

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK F. HONISH — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARK F. HONISH TDCJ# 1745461

(Your Name)

TDCJ ESTELLE UNIT 264 FM 3478

(Address)

HUNTSVILLE, TX 77320

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

1. Did the Fifth Circuit err and abuse its discretion in denying Honish a COA even though Honish stated a valid claim of the denial of a constitutional right?
2. Did the Fifth Circuit abuse its discretion by holding Honish to a higher standard for issuing a COA than required by the U.S. Supreme Court and other Circuits?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was entered on October 31, 2017.

A timely petition for rehearing was denied on November 21, 2017, and a copy of the order denying rehearing appears at Appendix F-1. An out of time petition for en banc rehearing was filed, and considered by the Fifth Circuit. The out of time petition for en banc rehearing was denied on February 12, 2018, and a copy of the order denying en banc rehearing appears at Appendix G-1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. IV

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

U.S. Constitution, Amend. V

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

U.S. Constitution, Amend. VI

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2253(c)(2)

§2253 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from:

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or

(B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. §2255

Please see Appendix H

STATEMENT OF THE CASE

Petitioner, (Honish) pled guilty to a violation of U.S.C. 922(g)(1), Felon In Possession of Firearms, on December 20, 2007. Honish was sentenced to 24 months imprisonment, 3 years of supervised release, and a \$4,000 fine on January 3, 2008.

After serving his 24 month sentence and paying his fine, Honish was remanded to the custody of the State of Texas on July 13, 2009 to face a charge of first degree murder. Honish's state murder trial commenced on August 22, 2011, approximately 3½ years after his guilty plea and federal sentencing.

During the course of Honish's murder trial, new evidence came to light through the testimony of 3 police investigators. The new evidence revealed in the investigator's testimony was their disclosure of a warrantless search of Honish's curtilage conducted by them. The testimony further revealed that information gleaned in the warrantless search was used in a search warrant affidavit for a warrant to search Honish's home and truck. Firearms found in Honish's home as a result of this warrant resulted in federal firearms charges against Honish.

Based on this newly discovered evidence, Honish filed a §2255 motion to vacate his conviction on August 1, 2012. In this motion, Honish alleged he was denied his Sixth Amendment right to effective assistance of counsel at plea bargaining, and Fifth Amendment right to due process, by the government's concealment of the warrantless search, and its taint on the search pursuant to warrant, from Honish's counsel. Honish alleged he was prejudiced in that the government's concealment of material information prevented his counsel from filing a properly supported, meritorious motion to suppress the firearms. A motion for evidentiary hearing was also filed, but denied.

The government filed a response, (Exhibit A) asserting Honish's motion was time-barred, barred by his plea agreement waiver, and was alternatively without merit. Honish filed a Traverse to the government arguing his §2255 motion was timely under both §2255(f)(2) and (4), and that he had shown both cause for the procedural default and prejudice. Honish argued his motion was not barred by the plea waiver, as it was a claim of ineffective assistance of counsel that affected the validity of the plea and its waiver, which was the plea waiver agreement.

On September 9, 2015 a federal magistrate judge for the Eastern District of Texas issued a Report and Recommendation to deny Honish's §2255 motion and to dismiss with prejudice, and deny a COA. (Appdx.D.) Honish timely filed his Objections to the magistrate's report, arguing the motion was timely under §2255(f)(2)(4), and that the magistrate had misconstrued and misstated the entire basis of Honish's IAC claim. Honish also responded to the magistrate's Fourth Amendment arguments, showing them to be erroneous and in conflict with the U.S. Supreme Court's Fourth Amendment case law precedents.

The district court entered an order of Dismissal on September 29, 2015, (Appdx. B) concluding the findings and conclusions of the magistrate judge were correct. The court erroneously stated Honish had filed no objections. Honish filed a motion for reconsideration under Rule 59(e), arguing he had in fact filed a timely objection with the court. Upon a de novo review of Honish's objections, the court denied Honish's motion for reconsideration on September 26, 2016. (Appdx. C)

Honish filed an application for a COA with the district court, which was denied on December 21, 2016. (Appdx. E) Honish filed a notice of appeal with the Fifth Circuit Court of Appeals, an application for a COA, and a motion for

leave to proceed in forma pauperis. The Fifth Circuit denied Honish a COA on October 31, 2017. (Appdx. A) Honish timely filed a motion for reconsideration, which was denied on November 21, 2017. (Appdx. F)

