ORIGINAL

19-5837

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

*****

TERRI MCGUIRE MOLLICA
Petitioner

vs.

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 CERTIFICATE

*****

Terri McGuire Mollica
Reg #31860-001
c/o SPC Aliceville
P.O. Box 487
Aliceville, AL 35442-0487

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's guilty plea sustained in violation of the Fourth Amendment, Unreasonable Search and Seizure, where law enforcement conducted a warrantless search of Petitioner's purse [in which she had a reasonable expectation of privacy] after the purse was under the exclusive control of law enforcement and while Petitioner was locked in a detention cell, thus unable to access purse contents at the time of the search?

2. Was defense and appellate counsel constitutionally ineffective when he misadvised Petitioner regarding the admissibility of illegally obtained evidence ["fruits of a poisonous tree"]; failed to investigate the illegal search and seizure before advising Petitioner to accept a plea agreement; failed to file a suppression motion for the illegally obtained evidence; and, failed to raise the illegal search and seizure on direct appeal?

3. Did the Court of Appeals for the Eleventh Circuit and the District Court for the Northern District of Alabama commit reversible error denying Petitioner's section 2255 motion without conducting an evidentiary hearing?

4. Did the Court of Appeals for the Eleventh Circuit commit reversible error when it refused to rule on Petitioner's section 2255 claims of Sixth Amendment violations of ineffective assistance of counsel?

PARTIES TO THE PROCEEDINGS

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Reg #31860-001
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Petitioner, Terri McGuire Mollica, prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in above proceeding on May 13, 2019; vacate the judgment and conviction; and, remand to the Court of Appeals for further consideration in light of the applicable decisions of this Court.

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I. CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgment of conviction of Petitioner in the United States District Court for the Northern District of Alabama was not reported and is attached hereto as "Exhibit A."

The original judgment of conviction of Petitioner was appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the conviction and sentence in a published opinion attached hereto as "Exhibit B."

The opinion and order of the United States District Court for the Northern District of Alabama on Petitioner's Section 2255 motion is published and attached hereto as "Exhibit C."

The opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the District Court's denial of the Section 2255 motion, is unpublished and is attached hereto as "Exhibit D."

The Petitioner's "Motion for Reconsider" is unpublished and attached hereto as "Exhibit E."

The opinion of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's "Motion to Reconsider," is unpublished and attached hereto as "Exhibit F."

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II. JURISDICTION STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 13, 2019. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

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III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment of 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 seized."

2. The Sixth Amendment of the United States Constititution provides:

   "In all criminal prosecutions, the accused shall enjoy the right to.... be informed of the nature and cause of the accusations;.... and to have the assistance of counsel for his defense."

3. The statutes involved and under review are, Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 41(f)(1)(B); (C); and (D), which states:

(f) Executing and Returning the Warrant

(1) Warrant to Search for and Seize a Person or Property

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another office and the person from whom....the property was taken.

(C) Receipt. The officer executing the warrant must give a ..... receipt for the property taken to the person from whom the property was taken...

(D) The officer executing the warrant must promptly return it -- together with a copy of the inventory -- to the magistrate judge designated on the warrant.

4. The statute under which Petitioner sought habeas corpus relief was 28 U.S.C. section 2255 which states in part:

Section 2255 Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of 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, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to not relief, the court shall cause notice to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusions of law with respect thereto. If the courts find that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

IV. STATEMENT OF THE CASES

A. COURSE PROCEEDINGS IN THE CRIMINAL CASE (2:15-cr-00224-VEH)

On May 11, 2015, two U.S. Postal Inspectors (Bailey and Holley) with the assistance of an Assistant U.S. District Attorney (Atwood), arranged a meeting with Petitioner, Terri McGuire Mollica, at her home. The meeting was intentionally arranged without her attorney present. The inspectors surreptitiously and illegally recorded the conversation in order to entrap Petitioner into making certain statements. These statements were used to obtain an arrest warrant for Obstruction of Justice, title 18 U.S.C. section 1:001 (case 2:15-mj-00122-JEO and case 2:15-cr-00162-VEH).

On May 12, 2015, Petitioner Mollica was arrested at an office building in Birmingham, Alabama.

On May 20, 2015, a Preliminary and Detention hearing was held (see transcripts for case #2:15-mj-00122-JEO).

On July 02, 2015, court appointed attorney William R. Meyers filed a motion to suppress the illegal voice recording, which was subsequently granted.

