No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ARNOLD MATHIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether trial counsel was ineffective in violation of the Sixth Amendment by failing to investigate and litigate a warrantless search of petitioner's cell phone that preceded the issuance of a warrant and which was not disclosed in the application for that warrant, and which thus violated the Fourth Amendment.

The Petitioner, Arnold Mathis, asserts that counsel was ineffective, and that the Eleventh Circuit erred in denying his application for a Certificate of Appealability.

The present case affords the Court an opportunity to revisit the independent source doctrine, which inappropriately encourages law enforcement officers to conceal from neutral magistrates the fact of prior, warrantless searches.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Arnold Mathis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying his application for a certificate of appealability.

OPINION BELOW

The Eleventh Circuit's initial opinion was unpublished and was issued on May 7, 2019. The Petitioner filed a motion for reconsideration, which was denied on June 12, 2019.

JURISDICTION

The jurisdiction of this Court is invoked under Supreme Court Rule 10(c).

The United States District Court for the Middle District of Florida had original jurisdiction of this federal criminal case pursuant to 18 U.S.C. §3231.

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "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 searched."

STATEMENT OF THE CASE

I. *Procedural History*

Petitioner, Arnold Mathis, was arrested on December 17, 2011 in Polk County, Florida on multiple charges of sexual battery. A state law enforcement officer, Detective Vizcarrondo, obtained a search warrant for petitioner's cell phone on December 22, 2011. Pursuant to the search, state law enforcement found evidence that he attempted to, and actually did, persuade minors to participate in the production of child pornography.

A federal grand jury returned an indictment on October 31, 2012, charging

Petitioner with two counts of producing child pornography in violation of 18 U.S.C. § 2251. A superseding indictment, adding the charge of enticing a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b), was returned on January 30, 2013. On February 27, 2013, the grand jury returned a second superseding indictment adding a charge that Petitioner committed the offenses while required to register as a sex offender, in violation of 18 U.S.C. § 2260A.

Petitioner filed a motion to suppress before trial. The motion to suppress was referred to the magistrate judge who, after an evidentiary hearing, recommended that it be denied. The district court adopted the Report and Recommendation, and denied the motion to suppress. After a five-day jury trial, Petitioner was found guilty as charged. Thereafter, Petitioner was sentenced to 40 years' imprisonment, followed by a period of supervised release for life.

Petitioner then appealed, arguing: 1) the district court erred in denying his motions to suppress and motion for a mistrial; 2) the district court erred in permitting the admission of certain text messages in violation of his Confrontation Clause rights; 3) insufficient evidence; 4) the district court erred in failing to interrogate jurors after inadvertent contact; 5) cumulative trial error; and 6) sentencing errors. The Eleventh Circuit affirmed Petitioner's convictions and

sentence, but remanded the case so the district court could correct a scrivener's error in the judgment. (The opinion is published. *See United States v. Mathis,* 767 F. 3d 1264 (11th Cir. 2014).) The amended judgment was entered in November 2014. This Court denied the petition for writ of certiorari in March, 2015.

In August, 2015, Petitioner moved for a new trial, claiming that newly discovered forensic evidence indicated that the law enforcement official illegally accessed his cell phone prior to obtaining a search warrant. Petitioner's motion for new trial was denied, and Petitioner appealed. The Court of Appeals affirmed the denial of Petitioner's motion in June 2017. (The opinion is not published. *See United States v. Mathis* (11th Cir., No. 15-14769, June 7, 2017) (unpublished)).

On February 22, 2016, Petitioner, acting *pro se,* timely filed his initial petition to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. He argued that he received ineffective assistance of trial counsel, in violation of the Sixth Amendment, specifically by trial counsel's failure to investigate a Fourth Amendment violation, namely the warrantless search of his cell phone before law enforcement officers obtained a warrant on December 22, 2011 for that purpose. Specifically, Mr. Mathis argued that a law enforcement officer conducted a warrantless search of his cell phone, in violation of the Fourth Amendment, on December 19, 2011, that is, before a search warrant was

obtained for this purpose on December 22, 2011. Mr. Mathis cited the expert testimony, (appended as an exhibit to his petition), of a forensic computer expert, Robert Moody. He also asserted that the government violated his Fifth Amendment rights by failing to disclose the fact of the warrantless, pre-December 22, 2011 search of his cell phone, in violation of *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

Mr. Mathis argued that, pursuant to *Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986), his counsel's failure to litigate the Fourth Amendment violation constituted ineffective assistance because the claim was meritorious and that there is a reasonable probability the verdict would have been different absent the excludable evidence.

