitive enterprise of ferreting out crime.'"); U.S. v. Camou, 773 F.3d 932, 945 n.3 (9th Cir. 2014)("In fact, because 'objectively reasonable' and 'negligent' are mutually exclusive, the only way to reconcile the 'objectively reasonable reliance' rule established in Leon with Herring is to conclude that the officer who executed the unconstitutional search or seizure cannot have been the negligent actor.").

The Circuit Court, and later the District Court in the §2255 Motion, disregarded Groh completely, and, in fact, Groh was never mentioned in the majority opinion. The Court relied instead on the erroneous rulings of other courts involving this same warrant (some of whom even concluded that the warrant **could have been** controlled by Rule 41(b)(4) (tracking device)), and none of whom had the benefit of MacFarlane's admission.

Nevertheless, those courts, as well as the Eleventh Circuit, looked to find good faith while ignoring the fundamental violation of the Fourth Amendment. The Eleventh Circuit, in quoting the Sixth Circuit, went as far as to say, "the good faith

exception is not concerned with whether a valid warrant exists but instead ask whether a reasonable well-trained officer would have known that search was illegal."

This is a very narrow reading of Leon, as Leon states,

> "In so limiting the suppression remedy, we leave untouched the probable cause standard and the various requirements for a valid warrant...The good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe it will have that effect." Leon, 468 U.S. at 924.

However, that is what is happening here. When courts start separating good faith and whether a valid warrant is necessary, or exists, then the courts are opening a Pandora's Box of possibilities for "subjective understanding" prohibited in Leon. In the case at hand, the government has already tried to argue (and succeeded on at least two occasions) that Agent MacFarlane "thought" the warrant fell under Rule 41(b)(4), even though, as previously stated, there is a separate form for that request, and the procedures are different, including having to note the date and time of the physical placement of the tracing device, the date and time when the device was removed, and reporting requirements to the magistrate.

As previously noted herein, the Supreme Court has, "time and again" noted that the Founders fought against the general warrants of the monarchy. Yet the Circuit Courts, in cases invloving this warrant have "time and again" looked for reasons to apply the good faith exception, while ignoring the fun-

damental Fourth Amendment violations, contrary to Leon as well as numerous other Supreme Court decisions protecting the sanctity of the home from warrantless searches.

"It is the government's burden to prove it's agents' reliance upon the warrant was objectively reasonable." U.S. v. Corral-Corral, 899 F.2d 927 (10th Cir. 1990). It is not, however, up to the courts to ignore violations of the Fourth Amendment and go looking for reasons, contrary to established precedent, to rationalize good faith.

The Court in Leon continued,

> "Nor are we pursuaded that application of a good faith exception to searches conducted pursuant to warrants will preclude review of the unconstitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifests good faith **before** turning to the question whether the Fourth Amendment has been violated. If the resolution of a Fourth Amendment question is necessary to guid future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue."

Leon, 468 U.S. at 924-25.

Here, the court did not ignore the question whether the Fourth Amendment was violated. However, after deciding that it had been violated by the government, they ignored the criteria of Leon and its progeny, by ignoring "what a reasonably well-trained officer knew or should have known." The Court ignored that the Fourth Amendment requires particularity

in the location and that "despite the government's argument to the contrary, Herring does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants ab initio." U.S. v. Lazar, 604 F.3d 230 (6th Cir. 2009).

The Court ignored Malley in that MacFarlane admitted that he knew that the search would occur outside of the Eastern District of Virginia, and, after being presented with evidence of the same, in the §2255 motion, ignored it, stating that, in effect, that admission changes nothing, and that even though he admitted to knowingly breaking the law, and committing perjury in the process, he did it in good faith.

What the Eleventh Circuit did do, however, was to decide that "the application and affidavit sufficiently disclosed the bounds of the intended search." U.S. v. Taylor, Smith, 935 F.3d at 1292.

3. Can the application for a warrant be used to validate a facially deficient warrant, found to be violative of the Fourth Amendment and void ab initio, in an effort to find good faith?

> "While the NIT warrant application was perhaps not a model of clarity, it seems clear to us that the officers did the best they could with what they had...It is true, as Taylor and Smith emphasize, that the face of the pre-printed warrant application stated that 'the property to be searched' was 'located in the Eastern District of Virginia.' It is also true that Attachment A, which described the target property, reported to

> be the Playpen server was 'located at a government facility in the Eastern District of Virginia.' That being said, there were indications that the FBI was seeking a more broad-ranging search authority...We conclude that, in their totality, the application and affidavit sufficiently disclosed the bounds of the intended search."