On July 23, 2015, the criminal complaint for Obstruction of Justice (case #2:15-cr-00162-VEH-TMP) was dismissed.

However, based on alleged evidence seized at the time of the illegal search, charges of Unlawful Use of Communication Facility title 21 U.S.C. 843(b) were filed. Petitioner was not indicted on this charge. Upon advice from attorney Meyer, Mollica pled guilty to an Information and entered into a plea agreement.

On October 15, 2015, Mollica was sentenced to 14 months for the original charge and another 14 months, to be served consecutively, for the section 3147 enhancement, bringing her total sentence to 28 months.

On October 27, 2015, attorney Meyer filed a Timely Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit, appealing the sentence as "procedurally unreasonable."

One June 30, 2016, the United States Court of Appeals for the Eleventh Circuit affirmed petitioner's conviction and sentence in United States v. Mollica, Appeal # 15-14817(11th Cir. 2016)

B. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE BEFORE THIS COURT
(District Court Case #2:15-cv-08033-VEH and Appeal #18-14100-J)

On June 29, 2017, Petitioner Mollica filed a 28 U.S.C. section 2255 motion to Vacate, Set Aside or Correct Sentence challenging the constitutionality of the conviction, which asserted 17 separate counts. Petitioner has abandoned most of the claims, except for ineffective assistance of counsel claims, as follows: (1) counsel Meyer was constitutionally ineffective when he misadvised Petitioner regarding the admissibility of illegally obtained evidence at trial; (2) counsel was ineffective for failing to investigate the illegal search and seizure prior to advising her to accept a plea agreement; (3) counsel was ineffective for failing to file a motion to suppress all evidence found as a result of an illegal search; and, (4) counsel Meyer was ineffective for failing to include the illegal search and seizure on the timely filed appeal in order to preserve her rights.

On November 16, 2017, the United States filed a response to Petitioner's section 2255 motion.

On September 12, 2018, the United States District Court for the Northern District of Alabama denied Petitioner Mollica's motion in its entirety, without an evidentiary hearing to resolve factual disputes.

On September 24, 2018, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

On October 1, 2018, the District Court denied a Certificate of Appealability.

On March 14, 2019, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Petitioner's section 2255 motion [except for the ineffective assistance of counsel claims] and denied Petitioner's Certificate of Appealability, without an evidentiary hearing to resolve the factual disputes.

On March 29, 2019, Petitioner filed a Motion to Reconsider, Vacate or Modify an Order and asked the Court of Appeals for reconsider only the ineffective assistance of counsel claims related to the illegal search and seizure.

On May 13, 2019, the United States Court of Appeals for the Eleventh Circuit refused to reconsider and failed to issue an opinion on the ineffective assistance of counsel claims related to the illegal search and seizure, without explanation.

V. SUMMARY OF THE CASE - FOURTH AMENDMENT VIOLATION

Item 1 On May 11, 2015, U.S. Postal Inspectors John Bailey and Phil Holley and interviewed Petitioner Mollica at her home. This meeting was set up between Asst. U.S. D.A. Melissa Atwood, with the cooperation of Mollica's then attorney, James Parkman. The purpose of the meeting was to trick Mollica into making certain statements and denying her the benefit of her attorney. The Inspectors illegally and surreptitiously recorded the meeting, without Mollica's knowledge or consent.

On that same day, Bailey procured an arrest warrant for Obstruction of Justice Title 18 U.S.C. 1001.

Item 2 On May 12, 2015, Mollica was called to a fictitious meeting at a downtown office building, purportedly to meet with James Morrow, a federal employee. The actual purpose of the meeting was to arrest Mollica

Mollica arrived at the office building at approximately 10:00 am, where U.S. Postal Inspectors arrested Mollica. Her purse was taken from her when she was handcuffed and remained in the physical custody of the Inspectors from that point forward.

See Exhibit G Excerpt from Preliminary & Detention Hearing Transcripts, case #2:15-mj-122-JEO, dated 5/20/2015; page 86, lines 16-24:

{ASUDA Atwood was asking questions to US Postal Inspector John Bailey.}

Q. Was Ms. Mollica arrested on the morning of May 12th when she reported to a PROBATION OFFICE HERE IN THIS DISTRICT?

A. That is correct.

Q. And was the arrest warrant executed at that time?

A. It was. We TOOK HER her into CUSTODY.

Q. And as part of that arrest, did you search her person and the PURSE that she had on her at that time?

A. We did.**

**US Postal Inspector John Bailey perjured himself with this answer as the purse was not searched at the time of arrest.

Item 3 Mollica was transferred, via private automobile, to the the U.S. Federal Courthouse in Birmingham, Alabama, processed and placed in a detention cell.

