20-6983

No._____

IN THE SUPREME COURT OF THE UNITED STATES

******

DEMARCUS COLE,
Petitioner

v.

KEVIN MYERS,
Respondent

******

ON A PETITON FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI

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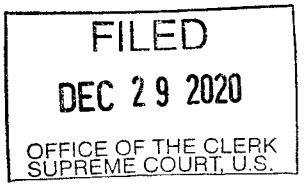

Demarcus Cole

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QUESTION PRESENTED

Did the Court of Appeals err in denying a Certificate of Appealability on trial counsel was ineffective, when counsel failed to file a pre-trial Motion to Suppress, illegally obtained evidence recovered from Mr. Cole cellular phone?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioner, Demarcus Cole, respectfully prays that a Writ of Certiorari issue to review the judgement below.

OPIONION BELOW

The Sixth Circuit Court of Appeals denied Certificate of Appealability in Case No. 20-5544. The order in the Appendix to this petition on page "1a" *infra.* The opinion of the United States District Court for the Western District of Tennessee appears at Appendix "6a" to the petition and is unpublished at *Cole v. Myers* 2020 WL 1988256 (W.D. Tenn. Apr. 27, 2020) certificate of appealability denied in its order. The opinion of the highest state court to review the merits on post-conviction appears at Appendix "17a" to the petition and is unpublished at *Cole v. State 2016 WL 2859196* (Tenn. Crim. App. May 11, 2016).

JURISDICTION

The original order of the Court of Appeals was filed Oct. 07, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States and of the States wherein which they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive ant person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., AMEND IV

The right of the people to be secure in their persons houses, papers, and effects against unreasonable searches and seizure, 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 thing seized.

U.S. CONST., AMEND VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, Which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 2253 (C) of Tittle 28, United States Code, Provides:

(1)Unless a circuit justice judge issues a certificate of appealibility, an appeal may not be taken to the court of appeals from-

(A)The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B)The final order in a proceeding under section 2255.

(2)A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3)The certificate of appealabilty under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254 (d) and (e) (1) of Title 28, United States Code, provide:

(d) An application for the writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of a claim-

(1) resulted in a decision that was contrary to or involved and unreasonable application of clearly established Federal, as determined by the Supreme Court of the United; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Stated court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination of factual issue made by a State court shall be presumed correct. The applicant shall have a burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Mr. Cole was convicted by a jury, of first degree felony murder and especially aggravated robbery and was sentenced by the trial court to consecutive terms of life and twenty years to be served consecutive to six year prison term for a previous conviction. *State v. Cole*, 2014 WL 7269813 (Tenn.Crim.App. Dec 22, 2014) The Tennessee Supreme Court denied review on 18 May 2015.

Cole filed a *pro se* petition for post-conviction relief, claiming ineffective assistance of counsel, based on Fourth Amendment violation, after hearing on post-conviction motion the trial court denied it the state appellate court affirmed, and the state Supreme Court denied permission to appeal *Cole v. State 2016* WL 2859196 (Tenn.Crim.App May 11, 2016) App.17a.

Cole filed 28 U.S.C § 2254, through counsel, District Court denied the petition and certificate of appealability. *Cole v. Myers 2020 WL 1988256* (W. D. Tenn. Apr 27,2020) App.6a. Cole moves for a certificate of appealibility (COA) The Sixth Circuit Court of Appeals denied certificate of appealibility on Oct. 07, 2020 in case No. 20-5544 App.1a, and this Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.COUNSEL FAILED TO FILE A PRE-TRIAL MOTION TO SUPPRESS, ILLEGALLY OBTAINED EVIDENCE RECOVERED FROM MR.COLE CELLULAR PHONE

Upon first coming to the police station voluntarily at approximately 6:40 a.m. on 29 October 2011, Mr. Cole was called back to the station and asked to allow Sergeant Chestnut to "see his phone." (D.E. 16-5 Page ID# 521-528) At that time, Mr. Cole acquiesced to officer's strongly worded request, without an understanding that, according to officer testimony, he intended to do a "forensic examination" of the phone, which would have consisted of making a physical copy of the contents of the memory storage and records, located on the phone. Had that been the only occasion when officer obtained custody of the phone, and had his forensic software worked, there would be no challenge to the evidence obtained from the phone and Mr. Cole would not be presenting this issue. But that is not the case.

The record establishes, without question, that the one time Mr. Cole gave consent to Sgt. Chestnut to look at his phone; officer was unable to retrieve anything whatsoever. This is from officers own testimony. (D.E. 16-5 Page ID# 528) With regards to October 29th 2011, officer testified that:

> "I had given him his phone back. It was after he left that we decided we wanted to try to do the forensic extraction. I called him back. He returned. He'd already given us consent to go through his phone. I tried to do the forensic dump at that time; however, there was a problem with the machine. I'm not a technician on it; I couldn't fix the problem. I was pretty much stuck there and not able to do it."

