NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

TERRENCE 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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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

2. Whether Mr. Mathis's Fifth Amendment rights were violated when law enforcement officers detained and interrogated him without counsel even though he repeatedly asked for a lawyer?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Terrence Mathis, No. 117-60181-Cr-Dimitrouleas (February 13, 2018)

United States Court of Appeals (11th Cir.):

United States v. Terrence Mathis, No. 18-10696 (August 16, 2019)

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Terrence Mathis respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10696 in that court on August 16, 2019, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 16, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

Section 922(g)(1) of Title 18 of the U.S. Code provides that "[i]t shall be unlawful for any person . . . who has been convicted" of a felony to possess a firearm or ammunition. Section 924(a)(2) provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be . . . imprisoned not more than 10 years."

The Fifth Amendment provides "[n]o person...shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

STATEMENT OF THE CASE

On August 10, 2017, a federal grand jury in Broward County, Florida returned a two (2) count indictment against Mr. Mathis charging him with two counts of possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Notably, the grand jury did not charge that Petitioner knew of his status as a convicted felon when he possessed the ammunition. Nor was Petitioner's jury instructed that such knowledge was an element the government must prove beyond a reasonable doubt.

Before trial, Mr. Mathis filed a motion to suppress statement and an amended motion to suppress statement and physical evidence. He also filed a motion for separate trial on counts and a motion in limine regarding government's 404(b) evidence. Hearings were held for the motions to suppress and the motion for separate trial on October 6, 2017. After conducting a hearing on the motions, the district court denied the motions to suppress and the motion for separate trial. The district court also denied the motion in limine.

A jury trial began on October 30, 2017. During the trial, the government did not prove that Mr. Mathis knew of his prohibited status when he possessed the ammunition and the jury was not instructed that it must find that Mr. Mathis knew of his prohibited status. At the conclusion of trial, the jury returned verdicts of guilty against Mr. Mathis on both counts. Mr. Mathis then filed a motion for new trial and for judgment of acquittal which the district court denied. Before sentencing, Mr. Mathis filed written objections to the presentence investigation report in which he

objected to the application of the first-degree murder sentencing guideline to determine his offense level.

Sentencing began on February 9, 2018. The presentence investigation report set forth a criminal history category of II and an offense level of 43, resulting in an advisory guideline range of life. The statutory maximum sentence for both counts is ten years imprisonment. At the conclusion of sentencing, the district court overruled the objection to the sentencing guideline cross reference. The district court then sentenced Mr. Mathis to 120 months imprisonment as to both counts, to be served consecutively, for a total term of 240 months, followed by three (3) years supervised release. Mr. Mathis timely filed a notice of appeal.

On appeal Mr. Mathis challenged the denial of his motion to suppress statements, the admission of evidence of the Wolfer shooting, the sufficiency of the evidence and the reasonableness of his sentence. The Eleventh Circuit Court of Appeals determined that it was only Mr. Mathis's last statement, "I need, I wanna get a lawyer first" that was unambiguous, so there was no *Edwards* violation, that the district court did not abuse its discretion in admitting evidence of the Wolfer shooting, that the evidence was sufficient to support the jury's verdict and that the sentence was reasonable.

After oral argument and shortly before the court affirmed Petitioner's conviction and sentence, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that, to prove a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the government "must show that the defendant knew he possessed a firearm and

also that he knew he had the relevant status when he possessed it." *Id.* at 2191. Because this case is still on direct appeal, Petitioner now seeks the benefit of that intervening decision, which overruled circuit precedent. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

Statement of Facts

1. Motion To Suppress

Mr. Mathis filed a motion to suppress statement and an amended motion to suppress statement and physical evidence based on the continuing questioning of Mr. Mathis after he asked for a lawyer. At the motion to suppress hearing, held on October 6, 2017, the government called one witness, Detective Libman, to testify. The government also introduced the recorded video of Mr. Mathis's questioning. The testimony and evidence showed as follows:

On July 15, 2017, police obtained a search warrant authorizing them to obtain DNA, photographs, and fingerprints from Mr. Mathis. He was detained and transported to a police station. He was brought to an interview room where he was shackled to the floor. Detective Libman, with the Broward Sheriff's Office, entered the room to begin an interview of Mr. Mathis. The entire interview was video and audio taped. Almost immediately after the detective entered the room, Mr. Mathis asked him twice, "Do I need an attorney for anything?" Detective Libman told Mr. Mathis he couldn't tell him what he needed or didn't need but could tell him what he wanted to talk to him about and why Mr. Mathis was there. The detective then continued with the interview.

