

18-9042

NO. 18-10503-A

Supreme Court, U.S.

FILED

FEB 18 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

KINGY HOLDEN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Kingy Holden

ORIGINAL

RECEIVED

MAR 12 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS CONVICTION WAS OBTAINED BY THE USE OF EVIDENCE PURSUANT TO AN UNCONSTITUTIONAL SEARCH AND SEIZURE8
2. THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO FILE A MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.....10
3. THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO PRESENT ISSUE THAT OCCURRED DURING TRIAL AND SENTENCING12

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	iv
STATEMENT OF THE BASIS FOR JURISDICTION.....	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	vi
STATEMENT OF THE FACTS.....	1
A. The Indictment and Trial.....	1
B. The Wiretap.....	2
C. The 28 U.S.C. 2255 Proceedings.....	5
ARGUMENT AMPLIFYING REASONS FOR WRIT.....	8
1. THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HIS CONVICTION WAS OBTAINED BY THE USE OF EVIDENCE PURSUANT TO AN UNCONSTITUTIONAL SEARCH AND SEIZURE.....	8
2. THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO FILE A MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.....	12
3. THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO PRESENT ISSUE THAT OCCURRED DURING TRIAL AND SENTENCING.....	12
CONCLUSON.....	15
CERTIFICATE OF SERVICE.....	16
APPENDEX.....	17

TABLE OF AUTHORITIES

Agurs v. United States, 427 U.S. 97, 111, 96 S.Ct. 2392 (1976).....	11
Berger v. New York, 388 U.S. 128 (1976).....	9
Donnelly v. DeChristopher, 416 U.S. 637 (1974).....	12
Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 595, 596 (1972).....	8
Jones v. United States, 527 U.S. 373, 389 (1999).....	14
Kahn v. United States, 415 U.S. 143, 153, n.12, 94 S.Ct. 977, 953 (1974).....	9
Kimmelman v. Morrison, 477 U.S. 365 (1986).....	10
Napue v. Illinois, 360 U.S. 264, 269 (1959).....	11
Smith v. Robbins, 528 U.S. 259 (2000).....	13
United States v. Blackman, 273 F.3d 1204, 1209 (9th Cir.2001).....	9
United States v. Ojeda-Rios, 495 257, 260, 110 S.Ct. 1845(1990).....	9
18 U.S.C. 922(g)(1).....	1
18 U.S.C. 2515.....	3
18 U.S.C. 2518.....	3
18 U.S.C. 2518(c).....	9
18 U.S.C. 2518(1)(c).....	9
18 U.S.C. 2518(8)(a).....	9
21 U.S.C. 841(a)(1).....	1
21 U.S.C. 841(b)(1)(A).....	1
21 U.S.C. 841(b)(1)(D).....	1
28 U.S.C. 2255.....	Passim

OPINIONS BELOW

Appellant respectfully prays that a Writ of Certiorari issue to review the judgment.

The opinion of the United States Court of Appeals for the Eleventh Circuit for which review is sought is United States v. Kingy Holden, No. 18-10503-A. A copy of the Slip opinion is included as Appendix A.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed in this case is the decision of the United States Court of Appeals for the Eleventh Circuit in Case No. 18-10503-A, decided by unpublished opinion, dated September 19, 2018. See Appendix A.

The district court had jurisdiction of these cases pursuant to 18 U.S.C. § 3231, which grants original jurisdiction to the district courts of all offenses against the laws of the United States.

The United States Supreme Court has jurisdiction to review these decisions upon a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction by writ of certiorari granted upon the petition of a party to a criminal case after rendition of a judgment in a court of appeals. This petition is filed pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States and addresses a decision of the United States Court of Appeals for the Eleventh Circuit which so far departed from the accepted and usual course of judicial proceedings, and which sanctioned such a departure by the district court, as to call for an exercise of the supervisory power of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1) provides that:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 846 provides that:

Any person who attempts or conspires to commit- any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Statement of Facts

A. The Indictment and Trial

In December 2011, a twenty-six count superseding indictment was filed against Appellant and numerous other individuals. (Doc. 53). The relevant charges (relevant to this appeal that is) were as follows: Count 2 charged Appellant with conspiracy to distribute 1,000 kilograms or more of marijuana, a violation of 21 U.S.C. §§841 (a) (1), (b) (1) (A), and 846; Counts 3-6 charged Appellant with distribution of marijuana, a violation of 21 U.S.C. §841 (a) (1), (b) (1) (D); Count 11 charged Appellant with being a felon in possession of a firearm, a violation of 18 U.S.C. §922 (g) (1). (Doc.53).