Item 4 More than one hour after her arrest and while she was being held in a detention cell, Molllica's then attorney Parkman, found Inspectors Bailey and Holly inside the lobby

of the Federal Courthouse, searching Mollica's purse and comparing its contents with their records.

Please see Exhibit H, U.S. Postal Inspector John Bailey's Memo, dated 5/12/2015, regarding his interaction with Mollica's attorney, James Parkman. Per the first paragraph, lines 1 - 7:

On 5/12/2015, I, accompanied by Inspector Phil Holly, were in the reception area of the U.S. Marshals Serviced office located on the 2nd floor of the Federal Courthouse in Birmingham. Inspector Holly and I had just arrested Terri Mollica for violating title 18, United States Code Section 1001. Mollica was BEING HELD IN A DETENTION CELL awaiting an initial appearance, and Inspector Holly and I were COMPLETING A SEARCH OF HER PURSE AND IT'S CONTENTS.....

Item 5 Items found during the illegal search of Mollica's purse were used to charge Mollica with Illegal Use of a Communications Facility 21 U.S.C. 843(b) (case #2:15-cr-00224-VEH)

Please see Exhibit G, Excerpt from Preliminary & Detention Hearing Transcripts, case #2:15-mj-00122-JEO, dated 5/20/2015, pages 86 - 87, beginning on line 25:

{AUSDA Atwood was asking questions of U.S. Postal Inspector John Bailey.}

Q. I'm going to show you Government's Exhibit 31 and 32

and I'm going to ask you were those items that were recovered from Ms. Mollica's purse at the time of her arrest?

A. Yes. Government's Exhibit 31 is the CREDIT CARD that, if unredacted, would show the full number that was used pay....
.... And 32 is a priority MAIL RECEIPT for a package that we determined.....

Item 6 The U.S. Postal Inspectors violated Fed R Crim P 41(f)(1)(B) by failing to prepare an inventory Mollica's seized property in the presence of another officer and Mollica (the person from whom the property was taken); they failed to provide Mollica a receipt for the seized property; they failed to return a copy of the inventory to the magistrate judge designated on the warrant.

The government's Exhibits 31 and 32 (a credit card and a mail receipt) do not appear on any inventory list or receipt, therefore, there is no proof or record of its origins.

Item 7 The items obtained from the warrantless, illegal search and seizure were used to negotiate a plea agreement (case #2:15-cr-00224-VEH). The guilty plea was sustained in violation of the Fourth Amendment.

Item 8 In his affidavit, counsel William R. Meyer (see Exhibit I) admits, under oath, in paragraph 5, that he did not investigate the illegal search and seizure or file any motions to suppress the fruits of that search.

VI. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted, via information and plea agreement, in the United States Court for the Northern District of Alabama, Southern Division, for Illegal Use of a Communication Facility, under 21 U.S.C. section 843(b). A Section 2255 motion was appropriately made in the convicting court and subsequently denied. A timely appeal to the United States Court of Appeals for the Eleventh District was filed.

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VII. REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT.

1. The Eleventh Circuit Panel Opinion affirming the district court's denial of Petitioner's section 2255 motion, holding that a Fourth Amendment Illegal Search and Seizure violation was not cognizable in a section 2255 proceeding because Petitioner did not establish "cause" for procedural default. Contrary to the Eleventh Circuit Court's holding, the Supreme Court has held that a federal prisoner's claim of conviction based on evidence obtained in an unconstitutional search and seizure was cognizable in a post conviction proceeding under 28 U.S.C. section 2255, it not being necessary to show special circumstances and that failure to appeal from a conviction did not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims.

2. The Eleventh Circuit Panel Opinion erred in affirming the district court's denial of Petitioner's ineffective assistance of counsel claims because its decisions is in direct conflict with this Court's decisions in Strickland, Hill, and Evitts, infra. The record reveals that counsel advised Petitioner to sign a plea agreement, based on an warrantless, illegal search and seizure; failed to investigate the illegal search and seizure; failed to file a motion to suppress illegally obtained evidence; and then failed to raise the obvious violation on direct appeal.

3. The Eleventh Circuit Court erred in affirming the denial of Petitioner's section 2255 motion where the district court failed to conduct an evidentiary hearing to resolve the factual disputes, which if true, warrants habeas relief and the record did not "conclusively show" that she could not establish facts warranting relief under section 2255, which entitled Petitioner to a hearing.

