ORIGINAL

No. 20-6763

IN THE

SUPREME COURT OF THE UNITED STATES

ARNOLD MATHIS pro se — PETITIONER
(Your Name)

vs.

ZULAIKA ZOE VIZCARRONDO et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Arnold Mathis 57679-018
(Your Name)

P. O. Box 33
(Address)

Terre Haute, IN 47808
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the Court of Appeals for the Eleventh Circuit correctly dismissed Petitioner's Counts II and III of the Original Complaint for false arrest on the basis that the Counts are barred by the statute of limitations..

Whether the Court of Appeals for the Eleventh Circuit correctly dismissed the Second Amended Complaint on the basis that Defendant is entitled to qualified immunity on Petitioner's claim that a warrantless search was conducted of Petitioner's cellphone in violation of his rights under the Fourth and Fourteenth Amendments where no exigency is shown.

Whether it is ever a lawful discretionary function for a person's personal password encrypted cellphone to be breached without owner's consent or abandonment and no exigency.

Whether the Petitioner is entitled to compensatory and/or punitive damages in this action.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JAMES MICHAEL EVANS

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 2, 2019.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 9, 2020, and a copy of the order denying rehearing appears at Appendix C.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including November 16, 2020 (date) on September 16, 2020 (date) in Application No. 18 A 14396.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of 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.

U.S. Const. amend. V
U.S. Const. amend. XIV

STATEMENT OF THE CASE

In this case, the investigation involving Arnold Maurice Mathis (Petitioner), began on December 16, 2011, when Jarvis Jiles (Jiles), an adult, went to Polk County, Florida Sheriff's Office to report he was sexual abused by the Petitioner seven years earlier 2004. In light of Jiles' allegations, Detective Zulaika Zoe Vizcarrondo (Vizcarrondo) and Sergeant James Michael Evans (Evans) had Jiles conduct a controlled call with Petitioner where the two discussed the time period surrounding the alleged 2004 incident.

According to Detective Vizcarrondo's sworn Arrest Affidavit dated December 17, 2011, states "As the suspect (Mathis) admitted the above listed information, there is probable cause to believe his actions meet the statutory requirements for sexual battery by person of authority, as defined in Florida State Statue 794.011(8)(B). The suspect was subsequently taken into custody and transported to Polk County Jail without incident." The Petitioner was arrested from his home without a warrant on December 17, 2011.

According to Detective Vizcarrondo's Supplemental Insert dated January 5, 2012, states "On 12-22-11 at approximately 1300 hours, cellphone search warrant

was completed. The warrant was signed by a Circuit Court Judge, Polk County, Florida, allowing the Polk County Sheriff's Office to search suspect Mathis' cellular phone, for content deemed to be of evidentiary value in this investigation into Victim Jiles." (Detective Vizcarrondo did not state in her affidavit whether or not any search of Mr. Mathis' phone was conducted during the period of December 17, 2011 - December 22, 2011, that is, during the period between Mr. Mathis' arrest and the seizure of his cellphone, and the completion of her search warrant application. Nor did the affidavit request permission to breach the phone's encrypted password to conduct any search.). As a result of that forensic analysis, aside from the log of the December 16, 2011, controlled calls no information connected Mathis to Jiles and no information pre-dated 2011. The Petitioner was subsequently charged with numerous counts of sexual misconduct.

On February 7, 2012, during a state court arraignment, the charges against Petitioner for the alleged offenses on Jiles were dismissed because the statute of limitations expired. See Appendix B, at 1'.

On October 31, 2012, a federal grand jury returned an indictment charging Petitioner with several counts of producing child pornography.

On February 4, 2013, a federal court suppression hearing was conducted. See Criminal Docket for

Case 8:12-cr-00457-SCB-MAP-1, Document 29.

On March 1, 2013, the transcript of Evidentiary Hearing as to Petitioner was entered in the docket. See Document 39, Filed 03-01-2013. That document 39 established the following apparent facts as testified by Sergeant Evans with the Polk County Sheriff's Office and Adam Sharp, an expert in data recovery and the forensic analysis of computers and cellphones. Detective Vizcarrondo who swore out the application for search warrant did not provide any testimony during the federal proceedings other than grand jury testimony.

> Sergeant Evans testified that after they received the complaint from Victim Jiles they did not seek an arrest warrant. They consulted with the Florida State Attorney, Polk County, prior to the arrest, regarding the probable cause that they had from the investigation itself and made it an arrest. See Document 39 at 15. (Detective Vizcarrondo did not state in her sworn Arrest Affidavit for a probable cause determination that she actually consulted with the Florida State Attorney regarding probable cause prior to Petitioner's arrest.). See Williams v. Sirmons, 307 F. Appx. 354 (11th Cir. 2009)(unpublished)("If an officer has knowledge of facts and circumstances which establish an affirmative defense he or she lacks probable cause to arrest, even when the facts and circumstances establish

that the person meets all elements of the offense.") Id. at 359.