The government filed a timely response. The United States conceded that Mr. Mathis's 28 U.S.C. § 2255 motion was timely, and conceded that his Sixth Amendment claim, based on the failure to investigate a Fourth Amendment violation, was cognizable under the statute. However, the government argued that, to the extent Mr. Mathis raised an independent *Brady*/prosecutorial misconduct claim, the claim was procedurally barred because it was not raised in the trial court or on direct appeal.

Addressing Mr. Mathis's specific claim that his trial counsel was ineffective for failing to uncover evidence that his cellphone was searched by law enforcement before seeking a warrant, the government first argued that it provided spreadsheets of the forensic reports to Mr. Mathis's counsel in November 2012. The government asserted

that his trial counsel examined the forensic reports – which were contained on CDs – "for both the December 2011 and the August 2012 examinations – on two separate occasions." (However, Mr. Moody's testimony was that, although there was a forensic report completed for a December 22, 2011 search, there was an earlier search, on December 19, 2011.) The government also pointed out that the government retained an expert who reviewed the forensic phone evidence. Finally, the government contended that that, "Mathis's section 2255 motion is based on his state court expert's 'new' opinion than an unauthorized access of his phone had occurred on December 19, 2011, ..., [but] [t]hat opinion is not 'new' at all but rather is based on the expert's analysis of the 2011 extraction report – which was provided to and reviewed by defense counsel and the defense expert in 2012 and 2013."

The government also argued that, even if counsel's performance was deficient, Mr. Mathis cannot satisfy the second prong of the well-established standard of *Strickland v. Washington,* 466 U.S. 668 (1984), namely that he did not suffer prejudice, which requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Specifically, the government contended that, "Even if there had been a prior search of the phone, this would not render the subsequent search warrant invalid. Evidence from Mathis's phone would be admissible in a new trial because the state search warrant is a wholly independent source for the discovery of that

evidence."

The district court denied the 28 U.S.C. § 2255 petition. First, characterizing Mr. Mathis's claim as an allegation "that his counsel was ineffective for failing to hire a forensic expert to uncover evidence that Petitioner's cell phone had been accessed by law enforcement prior to obtaining the search warrant," the court reasoned that his trial counsel was not ineffective. The court applied the *Strickland* test, which requires a petitioner to show that "(1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense." The court reasoned that counsel's performance was not deficient, framing the claim that "because the forensic expert retained by his defense counsel in the later related state case uncovered law enforcement's alleged pre-warrant search of his cell phone, the forensic expert retained by his counsel in his federal case should have as well. Counsel's representation did not fall below the objective standard of reasonableness required by *Strickland*'s first prong."

Second, assuming that the claim of a pre-warrant search of the cell phone is factually true, there was no prejudice under *Strickland*. Provided that law enforcement would have sought a search warrant without the illegal search, the independent source doctrine provides that evidence seized pursuant to a warrant after an illegal search is admissible. *Citing Murray v. United States,* 487 U.S. 533, 541-42 (1988). The court also relied on *United States v. Somers,* 591 F. App'x 753 (11th Cir., Nov. 14, 2014, Case No.

13-10616) (unpublished). The court reasoned that Detective Vizcarrondo's affidavit did not include any information gained from any warrantless search of Mr. Mathis's cell phone, and therefore any unauthorized search would not have affected the admissibility of the cell phone evidence at trial.

The court also addressed the *Brady*/prosecutorial misconduct claim, finding that it is procedurally barred. Otherwise, the claim was denied, as Mr. Mathis "does not point to any specific evidence that the Government knew of and actively concealed a warrantless intrusion into his cell phone." The district court reasoned that "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." Finally, the district court found that no evidentiary hearing was appropriate, as no such hearing could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."

