

21-5304

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

JUL 29 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Lonny Joseph DiTirro, Jr. — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lonny Joseph DiTirro, Jr.
(Your Name)

P.O. Box 24550 USP Tucson
(Address)

Tucson, AZ 85734
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did the Ninth Circuit sanction a violation of Petitioners Fourth and Fifth Amendment rights when it allowed the District Court to use Court ordered suppressed evidence at trial or didn't reverse and grant full suppression?
2. Did the Ninth Circuit decide an important federal question in a way that conflicts with this court's decisions?

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:

RELATED CASES

United States of America v. Lanny Joseph DiTiro, Jr., No. 2:16-cr-00216-KJD-VLF-1
U.S. District Court District of Nevada. Judgment entered on May 9, 2019

United States of America v. Lanny Joseph DiTiro, Jr., No. 19-10163
U.S. Court of Appeals for the Ninth Circuit. Judgment entered on February 3, 2021

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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 _____ 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☒ is unpublished.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 _____ 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☒ is unpublished.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☐ is unpublished.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 February 1, 2021.

☐ 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: March 1, 2021, 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 _____ (date) on _____ (date) in Application No. A.

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

* This petition is timely in accordance with Order list 589 extending time to file 150 days.

☐ 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

Federal Rules of Criminal Procedure 52(b)

A plain error that affects substantial rights may be considered even though it wasn't brought to the court's attention.

Federal Rules of Evidence 103(d)

To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Federal Rules of Evidence 103(e)

A court may take notice of plain error affecting a substantial right, even if the claim of error was not properly preserved.

Federal Rules of Evidence 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

United States Constitution Amendment IV

The right of the people to be secure in their persons, 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 person or things to be seized.

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On September 10th, 2015, Officers conducted a warrantless search and seizure of Petitioner's SD card. After the warrantless search, officers conducted an interview with Rachael Saito, last name now Ismail, whose sole statements were used to provide probable cause for a search warrant three months later. Detective Tooley was referred the case in late November and applied for the search warrant on December 2nd, 2015.

Petitioner motioned to suppress evidence on the grounds of the delay seeking a warrant, all evidence being derivative of the search, probable cause being tainted by the search, and officers exceeding the scope of the private search.

During the evidentiary hearing for the motion to suppress Ismail testified that officers had told her what they had seen so she knew they viewed the card before speaking with her before she had arrived. She testified that they told her they had seen "other things that show more of a young age" and what "looked like a 14 year old," who officers identified as "Sammy" in their police report. The Officers' report states Ismail had seen "Sammy" and that Petitioner had driven to Texas to see her. Ismail also gave testimony that she had seen a teenager named "Samantha Banks" and one image of child pornography in a file folder called "restricted".

The District Court suppressed evidence obtained from the SD cards reasoning that officers may have exceeded the scope of private searches, which the Ninth Circuit affirmed in their decision. The evidence deemed admissible was evidence discovered by private actors as well as the evidence officers had seen so long as it was first seen by private actors but suppressing officers' statements about what they seen, upon some confusion defense counsel requested clarification of the ruling to suppress before trial. To which the court clarified: What officers had seen is suppressed unless first seen by private searchers.

At trial all photo and video evidence, as well as derivative testimony of that evidence, was admitted during trial regardless of Counsel's Rule 403 objections to exclude evidence due to its prejudice outweighing its probative value.

The Ninth Circuit reviewed the District Court's ruling on the motion to suppress *de novo* and reviewed the probable cause offering of the affidavit to the issuing judge for clear error. The court determined that the lower court had "correctly excused any reference to the initial search from the probable cause affidavit" and that the remaining evidence still provided probable cause for the warrant to issue.

Petitioner was found guilty as a result of that evidence which was admitted at trial.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit determined officers conducted a warrantless search that presumptively violated the Fourth Amendment. Any evidence, "testimony concerning knowledge," and any "derivative evidence both tangible and testimonial that is product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search" is prohibited from being introduced at trial "up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." *Murray v. United States*, 487 U.S. 533, 536-537 (1988). Ismail testified at the evidentiary hearing that officers had divulged to her what they viewed during their unlawful search, thereby tainting her statements and testimony. Evidenced by the facts that "Sammy Jo Williams" and "Samantha Montes" are two different people and there is no "restricted" file folder on the SD card that contains child pornography. (See Appendix F: police report; App I transcripts pages 20, 21, 36, 37; Government Exhibit 6 Affidavit, App. H; Ismail's telephonic interview) Officer Bianco conducted an investigation and reported to a Sexual Assault detective who instructed officers to impound the card. (App I: pages 79, 81, 82) Ismail had arrived later (App I: page 99), after officers had searched, and seized evidence in accordance with the detective's instruction. As such Ismail's derivative testimony is a direct result of the unlawful search and there is no evidence untainted in the affidavit for the search warrant of the SD card.

When determining if a delay is unreasonable the "brevity of the seizure" is "an important factor" and "a court must take into account whether the police diligently pursued their investigation." *United States v. Place*, 462 U.S. 696, 709 (1983); See also *Illinois v. McArthur*, 531 U.S. 326, 332 (2001). A lawful seizure can become unlawful and violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on unreasonable seizures. *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). Petitioner sought return of the SD card repeatedly through text, calls and going by Ismail's apartment. (App I: pages 29, 30) Ismail told Detective Toolery "He was really wanting that back" (App I: page 43). Petitioner was not incarcerated and could therefore make use of her property so her possessory interest was not "virtually non-existent" as in *United States v. Segura*, 468 U.S. 796, 813 (1984). Detective Lang was contacted regarding this case when the card was

impounded (App. F) No explanation was given for the 2-3 months delayed in seeking a search warrant prior to Detective Tooley being returned to the case. The District Court found their delay was not the result of bad faith complete abdication of their work or failure to "see any urgency" (App. E, page 13)

During trial the District Court allowed suppressed evidence to be admitted in violation of Federal Rules of Evidence 103(d) and the Fifth Amendment Rule 103(d) prohibits use of inadmissible evidence at trial and allowing evidence to be admitted even though it was ordered suppressed in violation of both, in effect applies the inevitable discovery doctrine. However inevitable discovery as well as good faith exceptions don't apply when officers have probable cause but don't seek a warrant. See *United States v. Lundin* 817 F.3d 1151, 1162 (9th Cir. 2015) ("to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth Amendment.") (There is no good faith exception for the exclusionary rule for police who don't act in accordance with governing law.) *United States v. Song Ja Cha* 597 F.3d 995, 1005 (9th Cir. 2010)

Federal Rules of Evidence 103(c) and Federal Rules of Criminal Procedure 52(b) allows County to take notice and correct a plain error that effects a substantial right and "although 52(b) is permissive, not mandatory, it is well established that the error seriously effects the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles v. United States* 201 F.3d 376, 385 (2018) When erroneously admitting evidence it's "highly probable that the error had substantial and injurious effect or influence determining the jury's verdict." *Kotteakos v. United States* 380 U.S. 730, 776 (1966)


"Prejudice is an apex when district court erroneously admits evidence that is critical to proponent's case." *United States v. Valencia-Lopez* 971 F.3d 891, 902 (9th Cir. 2020)

For the above stated reasons petitioners Fourth and Fifth amendment rights were grossly violated and utterly stripped.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lenny Joseph DiTiro, Jr. 

Date: July 28, 2021