In light of the U.S. Supreme Court's recent decision in Buck v. Davis,¹³⁷ S.Ct. 759(2017), where this Court reversed the Fifth Circuit Court of Appeals for its failure to issue a COA, Honish filed a motion for leave to file an out of time motion for en banc reconsideration. Honish was granted leave to file, but en banc review was subsequently denied on February 12, 2018. (Appdx. G)

The magistrate in his report and recommendation misconstrued, and misstated Honish's IAC claim to be that Honish claimed ineffective assistance because his attorney failed to learn of the warrantless search by police and was therefore ineffective. (Appdx. D 4-5) Honish's claim is that he was denied effective assistance at plea bargaining by the government's interference in concealing the warrantless search by police from his counsel. The government's withholding of material information was a constructive denial of effective assistance, that rendered counsel constitutionally deficient at plea bargaining.

Honish filed his §2255 motion within 12 months of the discovery of the new evidence, thus, it is timely under §2255(f)(4). No amount of diligence by Honish or his counsel could have uncovered the warrantless search by officers and its taint on the search pursuant to warrant. State investigators actively concealed the search, falsifying documents and giving false testimony to do so. A §2255 motion is ordinarily the proper vehicle for an IAC claim, and Honish had no basis to file a direct appeal or an IAC claim until the discovery of the new evidence in August of 2011.

REASONS FOR GRANTING THE PETITION

- I. THE FIFTH CIRCUIT HAS MISAPPLIED THE STANDARD OF REVIEW FOR ISSUING A COA, AND IS HOLDING APPLICANTS TO A HIGHER STANDARD THAN REQUIRED BY THIS COURT, WARRANTING THIS COURT'S ATTENTION.

28 U.S.C. §2253(c)(2) holds a petitioner is entitled to a COA if he makes a "substantial showing of the denial of a constitutional right." In Barefoot v. Estelle, 463 U.S. 880, 893 (1983), the Court held this to mean an appellant need not show he would prevail on the merits, but must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.'" (Barefoot Standard)

The Barefoot standard does not require the petitioner to show that he is entitled to relief. Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Therefore, doubts as to whether to issue a COA should be resolved in favor of the appellant. Fuller v. Johnson, 114 F.3d 491, 495 (CA 5 1997). Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of a case. Miller-El at 336. Recently, in Buck v. Davis, 137 S.Ct. 759 (2017), the Court reversed the Fifth Circuit for failing to issue a COA. Buck cites Miller-El at 327:

"The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown the jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."

This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Id. at 336. A Court of Appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merits of the claims, and ask "only if the District Court's decision was debatable." Id. at 327, 348.

The question before the Fifth Circuit in the instant case was the debatability of Honish's time barr claim, and the debatability of his constitutional claims, not, the resolution of those claims. In denying Honish a COA, the Fifth Circuit cites the proper standard of §2253(c)(2) and of Slack v. McDaniel, 529 U.S. 473,484(2000), and states only, "Honish has not made the requisite showing." (Appdx A-2) Honish respectfully disagrees.

Prior to this Court's ruling in Buck v. Davis, the Fifth Circuit was routinely denying COA's based on the merits of a claim. Honish argues the Fifth Circuit is continuing to deny COA's based on the merits, without stating such. The court's denial of a COA is based on subjective assessments, however, they must be supported by objective evidence. Honish argues he supported his claims with objective evidence, that showed his claims to be debatable among jurists of reason.

Honish filed his §2255 motion within the 12 month limitation of §2255(f) (4) on August 1, 2012. Honish had no basis for a direct appeal, or a §2255 motion until the discovery of the new evidence on August 22, 2011. This Court in Massaro v. U.S., 538 U.S. 500,504(2003), held that "an ineffective assistance of counsel claim may be brought in a collateral proceeding under §2255, whether or not the petitioner could have raised the claim on direct appeal." Despite following proper procedure, the district court insists Honish's §2255 motion is time barred because he did not file a direct appeal, or his §2255 motion within 12 months of his conviction becoming final.

The "cause" standard required Honish to show some objective factor external to the defense impeded his ability to raise the issue on direct appeal. Examples of such external factors include the discovery of new evidence. Murray v. Carrier, 477 U.S. 478,488(1986). Ineffective assistance of counsel

is another example of an external factor that may constitute "cause" excusing a procedural default. Edwards v. Carpenter, 529 U.S. 416(2000); Anderson v. Collins, 18 F.3d 1208, 1215(CA5 1994). Cause for a procedural default exists where 'something external to the petitioner, something that cannot be fairly attributed to him,...impeded his efforts to comply with a procedural rule. See Coleman v. Thompson, 501 U.S. 722(1991). This Court in Amadeo v. Zant, 486 U.S. 214(1988), held that interference by state officials was cause excusing default.