On November 4th 2011, Mr. Cole was arrested and in continuous custody from that

date forward in the Henderson County Jail on unrelated charges. On 17 January, A Henderson County investigator/law enforcement officer apparently took Mr. Cole's cell phone out of the property room and gave it to Sgt. Chestnut, who then performed a "forensic evaluation" (D.E. 16-5, Page ID# 502-05) and acquired evidence which was later admitted and used to convict Mr. Cole. More specifically, Sgt. Chestnut recovered pictures from the phone of weapons which were alleged to be the murder weapons, and the state utilized the CSLI information a call and text records to create maps, which were then entered into evidence and used to purportedly established Mr. Cole's physical location in the hours and days following the robbery and homicide.

Let's make sure we clearly understand this point: Mr. Cole never gave anyone consent to search his phone after the initial occasion when officer demanded the phone on 29 October 2011. Never. Officer testified at the trial that Cole had given consent to have his phone searched (D.E. 16-5, Page ID# 502-05), but trial counsel, nor anyone else, ever asks the right question, that is, when did Cole give his permission? The record will show that Officer deliberately misled Cole's counsel, the Court and, hopefully, the district attorney when he lied and insinuated that the search he accomplished on 17 January 2012 was done with Cole's permission.

Again, to be clear, it is uncontested that law enforcement never requested nor obtained a warrant to search Mr. Cole cell phone at any time following the first request on 29 October 2011. It is also uncontested that law enforcement performed a second

forensic evaluation of Mr. Cole cell phone after he somehow acquired of from Henderson County on 17 January 2012 while Cole in the Henderson County Jail (D.E. 16-5 Page ID # 502-05), and it was the results of that search and seizure that were admitted at trial as evidence, including photos of what the state characterized as the murder weapon.

From review of the record, it is conclusively established that prior rulings finding that Mr. Cole consented to the search of his phone are based solely upon Mr. Cole's alleged consent for officer to search his cell phone at the very first interview on 29 October 2011. However, what the court and counsel seem to miss, perhaps deliberately ignore, is that Mr. Coles' consent was given at least Ten Weeks (October 29 2011 to 17 January 2012) prior to the officer gaining custody of the phone from Henderson and performing the second search (forensic evaluation and dump) which resulted in the evidence later used at trial. Apparently, if we are to believe Sergeant Chestnut's testimony and his-hopefully-good faith belief, once a person gives the police permission to look at their phone, it gives law enforcement personnel carte blanche to seize and search the phone at any time in the future, under apparently any set of circumstances. This "good faith" belief that any consent, ever given, is enough to grant access at any time in the future... is of course fatally and completely flawed and must fail.

The United States Constitution, Fourth Amendment provides:

> "The right of the people to be secure in their persons houses, papers, and effects against unreasonable searches and seizure, 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 thing seized."

It is uncontested that Mr. Cole had a legitimate expectation of privacy regarding text messages, pictures, CSLI and other data saved on his phone. It is axiomatic that searches of an arrestee's smart-phone for digital data that are conducted without consent and without a warrant violate the Fourth Amendment.

On June 25, 2014, the Supreme Court issued a unanimous opinion in *Riley v. California*, 134 S. Ct. 2473, (U.S.2014) that addressed two cases, of which both concerned whether the Fourth Amendment permits police officers to search and arrestee's cellular telephone without a warrant. The Court reviewed the search incident to arrest doctrine to determine how it should apply to "modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from mars might conclude that they were an important feature of human anatomy. " *Riley*, 2014 WL 2864483, (2014) (slip op. at 8-9).

Similar to previous Supreme Court opinions regarding a search incident to arrest, the Court balanced the promotion of legitimate government interests and an individual's right to privacy under the Fourth Amendment. In conducting this balancing of interests, the Court concluded that a "digital data" search has no identifiable risk harm to officers or destruction of evidence, which were the two risks identified in *Chimel v. California*, 395 U.S 752, 89 S.Ct. 2034,23 L.Ed.2d 685 (1969). Additionally, the Court distinguished a digital search from "the type of brief physical search" at issue in *United States v. Robinson*, 414 U.S. 218, 94 S.CT. 467, 38 L.Ed.2d 427 (1973). ("Modern cell phones, as a category, implicated by the search of a cigarette pack, a wallet, or a purse.")

Based on these considerations, and the "immense storage capacity" of modern cell phones, the Court held that "officers must generally secure before conducting [searches of data on cellphones.]" *Riley*, (slip op. at 10,17). However, while the Court held that the search incident to arrest exception does no apply to sell phones, it found that "other case-specific exceptions [such as the exigent circumstances exception] may still justify a warrantless search of a particular phone." (Slip op. at 26).