U.S. v. Taylor, Smith, F.3d at 1292.

> "Unless the particular items described in the affidavit are **also set forth in the warrant itself** (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the magistrate actually found probable cause to search for, and to seize, **every item listed in the affidavit**...because the [officer] himself prepared the invalid warrant, he may not argue that he reasonably relied on the magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid."

Groh v. Ramirez, 540 U.S at 561, 564.

It is interesting to note that the application and the warrant both referred to the same "Attachment A", and therefore the Circuit Court effectively acknowledges that the warrant authorizes a search only in the Eastern District of Virginia.

As the Circuit Court in the direct appeal agreed (the Circuit Court had no opportunity to rule on the Petitioner's §2255 motion, as the Application for a COA was denied, first because the court stated that your Petitioner didn't show that "reasonable jurists would debate", then on Motion for Reconsideration, after presenting case law for a second time, the Court changed its Order to failure to present meritorious claims), the search was unconstitutional. The next step to resolve any good faith issues is also found in Groh.

> "Having concluded that a constitutional violation occurred, we turn to the question whether [the officer] is entitled to qualified immunity despite the violation. The answer depends on whether the right that was transgressed was clearly established - that is 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted...' Given that the particularity requirement is set forth in the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."

Groh, 540 U.S. at 563.

See also: U.S. v. Leon, 468 U.S. at 923 ("Finally depending on the circumstances of the particular case, a warrant may be so facially deficient - i.e., **in failing to particularize the place to be searched** or the things to be seized - that the executing officers cannot reasonably presume it to be valid."); Herring v. U.S., 555 U.S. 135, 172 L.Ed. 2d 496, 129 S.Ct. 695 (2009)("As we said in Leon, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule. Similarly, in Krull, we elaborated that '**evidence should be suppressed** only if **it can be said that the law enforcement officer had knowledge,** or may properly be charged with knowledge, **that the search was unconstitutional under the Fourth Amendment.**"); Harlow v. Fitzgerald, 100 S.Ct. 2727, 73 L.Ed. 2d 396, 457 U.S. 800 (1982) ("If the law was clearly established, the immunity defense should ordinarily fail, since a reasonably competent public official should know the law governing his conduct.").

Groh, Leon, Herring (which refers to Krull), and Harlow

all support suppression in this matter. Five Supreme Court decisions. Precedent for the guidance of the Circuit Court in the direct appeal and the District and Circuit Courts in the §2255 motion. And all five were ignored by those courts.

This is not a misunderstanding as to Supreme Court precedent. This is not a misunderstanding of the Constitution and the Fourth Amendment. As stated previously, Groh was never mentioned by the majority. This is deciding good faith, then attempting to justify the decision despite, or in spite of, the Supreme Court precedents.

Good faith, pursuant to Supreme Court precedent and the Constitution, cannot be found. The warrant did not reference the application (it was under seal). The Circuit Court acknowledged that the application stated the search would be in the Eastern District of Virginia. They did not deny that the warrant stated that the search would occur in the Eastern District of Virginia. As previously noted (infra. Page 8), Judge Tjoflat noted that the application, on numerous occasions, noted "the server...located in the Eastern District of Virginia." Nowhere in the application or the warrant was there any reference to a residence in the Northern District of Alabama. That location was unknown. The "Target Computer at an Unknown Location." Agent MacFarlane was an admitted veteran of the FBI for 19 years. He was required to know warrant rules, laws, and procedures, and "[g]iven that the particularity requirement is set forth in the Constitution, no reasonable officer could believe

that a warrant that plainly did not comply with that requirement was valid," then MacFarlane, as the officer who prepared the warrant application, the warrant for signature, effected the warrant through the search of the Petitioner's residence to obtain information which he then used to obtain second and third warrants to search the Petitioner's home and office, cannot be afforded good faith, the evidence must be suppressed, and the conviction overturned.

4. Does Stone v. Powell, 428 U.S. 465 49 L.Ed. 2d 227, 96 S.Ct. 3037 (1976) overturn the Supreme Court's decision in Kaufman v. United States, 394 U.S. 217, 22 L.ed. 2d 227, 89 S.ct. 1068 (1969), as it pertains to raising questions of Fourth Amendment violations in cases filed under 18 U.S.C. 2255?