After some further discussion, Detective Libman told Mr. Mathis that he was going to advise him of his *Miranda* rights. The detective read the rights to Mr. Mathis from a form. Detective Libman read each paragraph of the form to him and asked him if he understood. Mr. Mathis was advised that he had a right to talk to an attorney before speaking with the detective and to have an attorney there during questioning. As this was being read to him, Mr. Mathis asked, "So I can get one now?" The detective told him, "yes" but, "He's not gonna show up here." The detective then told Mr. Mathis that he could choose not to speak with him and that he was being detained to obtain DNA, fingerprints and pictures and after that he was free to go. Thereafter, Mr. Mathis signed the waiver form and began answering questions.

During the questioning the following exchange took place between Mr. Mathis and Detective Libman:

> Mathis: Listen, can I ask you a question?
>
> Libman: Yeah.
>
> Mathis: All right, in all honesty, can I have uh, uh, uh, uh, a lawyer before I do DNA? Because I . . .
>
> Libman: No. Because the judge signed the order on the DNA. It's done. The lawyer, the lawyer has nothing to do with DNA. We got, we got a search warrant from a, signed by a judge. I'll give you a copy of it.
>
> Mathis: Yeah, cause I'm saying I, I just want to be safe because, you know, I told you how I, I did that time on the last time.
>
> Libman: Yeah, no, I, I don't know what happened with that case. But I, I don't put cases on people just for the hell of it.

Mathis: I don't want nobody to try to put . . .

Libman: No, no, look, everything's on the up and up here.

Questioning continued and at some point detectives took photos, DNA samples and fingerprints as authorized by the search warrant. Afterwards, Detective Dyer entered the room and advised that she wanted consent to get into the defendant's phone. Then the following exchange took place:

> Dyer: What I want to see is if you'll give us consent to go into your phone.
>
> Mathis: Uh, I think I should get a lawyer. I mean, I, it's not that, you know what I mean, like I've got something to hide. But I'm just, I've been through something already before this . . .
>
> Dyer: I understand.
>
> Mathis: . . . and I don't want . . .
>
> Dyer: Okay.
>
> Mathis: . . . you know what I mean, any . . .
>
> Dyer: All right . Then that's what we're gonna go ahead and do is, because the phone was inside the car and we have the search warrant for the car, we're gonna keep the phone and get a search warrant on the phone. That's gonna take us a few days.
>
> Mathis: Well, what if I give you all consent?
>
> Dyer: If you give me the consent . . .
>
> Mathis: I mean, you all gonna do it anyway, right?
>
> Dyer: Either way we're going to do it. It's choice A, you do it right now and I can give you the phone as soon as we're done dumping it, or choice B, I get a judge on the weekend. It's gonna take a while. He's gonna sign a search warrant and then we're gonna go ahead and do it that way.

Mathis: [Unintelligible] said he's gonna do it anyway, right? Cause he said he's gonna get numbers out of there, right?

Dyer: Either way we wanna get the information. We'd like to do with your consent. If not . . .

Mathis: What information?

Dyer: The stuff that's inside your phone.

Mathis: Like what?

Dyer: Data.

Mathis: Data?

Dyer: Remember when Detective Libman, he told me that he told you that he wants to be able to either prove or disprove who killed someone?

Mathis: Right.

Dyer: Okay. So, the data that's captured on your phone will help us in either proving, or disproving.

Mathis: Well, what kind of data? I don't understand, like . . .

Dyer: All the stuff that's in there. Listen, I'm not the tech person. I couldn't tell you what it is they do. I just know that's what they do. So, it's, it's your call.

Mathis: I don't know what I'm supposed to do. I think I should ask a lawyer first because I don't know what I should do. Like, I really don't. I'm, I'm just being honest.

Dyer: You don't have to sign the form. Not a problem.

Mathis: I mean, can I, can I like, get a lawyer now?