A number of the individuals charged in the indictment elected to plead guilty and cooperate with the investigation and prosecution. Before trial, Appellant filed a motion to suppress the evidence obtained as a result of wiretap placed on Appellant's phone. (Doc. 151). Appellant argued that the wiretap orders were issued without sufficient probable cause or a showing of necessity, and that the method of minimization was proper. (Doc. 151 and 187). In addition, Appellant argued that suppression was warranted based on the Government's failure to attach the DOJ letter authorizing the wiretap request to the application, and that evidence from the second wiretap should be suppressed because the authorizing individual was misidentified. (Doc. 187). Following two hearings on the matter, the district court issued an order denying the motion to suppress. (Doc. 187).

Appellant was tried jointly with his co-defendants. At the conclusion of the Government's case, Appellant moved for a judgment of acquittal under Rule 29 of the Criminal Procedure. (Doc. 373, pp. 1365-1404). The motion was denied. *Id.*

The jury convicted Appellant of: conspiracy to distribute 1,000 kilograms of marijuana, four counts of distribution of marijuana; one count of being a felon in possession of a firearm. (Doc. 375 p. 3-5). Appellant was acquitted of conspiracy to distribute cocaine and the money laundering counts. (Doc. 375 p. 3-5).

For the conviction under count two, Appellant was sentenced to serve 365 months. (Doc. 342). For each of the remaining counts Appellant was sentenced to 120 months to be ran concurrently with 120 months of supervised release. Id.

B. The Wiretap

On July 20, 2011, law enforcement obtained an order authorizing the interception of wire communication for Appellant telephone. (Doc. 151, p. 8). On August 19, 2011, the 30-day interception period expired. Id. On August, 22, 2011, law enforcement obtained a second order authorizing the continued interception of Appellant's telephone. Id. Appellant's motion to suppress addressed the legality of the authorization of these two wiretaps. Id.

On June 6, 2012, Counsel filed Defendant's First Particularized Motion To Suppress Evidence/and Statements Illegally seized Pursuant to Title III Orders and Brief in Support, a Motion to Suppress evidence obtained as a result of Title III wiretap orders. (Doc. 151).

Counsel further filed a Notice of Adoption of Co-defendants Michael Arnez Brown's Motion to Suppress, (Doc.156), including any grounds presented therein that were applicable in regard to defendant's Motion to Suppress. (Doc. 151 and 171)¹

On July 2, and July 3, 2012, United States District Judge Karen Bowdre conducted a hearing for argument by the parties on Appellant's Motion to Suppress. (Doc. 288; Doc. 288 p.48; Doc. 289).²

¹ Within Mr. Holden's Motion to Suppress which was adopted by Holden which argued that the order of authorization under which it was intercepted was insufficient on its face and must contain "the individual approving the application and the agency executing the order..." (Doc. 156, pp. 2-3).

Appellant argued in his motion to suppress and orally during argument, *inter alia*, that the communications were unlawfully intercepted, that the orders of authorization were insufficient on their face, and that the applications and court orders were obtained in violation of 18 U.S.C. §§2515 and 2518. (Doc. 151, pp. 23-24). Appellant argued that the affidavits in support of the wiretaps were not supported by the requirements of probable cause or necessity. (Doc. 151, pp. 9-17; Doc. 288 pp. 4-15, 20-21, 22-24, 27-30).

The two Applications described that proper designation had occurred from the attorney General and listed “Jason Weinstein” as the authorized official who approved the Application. (Doc.172, Sealed Attachment B at 3; Sealed attachment E at 3).

