IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	Civ. No.00-3047DV
	)	Crim. No. 99-20156Ml
JOSEPH VERSHISH,	)	
	)	
Defendant/Petitioner.	)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO VACATE, SET ASIDE
OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

On November 23, 1999, the defendant, Joseph Vershish, was sentenced to a term of imprisonment of eighty-seven months for one count of felon in possession of a fireman in violation of 18 U.S.C. § 922(g) and a concurrent term of eighty-seven months on one count of possessing with intent to use five or more false identification documents in violation of 18 U.S.C. § 1028(a)(2). Vershish pled guilty to both counts in exchange for the government dismissing the two other counts in the indictment. Now before this court is Vershish's November 2, 2000 motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.[1] The motion was

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[1] Section 2255 states in part:

> Federal custody; Remedies on motion attacking sentence. A prisoner in custody under sentence of a court established by Act of

referred to the United States Magistrate Judge for an evidentiary hearing and a report and recommendation.

Vershish argues four primary grounds, *inter alia*[2], for setting aside his conviction and sentence: (1) ineffective assistance of counsel in failing to file a notice of appeal; (2) ineffective assistance of counsel in failing to adequately investigate his arrest and advise him of the consequences of a guilty plea; (3) ineffective assistance of counsel in failing to move for suppression of evidence obtained as a result of an allegedly unlawful arrest, search, and seizure; and (4) that his conviction violated due process because the government failed to disclose evidence favorable to him. More specifically, Vershish alleges that his attorney failed to follow his express request to file an appeal after his sentencing hearing. All parties agree that no

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> **Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.**

28 U.S.C. § 2255.

[2] **Vershish also argues for a sentencing guideline departure and requests leave to introduce new issues on re-sentencing, including a facial attack on the indictment. This court does not address these issues because, as discussed in Section 1 below, the district court has discretion to consider such evidence during re-sentencing.**

appeal was ever filed. He further alleges that his attorney should have investigated the circumstances surrounding his arrest and discovered that he was improperly arrested on a flawed parole violation warrant. He also asserts that evidence of identity fraud and the guns were obtained in violation of his Fourth Amendment right to be free from unlawful searches and seizures and fruits of the poisonous tree. Finally, he argues that the government failed to disclose to him prior to his guilty plea that he was not arrested on the parole violation warrant as originally told.

At the evidentiary hearing on August 19, 2002, and September 16, 2002, the government called as a witness James Cooper. At the time of Vershish's arrest, Cooper was working at Brewer Detective Services of Memphis. Vershish called two witnesses: (1) Russell Kinard, the Deputy U.S. Marshal who arrested him; and (2) April (Ferguson) Goode, the attorney who represented him on the criminal charges. In addition, Vershish took the stand and testified on his own behalf.

At the request of the bench, Vershish filed a supplemental memorandum on October 29, 2002, to clarify the issues presented during the hearing, and the United States responded on November 25, 2002. Based on the evidence presented and the arguments of counsel, the court proposes the following findings of fact and conclusions of law and recommends that Vershish's motion be

granted.

PROPOSED FINDINGS OF FACT

In 1986, Vershish was convicted in the Southern District of Florida for conspiracy to import and distribute methaqualone. He was sentenced to serve a term of imprisonment of nine years. On September 13, 1990, he was released on parole. On March 30, 1992, the U.S. Parole Commission issued a warrant for the arrest of Vershish because he had absconded from supervision. In 1993, an arrest warrant for Vershish was issued from the state of Massachusetts on unrelated charges.

In April of 1999, the U.S. Marshal's office in Florida contacted the U.S. Marshal's office in the Western District of Tennessee and advised that Vershish was wanted on a parole violator warrant and was believed to be in the Memphis area. On April 8, 1999, the Marshal's office in Florida faxed a copy of the parole violator warrant to Memphis. Instructions on the back of the parole violator warrant state that a criminal warrant takes precedence over the parole violator warrant:

> **Please assume custody as soon as possible or when located. NOTE: If the parolee is already in the custody of federal or state authorities, do not execute this warrant. Place a detainer and notify the Commission for further instructions. Also, if a criminal warrant has been issued for the parolee, execution of such criminal warrant shall take precedence and the Parole Commission is to be notified before its warrant may be executed.**

(Ex. 1.)