Dyer: No. Not this very second. No. Not this very second. We're not calling a lawyer and bringing you a lawyer. So since you don't want to, and you're hesitant, that's fine. And I understand your position. I'm gonna go ahead . . .

Mathis: No, I'm not saying I don't want to. I'm just saying like I'd rather like a lawyer here now like . . .

Dyer: We're not calling a lawyer here for you. Plus it's Saturday. It's Saturday. So do you have a lawyer on retainer that you're just gonna call up and go, you know, I need somebody to sign up, even though, you know what I mean?

Mathis: No, not really [unintelligible]. What I'm saying, all right, so, if I do it today you all give me my phone back today?

Dyer: Yeah.

Mathis: Oh, okay, I mean, no problem.

An attorney was never called or made available to Mr. Mathis. Mr. Mathis then signed a consent form for the search of his phone and the questioning continued.

After a period of time, Detective Libman re-entered the interview room and confronted Mr. Mathis with inconsistencies in his statements based on information obtained from Mr. Mathis's cell phone. At that point Mr. Mathis again asked for a lawyer as follows:

Mathis: Yeah, I know, but, I need, I wanna get a lawyer first, before, you know, cause. . .

Libman: Well, I'll tell you what. You get a lawyer. That's fine. That's your, that's your privilege. All right? I don't wanna ask you no more questions. All right? If I grab your brother up, and he makes you complicit in this, lawyer, no lawyer, ten lawyers, it doesn't , it's not gonna stop you from going to jail. I'll just let you know that. All right? So, you want a lawyer? That's fine. I ain't gonna ask you no more questions. I ain't gonna talk to you no more about this case. But when I walk out that door, remember, that I'm gonna finish the investigation. I'm gonna continue to work on this. And I'm gonna yank, I'm gonna yank your brother up. If he puts you, if he says he got into that car, whether it's today or tomorrow, and I don't care where you go, you run, I'm gonna throw a warrant on you and you're gonna go to jail.

> Okay? If you're innocent, you're innocent. But I'm telling you, if your brother puts you there, and I don't care who you call, cause I can put your brother there without him saying he was there, then, then that's it. It's over. Okay, so you think about that.

Libman then exited the interview room and Mr. Mathis was released later that day.

During this police interrogation, Mr. Mathis told the detectives that he sometimes lives at 3030 SW 187th Street in Miami Gardens. Additionally, he identified himself in a security surveillance photo while inside J&L Liquor Store, where the victim of the homicide was employed. He further told the detective that the Yankees sweat shirt he is seen wearing in the video should be at the residence. Mr. Mathis also signed consent to search form for the Miami Gardens address and a bedroom. This specific information was later included in a search warrant for the residence that was prepared and executed the same day. The police searched the bedroom pursuant to the warrant and seized one live round of 9mm Plus P ammunition.

Mr. Mathis also disclosed during the interview that an I-Phone 6 Plus that was recovered inside his car on July 15, 2017, was used by him in the area of J&L Liquors on July 7, 2017, the date of the homicide. This information was then included in a search warrant for this phone. A later search and analysis of this phone revealed several incriminating text messages and searches related to the murder in Lighthouse Point, Florida.

After the hearing, the district court entered a written order denying the motion to suppress and amended motion to suppress. The district court found that

all of Mr. Mathis's requests for a lawyer "were either ambiguous statements for which questioning need not have stopped" or "they involved a desire to have an attorney render advice about a limited issue: DNA or consent." The district court determined that, "[w]hen the ambiguity was clarified, it was clear that Mathis wanted to continue the questioning," and that the statements were "freely and voluntarily made." Moreover, the district court found that, "[e]ven had the Court suppressed some or all of Mathis's statements as being in violation of *Miranda*, such a ruling would not have extended to the suppression of physical evidence." In addition, the district court found that Mr. Mathis consented to the search of his residence in Miami, and omitting statements from the warrant for the cell phone, "still results in a probable cause finding."

2. Trial

In the early morning hours of July 7, 2017, Karl Wolfer was shot twice and killed in his van as he sat in front of his condo in Lighthouse Point, Florida. Lighthouse Point police officers discovered two 9mm spent shell casings in the parking lot. One cartridge case was on the left side of the vehicle close to the rear bumper. The second cartridge case was a couple of feet from the first a little closer to the road. Testimony at trial concluded that the two fired cartridge cases were fired from the same unknown firearm.