The 2011 testimony of the 3 state investigators was that, (1) police had carried out a warrantless search within the curtilage of Honish's home to look for evidence in the murder of Honish's brother. (See 4 RR: 42-48, Ex. B; 4 RR: 119, Ex. C; 5 RR:83-88, Ex. G) (2) That information gleaned from the warrantless search motivated officers to seek a search warrant, (See 4 RR:59-60, Ex. B) and was used in the search warrant affidavit. (See 4 RR:131-133, Ex. D)

Prior to these officers' August 2011 testimony, their written reports had no mention of a warrantless search, and the warrant affidavit attributes the evidence of mud, tires, and blood being seen on Honish's truck after he was stopped by police, not, as officers' testified in 2011, as seen during their warrantless search. (See Ex. A, Pg. 5) Officers Murphree and Sullivan testified under oath at an August 2009 bond hearing that Honish was not a suspect in his brother's murder, that they went to Honish's home to make a death notification, and that Honish then became a suspect as a result of that "contact." (See 2 RR:44-47,75, Ex. E) No mention was made of the warrantless search. The courts have denied Honish access to these officers' grand jury testimony, which he believes would not mention the warrantless search.

The August, 2011 testimony of officers Murphree and Sullivan, is in fact,

perjured when compared to their August of 2009 testimony. (Compare 2 RR:44-47, 75, Ex. E to 4 RR:42-48, Ex. B, 4 RR:119, Ex. C, 5 RR:83-88, Ex. G) However, the admission to the warrantless search shows that, (1) the warrant used to search Honish's home was tainted by the illegal search; (2) That the government, through its agents, concealed the warrantless search from Honish's counsel at plea bargaining; and (3) that Honish's counsel was rendered constitutionally deficient in advising Honish to plead guilty, by the government's interference in concealing the illegal search and its taint.

A petitioner must also establish "prejudice" incurred as a result. In Kyles v. Whitley, 514 U.S. 419(1995) and Strickler v. Greene, 527 U.S. 263 (1999), the Court explained that in order to establish prejudice under Wainwright v. Sykes, 433 U.S. 72(1977), a petitioner must demonstrate that there is a "reasonable probability that the result of the trial would have been different." In the instant case, Honish's counsel, had he known of the illegal search prior to, or during plea bargaining, would have been able to file a properly supported, meritorious motion to suppress the guns found in the home. Had counsel known of the blatantly unlawful search, he would not have advised a guilty plea, nor would Honish have accepted one.

In Elkins v. U.S., 364 U.S. 206, 223(1960), the Court held that evidence unlawfully obtained by state officers in a federal case, is inadmissible at trial. In the instant case, with the firearms suppressed because of the taint from the warrantless search, the government would have had no case. There is a reasonable probability therefore, of a different outcome.

Honish's time barr claim is shown to be debatable among jurists of reason. The Fifth Circuit's denial of a COA is an abuse of discretion that disregards the standard for issuing a COA of this Court, and appears to be merit based.

The district court held that Honish was not denied effective assistance of counsel at plea bargaining, as "testimony given approximately 4 years after Movant pled guilty cannot be used to hold counsel ineffective in this case." (Appdx. D-15) The district court adopted the magistrate's report as correct, however, as Honish argued in his objections and COA application, the magistrate misstated the basis of Honish's claim. The district court therefore, accepted and ruled on an IAC claim that Honish never made. Surely, this makes the IAC claim debatable and would allow a COA to issue.

Honish's IAC claim was that his counsel was rendered ineffective at plea bargaining by government interference in concealing the warrantless search. Honish has never contended, as the magistrate stated, that counsel was ineffective for advising a guilty plea, and that he should have known of the illegal search. The district court and the Fifth Circuit made no acknowledgement of the magistrate's misstatement of the IAC claim.

The actions of the state officers in conducting the warrantless search, and their misconduct in concealing it are imputed to the government in the federal prosecution of Honish, as the government relied on the search pursuant to warrant. See Giglio v. U.S., 405 U.S. 150, 154-155 (1972). If a plea has been offered, a defendant has a right to effective assistance of counsel in considering whether to accept it. Lafler v. Cooper, 132 S.Ct. 1376 (2012). In Strickland v. Washington, 466 U.S. 668 (1984) and U.S. v. Cronin, 466 U.S. 648 (1984), the Court held that, (1) the government violates the right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct a defense. (2) Prejudice is presumed when there is an actual or constructive denial of effective assistance of counsel. Therefore, Honish's claim was debatable among jurists of reason.