The Application further provided, “[a]ttached to this Application are copies of the Attorney General’s order of Special Designation and the Memorandum of Authorization approving this Application,” however, none were attached. *Id.* Both orders also listed “Jason Weinstein” as the authorizing official. (Doc.172, Sealed Attachment A at 4; Sealed Attachment E at 4.

During the July 2, 2012 hearing, it was discovered that the wiretap applications on file in the vault of the Clerk’s Office failed to contain any attached authorization letters demonstrating that the authorizing official mentioned in the application in fact had the authority to authorize the application and did in fact authorize the application exercising authority. (Doc. 288, p. 41; Doc. 184. p 2).

Thus, the wiretap application of July 20th and August 22nd that were presented to the issuing District Court Judge, the Honorable Abdul Kallon, were not accompanied by the

² All references to the Transcript of July 2, 2012 motions hearing are hereinafter referred to as “(Doc. 288, p[p]. [page number(s)]).” All references to the Transcript of July 3, 2012. Motions hearing are hereinafter to as Doc. 289, p[p]. [page number(s)].

supporting documentation--the Memorandum of Authorization-as described in the Application. Id. Counsel objected to any supplementation of the record at that point. (Doc. 288 pp. 46 - 48).

The Government did not request to supplement the record, but requested an opportunity to submit legal research on the issue within 24 hours. (Doc. 288, p. 49).

Additionally, it was discovered that at least one of these applications failed to disclose the identity of the correct authorizing official. (Doc. 289, p. 3, and p. 18). While the Government did not supplement the evidence on the record, the Government attached to its Supplemental Response, (Doc. 180), the purported missing documents: a letter of authorization dated July 18th from “Jason Weinstein,” purportedly pertaining to authorization of the July 20th wiretap application, and a letter of authorization dated August 18th from Kenneth Blanco, purportedly pertaining to authorization of the August 22nd wiretap application. (Doc. 289, pp.3 - 4; Doc. 180, p.1; and Doc.180, p.2).

Thus, it was discovered that while both July 20th and August 22nd wiretap applications and orders referenced “Jason Weinstein” as the authorizing official, Jason Weinstein was the purported authorizing official for only the July 20th application, and Kenneth Blanco was in fact the purported authorizing official for the August 22nd application. (Doc. 289, pp. 3, 18). As such, in addition to failing to provide supporting documentation of authorization, the August 22nd wiretap application and order failed the correct identity of the authorizing official. Id.

At the July 3, 2012 hearing, despite the above-described deficiencies in the Applications and Orders, the District Court made the finding that there was no defect in the first wiretap application that would justify suppression. (Doc. 289, pp. 18-19).

On July 5, 2012, the district court issued a Memorandum opinion, denying the motion. (Doc. 184). The Appellant’s trial attorney requested that the district court certify the issue for an

interlocutory appeal to the Eleventh Circuit, but the district court denied the request. (Doc. 289). Trial counsel did not lodge any other objections to the issuance of the warrant.

Later during trial, informant Fletcher admitted to being a liar and double dealer, and the false and misleading information that he provided formed the basis for affiant Boyd's probable cause for the issuance of the wiretaps. Agent Boyd knew or should have known that the information that he submitted in the application in support of the wiretaps was false and misleading. Moreover, during trial, agent Boyd admitted that he never utilized normal investigative procedures and techniques during or after the wiretaps, including determining pertinent and non-pertinent calls until a week before trial.

Appellant's trial counsel did not object to the false and misleading information deliberately included in the application in support of the wiretaps. Counsel also did not object to the affiant's deliberate failure to utilize normal investigative procedures and techniques (i.e., the "necessity" and "minimization" requirements), during or after the wiretaps, including determining pertinent and non-pertinent calls.