The Marshal's office in Memphis received information that Vershish was using the name Michael Powers and was believed to be gambling in casinos in Tunica, Mississippi. On April 9, 1999, Vershish was arrested at the Goldstrike Casino in Robinsville, Mississippi, by deputies with the United States Marshal Service pursuant to the parole violation warrant issued by the state of Florida. A copy of the parole violator warrant was served on Vershish at the time of his arrest. Identification documents belonging to Michael Powers were found in Vershish's billfold when he was arrested. Four days later, on April 13, 1999, the U.S. Marshall obtained a search warrant from United States Magistrate Judge James H. Allen to search Vershish's dwelling at 1855 Poplar Woods Circle West, Apartment 307, in Memphis, Tennessee, for evidence relating to the identity theft of Michael Kevin Powers. The warrant was issued on the basis of an affidavit submitted by Deputy Marshal Kinard which provided as follows:

> **Joseph Vershish was arrested on a criminal warrant from the Southern District of Florida on or about April 9, 1999. During the investigation, the affiant learned appellant had been utilizing the identify of Michael Kevin Powers in order to conduct business negotiations, lease a residence at 1855 Poplar Woods Circle West, Apt. 307, in Shelby County, TN, purchase golf memberships, and rent vehicles. Joseph Vershish resided at the above address since on or about December 1998, using the identity and social security number of Michael Kevin Powers. Mr. Vershish has been a fugitive from the**

> **Souther [sic] District of Florida since February 11, 1992. Upon information and belief, Mr. Vershish has been conducting business from the above address.**

(App. and Aff. for Search Warrant, Case No. 99-SW-042, U.S. Dist. Ct., W.D. Tenn., Apr. 13, 1999, *avail. in* Crim. Case No. 99-20156 as Ex. 2 to Def.'s Mot. for New Trial, Jan. 21, 2000.) The two firearms upon which the felon in possession charges were based were recovered in the search of Vershish's apartment along with numerous other documents, credit cards, etc.

Vershish was then charged in a complaint on April 26, 1999, with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The Federal Public Defender was appointed to represent him, and attorney April (Ferguson) Goode was assigned to the case. On June 22, 1999, the grand jury returned a four count indictment against Vershish charging him with two counts of felon in possession of a firearm, one count of using an unauthorized MasterCard to obtain goods and services, and one count of using five or more false identification documents. Pursuant to a plea agreement entered into with the government, on September 2, 1999, Vershish pled guilty to one count of felon in possession of a firearm and to the count of using more than five false identification documents. In exchange, the government agreed to dismiss the remaining counts of the indictment at sentencing. On November 23, 1999, Judge Jon Phipps McCalla sentenced Vershish to

a term of imprisonment of eighty-seven months on the count of felon in possession of a fireman and a concurrent term of eighty-seven months on the count of possessing with intent to use five or more false identification documents. At the conclusion of the sentencing hearing, which contained disputed matters, Vershish instructed his attorney to file an appeal. Through oversight or neglect, no appeal was filed.

After his sentencing hearing, Vershish contacted the Bureau of Prison liaison to the United States Parole Commission and discovered that the U.S. Parole Commission warrant had not been executed on April 9, 1999, when Vershish was arrested at the casino. The government concedes that the parole violator warrant was not executed but rather was returned to the Commission unexecuted.

PROPOSED CONCLUSIONS OF LAW

The main issues raised in Vershish's motion are (1) whether his Sixth Amendment rights were violated through ineffective assistance of counsel when his attorney failed to file an appeal on his behalf, and, if so, the appropriate remedy; and (2) whether his Sixth Amendment rights were violated through ineffective assistance of counsel when his attorney failed to fully investigate the circumstances surrounding Vershish's arrest before advising him about the possible consequences of a guilty plea; and (3) whether

his Sixth Amendment rights were violated through ineffective assistance of counsel when his attorney failed to file a suppression motion arguing an unlawful arrest, unlawful search, and unlawful seizure; and (4) whether his right to due process of law was violated by the Government's withholding from Vershish favorable evidence that the parole warrant was unexecuted.