The headstamp marks on the bottom of each of the cartridge cases indicated that these cartridge cases were manufactured by Starline Brass, Inc., in Sedalia,

Missouri. Law enforcement officers advised that Starline Brass cartridge cases were not as common as other manufacturers.

A search of license plate recognition cameras and store cameras from various locations showed the victim's car in the hours before the homicide leaving the liquor store where he worked, going to Walmart and then going home. The cameras also revealed that his car was followed by another vehicle with a tag that came back as belonging to Mr. Mathis. A warrant was issued for Mr. Mathis in order to collect DNA.

On July 15, 2017, BSO deputies took Mr. Mathis into custody and transported him to the BSO West Park District Station in Hollywood, Florida, where they placed him in an interview room which was wired for audio and video recording. They seized his car and his cell phone at that time. A redacted recording of the interview was played for the jury. During his interview at the BSO station, Mr. Mathis signed a consent form to search his phone. They also took photographs, fingerprints and DNA samples. During the interview, a search warrant was issued authorizing BSO detectives to search Mr. Mathis's residence. A search of the phone revealed Google searches and website visits for "shooting in Pompano Beach" and "Man found dead outside Lighthouse Point home," and similar searches, shortly after the murder occurred. None of the cell phone tower records showed Mr. Mathis's phone at the scene of the homicide in Lighthouse Point. A search of the vehicle failed to reveal any incriminating evidence linking Mr. Mathis to the cartridges or the murder.

A search of Mr. Mathis's residence was conducted on the same day. Mr. Mathis's brother, Nathaniel Green, also lived at the residence and had recently been released from prison. The search revealed a 9mm cartridge in a clothes hamper in Mr. Mathis's bedroom. The officer who found the cartridge searched with gloves on for an hour and a half to two hours before finding the cartridge. He disposed of the gloves without testing the exterior of the gloves for DNA. The headstamp marks on the bottom of the cartridge indicated that the cartridge case was manufactured by Starline Brass, Inc., in Sedalia, Missouri. The headstamp marks on the case were identical to the headstamp marks on the two cartridge cases recovered at the scene of the homicide. The cartridge was swabbed for possible DNA and submitted to the BSO crime lab for comparison. No other incriminating evidence was found at the residence. At a later point, the live round found in the bedroom and the two spent shell casings from the scene of the murder were sent to the Florida Department of Law Enforcement lab in Orlando for examination. An expert at trial gave the opinion that after comparing one of the spent cartridge cases with the live round that "the mark of common origin was identical on both of them, that it came from the same source."

Jennifer Parker, a DNA expert at the BSO Crime Laboratory issued a report concluding that DNA from the 9mm cartridge recovered during the search of Mr. Mathis's bedroom was consistent with the DNA collected from Mr. Mathis. Analysis failed to connect Mr. Mathis's DNA to the DNA taken from Mr. Wolfer and

his vehicle. None of Mr. Mathis's fingerprints were found at the scene of the homicide.

3. Sentencing

Before sentencing, Mr. Mathis filed written objections to the presentence investigation report in which he objected to the application of the first-degree murder sentencing guideline to determine his offense level. Sentencing began on February 9, 2018. The presentence investigation report set forth a criminal history category of II and an offense level of 43, resulting in an advisory guideline range of life. The statutory maximum sentence for both counts is ten years imprisonment. At the conclusion of sentencing, the district court overruled the objection to the sentencing guideline cross reference. The district court stated:

> I mean, I heard a first degree murder case. I mean he was charged in federal court with possession of ammunition, but the case was a first-degree murder case. And that's what I think the government proved. And I think that's what the jury found Mr. Mathis guilty of. I don't think the jury would have come back with a guilty verdict unless they believed that he was there either assisting the shooter or being the shooter himself. The circumstantial evidence in this case was very, very strong. You know, they pretty much tracked Mr. Mathis in his car all the way up to the shooting and away from it. His actions afterwards were consistent with someone who committed the crime. The same type of spent ammunition is found in his bedroom afterwards. I think it was a very strong circumstantial evidence case. . . .
>
> Well, let me just say this. You know, I don't know that the cross-reference would be applied by me if it was just the spent cartridge in the bedroom that he was convicted of. The cross-reference is being applied by me because of the spent cartridge found at the murder scene. . . .
>
> I think that the cross-reference is appropriate. I think the government proved a first-degree murder case. I think the circumstantial evidence