C. The 28 U.S.C. 2255 Proceedings

On March 07, 2016, the Appellant filed a pro se 2255 petition, asserting Appellant's conviction was obtained by the use of evidence pursuant to an unconstitutional search and seizure. See (Doc. 1, Ground 1). As part of this claim, Appellant argued that the Government's basis for probable cause was based on false information supplied by informant Ivan Fletcher, who admitted during trial to being a liar and double dealer. Id. Appellant also contended that the search and seizure was unconstitutional in light of the fact that Agent Boyd admitted during trial that he never utilized normal investigative techniques before or after the issuance of the wiretaps, including determining pertinent and non-pertinent calls until a week before trial. Id. See also

Doc. 8, at. 2-3. in denying this claim, the court ruled that Appellant was procedurally barred from raising this issue regarding the wiretaps and that he failed to show actual prejudice to overcome the bar. (Doc. 19, Memorandum and Opinion).

In claim 2 of the 2255 petition, Appellant argued that he was denied his Sixth Amendment right to counsel for the failure to file a motion for new trial based on newly discovered evidence. (Doc. 1, at Ground 2). In this claim, the Appellant claimed that after trial, prior to sentencing, he discovered that the government withheld Brady material on Cedric Carroll, that proved that he falsely testified under oath that he had never been a snitch before. *Id.* Appellant also averred that the government knew this testimony was false, and failed to correct it, thus, the government withheld Brady material because it did not disclose that Mr. Carroll had previously cooperated with the government and that the government knowingly used or failed to correct the perjured testimony of Carroll. (Doc. 8, at 5-7). In denying this claim, the district court held that trial counsel was not ineffective for failing to file a motion for new trial that had no grounds for success. Even assuming arguendo that his trial counsel was ineffective for failing to file a motion for new trial, defendant cannot show a reasonable probability that the court would have granted a motion for new trial on this issue had trial counsel filed one. (Doc. 19, Memorandum and Opinion). The Court also held that Appellant failed to show how his trial counsel could be ineffective for failing to raise this ground when Carroll did not give false testimony. He failed to show a reasonable probability that the court would have granted a motion for new trial on this ground had his trial counsel filed such a motion. Therefore, this ground failed to meet the Strickland standard.

In Claim 3 of the 2255 petition, Appellant argued that he was deprived of his Sixth Amendment right to effective assistance of counsel for failing to present issues that occurred

during trial and sentencing. (Doc. 1, at Ground 3). In this claim, Appellant argued that although his appellate counsel did file a direct appeal, the sole issue raised was an issue that occurred prior to trial, during the motion to suppress hearing, i.e., the wiretap orders and applications failed to provide supporting documentation of authorization, and the August 22nd wiretap application and orders failed to name the correct identity of the authorizing official. (Id. at. Ground 1). Appellant also contended that there were numerous constitutional violations that occurred during trial and sentencing and Appellant requested the right to be allowed to the issues (i.e., the right to bring forth other issues that counsel neglected to raise) on direct appeal. (Id. at Ground 3). Therefore, liberally construing this claim, Appellant asserted a claim that he was denied his Sixth Amendment right to appellate counsel for failing to adequately argue for suppression of the wiretap evidence based on the fact that Agent Boyd admitted at trial that he never used normal investigative techniques before or after the issuance of the wiretap, and the fact that affiant Boyd admitted that he did not determine pertinent and non-pertinent calls until a week before trial. (Doc. 1, at. Ground 1). Moreover, a part of the Appellant's argument was subsumed in ground 1. See (Doc. 8, at. Ground 1). Additionally, this claim also encompassed the argument that Appellant was denied the right to effective assistance of appellate counsel for failing to raise a claim that trial counsel was ineffective for failing to file a motion for new trial based on newly discovered evidence. See (Id. at. 6).

On November 09th 2017, this District Court issued its order denying Appellant's 28 U.S.C. 2255 motion. (Doc. No. 20) On January 11, 2018, the District Court issued an order denying Appellant's Motion For Certificate of Appealability. (Doc. No. 22). The Appellant timely filed a Notice of Appeal.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

1.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HIS CONVICTION WAS OBTAINED BY THE USE OF EVIDENCE PURSUANT TO AN UNCONSTITUTIONAL SEARCH AND SEIZURE.