In its May 7, 2019 order, the Eleventh Circuit Court of Appeals denied petitioner's application for a Certificate of Appealability (COA). This Court noted that petitioner, after his conviction was affirmed on direct appeal, previously moved for a new trial on the grounds that there was newly discovered evidence in the form of information that a law enforcement officer conducted a search of his cell phone *before* seeking a search warrant. The appeals court also observed that, in

the appeal affirming the district court's denial of that motion, petitioner failed to demonstrate that: the evidence was discovered after trial; he exercised due care; and that a different result would not have occurred because the search warrant application did not include any information that was obtained from the warrantless search.

Turning to Petitioner's application COA, the Eleventh Circuit noted that petitioner's first basis for requesting a COA was that his trial counsel was ineffective within the meaning of the Sixth Amendment by failing to investigate the forensic evidence that law enforcement had searched his cell phone before seeking a warrant. Observing that the Eleventh Circuit found previously – in the appeal from the order denying the motion for new trial – that the search warrant application did not contain any information gained from the warrantless search, this Court found that the evidence from the cell phone would not have been suppressed.

Likewise, the Eleventh Circuit rejected Petitioner's second basis for requesting a COA, namely that the government violated *Brady v. Maryland,* 373 U.S. 83 (1963), by withholding from the defense the evidence that law enforcement searched petitioner's phone before seeking a warrant. The Eleventh

Circuit noted that the *Brady* claim was not raised in the trial court or on direct appeal. This Court first found that petitioner failed to show cause for his procedural default because he could have discovered the alleged warrantless search of his phone, but failed to do so. Second, this Court found that petitioner failed to establish prejudice because, again, the search warrant application did not include any information that was obtained from a previous, warrantless search.

II. *Facts*

On December 22, 2011, Polk County Sheriff's Detective Zulaika Vizcarrondo presented a sworn application for a search warrant to a state court judge for Mr. Mathis's phone. She attested that the cell phone potentially contains evidence relating to potential violation of Florida law relating to sexual battery. Detective Vizcarrondo attested that, on December 16, 2011, a 21-year old man contacted the Polk County Sheriff's Office to claim that Mr. Mathis sexually battered him 6 to 7 years previously. The man claimed that Mr. Mathis communicated with him with by cellphone, by making calls and sending text messages.

On December 17, 2011, according to Det. Vizcarrondo's December 22, 2011 affidavit, the man, in the presence of law enforcement, performed a recorded, controlled phone call with Mr. Mathis. According to the affidavit, in this phone call Mr. Mathis

admitted the sexual encounters from 6-7 years ago.

Detective Vizcarrondo also attested that, according to her observations, Mr. Mathis used his cell phone as "a primary form of communication to communicate with the victim." She also attested that she learned that Mr. Mathis's current phone number is the same number he used 6-7 years earlier. Detective Vizcarrondo attested, moreover, that Polk County Sheriff's Office records reflect that Mr. Mathis does not maintain a home phone number, apparently using his cellphone exclusively. Finally, Detective Vizcarrondo attested, "Forensic analysis of the phone *will also show* logged history of the communication made between the victim and suspect on 12-17-11." (Emphasis added.) (Detective Vizcarrondo did not state in her affidavit whether or not any search of Mr. Mathis's phone was conducted during the period of December 17, 2011-December 22, 2011, that is, during the period between Mr. Mathis's arrest and the seizure of his cell phone, and the completion of her search warrant application.) On the same day of the application, a state Circuit Court Judge signed the requested search warrant.

Following his federal conviction, Mr. Mathis faced prosecution in state court on related charges filed before his federal trial. *See State of Florida v. Arnold Mathis,* Case Nos. 11-CF-000192, 12-CF-000927, 12-CF-001037, 12-CF-002332, 12-CF-002333, and 12-CF-0002334 (Fla. 10th Jud. Cir., Polk County, Florida) (all of which were dismissed by the filing of notices of *nolle prosequi* by the State of Florida on or about February 4,

2015). In those state court proceedings, Detective Vizcarrondo testified at a pretrial suppression conducted on April 25, 2014 that she obtained Mr. Mathis's phone in 2011 at the time of his arrest (on December 17, 2011), and that the phone was password protected. She was able to unlock the phone, however, through information obtained from a monitored jail visit between Mr. Mathis and another person after his arrest. Detective Vizcarrando recalls that the date was December 19, 2011, before she obtained a warrant to search Mr. Mathis's phone.