4. The Eleventh Circuit Court erred when it refused to rule on Petitioner's section 2255 motion claims related to ineffective assistance of counsel.

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B. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION AND ISSUED RULINGS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF OTHER APPELLATE CIRCUITS, INCLUDING ITS OWN, ON THE SAME ISSUES

1. The Eleventh Circuit has denied Petitioner's Fourth Amendment violation claim of illegal search and seizure in direct conflict with other Circuit's rulings, including its own.

2. The Eleventh Circuit has denied Petitioner's Sixth Amendment ineffective assistance of counsel claims in direct conflict with other Circuit's rulings, including its own.

3. The Eleventh Circuit has denied an evidentiary hearing to resolve factual disputes, in conflict with rulings from other Circuits, including its own.

VIII. ARGUMENTS AMPLIFYING REASONS FOR WRIT

A. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION OF THE BASIS THAT A FOURTH AMENDMENT ILLEGAL SEARCH AND SEIZURE VIOLATION WAS NOT COGNIZABLE IN A SECTION 2255 PROCEEDING AND PETITIONER FAILED TO SHOW CAUSE FOR PROCEDURAL DEFAULT.

The Court of Appeals treated the illegal search of Petitioner's purse as procedurally barred rather than an ineffective assistance of counsel claim. In Kaufman v. United States, 394 U.S. 217, 220 n.3, 22 L.Ed.2d 227, S.Ct. 1068, 1070 n.3 (1969), the Supreme Court "held that (1) a federal prisoner's claim that he was convicted on evidence obtained in an unconstitutional search and seizure was cognizable in a post conviction proceeding under 28 post conviction section 2255, it not being necessary that there be a showing of special circumstances, (2) failure to appeal from a conviction did not deprive a federal post conviction court of power to adjudicate the merits of constitutional claims..."

In order to prevail on Fourth Amendment claims, the complainant need only prove that a search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue.

The Fourth Amendment provides that "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violates." In general, warrantless searches are per se unreasonable. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The warrantless search rule, however, is subject to several exceptions. One exception allows arresting officers to "search the person of the accused when legally arrest." Weeks v. United States 323 U.S. 383, 392, 34 S.Ct. 341 58 L.Ed 652 T.D. 1964 (1914). Case law has developed to allow not only the search of the arrestee's person, but also the area within the arrestee's "immediate control."

Petitioner's purse came under the "exclusive control" of the Inspectors at the time she was arrested and placed in handcuffs. The search was conducted, more than one hour later, at the federal courthouse and after Petitioner was locked in a detention cell. Since evidence lockers were available where purse could have been securely placed, there was no reason to believe that any evidence in the purse might be destroyed. Moreover, there was no reason to believe that the purse contained explosive or other weapons as it had been scanned upon arrival in the federal building. Per Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed 2d 485 (2009), for the search to be necessary to preserve evidence or disarm arrestee, the arresting officers should "reasonably have believed...[the arrestee] could have accessed...at the time of the search (emphasis added).

Applying Chadwick, Gant, and Chimel, it was unreasonable to believe Petitioner could have gained possession of a weapon or destroyed evidence within her purse at the time of the search, since she had been locked in a detention cell for more than one hour at the time of the search.

Once the officer's obtained exclusive control , the requirement for the warrant is triggered. Ordinarily the initial seizure at the time of arrest is sufficient to place the property within the officers' exclusive control. Also, "when no exigency is show to support the need for an immediate search, the Warrant Clause places the line at the point where ether property to be searched comes under the exclusive dominion of police authority. (United States v. Chadwick, at 15).

[Warrantless] "searches of luggage or other property seized at the time of arrest cannot be justified as incident to arrest either if the "search is remote in time or place from arrest." Preston v. United States, 376 U.S. 364 at 367, 84 S.Ct. 881 at 883, 11 L.Ed.2d 777 (1964).

It is clear from the record that this was an illegal, warrantless search and any evidence obtained should have been suppressed. The officers never prepared an inventory of items seized or gave Petitioner a receipt for property seized, in violation of Fed R Crim P 41. The safety valve doctrine (namely independent source, inevitable discovery, and attenuation of the taint) may allow a poisoned fruit's admission in limited circumstances, which did not occur in this case. The search was separated from the arrest by intervening events (i.e. the transit to the Courthouse and the locking of the Petitioner in a detention cell).