In Ground 1 of the Appellant's 2255 petition, Appellant asserted that his conviction was obtained by the use of evidence pursuant to an unconstitutional search and seizure. See (Doc. 1, at Ground 1). Appellant also asserted that the Government's ("the affiant") basis for probable cause for the wiretap was based on false information supplied by informant Ivan Fletcher, who admitted during trial to being a liar and a double dealer. Id. Appellant also asserted that the search and seizure was unconstitutional in light of the fact that Agent Boyd admitted during trial that he never utilized normal investigative procedures and techniques during or after the wiretaps, including determining pertinent and non-pertinent calls until a week before trial. Id. More specifically, in his traverse to the Government's response, Appellant asserted that the wiretap application lacked the "necessity" and "minimization" requirements. (Doc.8, at. 2-3).

In denying Appellant's claim, this district court ruled that Appellant was procedurally barred from raising this issue regarding the wiretaps and that he failed to show cause and actual prejudice to overcome this bar. (Doc. 19, at. Memorandum Order).

The facts of Appellant's case go beyond liberal reading of pro'se pleadings, which are held "to a less stringent standard than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 595, 596 (1972). The facts of Appellant's case clearly asserted a claim that trial counsel was ineffective for failing to adequately argue the wiretap issue, where had counsel raised the claim that the wiretap was unconstitutional based on (1) the affiant utilizing false information from admitted lair Ivan Fletcher (2) the affiant never utilized normal investigative techniques before or during the wiretap process; and (3) the fact that the wiretap

application lacked the “necessity” and “minimization” requirements. (Doc. 1, at. Ground 1; Doc. 8, at. 2-4).

In the context of the admissibility of wiretap evidence, 18 U.S.C.S. 2518(8)(a) requires that, immediately upon expiration of an order authorizing inception and recording of certain communications, the recordings must be sealed under the direction of the judge who issued the order. The statute contains an explicit exclusionary remedy for noncompliance, providing that the presence of the seal or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use disclosure of the contents of the recordings, or evidence derived there from, in a proceeding. See United States v. Ojeda-Rios, 495 U.S. 257, 260, 110 S.Ct. 1845 (1990)(quoting 18 U.S.C. 2518(8)(a)). Moreover, in regards to the “necessity” and “minimization” requirements, the “necessity” requirements of 2518(1)(c) and 2518(c), i.e., probable cause, mandates that, before a wiretap order is issued, traditional investigative techniques would suffice to expose a crime, Kahn v. U.S., 415 U.S. 143, 153 n.12, 94 S.Ct 977, 953 (1974). Agent Boyd violated this requirement as shown in the record where he admitted that he never used normal investigative techniques before, during or after the wiretapping. A COA should issue. See United States v. Blackman, 273 F.3d 1204, 1209 (9th Cir. 2001). Agent Boyd’s actions also violated the “minimization” requirements set forth in 2518, which requires each initial and extension order to include a “minimization” requirement, which embodies the constitutional requirement of avoiding, to the greatest extent, seizure of conversations which have no relationship to the crimes being investigated, and limiting the scope of any invasion of privacy by the government. See Berger v. New York, 388 U.S. 128 (1976).

In this case sub judice, the application in support of the wiretap was predicated upon a constitutionally flawed investigation conducted by law enforcement officials, who, without any

independent corroboration, alleged that Appellant was engaged in a large scale cocaine trafficking conspiracy with Reginald Lightfoot, Kevin Thomas, Tyron Bibbs, and others. Moreover, the affiant submitted known perjurious information in the affidavit supplied by admitted liar Fletcher, which averred that Fletcher directly received large quantities of cocaine from Appellant on a weekly basis.

A writ of Certiorari should issue because the facts of Appellant's case evidence the fact that he was denied his Sixth Amendment right to effective assistance of counsel, where counsel failed to adequately argue for suppression of the fruits of the unconstitutional search and seizure, in light of the illegally obtained wiretap, in violation of this Court decision in Kimmelman v. Morrison, 477 U.S. 365 (1986), because had counsel adequately argued this and highlighted the perjury, the circumvention of the "necessity and minimization requirements", the results of the proceedings would have been different, because the evidence would have been suppressed. A Writ of Certiorari should Issue.