It is undisputed that Vershish received ineffective assistance of counsel in failing to file an appeal. In addition, for the reasons set forth below it is submitted that Vershish also received ineffective assistance of counsel based on Goode's failure to fully investigate underlying facts and advise Vershish sufficiently to enter an intelligent and voluntary plea. However, the evidence does not justify relief based on Goode's failure to file a suppression motion, nor on the government's alleged failure to reveal favorable evidence.

A. <u>Ineffective Assistance of Counsel Claims</u>

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial . . . [and] 'the right to counsel is the right to effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 684-686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Ineffective assistance of counsel contemplates both performance and prejudice; counsel's assistance is deemed ineffective when 1)

counsel's performance was deficient, and 2) the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 699-700 (1984); *Miller v. Straub*, 299 F.3d 570, 578 (6th Cir. 2002); *Lyons v. Jackson*, 299 F.3d 588, 596 (6th Cir. 2002). The petitioner must prove both prongs by a preponderance of the evidence. *United States v. Bondurant*, 689 F.2d 1246, 1251 (5th Cir. 1982); *Hall v. United States*, 1989 U.S. App. LEXIS 12464, *7 (6th Cir. 1989) (citing *Bondurant*). Questions of what constitutes "deficient" performance, how prejudice shall be shown, and the proper remedy, vary according to the nature of the alleged deficiency and the circumstances surrounding each case. *See Strickland v. Washington*, 466 U.S. 668, 688-690 (1984) (discussing several circumstances under which ineffective assistance claims may arise, but cautioning that the Sixth Amendment relies not on mechanical rules but on the profession's own "maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.")

1. <u>Failure to File a Notice of Appeal</u>

The Sixth Circuit has held that an attorney's failure to file a notice of appeal, when the defendant has requested an appeal, is per se ineffective of assistance of counsel and a violation of the Sixth Amendment. *Ludwig v. United States*, 162 F.3d 456, 459 (6th

Cir. 1998). Here, the parties stipulate that Vershish asked his attorney to file an appeal, that no appeal was filed, and that Vershish is entitled to a delayed appeal. Accordingly, Vershish has met his burden of proving ineffective assistance of counsel. *See United States v. Bondurant*, 689 F.2d 1246, 1251 (5th Cir. 1982) (requiring the petitioner in a § 2255 motion to prove ineffective assistance of counsel by a preponderance of the evidence); *Hall v. United States*, 1989 U.S. App. LEXIS 12464, *7 (6th Cir. 1989) (citing *Bondurant* for the same standard).

The parties disagree, however, on whether the remedy involves anything more than permitting a delayed appeal. The government maintains that the Vershish should receive a delayed appeal in the form of an extension of time to perfect an appeal but that the original sentence should not be vacated. Vershish claims not only that the district court should vacate the original sentence and re-enter a sentence to begin anew the time limit for filing an appeal, but also that the district court may concomitantly accept new evidence or consider *de novo* the existing evidence.

In *Rosinski v. United States*, 459 F.2d 59 (6th Cir. 1972), the Sixth Circuit was confronted with a situation, similar to the present one, in which a defendant moved under § 2255 to vacate his sentence when his counsel failed to perfect an appeal. The court

found ineffective assistance and enunciated the proper remedy by directing the district court "to grant petitioner's motion, vacate the sentence imposed, and re-sentence petitioner on the original conviction in order to start the time for appeal running again." *Id.* at 60. The Ninth Circuit echoed this approach in *United States v. Gaither*, 245 F.3d 1064 (9th Cir. 2001). In *Gaither*, the court held that "if a defendant did not consent to his lawyer's failure to file notice of appeal, the appeal must be reinstated. 'That can be accomplished by vacating the judgment and then reentering it, which will allow a fresh appeal.'" *United States v. Gaither*, 245 F.3d 1064, 1070 (9th Cir. 2001) (citation omitted). The government has failed to adduce any authority that a court may simply grant an extension of time to appeal without following procedural formalities of vacating the sentence imposed and re-sentencing the defendant.