The district court held Honish's guilty plea was voluntary and knowing, and that his plea waiver must be enforced. (Appdx. D 10-15) Honish argued his guilty plea cannot be deemed intelligent and voluntary as it was entered into without knowledge of material information, intentionally concealed by the government. Additionally, Honish argued his IAC claim is a claim that affects the validity of the plea and its waiver, and is thus in compliance with the plea waiver.

To show the debatability of his claims, Honish offered the following case law in support. A waiver may not be enforced against a §2255 movant who claims that ineffective assistance of counsel rendered that waiver unknowing or involuntary. U.S. v. Henderson, 72 F.3d 463, 465 (CA5 1995). Pleading guilty does not preclude a defendant from claiming his plea was the product of prosecutorial misrepresentations or misconduct. Such a claim directly challenges the voluntary and intelligent nature of the plea. U.S. v. Wright, 43 F.3d 491, 496 (CA10 1994). Guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution. Evidence or information is material if there is a reasonable probability that but for the failure to disclose the material information, defendant would have refused to plead guilty and would have gone to trial. *Id.*

In administering the writ of habeas corpus, and its post conviction counterpart for federal prisoners, federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make a guilty plea a constitutionally inadequate basis for imprisonment. Blackledge v. Allison, 97 S.Ct. 1621 (1977).

Black's Law Dictionary defines "Fraud" as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Black's 5th Edition, Page 594.

Black's definition readily sums up the fraud imposed on Honish by the misconduct in concealing the warrantless search from him. A plea agreement is in essence a contract between the government and the defendant. Under contract law, this contract would be void under fraud. Therefore, it is open to collateral attack. See Bradshaw v. Stumpf, 545 U.S. 175(2005). Certainly the debatability of the validity of Honish's plea has been established, and that he is not restricted by the plea waiver. The Fifth Circuit in denying Honish a COA abused its discretion, and held him to an arbitrary and unknown standard of debatability, higher than required by this Court.

Honish raised Fourth Amendment violations that were revealed with the newly discovered evidence, in his §2255 motion, but was unsure if they were cognizable claims because of his plea waiver. As the district court addressed in some detail the Fourth Amendment grounds, Honish responded to the court's finding that they were without merit.

In an attempt at brevity...Honish will list the district court's Fourth Amendment holdings and cite where they are located, and attempt to make a brief argument encompassing the district court's holding.

(1) The district court holds Honish's claim that the search warrant was tainted to be without merit. (Appdx. D 5-6) (2) The district court holds that

any evidence obtained by law enforcement during the warrantless search was in "plain view" once Honish left his house and was stopped by police. "Thus, it was independently obtained by law enforcement." (Appdx. D 8-9) (3) The district court held that a search warrant was already in progress prior to the established surveillance on Honish's house and the warrantless search. (Appdx. D-8) (4) The district court held Honish had no legitimate expectation of privacy in any portion of an automobile visible from the outside, and cites Texas v. Brown, 460 U.S. 730, 743-744 (1983), in support. (Appdx. D-9) (5) The district court held that any motion to suppress evidence discovered during the warrantless search of Honish's truck in his driveway would have been without merit. As such, the court holds counsel's advice to plead guilty cannot be held to be erroneous or deficient performance.

In the instant case, officers testified to entering Honish's curtilage without a warrant, to search for evidence. (4 RR:42-48, Ex. B; 4 RR:119, Ex. C; 6 RR:203-221, Ex. H) Officers testified they had no probable cause or exigent circumstances to justify a warrantless search. (4 RR:114, Ex. B; 6 RR:196, Ex. H) The officers' testimony showed that information gleaned from the warrantless search motivated police to seek a warrant, (4 RR:59-60, Ex. B) and was improperly used in the search warrant affidavit, thus, tainting the search pursuant to warrant. (4 RR:131-133, Ex. D)

Warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions. Katz v. U.S., 389 U.S. 347, 357 (1967); U.S. v. Cardenas, 9 F.3d 1139, 1147 (CA5 1993). As the government's agents in the instant case admit to conducting a warrantless search, the burden of proof is on the government to establish probable cause and reasonableness of the warrantless search. U.S. v. Jones, 234 F.3d 234, 239 (CA5 2000). The district

court did not meet this burden, or even attempt to. This Court in U.S. v. Ramsey, 431 U.S. 606(1977), employed a two step analysis for determining the constitutionality of a warrantless search or seizure. The Fifth Circuit adopted this same analysis in U.S. v. Odutayo, 406 F.3d 386,389(CA5 2005). The first step in the Ramsey analysis should be controlling in the instant case. First, the government must establish some statutory or legal authority under which it acted; in the absence of such authority, a court must conclude without any further consideration, that the search or seizure was unconstitutional.