(2)

THE DISTRICT COURT ERRED IN DENYING APPELLANTS CLAIM THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO FILE A MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

In claim 2 of the 2255 petition, the Appellant argued that counsel was ineffective for failing to file a Motion for New Trial based on newly discovered evidence. (Doc. 1, at Ground 2). In his motion, Appellant claimed that after trial, prior to sentencing, he discovered that the government withheld Brady material on Cedric Carroll that proved that he testified falsely when he testified under oath that he had never been a snitch before. Id. Appellant claimed that the government knew this testimony was false, and failed to correct it, and thus, the government withheld Brady material because it did disclose that Mr. Carroll had previously cooperated with

the government and that the government knowingly used or failed to correct perjured testimony of Mr. Carroll. (Doc. 8, at. 5-7).

In denying this claim, the district court held that trial counsel was not ineffective for failing to file a motion for new trial that had no grounds for success. Even assuming arguendo that his trial counsel was ineffective for failing to file a motion for new trial, defendant cannot show a reasonable probability that the court would have granted a motion for new trial on this issue had trial counsel filed one. (Doc. 19, at Memorandum Opinion).

In concluding the court held that Appellant failed to show how his counsel could be ineffective for failing to raise this ground when Carroll did not give false testimony. He also failed to show a reasonable probability that this court would have granted a motion for a new trial on this ground had his trial counsel failed such a motion. Therefore, this ground failed to meet the Strickland standard. (Id).

A Writ of Certiorari should issue, because the district court utilized the wrong standard of review when deciding Appellant's Brady, Giglio, and Napue claims, because this court has held that a defendant does not have to satisfy the burden of establishing that the newly discovered evidence would probably result in an acquittal. See United States. Agurs, 427 U.S. 97, 111, 96 S.Ct. 2392 (1976).

Moreover, in regards to the perjured testimony given by admitted liar Fletcher, a Writ of Certiorari should issue because Appellant's case fell with the "exception" where it is shown "that the government's case included false testimony and the prosecution knew or should have known of the falsehood...[I]n that event, a new trial must be held if there was any reasonable likelihood that the false testimony would have affected the judgment of the jury." Napue v. Illinois, 360 U.S. 264, 269 (1959). It has long been held that the term "false evidence" includes the

introduction of special misleading evidence that is important to the prosecution's case in chief or the non-disclosure of certain evidence valuable to the defense of the accused. See Donnelly v. DeChristopher, 416 U.S. 637 (1974).

In addition, while Napue and Donnelly deal with the "judgment of the jury", Appellant submits that the issue regarding the "pre-trial" suppression of facts withheld from the judge, who is the trier of fact, rather than a jury, requires this court to deal with an issue of first impression, and should be considered in light of this Court's Napue and Donnelly decisions, because the nature and circumstances surrounding pre-trial suppression hearings, and misconduct thereof, requires this Court to deal with this often occurring circumvention of the Fourth Amendment. Trial counsel owed Appellant a duty to challenge the blatant perjury from Fletcher, and had counsel done so, a new trial would have been mandated. A Writ of Certiorari should issue on both the Appellant's Fourth and Sixth Amendment claims.

(3)

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO PRESENT ISSUES THAT OCCURRED DURING TRIAL AND SENTENCING

In Ground 3 of the 2255 petition, the Appellant asserted that he was deprived of his Sixth Amendment right to effective assistance of counsel for failing to present issues that occurred during trial and sentencing. (Doc. 1, at Ground 3). In this claim, Appellant argued that although Appellant appellate counsel did file a direct appeal, the sole issue raised was an issue that occurred prior to trial during the motion to suppress hearing., i.e., the wiretap orders and applications failed to provide supporting documentation of authorization, and the August 22nd wiretap application and order failed to name the correct identity of the authorizing official. (Id. at. Doc. 1, Ground 1). Appellant also claimed that there were numerous constitutional violations

that occurred during trial and sentencing and Appellant requested the right to be allowed the right to the issues on direct appeal. (Id. at. Ground 3).