The next issue is the scope of inquiry by the court during the re-sentencing procedures. The relevant authority is clear that the district court has discretion to admit additional evidence during re-sentencing, and, if it so chooses, to review the sentence *de novo*. *See United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999) (holding that district courts have authority to conduct a *de novo* re-sentencing pursuant to a successful motion for relief under

§ 2255); *Pasquarille v. United States*, 130 F.3d 1220 (6th Cir. 1997) (holding that district courts may revisit a defendant's "entire aggregate sentence" upon re-sentencing pursuant to a successful § 2255 motion to vacate).

In *Rudolph*, the Sixth circuit observed that "[m]uch as a a district court conducts *de novo* re-sentencing after a general remand, [citations omitted] so too may it choose to broaden the scope of resentencing after it chooses to grant relief pursuant to § 2255." *Id*. at 727. In *Rudolph*, the Sixth Circuit cited with approval the Tenth Circuit case of *United States v. Moore*, 83 F. 3d 1231 (10th Cir. 1996). In *Moore*, the Tenth Circuit provided a clear rationale for permitting district courts to conduct a re-sentencing *de novo*:

> **"[A] district court, following the appellate vacation of a sentence, possesses the inherent discretionary power to expand the scope of the resentencing beyond the issue that resulted in the reversal and vacation of sentence. It follows, then, that where the district court itself ordered the vacation, it has the discretion to determine the scope of the resentencing. Because it has this discretionary power, the district court necessarily has the jurisdiction to order *do novo* resentencing on any or all issues."**

***Id.* at 1235.**

Therefore, it is recommended that Vershish's sentence be vacated and the case submitted for a re-sentencing that will allow

Vershish to lodge his delayed appeal, and that the district court determine the scope of the re-sentencing procedure.

2. Failure to Investigate Circumstances Surrounding Arrest and to Advise of Consequences of Guilty Plea

***Miller* and *Lyons*, two cases concurrently decided in the late summer of 2002, set forth the Sixth Circuit's current formulation of tests for ineffective assistance of counsel in relation to guilty pleas:**

> **Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both deficient performance by counsel and prejudice to the defendant resulting from that deficient performance. To be deficient, counsel's performance must fall below an objective standard of reasonableness. In *Hill*, which applied *Strickland* to the guilty plea context, the Court explained that a defendant shows prejudice by demonstrating "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."**

***Miller v. Straub*, 299 F.3d 570, 578 (6th Cir. 2002)(internal citations omitted); *Lyons v. Jackson*, 299 F.3d 588, 596 (6th Cir. 2002) (internal citations omitted). *Accord Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (citing *Strickland*, 466 U.S. at 687). The "reasonable probability" requirement does not mean the defendant must prove by a preponderance of the evidence that he would have insisted on trial; rather, the defendant must prove by a preponderance of the evidence that there was a**

probability--a probability strong enough to undermine confidence in the outcome--that he would have insisted on a trial. *Miller v. Straub*, 299 F.3d 570, 581 (6th Cir. 2002)(citing *Strickland*); *Lyons v. Jackson*, 299 F.3d 588, 599 (6th Cir. 2002)(citing *Strickland*).

The first inquiry, then, is whether the actions of Vershish's counsel fell below an objective standard of reasonableness when counsel failed to investigate whether the parole warrant had been executed and subsequently failed to advise Vershish as to the possible effect of its non-execution before Vershish entered his plea.

When a counsel's decisions can be characterized as trial strategy decisions, they receive a high level of deference. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Such decisions, however, receive this deference only if they are grounded in a thorough investigation of underlying fact, which a criminal defense attorney is duty-bound to perform. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). An attorney need not be clairvoyant, but the investigation must be conducted with reasonable prudence. *Workman v. Tate,* 957 F.3d 1339, 1345 (6th Cir. 1992). In *Phillips v. Mills,* 1999 U.S. App. LEXIS 20628 (6th Cir. 1999), for example, the court found ineffective assistance of counsel when an appointed defender advised the defendant to plead guilty without conducting a thorough investigation of underlying