In the instant case, the district court failed to meet the required burden of proof to show the warrantless search was reasonable, and has failed to establish any statutory or legal authority under which the search was conducted. Under the Ramsey analysis, the court was required to conclude without any further consideration, that the search was unconstitutional. These two arguments alone, show the Fourth Amendment claims to be debatable among jurists of reason, yet, the Fifth Circuit holds Honish failed to show debatability.

The search pursuant to warrant is tainted, the affiant admits using information from the illegal search in the affidavit, and a reading of the affidavit shows the affiant attributes Ranger Murphree's viewing of evidence on Honish's truck to occurring after the stop, not, as Murphree testified to in 2011, as being seen in the warrantless search. (See Ex. A 4-6) The affiant made statements that were knowingly false or in reckless disregard of the truth. A search warrant was not in progress at the time of the warrantless search as claimed by the magistrate, and even if it had been, the police still were not permitted to conduct a search until they had a signed warrant. The police could have requested a telephonic warrant, but did not.

The only indication of a warrant being in progress during the illegal

search was the affiant's 2011 testimony claiming he went from the crime scene to the police station to start a warrant. However, that testimony is perjured when compared to the affiant's 2009 bond hearing testimony, where he testified that he had no suspect in the murder, and went to Honish's home to make a death notification, and that Honish then became a suspect as a result of that contact. (Compare 2 RR:44-47, Ex. E; to 4 RR:131-132, Ex. D) The affiant's partner, Det. J. Walker, wrote in his report at Page 2, (Ex. F) that they did not start a search warrant until after the warrantless search and stop of Honish, when the investigator's called them with the information from the illegal search and stop.

Police in the instant case admit to entering an area protected under the Fourth Amendment, to search for evidence, without a warrant, or any statutory or legal authority to do so. The curtilage is afforded the same protections under the Fourth Amendment as the home itself. Florida v. Jardines, 133 S.Ct. 1409, 1414-1415(2013). Honish had a constitutionally protected, reasonable expectation of privacy in the area and effect searched, he had possessory interest in the area and the right to exclude others. See Katz at 360; Rakas v. Illinois, 439 U.S. 128, 136(1978). Honish took normal precautions to protect his privacy, which included having his truck parked in the driveway, on his property, to protect that privacy. See U.S. v. Gomez, 276 F.3d 694, 698(CA5 2001).

The independent source exception to the exclusionary rule does not apply to evidence seen on Honish's truck after his invalid stop. As the police testified, at least in 2011, that the stop was based on the evidence seen in the warrantless search, the court cannot say with any credibility that it was discovered through a distinct untainted source. See U.S. v. Zavala, 541 F.3d

562,577-578(CA5 2008). The district court's finding of independent source to apply to evidence seen after the stop ignores the facts, and officers' own testimony.

As police lacked probable cause to stop and arrest Honish, both before and after their illegal search, and testified they stopped Honish based on the evidence seen in the illegal search, the stop and arrest is invalid. As such, any evidence seen or discovered as a result of the stop and arrest is subject to suppression as the fruit of an illegal arrest. See Smith v. Ohio, 494 U.S. 541,543(1990); U.S. v. Al Dac Ho, 94 F.3d 932,937-938(CA5 1996).

A search pursuant to warrant is not an independent source of the evidence seized if officers decision to seek the warrant was prompted by what they saw in the initial search, or if information obtained during that search was presented to the magistrate and affected his decision to issue the warrant. See Murray v. U.S., 487 U.S. 533(1988). Murray dealt with the so called confirmatory search, conducted for the precise reason of making sure it is worth the effort to obtain a search warrant, which is the exact scenario in the instant case. There is a clear causal connection between the warrantless search by police, Honish's stop and arrest, and the subsequent search of his home pursuant to warrant. The search pursuant to warrant was merely a continuation of the initial warrantless search.