Sergeant Evans testified that pursuant to the Petitioner's arrest they seized his cellphone, that cellphone was not searched incident to his arrest. Acknowledging without consent in their state district, the preferred method would be a search warrant signed by a judge. See Document 39 at 12.

Based from the court's inquiry, Sergeant Evans testified he did not know what was on the Petitioner's seized cellphone in regards to text messages dating back to 2004 or 2005, or photographs of potentially other individuals. See Document 39 at 37. However, Evans testified they looked at photos, despite having no information that any photos were taken in 2004 because the search warrant requested to search for photos. Id. at 30.

Adam Sharp, an expert, testified it was highly improbable that text messages sent from a phone in 2004 would be present on a smartphone in 2011. Sharp explained, data was stored differently in 2004 than in 2011, and various other factors would have made it improbable that a text message from a cellphone in 2004 would be transferred to

subsequent cellphones. Id. at 40-68.

The magistrate judge issued a report and recommendation, Document 32, Date Filed 02-19-2013, concluding Mathis' motion to suppress should be denied because Detective Vizcarrondo did not recklessly mislead the state court judge who issued the search warrant, and because law enforcement acted in good faith reliance on the warrant when searching Mathis' cellphone. Id. at 1. The Supreme Court has emphasized that "reasonableness is the ultimate touchstone for addressing the constitutionality of a search under the Fourth Amendment." United States v. Steed, 548 F. 3d 961, 967 (11th Cir. 2008). Finding the search reasonably comported with the Fourth Amendment. Id. at 14.

Following Petitioner's federal conviction, he faced prosecution in state court on related charges filed before his federal trial. See State of Florida v. Arnold Mathis, Case Nos. 11-CF-192, 12-CF-927, 12-CF-1037, 12-CF-2332, 12-CF-2333, and 12-CF-2334 (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' cellphone in 2011 at the time of his arrest (on December 17, 2011). Vizcarrondo attested that Mr. Mathis made statements that was his cellphone and

she attested that cellphone was password protected when she first took it in her control and attested she held that phone in her possession for five (5) days until she obtained a search warrant to search it. Vizcarrondo testified she filled out the application for search warrant and that she took it to a state judge for a signature. Vizcarrondo testified in her own words explaining how she was able to unlock the phone independent of her own actions, after Mathis' arrest, however through intercepted communications from monitoring of Mathis and his jail visits. Detective Vizcarrondo recalls that the date was December 19, 2011, before she obtained a warrant to search Mr. Mathis' cellphone on December 22, 2011. Although Detective Vizcarrondo admitted her investigatory monitoring of Mathis and his jail visits, disclosed numbers she believed was possibly the phone's password, she testified she did not unlock the phone or look at any of the information inside the phone or the phone's SD card before obtaining the search warrant. Detective Vizcarrondo further testified that their Victim Jiles did not give any information or indication as to information that Mr. Mathis was storing on his cellphone during the time 2004 and she acknowledged there was no mention that Mathis took any photographs of Jiles with any cellphone or that any text messages between Mathis and Jiles were sexual in nature for any fair probability that contraband or evidence

of a crime will be found on Mathis' phone. Vizcarrondo never alleged her investigatory monitoring identified the phone or nothing about the contents of the phone.

On February 2, 2015, (that is, just two (2) days before the State of Florida filed its notices of nolle prosequi), the state prosecutor deposed a Defense Expert, Robert Moody. Mr. Moody testified he reviewed extraction reports of searches of Mr. Mathis' phone conducted by law enforcement in 2011 and in 2012. (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 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' 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' 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 Petitioner's Fourth Amendment rights were actually violated and it is the duty of the courts to be watchful for the constitutional rights of the citizen, and agaist any stealthy encroachments thereon. The Petition should be granted so that this Court can reverse the Eleventh Circuit's dismissal of his 42 U.S.C. § 1983 action for violations of the Fourth, Fifth, and Fourteenth Amendments. First, dismissing his unlawful arrest claims as barred by the statute of limitations. Second, dismissing his illegal search claim on the basis of qualified immunity. This Court has recently warned that "clearly established law should not be defined at a high level of generality." White v. Pauly, 137 S.Ct. 548, 552 (2017). And "Qualified immunity attaches when an officials conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Kisela v. Hughes, 128 S.Ct. 1148 (2018). The Eleventh Circuit affirming the district court's holding on these issues, is detriment of Petitioner and in a way that would permit law enforcement to arrest and search personal property without the probable cause required to support the issuance of a warrant.

The Fourth Amendment guarantees the right... against unreasonable searches and seizures shall not be

violated. U.S. Const. Amend. IV. "The makers of our Constitution undertook... to protect Americans against every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. 438 (1928).