> "We therefore hold that a claim of unconstitutional search and seizure is cognizable in a §2255 proceeding."

Kaufman, 394 U.S. at 231

> "Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a **state prisoner** be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial...The issue in Kaufman was the scope of §2255. Our decision today rejects the dictum in Kaufman **concerning the applicability of the exclusionary rule in federal habeas corpus review of state court decisions pusuant to §2254."**

Stone, 428 U.S. at 481-82, n.16.

> "[t]he court agrees with analysis from courts...that

> Stones's principles apply equally to state and federal prisoners. So the court finds that it can address Fourth Amendment claims in a §2255 proceeding only if the petitioner did not have a full and fair opportunity to raise the claims at trial or direct appeal...Smith had a full and fair opportunity to litigate the merits of his Fourth Amendment claims in his criminal case."

Smith v. U.S., 2022 U.S. Dist Lexis 104074 (N.D. Ala 2022)

Currently, five Circuit Courts have found that Stone does not apply or extend to §2255 cases. See: Pacelli v. U.S., 588 F.2d 360, 362 (2nd Cir. 1978)(noting that Constitutional claims were cognizable under §2255, while non-constitutional claims could be raised if there was a "fundamental" defect resulting in a complete miscarriage of justice."); U.S. v. Nino, 878 F. 2d 101 (3rd Cir. 1989)("28 U.S.C. §2255 allows a prisoner to file a habeas corpus motion with the sentencing court alleging that his or her sentence was imposed in violation of the Constitution."); U.S. v. Pasquantino, 230 Fed. Appx. 255, 259 (4th Cir. 2007)("Section 2255 'can perform the full service of habeas corpus' for a federal prisoner... A petitioner may petition for discharge or even for 'a more flexible remedy' such as a new trial or the remedy the Defendant here seeks, the right to vacate, set aside, or correct their sentences. Because §2255 and the writ of habeas corpus are substantially the same, this court may look to habeas precedent in considering the §2255 petition here, cf. Kaufman v. U.S. 394 U.S. 217,222...abrogated on other grounds, Stone v. Powell, 428 U.S. 465"); Mason v. Allen, 605 F.3d 1114 (11th

Cir. 2010)("In Stone, the Supreme Court narrowly delineated the scope of review over Fourth Amendment claims in the habeas actions brought under 28 U.S.C. 2254.")

And most informatively, Baranski v. United States, 515 F.3d 857 (8th Cir. 2007),

> "In Kaufman, the court had unequivocally held that a claim of unconstitutional search and seizure is cognizable in a §2255 proceeding, 394 U.S. at 231, and a Stone footnote suggested a different policy reason might underlie Kaufman because of the Court's supervisory role over federal proceedings. See 428 U.S. 481, n.16. It is well recognized that the supervisory power of federal appellate courts over district courts is broader than its authority to review state court decisions under §2254...We conclude that Stone does not bar our consideration of the issue certified by the district court, that is whether Groh v. Ramirez would entitle Baranski to prevail on his §2255 motion."

The First Circuit has not expressed an opinion, while the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that Stone prcludes consideration in §2255 motions, creating a true circuit split on this issue.

The government, in the district court proceedings, argued that a note in United States v. Johnson, 457 U.S. at 562, n. n.20, sealed the fate of Kaufman. However, this is incorrect. A full reading of the Court's ruling in Johnson, prior to the note, disputes that assertion.

> "we therefore hold that, subject to the exceptions listed below, a decision of this court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered. By so holding, we leave undisturbed our precedents in other areas... we need not address the retroactive reach of our Fourth amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack."

The Court in Johnson made clear that it did not change any other precedents, and it only dealt with retroactivity. Further, by noting "we need not address" indicates the intent that the Court was not considering anything but the issue before them.

The government cannot provide a single case overturning Kaufman directly, so they resort to using creative readings to obtain the result that they desire, quite similar to the creative efforts to modify Rule 41 to fit their purposes. No case post-Kaufman has considered overturning Kaufman, so to assume dicta in Johnson, which specifically states "**we leave undisturbed our precedents in other areas**", is a stretch, especially when Stone itself specifically states "[o]ur decision today rejects the dictum of Kaufman concerning the applicability of the exclusionary rule in federal habeas corpus review **of state-court decisions pursuant to** §2254."