facts, even though counsel's conduct at the hearing itself was reasonable. In *Workman v. Tate,* 957 F.3d 1339 (6th Cir. 1992), the court found ineffective assistance of counsel, and "negligence, not trial strategy," when counsel declined to interview defense witnesses. *Workman v. Tate,* 957 F.3d 1339, 1345 (6th Cir. 1992). Unless the record shows that counsel reasonably decided that investigation of underlying facts was unnecessary, *see O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994)(adopting *Strickland*'s statement of counsel's duty), or acted on the defendant's own representations that investigation would be futile, *Strickland v. Washington*, 466 U.S. 668, 691 (1984), a failure to investigate undermines the voluntary and intelligent nature of the guilty plea. A plea agreement, as in Vershish's case, also raises special concern, because an attorney who has failed to investigate all possible lines of defense is unable to give "informed advice . . . as to possible defenses or mitigatory evidence that could [affect] the plea negotiations." *Phillips v. Mills,* 1999 U.S. App. LEXIS 20628, *20 (6th Cir. 1999).

A review of the record shows that, at all critical times during this action, Vershish labored under the mistaken assumption that the parole violator warrant had actually been executed against him. When Vershish was arrested, he was told he was being arrested on the parole violator warrant. (Criminal Complaint, *United States*

***v. Vershish*, Crim. Case No. 99-20156, W.D. Tenn., Apr. 26, 1999.) When Vershish waived his detention hearing on April 28, 1999, he did so believing the parole violator warrant had been executed. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 19.) *See also* Order of Detention Hearing Pending, Waiver of Preliminary Examination or Hearing, and Minutes of Preliminary Hearing/Detention Hearing, *United States v. Vershish*, Crim. Case No. 99-20156, W.D. Tenn., Apr. 28, 1999. When Vershish agreed to plead guilty to the 922(g) violation on September 2, 1999, he did so believing the parole warrant had been executed. (Plea Agreement, *United States v. Vershish*, Crim. Case No. 99-20156, W.D. Tenn., Sept. 2, 1999.) During his sentencing and allocution, Vershish believed the parole violator warrant had been executed. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 62-68; Transcript of Continuation of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Sept. 16, 2002, at 19).**

The parole violator warrant, however, was never executed. Deputy Kinard testified that the parole violator warrant was returned to Florida unexecuted after Vershish's arrest. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case

No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 39, 46.) Vershish's Pre-Trial Services Report also showed that the parole violator warrant had not been executed. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 19-22.) Vershish's attorney, Goode, did not discover this fact in the course of her investigation. Vershish himself discovered the discrepancy when he independently requested information from government agencies in mid-December 1999, after his sentencing. (Letter from Joseph Vershish to United States Marshal Service, *United States v. Vershish*, Crim. Case No. 99-20156, W.D. Tenn., Dec. 15, 1999.) By this time, Vershish had entered into a plea agreement based on his understanding that the sentences for the current offenses and for the parole violator offense could run concurrently, and that he would not have to deal with the parole violator warrant as a separate matter after completing his 922(g) sentence. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 62-68; Transcript of Continuation of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Sept. 16, 2002, at 19).

From these facts, it appears that Vershish did not have the benefit of counsel's fully informed advice, nor even the benefit of

counsel's investigation of all pertinent facts surrounding his arrest, when he decided to plead guilty. A counsel's "[f]ailing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms." *Miller v. Straub*, 299 F.3d 570, 580-81 (6th Cir. 2002); *Lyons v. Jackson*, 299 F.3d 588, 598 (6th Cir. 2002).

The second inquiry is whether Vershish has shown "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *United States v. Cottage*, 307 F.3d 494, 500 (6th Cir. 2002), *reh'g denied* 2002 U.S. App. LEXIS 23305 (Oct. 30, 2002) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Vershish has testified that he would have insisted on further evidentiary proceedings, had he known of the unexecuted warrant. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 63.) Goode characterizes Vershish as "an unusually astute, intelligent, perhaps educated and knowledgeable type of client," who took an active interest in his case. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 51.) She also candidly admits that, while investigating the circumstances of an arrest is part of the defenders' office's