First, dismissing the unlawful arrest claims, filed March 1, 2017, as barred by the statute of limitations. See Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996) (When the facts that would support a cause of action "should be apparent to a person with a reasonably prudent regard for his rights," the statute of limitations will begin to run.). According to the District Court docket for case number 8:12-cr-457-T-30MAP, an indictment was returned in open court as to Petitioner on October 31, 2012, Document 1. An arrest warrant was returned executed on November 21, 2012, Document 10. An Evidentiary Hearing as to Petitioner was held on February 4, 2013, Document 29. The CORRECTED TRANSCRIPT of Evidentiary Hearing as to Petitioner held on February 4, 2013, was entered in the docket on March 1, 2013, Document 39. It is obvious the testimony occurred sometime prior to March 1, 2013. However the transcribed testimony, Document 39, Filed March 1, 2013, being perused by Petitioner made apparent the facts that support a cause of action that there was no probable cause supporting his December 2011 arrest.

As outlined above, Petitioner's Complaint mailed on March 1, 2017, was timely. This Court should not affirm the Eleventh Circuit's dismissal with prejudice of Petitioner's claims for false arrest.

Second, dismissing Petitioner's illegal search claim on the basis of qualified immunity. Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Kisela v. Hughes, 128 S. Ct. 1148 (2018). The gravamen of the Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. See e.g., Katz v. United States, 389 U.S. 347 (1967). "Searches conducted outside the judicial process this Court has explained, must be few in number and carefully delineated," if the main rule is to remain hardy. Id. at 357. In prevailing, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. See e.g., Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). In regards to this Civil Rights Complaint, Petitioner pray this Court take judicial notice of Mancusi v. Deforte, 392 U.S. 364, 368 (1968). Wherein, this Court made clear, "the legal qualification to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place - cellphone - but upon whether the area was one in which there was a reasonable

expectation of freedom from governmental intrusion."

The Petitioner have not found an identical case in which an officer's actions were held to be unconstitutional, to be clearly established "does not mean that a court must have previously found the very action in question to be unlawful, but it does mean that "in light of pre-existing law the unlawfulness must be apparent." See Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Petitioner identifying a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment point to this Court's pre-existing law in United States v. Chadwick, 433 U.S. 1 (1977), which did involve a footlocker, is informative. There the warrantless search of a footlocker was held unconstitutional where the footlocker was seized after their arrest. The footlocker was safely separated from the arrestee and transferred to a federal building under the exclusive control of law enforcement where it was searched an hour and a half later. Id. at 4-5. This Court explained placing personal effects inside a locked footlocker from view manifested an expectation that the contents within would remain free from public examination against intruders. This Court held one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides. Id. at 11.

January 2011

The novel question presented in United States v. Allen, 416 F. Appx. 21, 27 (11th Cir. January 31, 2011) (unpublished) ("Whether the warrantless search of a cell phone incident to arrest violates a person's Fourth Amendment expectation of privacy?") went unanswered in a manner of establishing Eleventh Circuit precedent.

May 2011

In recognizing exigent circumstances that make the needs of law enforcement so compelling that justify warrantless searches. This Court in Kentucky v. King, 131 S.Ct. 1849 (May 16, 2011) pre-dating December 2011, reiterated the principle that permits warrantless searches: Warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Holding a warrantless search is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects. Id. at 1858; see also id. at 1859-61. See also Horton v. California, 496 U.S. 128, 136-140 (1990).

June 2011

This Court in Davis v. United States, 564 U.S. 229, 131 S.Ct.

2419, 2428 (June 16, 2011) also pre-dating December 2011, gave [Responsible law enforcement officers] fair warning to take care to learn what is required of them under Fourth Amendment precedent and will confirm their conduct to these rules.

August 2011

Reasonable jurists in the Eleventh Circuit could find whether the warrantless search of a cell phone incident to arrest violates a person's Fourth Amendment expectation of privacy. See United States v. Gomez, 807 F. Supp. 2d 1134, 1140 (S.D. Fla. August 2011) (As the weight of authority agrees that accessing a cell phone's call log or text message folder is considered a "search" for Fourth Amendment purposes, it would logically follow that an individual also has a reasonable expectation of privacy with respect to operational functions.") (quoting Chadwick, 433 U.S. 1 (1977)). Thus at the time December 2011 the issue of warrantless cell phone searches incident to an arrestee's arrest was a known fact and question of debate within the legal community having questionable Fourth Amendment ramifications. The Eleventh Circuit's unanswered question in Allen was detrimental to arrestees in light of binding precedent. A warrantless search is "per se unreasonable under the Fourth Amendment." United States v. Steed, 548 F.3d 961, 967 (11th Cir. 2008) (per curiam)." While the Supreme Court

has repeatedly stressed that reasonableness is the ultimate touchstone for addressing the Constitutionality of a search under the Fourth Amendment, the High Court has also recognized that a warrant is usually required where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." United States v. Gonzalez, 71 F.3d 819, 824-825 (11th Cir. 1996)." Thus, the general rule in the criminal context is that warrantless searches are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Id. at 825.