Finally, as Justice Brennan stated in his dissent in U.S. v. Frady, 456 U.S. 152, 182, 71 L.Ed. 2d 816, 102 S.Ct. 1584 (1982), "In executing 28 U.S.C. §§ 2254 and 2255, Congress could not haven more explicit. Section 2254 provided for a separate civil action, but a Section 2255 motion was a further step in the criminal case in which petitioner is sentenced."

Therefore, because a §2255 proceeding is a "further step" in the process, it follows that a "full and fair opportunity" is not complete until after the §2255 process is

complete, especially with allegations of prosecutorial misconduct and a Fifth Amendment due process issue as well.

As such, Stone should not preclude a Court's review, in a §2255 motion, from hearing Fourth Amendment issues regarding an unlawful search. Further, given that the reason for the inability to raise the issue on direct appeal is the allegation of prosecutorial miscoduct in failure to disclose Brady material, the "cause" and "prejudice" criteria come into play.

5. Can the claim of "public record" be used to excuse the failure to provide Brady material, when the "public record" is unknown to the Defendant and contained in another Defendant's file in another Circuit?

> "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all material has been disclosed. ...The state here nevertheless urges, in fact, that 'the prosecution can lie and conceal and the prisoner still has the burden to...discover the evidence,'...so long as the'potential existence' of a prosecutorial misconduct claim might have been detected...A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have discharged their official duties.'...Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction]...plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.'... Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation."

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed. 2d 1166 (2004).

> "In finding procedural default, the District Court relied upon the fact that [the evidence] was available in the public record. However, if the state failed failed under a duty to disclose the evidence, then its location in the public record, in another defendnat's file, is immaterial...Thus we hold that reasonable jurists could debate whether Johnson had met the successive writs requirements and whether Johnson's claims of prosecutorial misconduct merit relief. Accordingly, a COA is granted and oral arguments are permitted."

Johnson v. Dretke, 394 F.3d 332 (5th Cir. 2004)

> "As the government points out, MacFarlane's testimony was a matter of public record by the time of Smith's suppression hearing...So while the government may not affirmatively told Smith about MacFarlane's testimony, it didn't withhold the testimony from him."

Smith v. U.S., 2022 U.S. Dist. Lexis at 104074 (N.D. Ala, 2022)

It is interesting to note, too, that the district court also noted that because the Court of appeals, on direct appeal, found that "in their totality, the application and affidavit sufficiently disclosed the bounds of the intended search" (contrary to Supreme Court precedent in Groh and others), that MacFarlane's would make no difference in the decision. ("In other words, this Court couldn't grant Smith relief on his Fourth Amendment claims without disturbing the Eleventh Circuit's rulings.")

To establish a Brady claim, a Defendant must show (1) the evidence must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the state; (3) the evidence must be material.

a.) The evidence must be favorable to the accused either because it is exculpatory or impeaching.

> "our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal in light of all the circumstances."

Leon, 468 U.S. at 922, n. 23.

> "I, a federal law enforcement officer...request a search warrant **and state under the penalty of perjury** that I have reason to believe that on the following person or property...**located in the Eastern District of Virginia....**"

Application for search warrant submitted by Agent Douglas MacFarlane, February 20, 2015.

> "An application by a federal law enforcement officer... requests the search of the following person or property...**located in the Eastern District of Virginia.**"

Search Warrant issued by Magistrate Judge Teresa Buchanan

> "Agent MacFarlane knew the NIT would deploy to computers outside the Eastern District of Virginia."

U.S. v. Knowles, 207 F. Supp. 3d at 594.

> "The Court has directed the Parties to address whether the government's use of the NIT infringed the Defendant's expectation of privacy. The United States concedes that it did...the United States does not dispute that it obtained the Defendant's IP address through its search of the Defendant's computer. Defendant thus has Fourth Amendment standing to challenge that search."

Letter to Court from Prosecution to Eleventh Circuit dated February 1, 2019.

Because the good faith exception centers around what the

officer knew or should have known, that Rule 41 is "crystal clear," that MacFarlane requested a warrant in one district knowing the search would occur in another district (perjury), and that the government acknowledges that the search occurred in Alabama at the Petitioner's residence, violating his reasonable expectation of privacy, then the sworn testimony of Agent MacFarlane is not only favorable, but material to show what the officer "knew or should have known." See also: Kalina v. Fletcher, 522 U.S. 118, 139 L.Ed. 2d 471, 118 S.Ct. 502 (1997)(a prosecutor's conduct in making allegedly false statements of fact in a certification for determination of probable cause is not protected by the doctrine of absolute prosecutorial immunity.).