The district court's reliance on Texas v. Brown, 460 U.S. 730,743-744(1983) is misplaced. Brown was based on a legitimate traffic stop. Honish's stop was unlawful. Once police trespassed onto Honish's curtilage to search for evidence without a warrant or exigent circumstances, any claim to plain view is invalid. See Horton v. California, 496 U.S. 128(1990); California v. Ciraolo, 496 U.S. 207(1986).

For the district court to find independent source doctrine applicable, it was required to perform an attenuation of taint analysis to show that there was attenuation of the taint from the warrantless search on the subsequent searches and seizures. See Wong Sun v. U.S., 371 U.S. 471, 484-487 (1963); Brown v. Illinois, 422 U.S. 590 (1975). The district court cites no attenuation factors.

The district court's holding that any motion to suppress would be without merit is not supported by the facts of this case, or Supreme Court precedent. Consequently, the advice by Honish's counsel to enter a plea of guilty, when the government knowingly and in bad faith withheld material information from counsel, is shown to be constitutionally deficient.

Honish was not required to win his arguments on the merits for the Fifth Circuit to issue a COA, but only to show his claims were debatable among jurists of reason. Honish has met the Barefoot standard in his claims. As the Fifth Circuit continues to deny COA's based on arbitrary and capricious standards that are out of step with, and stricter than those required by this Court, prejudicing all COA applicants, Certiorari should be granted to correct this abuse of discretion.

II. THE FIFTH CIRCUIT HAS INCORRECTLY APPLIED THE
AEDPA TIME LIMITATION OF §2255(f)(4) AND IT
WARRANTS THIS COURT'S ATTENTION

§2255(f)(4) states a 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of:
(4) the date on which facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. (Appdx. H)

In the instant case, Honish discovered the new evidence on August 22, 2011 at his state murder trial. His §2255 motion was filed on August 1, 2012,

within the 1-year limitation period of the plain and unambiguous language of §2255(f)(4). The district court held Honish was time barred, as Honish did not file a notice of appeal within 14 days of his sentencing, and failed to file his §2255 motion within 1-year of his conviction becoming final.

Honish had no basis for filing a direct appeal, nor a basis for filing a §2255 motion prior to the discovery of the new evidence in 2011. Honish has shown both "cause" for the procedural default, and "prejudice" incurred.

The district court misapplied §2255(f)(4) to the timeliness of Honish's motion, and the Fifth Circuit has ignored or accepted this error. The question the Fifth Circuit was required to answer, was simply the debatability of the district court's time barr ruling, to issue Honish a COA on this claim. As Honish filed his motion within the 1-year limitation of §2255(f)(4), and showed both cause and prejudice for the default, the district court's ruling was shown to be debatable among jurists of reason. The Fifth Circuit however, held Honish failed to show his time barr claim to be debatable.

Sixth Amendment claims of ineffective assistance of counsel should ordinarily be raised in a collateral proceeding pursuant to 28 U.S.C. §2255 rather than on direct appeal. U.S. v. Davies, 394 F.3d 182,188(CA3 2005). This Court in Massaro v. U.S., 538 U.S. 500,504(2003) held an IAC claim may be brought in a collateral proceeding under §2255, even if not raised on direct appeal.

Per Massaro, Honish was not required to raise his IAC claim on direct appeal, even if he could have. Honish has presented facts that are sufficient as a matter of law that allowed the district court and Appellate court to conclude Honish had established cause for not being able to raise his IAC claim within the initial 1-year AEDPA limitation period. Where the government's efforts to conceal its misconduct cause an issue to be overlooked or ignored at plea

bargaining or trial, the government should not be allowed to rely on its procedural default rules to preclude federal habeas review. See dissent in Amadeo v. Kemp, 816 F.2d 1502, 1513 (CA11 1987).

Honish's §2255 motion was timely filed under the plain and unambiguous language of §2255(f)(4), ~~that~~ that fact alone should have required the Fifth Circuit to issue a COA on the time barr issue. Both the district court and the Fifth Circuit erred, and appear to interpret §2255(f)(4) as pertaining only to the initial 1-year limitation period, not, as the statute requires, to pertain to the date from which the claim presented could have been discovered through the exercise of due diligence.

Because the Fifth Circuit Court of Appeals has interpreted, and misapplied §2255(f)(4) in a manner that will negatively impact any §2255 motions filed that are based on the discovery of new evidence or an ineffective assistance claim, Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark D. Homish

Date: May 8, 2018