> was strong. And for all the comments I made before, I think that those comments are sufficient to satisfy the *Mock* requirements for findings of fact and conclusions of law. I agree with Mr. Shockley's assessment of the 3553(a) factors. I think that a sentence less than 20 years does not promote respect for the law and act as a deterrent.

The district court then sentenced Mr. Mathis to 240 months imprisonment as to both counts, to be served consecutively, followed by three (3) years supervised release.

REASON FOR GRANTING THE WRIT

Issue 1

The Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

1. Under 18 U.S.C. § 922(g), nine categories of persons—felons being the first—are prohibited from possessing a firearm or ammunition by virtue of their status. But while § 922(g) prohibits felons (and eight other categories of persons) from possessing a firearm or ammunition, that provision does not actually criminalize such conduct. Rather, that work is done by 18 U.S.C. § 924(a)(2), which provides that whoever "knowingly violates" § 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." *Rehaif* has now made clear that a valid prosecution depends on *both* § 922(g) and § 924(a)(2).

In *Rehaif*, this Court addressed "whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S. Ct. at 2195. By a vote of 7–2, the Court answered affirmatively, "hold[ing] that the word 'knowingly' [in § 924(a)(2)] applies to both the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194; *see id.* at 2200 (repeating that holding).

The Court relied on the "longstanding presumption, traceable to the common

law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2195 (citation omitted). Rather than "find [any] convincing reason to depart from the ordinary presumption in favor of scienter," the Court found that the statutory text "support[ed] the presumption." *Id.* The Court emphasized that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* And the Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]. To the contrary, we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id.* at 2196.

2. In light of *Rehaif*, the indictment in this case was fatally flawed. It alleged that Petitioner, "having previously been convicted" of a felony, "did knowingly possess in and affecting interstate and foreign commerce ammunition, that is two 9 mm Starline Brass cartridge cases, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2)." Those allegations do not state a federal offense.

While the grand jury alleged that Petitioner was in fact a felon, it did not allege he *knew* he was a felon. *Rehaif* held that such knowledge is an essential element of the offense. Here, the only *mens rea* alleged was that Petitioner knowingly possessed ammunition. Under *Rehaif*, that conduct is not a crime.

Admittedly, Petitioner did not raise this argument below. After all, the Eleventh Circuit had long held that knowledge of status was not an element, *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997), and every other circuit had agreed, *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, J., dissenting) (citing cases). But his failure to raise the issue does not bar relief. This Court has held that it is "fatal error" to permit an individual to be "convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. 212, 219 (1960).

Moreover, all four prongs of plain-error review would be satisfied even if it applied: there is error; that error is now "plain" under *Rehaif*, *see Henderson v. United States*, 568 U.S. 266 (2013); it affected Petitioner's substantial rights, as "[t]he right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment," *Stirone*, 361 U.S. at 219; and convicting him of an unindicted offense seriously affected the fairness, integrity, and public reputation of judicial proceedings.

Finally, the Eleventh Circuit Court has "established precedent recognizing that the failure to allege a crime . . . is a jurisdictional defect" that can be raised at any time. *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013); *see United States v. McIntosh*, 704 F.3d 894, 902–03 (11th Cir. 2013); *United States v. Peter*, 310 F.3d 709, 713–15 (11th Cir. 2002); *United States v. St. Hubert*, 909 F.3d 335, 342–44 (11th Cir. 2018) (re-affirming those precedents). Thus, the Eleventh Circuit should be given a chance to address Petitioner's claim in the first instance.

3. Finally, after this Court decided *Rehaif*, it granted several petitions for certiorari, vacated the judgments below, and remanded for reconsideration in light of *Rehaif*. *See Reed v. United States*, 139 S. Ct. 2776 (2019); *Allen v. United States*, 139 S. Ct. 2774 (2019); *Hall v. United States*, 139 S. Ct. 2771 (2019); *Moody v. United States*, 139 S. Ct. 2778 (2019). In light of the foregoing, the same result is warranted here.