While Kalina, of course, dealt with a prosecutor, the concept is the same, inasmuch as the prosecutor made false statements on an application for a warrant. Here, MacFarlane should not be afforded immunity or good faith for his perjorious statements, and thus the statements were material.

> "A confession is like no other evidence. Indeed, the Defendant's own confession is probably the most damaging evidence that can be admitted against him ...[t]he admissions come from the actor himself, the most knowledgeable and unimpeachable source about his past conduct."

Arizona v. Fulminante, 111 S.Ct. 1246, 113 L.Ed. 2d 302, 499 U.S. 279, 296 (1991)

See also: Monarch Ins. Co. v. Spach, 281 F.2d 401,408 (5th Cir. (1960)("The ex parte statement under oath is relevant and material to the cause. It has probative value of significance.")

The government did not call MacFarlane to testify at the Petitioner's suppression hearing regarding his procurement and his effecting the warrant in Virginia, and, in fact, no official testified as to such, a fact noted by the Petitioner and a question raised to his counsel at that time). As the prosecution failed to disclose MacFarlane's statements, as required under Brady, he was unaware of the desparate need to have MacFarlane testify.

"Although the State is obliged to "prosecute with earnestness and vigor;"" the court wrote in Cone v. Bell, 129 S.Ct. 1769, 173 L.Ed. 2d 701, 556 U.S. 449, 469 (2009),

> "it 'is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one'...Accordingly, we have held when the State withholds from a criminal defendant evidence material to his guilt or punishment, it violates his due process of law.'. In United States v. Bagley, ... we explained that evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict."

In Franks v. Delaware, 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978), the court wrote that, upon a showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement was necessary to the finding of probable cause, the Fourth Amendment

requires that hearing be held at the Defendant's request.

A hearing was requested by your Petitioner at the District Court level in his §2255 motion.

The Court further stated, in Franks that

> "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. **On the other hand**, if the remaining content is insufficient, the Defendant is entitled to his hearing...In the event that at that hearing the allegation of **perjury or reckless disregard is established** by the Defendant by a proponderance of the evidence, and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Applying Franks to the application in this matter, and removing reference to the location in the Eastern District of Virginia, one is left with

"I, a federal law enforcement official or an attorney for the government, request a search warrant and state under the penalty of perjury that I have reason to believe that on the following person or property _____ located in the _____District of Virginia, there is now concealed..."

Further, the warrant would state,

"An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____."

b.) The evidence must have been suppressed by the State.

In its response to the Petitioner's §2255 motion, the government does not deny that MacFarlane's testimony was not provided. And the District Court doesn't either. Each only discounted the importance of it, and, as previously shown, stated that the government was not required to disclose it due to the public nature of the testimony. But one must question how "public" testimony transcripts from a suppression hearing for an unknown defendant in another state and circuit are, and how readily available that knowledge would be to the Defendant.

As stated in the previously cited Banks v. Dretke, the court added that, should a Defendant show "cause and prejudice" for his failure to present a Fourth Amendment claim on direct appeal, then the Defendant's §2255 motion regarding a Fourth Amendment violation should proceed.

> "Cause and prejudice in this case 'parallel two of the three components of a Brady violation. Corresponding to the second Brady component, (evidence suppressed by the state) a petitioner shows 'cause' when the reason for his failure to develop facts in a state court proceeding was the state's suppression of relevant evidence; coincident with the third Brady component (prejudice), prejudice within the compass of the 'cause and prejudice' requirement exists when the evidence is 'material' for Brady purposes."

The Banks Court's explanation of "cause and prejudice" defeats the district court's assertion that the Petitioner

was procedurally barred from raising these issues in his §2255 motion, and, coincidentally, defeats the Stone argument as well ("the court couldn't grant Smith relief on his Fourth Amendment claims without disturbing the Eleventh Circuit's ruling. So Smith is procedurally barred from bringing his Fourth Amendment claims in his §2255 motion.").

The government had a duty to disclose exculpatory and impeaching evidence to the Defendant. The government has not denied that they failed to do so.

Further, courts have found that "reasonable jurists could debate" whether a "public record" defense is valid in a prosecutorial misconduct claim, and therefore the suggestion from the district court and from Judge Stewart in her first denial that "reasonable jurists would not debate" was incorrect and not founded on any precedent, but was, in fact, particularly contradicted by the Supreme Court and other circuits.