Chimel v. California, 395 U.S. 752, 763 89 S.Ct. 2034, 23 L.Ed 2d 685 (1969). This authority is justified by the need to disarm the suspect and preserve evidence. United States v. Robinson 414 U.S. 218, 234, 94 S.Ct. 467 38 L.Ed 2d 427 (1973).

Slack v. McDaniel 529 U.S. 473, 484 120 S.Ct. 1595 146 L.Ed 2d 542 (2000) "when the district court denies relief based on procedural grounds without analysis of the underlying constitutional claims, a certificate of appealability should be granted when a jurist of reason would find it debatable whether [the Petitioner has stated] a valid claim of a constitutional right."

Petitioner was arrested in an office building located in Birmingham, Alabama, by two U.S. Postal Inspectors. Her purse was taken from her when she was handcuffed and remained under the "exclusive control" of the Inspectors from that point forward. Petitioner was transferred, via private automobile, to the federal courthouse building, processed, and placed in a detention cell. More than one hour after her arrest, the Inspectors were found by Mollica's then attorney, James Parkman, to be searching Mollica's purse, in the lobby of the federal building and comparing the purse's contents to their records. At the point of the search, Petitioner had been locked in a detention cell for more than one hour and no longer had access to the purse to seize a weapon or destroy evidence.

The Inspectors claim the the search was a "search incident to lawful arrest." For a search to be incident to arrest, the search must be contemporaneous in both time and location to the arrest. "Once an accused in under and in custody, then a search made a another place without a warrant is not incident to arrest." Angello v. United States, 269 U.S. 20, 39, 70 L.Ed 145, 148, 46 S.Ct. 4, 51, ALR 409 (1925).

Warrantless searches of property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest or no exigency exists. "Once law enforcement officers have reduced luggage or other person al property immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger the the arrestee might gain access to the property to seize a weapon or destroy evidence, as search of the property is no longer and incident of the arrest." United States v. Chadwick, 433 U.S. 1, 16 n.10, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977).

Elkins v. United States, 364 U.S. 206 4 L.Ed.2d 1669, 80 S.Ct. 143 (1960) "we exclude the fruits of unreasonable searched on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement" and excluding illegally obtained evidence "removes the officer's incentive to disregard the Fourth Amendment."

Mapp v. Ohio, 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961), the exclusionary ruled supplies the typical remedy for Fourth Amendment violations: suppression of the evidence..."

Segura v. United States, 468 U.S. 796, 815, 104 S.Ct. 3380, 82 L. Ed. 2d (1984), holding that "evidence is susceptible to exclusion if it is a product of the police's illegal conduct and the "exclusionary rule encompasses both "primary evidence obtained as a result of an illegal search and seizure" and "evidence later discovered and found to be derivative of an illegality; the so-called 'fruit of the poisonous tree.' "

Taylor v. Alabama, 457 U.S. 687, 690, 73 L. Ed. 2d 314, 101, S.Ct. 2664 (1982) "evidence obtained subsequent to a constructive violation must be suppressed as "fruit of the poisonous tree."

Utah v. Strieff, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016) "the exclusionary rule reaches not only the evidence uncovered as a direct result of the violation, but also evidence indirectly derived from it-so-call "fruit of the poisonous tree."

Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L. Ed. 2d 441 (1963) held that even "physical evidence...acquired downstream of a [Fourth Amendment] violation can be such [poisonous] fruit" and " evidence otherwise admissible but discovered as a result of an earlier violation is excluded as tainted, lest the law encourage future violations."

2. THE COURTS ERRED BY DETERMINING THAT PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DID NOT MEET THE STANDARD SET FORTH BY THIS COURT IN STRICKLAND AND HILL

{It should be noted that the U.S. Court of Appeals for the Eleventh Circuit refused to rule on Petitioner's Ineffective Assistance of Counsel claims (see Exhibit F), but affirmed the District Court's denial of Petitioner's sections 2255 motion and denial of her Certificate of Appealability.}

Restrictions on habeas corpus review of Fourth Amendment claims held as not applicable to Sixth Amendment claims that assistance of counsel was ineffective because incompetent representation on Fourth Amendment issues. In Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the court held "that an attorney's failure to timely move to suppress evidence.... could be grounds for federal habeas relief."