Therefore, liberally construing Appellant's argument as the court must do, Appellant asserted a claim that he was denied his Sixth Amendment right to effective assistance of appellate counsel for failing to adequately argue for suppression of the wiretap evidence based on the fact that agent Boyd admitted at trial that he never used normal investigative techniques before or after the issuance of the wiretap, and the fact that affiant Boyd admitted that he did not determine pertinent and non-pertinent calls until a week before trial. Moreover, parts of the Appellant's argument was subsumed in ground one. See (Doc. 1, at. Ground 1).

In Smith v. Robbins, 528 U.S. 259 (2000), the Supreme Court set out the standard for claims of ineffective assistance of appellate counsel. First, Appellant must show that his counsel was objectively unreasonable in failing to find arguable issue to appeal, and second, Appellant then has the burden of demonstrating prejudice. Id. at 285. As argued in Ground 3, the facts of Appellant's case evidence that trial counsel was ineffective for failing to adequately argue the suppression of the wiretap issue, whereby asserting a claim that the application contained deliberately made false statements derived from CI Fletcher, the failure to utilize normal investigative techniques before, during or after the wiretap process; and the fact that the wiretap application lacked the "necessity" and "minimization" requirements. (Doc. 1, Ground 1; Doc. 8, at. 3-5).

The Appellant's claim also encompassed the argument that he was denied the right to effective appellate counsel for failing to raise a claim that trial counsel was ineffective for failing to file a motion for new trial based on newly discovered evidence. See (Doc. 8, at. 6).

In denying this claim, the district court failed to liberally construe Appellant's claim, and ruled that the Appellant did not give the court absolutely any facts about the alleged constitutional violations, not even general statements about when or how these alleged violations occurred. Moreover, the court further held that Appellant's general, unsupported allegations that his appellate counsel was ineffective for failing to appeal "numerous constitutional violations" does not pass muster. In concluding, the court held that it "understood" that the Appellant may not remember every word from trial; but, even without the trial transcript, he could give the court some indication about factual support for the alleged constitutional violations to which he refers. (Docs. 19-20, Memorandum and Order). However, in making these findings, the court abused its discretion and totally ignored the Appellant's allegation that he was unable to obtain the documents requisite (i.e., the trial court records in re Carroll's cooperation against Tyrone Bynum) to properly argue this claim, because his lawyer refused to provide the records, despite being requested to do so, and Appellant only discovered such when he met with Bynum at the Cullman County Jail, and Bynum shared parts of his discovery with Appellant. (Doc. 8, at. 5).

This Court has held that plain error review "should be exercised sparingly". Jones v. United States, 527 U.S. 373, 389 (1999), and only "in those circumstances in which a miscarriage of justice would otherwise result." Olana, 507 U.S. at 736, 113 S.Ct. at 1179.

Nevertheless, errors that involve counsel's failure to adequately argue for suppression of an obvious illegal wiretap application; a Brady, Giglio and Napue claim; and sentencing issues, clearly fit the requirement of plain error that affected Appellant's substantial rights and would constitute a miscarriage of justice, and the lower court's denial of Appellant's claims clearly conflict with well established precedent of this Court, such as Kimmelman, Agurs, Brady, Giglio, and Smith.

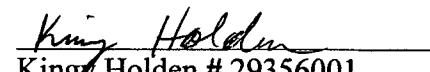
Here in this case, counsel's decision to raise arguments clearly weaker than ones not made, and when such arguments were not made, were based on dear evidence from the record itself, Appellant's appellate attorney's performance fell below objectives standards.

In conclusion, Appellant has shown a series of errors concerning the following: (1) the illegal application of the wiretap and its entire process; (2) suppression of Brady and Giglio material; and (3) the governments knowing use of perjured testimony. As such, the lower court should have considered the merits and or granted 2255 relief. A Writ of Certiorari should issue, because any waiver or default of any of the Appellant's claims and failure to raise said claims are excused by counsel's constitutional ineffectiveness and the serious prejudice to Appellant's substantial rights.

Conclusion

Wherefore the foregoing reasons as set forth, the Appellant prays that this Court issue an order granting a Writ of Certiorari on all claims asserted herein.

Dated: 02/18 / 2019


Kingy Holden # 29356001