Issue 2

Mr. Mathis's Fifth Amendment rights were violated when law enforcement officers detained and interrogated him without counsel even though he repeatedly asked for a lawyer.

The Fifth Amendment provides "[n]o person...shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona,* this Court established that a law enforcement agent may not conduct a custodial interrogation of a suspect before informing him of his rights against self-incrimination. 384 U.S. 436, 473–74, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); *United States v. Newsome,* 475 F.3d 1221, 1224 (11th Cir. 2007). Statements made in violation of *Miranda* are not admissible at trial. *Id.* at 444–45, 86 S. Ct. 1602.

As such, the right to *Miranda* warnings attaches at the moment a custodial interrogation begins because the Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also United States v. Acosta,* 363 F.3d 1141, 1148 (11th Cir. 2004). This means that "[s]tatements made in violation of *Miranda* are not admissible at trial." *United States v. Qose,* 679 Fed. Appx. 761, 764 (11th Cir. 2017) (citation omitted). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. "Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection,

the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citation omitted).

"[W]hether a suspect is 'in custody' is an objective inquiry." *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). Subjective beliefs of the defendant and the officer on whether a defendant was free to leave are irrelevant because "the reasonable person from whose perspective 'custody' is defined is a reasonable innocent person." *United States v. Peck*, 17 F. Supp. 3d 1345, 1358 (N.D. Ga. 2014) (citing *United States v. Brown*, 441 F.3d 1330, 1347 (11th Cir. 2006) (quotations, citations, alteration, and emphasis omitted)). In other words, the only relevant inquiry is how a reasonable person in the suspect's position understands the situation.

This Court has provided a number of factors to consider in determining whether a defendant is in custody, including the location of the questioning, *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010), its duration, *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984), statements made during the interview, *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977), the presence or absence of physical restraints during the questioning *N.Y. v. Quarles*, 467 U.S. 649, 655 (1984), and the release of the interviewee at the end of questioning, *Beheler*, 463 U.S. 1121, 1122-23. In addition to the aforementioned factors, the Eleventh Circuit has provided several other factors to consider, "including whether the officers brandished weapons, touched the suspect, or used language or a tone that indicated that compliance with the officers

could be compelled." *United States v. Street,* 472 F.3d 1298, 1309 (11th Cir. 2006) (quotation omitted). In considering the totality of the circumstances, the Eleventh Circuit has held that "[n]o particular fact in the 'custody' analysis is outcome determinative—[the court] simply weigh[s] the totality of the circumstances." *United States v. Lall,* 607 F.3d 1277, 1284 (11th Cir. 2010) (quoting *Brown*, 441 F.3d at 1349) (alterations added).

This Court has "decided that once 'an accused has invoked his right to have counsel present during *custodial* interrogation ... [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact." *Montejo v. Louisiana*, 556 U.S. 778, 787 (2009) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)) (emphasis added). *See also Bobby v. Dixon*, 565 U.S. 23, 28 (2011) (the Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.' ") (citation omitted).

In sum, if an individual in custody states that he wants an attorney, the interrogation must cease until an attorney is present. *Miranda*, 384 U.S. at 474. And "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated questioning even if he has been advised of his rights. *Edwards*, 451 U.S. at 484. After a defendant has invoked his right to counsel, "courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly

and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984). Information illegally obtained by disregarding a request for counsel which leads to evidence that would not be otherwise known must be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939). The burden is on the Government to prove that evidence was not obtained as a direct result of the illegality. *United States v. Crosby*, 739 F.2d 1542, 1549 (11th Cir. 1984).

In this case, Mr. Mathis's statements to both detectives articulated his desire to have an attorney present and to consult with an attorney regarding the police questioning. Both detectives were misleading in their responses to his request for an attorney and acted in violation of his rights under both *Miranda* and *Edwards*. The initial questioning, and the continued questioning, once the defendant requested an attorney, was unconstitutional and unlawful. Accordingly, Mr. Mathis's constitutional rights were violated when law enforcement officers detained and interrogated him without counsel even though he repeatedly asked for a lawyer.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Rehaif*. In the alternative, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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