Petitioner asserted in her section 2255 motion as ground for relief that (1) counsel was constitutionally ineffective when he misadvised Petitioner regarding the admissibility of illegally obtained evidence at trial; (2) counsel was constitutionally ineffective by failing to investigate the illegal search and seizure prior to advising her to accept the plea agreement; (3) counsel was constitutionally ineffective for failing to file a motion to suppress the illegally obtained evidence; and (4) counsel was constitutionally ineffective at the appellate level by failing to raise the illegal search and seizure on Petitioner's timely filed appeal to preserve her rights.

Claims of ineffective assistance of counsel are governed by the two prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2025, 2064, 80 L.Ed.2d 674 (1984). In plea bargaining context, a Petitioner seeking to establish ineffective assistance of counsel must demonstrate that (1) the counsel's advise and performance fell below an objective standard of reasonableness, and (2) the petitioner would not have pleaded guilty and would have insisted on going to trial in the absence of his attorney's errors. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985).

(A) {Claims 1 - 3} Counsel's performance fell below an objective standard of reasonableness

because he misadvised Petitioner regarding the admissibility of illegally obtained evidence at trial; failed to investigate the illegal search and seizure; and, failed to file a motion to suppress the illegally obtained evidence.

Had counsel investigated the illegal search and seizure and filed a motion to suppress, there exists more than a reasonable probability that the result of the proceeding would have been different and the evidence would have been suppressed. Kimmelman at 2587. The sole basis for the new charge of Illegal Use of a Communication Facility was two items allegedly found during this illegal search and seizure (a credit card and a receipt - See V. Summary of Case, Item 5). Without this illegally obtained evidence, the entire complaint would have been dismissed.

Petitioner was prejudiced by the attorney's failure to file the motion to suppress. Kimmelman v. Morrison, "failure to move for suppression of.... evidence recovered during an illegal seizure was deficient performance; counsel did not conduct any meaningful pretrial discovery and there was not any strategic reason, other than incompetence for his actions" (case remanded for determination of prejudice).

The evidence was "fruit of a poison tree" and was inadmissible at trial. A Petitioner "can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Lee v. United States, 582 U.S. ___, 137 S.Ct. 1958, 1965, 198 L.Ed.2d 476 (2017).

Obviously, had Petitioner been made aware that the evidence would have been suppressed at trial, she would not have pled guilty and would have proceeded to trial.

B. {Claim 4} Counsel's performance fell below an objective standard of reasonableness at the appellate level.

The same attorney, William Meyers, represented the Petitioner at the both the trial level and appellate level. The constitution guarantees an effective appellate counsel just as it guarantees a defendant an effective trial counsel. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. L.Ed.2d 821 (1985). Counsel failed to include the obvious warrantless, illegal search and seizure on the timely filed appeal.

For Strickland's performance prong, where appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, not further evidence is needed to determine whether counsel was ineffective for not having done so. Any attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point, is a quintessential example of unreasonable performance under Strickland. No conceivable reason that a lawyer might have proffered would have made his failure to pursue the claim reasonable. His failure to raise the issue, standing alone, establishes ineffectiveness.

For the prejudice prong, where the record also shows that an omitted claim would have had a reasonable probability of success on appeal, this makes the counsel's performance necessarily prejudicial becuase it affected the outcome of the appeal.

In this case, the two items used to charge Petitioner (the credit card and the receipt) were seized during the illegal warrantless search of Petitioner's purse and were the SOLE basis for the charge of Illegal Use of a Communicate Facility. Without these two items, the case would have been dismissed in its entirety. The attorney's failure to include the illegal search and seizure on the appeal established his ineffectiveness and affected the outcome of the appeal.

3. THE COURT OF APPEALS ERRED IN AFFIRMING THE DENIAL OF PETITIONER'S SECTION 2255 MOTION WHERE THE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE THE FACTUAL DISPUTES

Section 2255 provide that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall....grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. (2000).

Fontaine v. United States, 411 U.S. 213, 215 (1973) reversing summary dismissal and remanding for hearing because "motion and the files and record of the case [did not] conclusively show that the petitioner was entitled to no relief." Sanders v. United States 373 U.S. 1, 19-1 (1963).

Petitioner's section 2255 motion alleged facts that, if proven, entitled Petitioner to relief. See Hill v. Lockhart, 474 U.S. 52, 60, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985); and Blackledge v. Allison, 431 U.S. 63, 82-83 (1977).

Petitioner has asserted that she would not have pled guilty had she been correctly advised that the warrantless search and seizure of her purse was illegal and that evidence [fruits of a poisonous tree] would have been inadmissible at trial. Thus, Petitioner was entitled to an evidentiary hearing.

4. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO RULE ON PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The Court of Appeals refused to rule on Petitioner's Sixth Amendment ineffective of assistance claims, even after Petitioner filed a Motion to Reconsider (see Exhibit E), thus denying review of these claims at the Supreme Court level. The Supreme Court has stated time and again that it is "a court of review, not of first view," and will most likely have to remand this case for further proceeding consistent with its opinions. See Cutter v. Wilkinson, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2114, 161 L.Ed.2d 1020 (2005).

See also BNSF R. Co. v. Tyrrell, 581 U.S. 137 S.Ct. 1549, 198 L.Ed.2d 26 (2017);

City of Los Angeles v. Mendez, 581 U.S. ___, ___, 137 S.Ct. 198 L.Ed.2d 52, n. (2017);

Expressions Hair Design v. Schneiderman, 581 U.S. ___, ___, 137 S.Ct. 1144, 137 L.Ed.2d 442 (2017);

Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. ___, ___, 137 S.Ct. 1178, 197 L.Ed.2d 585 (2017);

Jennings v. Rodriguez, 583 U.S. ___, ___, 138 S.Ct. 830,200 L.Ed.2d 122 (2018);

Manual v. City of Jolier, 580 U.S. ___, ___, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017);

McLane Co. v. EEOC, 581 U.S. ___, ___, 137 S.Ct. 1159, 197 L.Ed.2d 500 (2017);

McWilliams v. Dunn, 582 U.S. ___,___, 137 S.Ct. 1790, 198 L.Ed.2d (2017).

B. THE ELEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION AND ISSUED RULINGS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF OTHER APPELLATE CIRCUITS, INCLUDING ITS OWN, ON THE SAME ISSUES

(1) The Eleventh Circuit has denied Petitioner's claim of violation of the Fourth Amendment legal search and seizure of Petitioner's purse in conflict with other circuits, including its own. Law enforcement claimed the search [which was conducted more than one hour after Petitioner's arrest and her transport to another federal building and while Petitioner was being held in a detention cell] was "incident to a lawful arrest."

Schleis v. United States, 433 U.S. 905, 53 L.Ed. 2d (8th Cir. 1978) (en banc) where "the warrantless search of the briefcase occurred after the briefcase was under the exclusive control of the police, and, therefore could not be justified as a search incident to arrest." **Case Dismissed**

United States v. Bonfiglio, 713 F.2d, 932, 937 (2nd Cir. 1983) holding "even when items have been lawfully seized, a separate warrant is required to conduct a search thereof if the individual has a high expectation of privacy in the seized item."

United States v. Bonitz, 826 F.2d, 954, 956 (10th Cir. 1987) holding "defendant handcuffed and in custody at the time of the seizure gave police no valid concern for their safety nor any real chance that evidence might be destroyed." **Case Dismissed**

United States v. Knapp, 917 F.3d 1161 (10th Cir. 2019) which held "the search of Knapp's purse was not one of her person for purposes of U.S. v. Robinson, because the search of her purse was not actually supported by an exception" and "search of a purse or similar items carried by an arrestee but not within their clothing is no a search 'of the person' for Fourth Amendment purposes. Officers could not have reasonably believed that the purse could be accessed at the time of her purse being search since she was already handcuffed outside." **Case Dismissed**

United States v. Mitchell, 565, F.3d 1347 (11th Cir. 2009) "even a seizure based on probable cause is unconstitutional if there is an unreasonable delay in obtaining a warrant."

United States v. Rafaela Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981) holding "that the warrantless search of her purse was unlawful because she had a reasonable expectation of privacy in her purse, the search was conducted more than an hour after her arrest, and it was conducted at the station house," not at the place of her arrest. The court held that the search could not be characterized as incident to arrest and that the purse could not be characterized as an element of defendant's clothing or person. **Case Dismissed**

United States v. Terzado-Madruga, 897 F.2d 1099, 1112-13 (11th Cir. 1990) "under the exclusionary rule, evidence derived from police misconduct is subject to exclusion as "fruits of the poisonous tree."

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2. The Eleventh Circuit has denied Petitioner's ineffective assistance of counsel claims related to counsel's failure to file a motion to suppress the illegally obtained evidence, in direct conflict with other Circuits, including its own.

Huynh v. King, 95 F.3d 1052, 1059 (11th Cir. 1996) held that "appellee shown that his counsel's performance at trial regarding decision to delay filing potentially meritorious motion to suppress was neither sound strategy nor reasonable in light of professional norms."