The evidence retrieved and then admitted at the trial should have been suppressed, and had Mr. Cole had counsel who was acting as reasonable counsel in this situation, a suppression motion would have been filed and, if the court applied the law, the evidence would have been suppressed. This would have significantly altered the evidentiary balance in the case.

Trial Counsel failed to file any pre-trial motions to suppress this illegally obtained evidence, nor did he object to its admission at trial. This clearly violated the petitioner's United States Constitution, Fourth Amendment right to be free from unlawful or unreasonable searches and seizures. See *Riley v. California,* 134 S.Ct. 2473 (June 25, 2014). This failure clearly falls below reasonableness standard established by *Strickland v. Washington*, 466 U.S. 668 (1984); it is inconceivable that the outcome of the trial would not have been different absent this illegally seized evidence.

This Court should Grant the Writ to ensure that every citizen has a fundamental right to Due Process and a Fair trial.

II. THE COURT BELOW APPLIED INCORRECT STANDADS TO PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND TO THE MERITS OF CLAIM

Section 2253(C) (1) of Title 28, United States Code. Provides that "unless a circuit Justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from-(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court." Section 2253 (C) (2) Further provides that a COA "may issue... only if the applicant has made a substantial showing of the denial of a Constitutional right." In deny petitioner request for a COA on his Sixth Amendment claim the Court of Appeals misconstrued the underlying standard governing petitioner's entitlement to federal habeas relief.

A. THE COURT ERRED IN BASING ITS CERTIFICATE OF APPEALABILITY ANALYSIS ON WHETHER PETITIONER HAD ESTABLISHED ULTIMATE ENTITLEMENT TO RELIEF.

As this Court has explained, a state prisoner whose habeas petition has been denied by a federal district court meets the standard for a COA if he show that "jurists of reason could disagree with the District Court's resolution of his Constitutional claims or, conclude the issues present are adequate to deserve encouragement to proceed further," *Miller –EL v. Cockrell*, 537 U.S. 322 (2003).

Petitioner's Sixth Amendment claim asserts entitlement to federal habeas relief principally under 28 U.S.C §2254 (D) (1). In particular, petitioner contends that the state appellate court rejections of claim "was based on an unreasonable application of clearly established law." *Id.* In denying petitioner's request for a COA on this claim, the court of

appeals focused on it ultimate merits:

> "In light of this inculpatory evidence jurists of reason would agree that it was not unreasonable for the State Courts to conclude that admission of the photos of the weapons did not prejudice Cole's Case because, without them, there is no reasonable probability that the results of the proceeding would have been different," App.4a

Having made those findings, the court rejected petitioners claim on the merits, concluding that "the state court's adjudication of [Sixth amendment claim] was not unreasonable application to clearly established federal law as determined by the Supreme Court." Only after reaching that ultimate conclusion did the court declare-in less than one sentence and without any additional analysis-that a COA was not warranted.

The Court of Appeals clearly erred in basing its' denial of a COA without more, that the underlying claim lacked merit. The plain language of the statute which is necessarily the starting point of the analysis, see *Williams v. Taylor,* 529 U.S. 420,431 (2000), makes clear that entitlement to a COA turns not on whether a petitioner can establish ultimate entitlement to relief prior to a appeal, but on whether he can make a "*substantial showing* of the denial of constitutional right," 28 U.S.C § 2253(C) (2) (emphasis added), so as to warrant permitting him to appeal. This court has described the analysis as a "threshold inquiry," *Slack v. Mcdaniel*, 529 U.S. 473 (2000) not a full review of the merits:

"In requiring a... substantial showing of the denial of [a Constitutional] right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that issues are debatable among jurists of reason; that a court *could* resolve the issues differently: or that the questions are adequate to deserve encouragement to proceed further."

Barefoot, 463 U.S. at 893 n.4 (emphasis in original). The clear language of the statute establishes that petitioner's entitlement to pursue an appeal is not conditioned on persuading the appellate court, in advance, that the appeal must ultimately prevail, but rather on making a "substantial showing" of merit in the underlying constitutional claim 28 U.S.C § 2253(C) (2).

By the same token, one court's determination that a habeas petitioner's underlying claim lacks merit is insufficient, without more, to establish that a COA should not issue. Instead, entitlement to a COA turns simply on whether the petitioner's claim is sufficiently plausible that it "deserves[s] encouragement to proceed further." *Slack* 529 U.S. at 484 (quoting *Barefoot* 463 U.S. at 893). Were that not the case, only those habeas petitioners who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the the COA process would be converted paradoxically, into appeal itself. That is precisely what the Court of Appeals did here. It first, rejected the petitioner's claim on the merits and then summarily concluded on the basis and without any additional analysis that petitioner had not made the requisite substantial showing for the COA that approach cannot be reconciled with the text or purpose of the statute.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,
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Date: December 29, 2020