

MARK F. HONISH,
Petitioner

No. 17-9144

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

MARK F. HONISH
TDCJ# 1745461
ESTELLE UNIT
264 FM 3478
HUNTSVILLE, TX 77320

Petitioner Pro Se

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PETITION FOR REHEARING

COMES NOW Mark F. Honish, Petitioner pro se, and prays this Court grant Rehearing pursuant to Rule 44, and thereafter, grant a Writ of Certiorari to review the Fifth Circuit Court of Appeals denial of a COA. In support of this petition, Honish states the following:

I. STATEMENT OF FACTS

Honish pled guilty to a violation of 28 U.S.C. §922(g)(1) on December 20, 2007. He was sentenced to 24 months imprisonment, 3 years of Supervised Release, and fined \$4,000. Honish served his 24 month sentence and has paid his fine.

Subsequently, Honish was remanded to the custody of the State of Texas on July 13, 2009 to face a murder charge in the death of his brother David. Honish was convicted of murder on September 1, 2011 and is currently serving a 50 year sentence.

During Honish's murder trial in late August of 2011, new evidence came to light that affected his federal guilty plea, when 3 police investigators for the State of Texas disclosed for the first time, that they had conducted a warrantless search within the curtilage of Honish's home. The search was of Honish's truck which was parked in his driveway, which abuts his house. Based on the information gleaned in this warrantless search, the officers filed for a search warrant to search Honish's home and truck. During the subsequent search pursuant to warrant, firearms were found in Honish's home, resulting in federal charges against him. Prior testimony and written statements of these officers made no mention of this warrantless search.

Based on this newly discovered evidence, Honish filed a §2255 motion to vacate his conviction on August 1, 2012. This §2255 motion was timely under

§2255(f)(4), as it was filed within 1 year of the discovery of the new evidence, which was the warrantless search by police, and its taint on the subsequent search pursuant to warrant.

The District Court for the Eastern District of Texas denied Honish's §2255 motion. Honish filed a timely notice of appeal and application for a COA to the Fifth Circuit Court of Appeals. Honish was denied a COA by the Fifth Circuit on October 31, 2017. Honish then filed the instant petition for a Writ of Certiorari, which was denied on October 1, 2018.

II. REASONS MERITING REHEARING

The Fifth Circuit's decision to deny Honish a COA is clearly in conflict with the precedents set by this Court for issuance of a COA in Barefoot v. Estelle, 463 U.S. 880, 893 (1983) and Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Both of these case precedents established that an applicant for a COA is not required to show he would prevail on the merits, but must demonstrate the issues were debatable among jurists of reason; or that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

The Fifth Circuit in denying Honish a COA, ignored the fact that the district court claimed Honish was time barred based on an erroneous interpretation and application of §2255(f)(4) pertaining to newly discovered evidence. Despite Honish showing he had filed his §2255 motion within 12 months of the newly discovered evidence, and showing both cause and prejudice for his procedural default in accordance with this Court's holding in Murray v. Carrier, 477 U.S. 478, 488 (1986), the Fifth Circuit refused to issue a COA.

Honish refuted each of the district court's erroneous Fourth Amendment arguments with the case precedents of this Court, as well as the government's

position that Honish was barred by his plea waiver from raising his claim. The Fifth Circuit ignored this Court's case precedents, and arbitrarily denied Honish a COA.

In the intervening time between Honish's petition for Certiorari being filed and considered by this Court, the Court has ruled on a Fourth Amendment case that is relevant and applicable to Honish's §2255 motion. In Collins v. Virginia, 138 S.Ct. 1663(2018), the Supreme Court held that the automobile exception to the Fourth Amendment does not permit law enforcement to enter the curtilage of a home, without a warrant or consent, in order to search a vehicle located therein.

Collins is relevant to Honish's §2255 claim and his petition for certiorari, and is similar in many respects to Honish's case, and the arguments made in his §2255 motion and application for a COA, regarding Fourth Amendment protections. As in Collins, the newly discovered evidence Honish's §2255 motion was based on, was a warrantless search by police officers of a vehicle parked within the curtilage of his home. As in Collins, police in Honish's case entered onto his curtilage to search his truck, then returned to their vehicle and waited for Honish to leave for work, so they could stop and seize Honish and his truck.

The district court in its ruling to deny Honish's §2255 motion argued that Honish had no expectation of privacy in his vehicle. (See Appdx. D-9, Pet. for Cert.) The Court's ruling in Collins has made clear that a vehicle parked within the curtilage of a home cannot be searched without a warrant.

Furthermore, Collins validates, and supports Honish's claim that the newly discovered evidence of a warrantless search by police tainted the search pursuant to warrant, that was used to prosecute Honish in federal court.

III. CONCLUSION

Honish's §2255 motion was timely filed in accordance with the 1 year limitation for newly discovered evidence under §2255(f)(4). This fact was ignored and the statute's plain language disregarded by the district court and the Fifth Circuit Court of Appeals. The §2255 motion was not time barred.

Honish's plea waiver allowed him to raise a claim of ineffective assistance of counsel that affects the validity of the waiver or plea itself. Honish raised an IAC claim that met this criteria, in that the government's withholding of material information from his counsel at plea bargaining was a constructive denial of effective assistance. This Court in Lafler v. Cooper, 132 S.Ct. 1376(2012) held that if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. The government's withholding of information of the warrantless search by police, and its obvious taint on the search pursuant to warrant, from Honish's counsel, is a clear case of constructive denial of effective assistance of counsel.

All of the district court's arguments against Fourth Amendment claims raised by Honish have been rendered moot in light of the Court's recent ruling in Collins. As the search of Honish's truck parked within his curtilage was unconstitutional, and police testified their warrantless search led them to stop and arrest Honish, (See 4 RR:50-63, Exhbt. G, Pet. for Cert.) and that information from the warrantless search was used in the warrant affidavit, (See 4 RR:132-133, Exhbt. D, Pet. for Cert.) any evidence gained as a result of the stop, and search pursuant to warrant must be suppressed. Therefore, the government's concealment of the warrantless search prevented Honish's counsel from filing a properly supported, meritorious motion to suppress the firearms found within Honish's home in the search pursuant to warrant.

Honish has met the standard of this Court in Barefoot and Miller-El for the Fifth Circuit to have issued him a COA. In light of this Court's ruling in Collins v. Virginia, Honish would respectfully ask the Court for a Rehearing to determine if Collins would give his claim additional weight, and require a COA to be issued.

This Court is the last chance any petitioner has for justice. This Court must uphold and enforce its own case law in the face of it being ignored and misapplied by the Fifth Circuit, for the sake of all applicants for a COA in the Fifth Circuit Court of Appeals.

For the reasons stated, this Court should grant a rehearing of its Order issued October 1, 2018, and issue a Writ of Certiorari to hold the Fifth Circuit Court of Appeals accountable.

Respectfully submitted,

Mark F. Honish
Mark F. Honish, pro se
TDCJ# 1745461
Estelle Unit
264 FM 3478
Huntsville, TX 77320

IV. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed postage prepaid to the Solicitor general of the U.S., Room 5614, Dept. of Justice, 950 Pennsylvania Ave., N.W. Washington, DC 20530-0001 on this 20th day of October, 2018.

Mark F. Honish
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INVOCATION OF MAILBOX RULE

__ I hereby certify under the penalty of perjury that this Petition For a Rehearing was placed in the TDCJ Estelle Unit mailbox on Saturday, October 20th, 2018. Per the mailbox rule, it is understood that this petition will be considered filed with the Court on this date.

Executed on this 20th day of October, 2018.

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Huntsville, TX 77320