In the ordinary case, searches and seizures of personal property are unreasonable within the meaning of the Fourth Amendment, without more, unless ... accomplished pursuant to a judicial warrant, issued by a neutral magistrate after finding probable cause. Illinois v. McArthur, 531 U.S. 326, 330 (2001)(quoting United States v. Place, 462 U.S. 696, 701 (1983)). See also Groh v. Ramirez, 540 U.S. 551, 572-73 (2004)(Thomas, J. dissenting)("[O]ur cases stand for the illuminating proposition that warrantless searches are per se unreasonable, except, of course, when they are not."). There are, of course, certain limited exceptions to the Fourth Amendment's warrant requirement. One of those is exigent circumstances, which can exist when there is a "need to prevent the imminent destruction of evidence." Brigham City v. Stuart, 547 U.S. 398, 403 (2006). To determine whether a police officer "faced an emergency that justified

acting without a warrant," a court "looks to the totality of circumstances." Missouri v. McNeely, 133 S.Ct. 1552, 1559 (2013). The government actor responsible for the warrantless search and seizure," had the burden of proof of showing exigent circumstances." United States v. Tovar-Rico, 61 F.3d 1529, 1535 (11th Cir. 1995). According to the district court, Appendix B, however, it is apparent Defendant Vizcarrondo did not argue that any exceptions to the warrant requirement applied and it therefore found that Defendant Vizcarrondo had conceded that Petitioner was arrested and taken into custody on December 17, 2011; that Petitioner's cellular phone was seized; that she discovered the password for Petitioner's cellphone and without a warrant searched the phone on December 19, 2011, without any exception to the warrant requirement actually engaging in conduct that violate the Fourth Amendment.

It has long been clear that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." The cases establishing these principles Katz v. United States, 389 U.S. 347, 360-61 (1967); United States v. Chadwick, 433 U.S. 1 (1977); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); United States v. Ross, 456 U.S. 798 (1982); Kyllo v. United States, 533 U.S. 27, 33 (2001); Kentucky v. King, 131 S.Ct. 1849 (May 16, 2011); and Gennusa v. Canova, 748 F.3d 1103, 1110 (11th Cir. 2014) and their reasoning, see Hope v. Pelzer, 536 U.S. 730, 743 (2002), made it obvious and

apparent to any reasonable law enforcement official in December 2011 that the Fourth Amendment protects privacy rights remaining free from public examination against intruders and requires that a warrant be secured where no exigency is shown. Accordingly, Defendant Vizcarrondo is not entitled to qualified immunity, and the Eleventh Circuit's dismissal of Petitioner's Second Amended Complaint should not be affirmed.

The undersigned counsel for Defendant Vizcarrondo pointed out that the Eleventh Circuit found that "[t]he search warrant application [in Appellant's case] did not contain any information gained from the alleged illegal access. The inculpating evidence from Mathis' cell phone would thus not have been suppressed, and the result of his trial would have been the same." See Answer Brief of Defendant, Case: 18-14396, Date Filed: July 3, 2019, at 38 n.5. The record is clear the alleged illegal access was not argued nor conceded in the first instance it was concealed. See Case: 8:12-cr-457-T-30MAP, Document 39, Date Filed: March 1, 2013. Thus, the Petitioner relying on the Eleventh Circuit's well-settled precedent, "the justifications for the good faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing caselaw, against improper searches. See United States v. Davis, 598 F.3d 1259, 1268 (11th Cir. 2010). Fraud in its elementary common law sense of deceit... includes the deliberate concealment of material information in a

setting of fiduciary obligation. A public official is a fiduciary toward the public... and if he or she deliberately conceals material information from them he or she is guilty of fraud. McNally v. United States, 483 U.S. 350, 371-372 (1987). Detective Vizcarrondo did not disclose her prior, warrantless search in her search warrant affidavit. See United States v. Leon, 468 U.S. 897, 913-914 (1984). The Warrant Clause was clearly established under the Fourth Amendment already at the time December 19, 2011 of the warrantless search and at the time December 22, 2011 when the search warrant was obtained.

CONCLUSION

The Court of Appeals for the Eleventh Circuit erred affirming the district court's dismissing Petitioner's complaint because Petitioner's unlawful arrest claims were not barred by the statute of limitations and Vizcarrondo's search of Petitioner's cellphone was not protected by qualified immunity violating Petitioner's expectation of privacy society recognizes as reasonable, a clearly established constitutional right that the Fourth Amendment exist to protect pre-dating December 2011. The petition for a writ of certiorari should be granted.

Respectfully submitted,

November 13, 2020.