As such, a Franks hearing should have been held, and, upon a showing of the information provided herein, the evidence obtained as a result of the warrant obtained by Agent MacFarland, suppressed. Further, as a result of that suppression, all evidence garnered as a result of the second and third warrants, which were founded on the evidence gathered by MacFarlane, should also be suppressed, and the conviction overturned.

CONCLUSION

There can be no question that Agent Douglas MacFarlane committed perjury on the application for the warrant in the Eastern District of Virginia. By his own admission, he knew that the search would occur outside of the district, thus negating his "reason to believe" that there was located, on a server on the Eastern District of Virginia, evidence. And if there was, then the search of the Petitioner's residence was performed before any warrant was obtained. Either way, MacFarlane lied to the Court issuing the warrant.

By the time of the suppression hearing, the Prosecution knew of, or is, at least, required to know of, his testimony. Contrary to the government's assertion (and the district court's confirmation), the government may not hide, forcing the Defendant to seek, unknown exculpatory or impeaching evidence from another court file, in another district, in another state, in another circuit. The Defendant and his counsel are expected to use "reasonable diligence" to discover evidence, and is was only by a fluke search by the Defendant, after the direct appeal, that he found the Knowles case out of the District Court of South Carolina, and there is no reference to MacFarlane's testimony in any Circuit Court decision, indicating that no court was told of MacFarlane's testimony.

The Eleventh Circuit, and most other circuits, ruled that the warrant was void ab initio as it violated Rule 41 and 28 U.S.C. 636. And warrantless searches, outside a few specific exceptions, are per se unreasonable. Yet the Court, in finding good faith, ignored Supreme Court precedent (established nearly twenty (20) years ago in Groh), in finding that the application and affidavit, which was sealed and not made a part of the warrant at all, sufficiently outlined the bounds of the search. The Court also ignored Supreme Court precedent by finding that the officer who prepared the invalid warrant, and later enforced it, was entitled to that good faith.

The Fourth Amendment requires specificity in the warrant as to the particularization of the location of the search. Specifically, then, general warrants which allow for searches of "unknown computers at unknown locations" (see: In Re Warrant, infra.), are unreasonable and forbidden, and the evidence uncovered must be excluded.

Finally, illegal search and seizure claims are cognizable in a §2255 motion, despite the government's insistence. Further, because this matter involves Brady issues, the "cause and prejudice" factors in to defeat the procedural default and Stone arguments.

Additionally, as noted previously, the Petitioner

retained his right in the plea agreement to address the Court's ruling in the Suppression hearing in his Direct Appeal or his §2255 motion (see Exh. 3). The fact that the government suppressed Brady material, which was only discovered **after** the direct appeal, makes the §2255 motion the first place he **could** argue completely. As noted in Banks, the government's attempts to "hide" evidence, with the hope that it will not be discovered until after a direct appeal, and thus, by their logic, forbidden to be argued again, is "untenable" and is contrary to the ruling in Banks and others. The Eleventh Circuit, in their ruling in the direct appeal, did not have any knowledge of MacFarlane's admission, because of the intentional suppression of the testimony by the government. Given that Leon requires what the officer "knew or should have known", certainly the Court could not make an informed ruling based on a review of incomplete facts.

The Eleventh Circuit, and the District Court in this §2255 Motion, ignored Supreme Court precedents, Circuit precedents, Federal Rules, the Federal Code, and they ignored the U.S. Constitution. One can speculate as to the reason, but now is not the time for speculation.

Based on the facts presented herein, the precedents shown herein, the Federal Rules and the U.S. Code, as well as the U.S. Constitution, the evidence garnered from the Virginia

as well as all subsequent warrants which were issued as a result of the information obtained from the Virginia warrant, should have been, and must be, suppressed.

Good faith cannot be afforded to Agent MacFarlane and those assisting him in this matter, as an agent of more than 19 years should be, and is, expected to know the laws he is duty bound to enforce. And, given his uncontroverted testtimony in Madish, he knew that the searches would violate the rules and the law by occuring outside of the Eastern District of Virginia, he just didn't care, and thus he committed perjury to obtain the invalid warrant.

Therefore, the Petitioner's §2255 motion should have been granted, the evidence suppressed, the conviction set aside, and, because the government could produce no other evidence against the Petitioner, certainly he would have never entered a guilty plea in this matter, and the case should have been dismissed.