standard procedure, she does not recall discussing with Vershish the possibility of an invalid warrant or the possibility of seeking to suppress evidence on basis of the circumstances surrounding his arrest. (Transcript of Evid. Hearing, *United States v. Vershish*, Civil Case No. 00-3047, U.S. Dist. Ct., W.D. Tenn., Aug. 19, 1999, at 52-55.) There is no evidence on the record to indicate that Vershish was disinterested in challenging the circumstances of his arrest or that he advised Goode that a challenge would be futile. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984)(adopting the court of appeals' reasoning that an attorney may be excused from a some part of a duty to investigate when the defendant himself indicates that such investigation is unnecessary). The testimony of both Vershish and his counsel is credible, and it is probable that Vershish would not have pled guilty had his counsel's investigation revealed that the parole warrant was not executed but instead he would have asked to submit the validity of his arrest to a trier of fact. Vershish has thus met his burden of showing prejudice as a result of his attorney's failure to investigate all circumstances of his arrest before he entered his guilty plea. Accordingly, it is recommended that Vershish's § 2255 motion be granted on this ground as well and that his sentence be vacated.

3. <u>Failure to File Motion to Suppress Evidence</u>

An ineffective assistance of counsel claim under the Sixth

Amendment may be asserted by a habeas petitioner for counsel's failure to file a motion to suppress evidence excludable under the Fourth Amendment. *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986). A two-prong test applies. First, the petitioner must show a meritorious Fourth Amendment challenge that a reasonable attorney would have brought. *Northrop v. Trippett*, 265 F.3d 372, 383-84 (6th Cir. 2001). Second, he must show a reasonable probability that the verdict would have been different but for the admitted evidence. *Northrop v. Trippett*, 265 F.3d 372, 384 (6th Cir. 2001). In this case, it is submitted that Vershish failed to meet his burden, because, as a matter of law, his Fourth Amendment claims probably would not have succeeded even if they had been raised.

Vershish contends that the parole violation warrant was invalid because it was not signed and not issued by an active member of the Commission as required by 28 C.F.R. 244(a)(2) and secondly that it was never executed on him. He further argues that his detention from April 9, 1999, until April 23, 1999, was illegal because it was not based on a valid warrant or on probable cause.

The court need not reach the warrant validity question, however, because the Government has shown probable cause for a warrantless arrest. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (warrantless arrest must be supported by probable cause to be valid). Probable cause for a warrantless arrest exists

when officers have, at the moment of arrest, "facts and circumstances within their knowledge and of which they had reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964)(quoting *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)).

At the evidentiary hearing on September 16, 2002, the Government offered testimony from James Cooper of the Brewer Detective Services of Memphis. Brewer testified that, at the time of Vershish's arrest, he had been investigating Vershish, then known to Brewer as Michael Kevin Powers, at the request of his client, Memphis Trailer Rebuilders (MTR). MTR was contemplating a business transaction with "Michael Kevin Powers" and provided to Cooper a copy of an Arizona driver's license, vehicle information and a Memphis apartment address, all in the name of Michael Kevin Powers. In the course of his investigation, Brewer contacted the real Michael Kevin Powers, a Massachusetts resident. The staff at Powers's office told Brewer that federal agents recently had visited Powers's office, asking questions about one Joseph Vershish in connection with a possible theft of Powers's identity. Brewer contacted federal agents in Washington, D.C. and received from them a photograph of Vershish, who the D.C. agents suspected of

masquerading as Powers.

Brewer then matched Vershish to the federal agents' photograph when Vershish left the Memphis apartment that MTR had identified as that of "Michael Kevin Powers." Brewer followed Vershish's gold Lexus to Mississippi, relaying to local federal agents information about Vershish's apartment address, vehicle, clothing, and driving route. When Brewer arrived at the Mississippi casino complex, federal agents took over, located Vershish's gold Lexus in the parking lot, and arrested Vershish inside.

The probable cause necessary to support a warrantless public arrest is no less than the probable cause required to obtain an arrest warrant. In other words, there must be probable cause to believe (1) an offense has been committed; and (2) the person to be arrested has committed it. *See* Fed. R. Crim. P. 4(a)(probable cause findings necessary to issue a warrant for an arrest).

Here, the federal agents acted on Brewer's information. Brewer obtained his information from other federal agents and through personal observation. Brewer was investigating a "Michael Kevin Powers" in Memphis, and personally matched Vershish to a photograph of a man suspected to be using the stolen identity of Massachusetts resident Michael Kevin Powers. Based on this information, federal agents could reasonably believe an identity theft had been committed, and could reasonably believe that the man

matching Vershish's photo was committing the offense of masquerading as Michael Powers.