Martin v. Maxey, 98 F.3d 844, 848 (5th Cir. 1996) held that "failure to file motion to suppress could be grounds for ineffective assistance of counsel."

Nell v. James, 811 F.3d 100, 106 (2nd Cir. 1987) remanding for hearing to "determine whether counsel was ineffective for failing to investigate the facts related to a search...."

Smith v. Wainwright, 770 F.2d 609 (11th Cir. 1985) held that "attorney's failure to move for suppression of [evidence] that was primary evidence against defendant's stated claim of ineffective assistance of counsel."

Tice v. Johnson, 647 F.3d 87 (4th Cir. 2011) held that "failure of counsel to move to suppress.... was constitutionally deficient."

White v. Ryan, 895 F.3d 641 (9th Cir. 2018) Court granted habeas relief for "ineffective assistance of counsel as a result of defense counsel failure to challenge the SOLE aggravating factor or investigate mitigating circumstances."

United States ex re. Thomas v. O'Leary, 856 F.2d 1011, 1016-17 (7th Cir. 1988) held that "counsel's failure to file brief in appeal....of suppression amounted to complete denial of assistance of counsel; prejudice is presume under such circumstances."

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3. The Eleventh Circuit has denied an evidentiary hearing related to Petitioner's ineffective assistance of counsel claims regarding counsel's failure to file a motion to suppress the illegally obtained evidence, in conflict with rulings from other circuits, including its own.

An evidentiary hearing must be held on a section 2255 motion to vacate "unless that files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255(b)

Aron v. United States, 291 F.3d 708, 714-15 (11th Cir. 2002) held that "if a Petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing to rule on the merits of his claims."

Gardner v. United States, 680 F.3d 1006, 1013 (7th Cir. 2012) case remanded for evidentiary hearing "to determine whether counsel's failure to file a suppression motion prejudiced the defendant."

Griffin v. United States, 871 F.3d, 1321, 1329 (11th Cir. 2017) "to show that he is entitled to an evidentiary hearing on his ineffective assistance of counsel claims, [Petitioner's} 2255 motion must allege facts that would show (1) the counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant."

Johnson v. Thaler, 406 Fed Appx 882 (5th Cir. 2010) A Certificate of Appealability should be granted where the movant was denied an evidentiary hearing, even where the movant has not shown enough evidence to prevail.

Martin v. United States, 889 F.3d 827 (6th Cir. 2018) Case remanded because "the district court abused its discretion by declining to hold an evidentiary hearing to determine Petitioner's ineffective assistance of counsel claims."

Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970) "unless it is clear... that the prisoner is entitled to no relief, the statue [28 U.S.C. section 2255(b)] makes a hearing mandatory."

Stano v. Duggar, 921 F.2d 1125, 1151 (11th Cir. 1991) When a defendant pleads guilty, he can show deficient performance by demonstrating that his counsel did not provide him "with an understanding of the law in relation to the facts, so that [he] may make an informed and conscious choice" between pleading guilty and going to trail."

United States v. Briley, 770 F.3d 267, 276 (4th Cir. 2014) A "district court abuses its discretion when it....relies on erroneous factual or legal premises or commits an error of law."

United States v. Maria-Martinez, 143 F.3d 914, 916 (5th Cir., 1998) holding "failure to file a motion to suppress cannot be review without testimony as to the reason behind the failing to file the motion."

CONCLUSION

Petitioner, Terri McGuire Mollica, has been deprived of basic fundamental rights guaranteed by the Fourth and Sixth Amendments of the United States Constitution and seeks relief in this Court to restore those rights. Based on arguments and authorities presented herein, Petitioner's guilty plea was sustained in violation of these Amendments. Petitioner was deprived of her right to effective assistance of counsel in the District Court and the Appellate Court and was subjected to unlawful search and seizure.

Petitioner prays this Court will GRANT a writ of certiorari VACATE the judgment of the Eleventh Circuit Court of Appeals, and REMAND this case back to the Court of Appeals for the Eleventh Circuit to rule on Petitioner's Sixth Amendment ineffective assistance of counsel claims and her claims of violation of her Fourth Amendment rights against unlawful search and seizure in light of this Court's decisions in Strickland, Hill, Chadwick, Fontaine, Chimel, Gant, and Cutter.

Respectfully submitted, on this the 7th day of August, 2019.

Terri McGuire Mollica
Pro se Representation