On February 2, 2015, (that is, just two days before the State of Florida filed its notices of *nolle prosequi*), the state prosecutor deposed a defense expert, Robert Moody. Mr. Moody testified that he viewed two CDs containing two reports generated by a phone data extraction device used by the government known as Cellebrite. He also reviewed a copy of the search warrant, police reports, and transcripts of the testimony of Detective Vizcarrondo and a defense expert who testified in the federal case. Mr. Moody is very familiar with the Cellebrite device. Mr. Moody reviewed extraction reports of searches of Mr. Mathis's phone conducted by law enforcement in 2011 and in 2012, and observed that there was data present in the 2011 report that was not present in the 2012 report. (According to the summaries of the phone extraction reports, data on the phone was extracted on December 22, 2011 and again on August 1, 2012. No other extraction reports appear on the summary.)

Mr. Moody determined that the 2011 report, like the 2012 report, contained the information retrieved through the use of the Cellebrite extraction tool, but that the 2011 report also contained a physical "dump" of the contents of the phone itself. More specifically, Mr. Moody found that the 2011 report, in reference to the specific date of December 19, 2011, identified 10 SMS messages, and that surprisingly, the 2012 report contained no such messages for that date. (He found the same discrepancy in SMS messages between the 2011 and 2012 reports relevant to December 18 and 19, 2011 as well.) Similarly, Mr. Moody detected significantly more evidence in the 2011 report (compared with the 2012 report) of missed calls on the dates of December 17, 18, and 19, 2011.

Mr. Moody then testified that, in his analysis of the 2011 extraction report, he found a file that was modified on December 19, 2011, at 6:19 p.m. The file on Mr. Mathis's phone that was modified on December 19, 2011, according to the extraction report, is associated with the pictures and the gallery feature of the phone. He explained that the entire gallery on the phone was accessed, and viewed. The gallery, he explained, is accessed by unlocking the phone and selecting the appropriate icon on the phone. In short, Mr. Moody testified, Mr. Mathis's phone was accessed on December 19, 2011 at 6:19 p.m. and the gallery itself was accessed. Even more specifically, he testified that, "[I]f the phone was locked, they [law enforcement] unlocked the phone. They found the

particular icon. They accessed the icon, and then they actually went through and viewed pictures."

REASONS FOR GRANTING THE WRIT

The Petition should be granted so that this Court can reverse the Eleventh Circuit's denial of a Petitioner's COA on the issue of whether the fact that a law enforcement officer's warrantless search of Petitioner's cellphone should compel suppression of the fruits of a later, warrant-based search of the same cellphone because the detective did not disclose her prior, warrantless search in her search warrant affidavit.

An appellate court may issue a COA where an "applicant has made a substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotation marks omitted). Mr. Mathis has satisfied this standard. Reasonable jurists could find that Mr. Mathis could prevail on his Sixth Amendment ineffective assistance claim. Accordingly, issuance of a COA and, alternatively, remand

to the district court for an evidentiary hearing, is appropriate.

In *Murray v. United States*, 487 U.S. 533 (1988), this Court, in a 4-3 decision (two Justices did not participate), held that the independent source doctrine supported the admissibility of evidence, like this case, seized pursuant to a warrant by the same law enforcement officers who engaged in a prior, warrantless search but who did not disclose that fact in their affidavit submitted to a neutral magistrate, who agreed to issue a warrant. The three-Justice dissent disagreed with the four-Justice majority, observing that the application of the independent source doctrine in these circumstances "creates an affirmative incentive for unconstitutional searches." *Id.* at 545 (Marshall, J., dissenting) (also noting that the doctrine creates an incentive to law enforcement to "engage in unlawful conduct.") The independent source doctrine, at least as applied in the circumstances of this case, has encouraged official disrespect, not respect, for the Fourth Amendment, and at a minimum has had the unsavory effect of diminishing the level of sensitivity of law enforcement officials to important constitutional values.

CONCLUSION

For the foregoing reasons, Arnold Mathis respectfully requests that his Petition for Writ of Certiorari be granted.

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