Vershish also contends that Deputy Kinard's affidavit in support of the search warrant falsely stated that Vershish had been arrested on a criminal warrant out of Florida when in fact there was no criminal warrant out of Florida, and that it falsely stated that Vershish was a fugitive when in fact he was at best an absconder from parole.

Vershish argues that Deputy Kinard intentionally and recklessly falsified the affidavit. Hence, the firearms and documents found in his apartment, Vershish contends, are fruit of the poisonous tree and should be excluded as evidence obtained incident to an unlawful arrest. *See Wong-Sun v. United States*, 371 U.S. 471, 485-86 (1963)(holding that both verbal and physical evidence derived from "the exploitation of illegality" is inadmissible).

Mere "[a]llegations of negligence or innocent mistake" by an affiant are not enough to undermine a warrant's validity. *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Vershish must show by a preponderance of the evidence that the underlying affidavit contained something more than "careless errors." *United States v. Charles*, 138 F.3d 257, 263-64 (6th Cir. 1998); *United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994) (citing *Franks,* 438 U.S.

at 156). Vershish has pleaded no facts other than the errors themselves and an allegation of their deliberate or reckless falsehood. *See United States v. Charles*, 138 F.3d 257, 263-64 (6th Cir. 1998) (challenge to search warrant validity fails without evidence that affidavit containing incorrect telephone number, incorrect physical description, and an incorrect implication regarding the number of informants represented anything other than "unintentional error[s]"); *United States v. Mitchell*, 457 F.2d 513, 515 (6th Cir. 1972) (affidavit's incorrect license plate number does not invalidate search warrant).

Because Vershish failed to show that Deputy Kinard's errors were the kind of false or reckless errors that could invalidate the warrant, the inquiry ends; a court need not ask whether the affidavit's non-erroneous information alone establishes probable cause. *Charles*, 138 F.3d at 264. *See also Zimmer*, 14 F.3d at 288 (analysis of the affidavit's remaining content is "not strictly necessary" when defendant fails to show falsity or reckless disregard for truth). The search was conducted pursuant to a valid warrant, which is all that the Fourth Amendment requires. *See* U.S. CONST., amend. IV.

Based on the foregoing, it is submitted that Vershish failed to meet his burden of proving the meritoriousness of these Fourth Amendment arguments, and accordingly that he has not shown that his

counsel performed deficiently in failing to file a suppression motion.

C. Due Process Argument

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . . " ***Brady v. Maryland*****, 373 U.S. 83, 87 (1963). Vershish contends that his sentence should be vacated because the government failed to disclose that his parole warrant was not executed. At the detention hearing, however, both Vershish and the government had access to Vershish's Pre-Trial Services Report. The report clearly showed that the parole warrant had not been executed, and it was available to both sides. "*Brady* is concerned only with cases in which the government possesses information that [the] defendant does not have."** ***United States v. Cottage*****, 307 F.3d 494, 500 (6th Cir. 2002),** ***reh'g denied*** **2002 U.S. App. LEXIS 23305 (Oct. 30, 2002).** ***Brady*** **does not apply when "the evidence is available to [the] defendant from another source."** ***Id.*** **(citations omitted). Accordingly, it is submitted that Vershish is not entitled to relief under** ***Brady*** **because he has not made even a prima facie showing that the prosecution withheld evidence that was unavailable to the defense.**

CONCLUSION

Based on the foregoing, the court recommends the following:

1. That Vershish's § 2255 motion to vacate sentence for ineffective assistance of counsel in failing to file an appeal be granted;

2. That Vershish's § 2255 motion to vacate sentence for ineffective assistance of counsel in failing to investigate the underlying facts that affected the knowing and voluntary nature of Vershish's guilty plea be granted; and

3. That Vershish's sentence be vacated and that Vershish be re-sentenced, with the scope of argument and evidence presented at the re-sentencing hearing to be left to the district court's discretion.

Respectfully submitted this 10th day of December, 2002.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE