

No. \_\_\_\_\_

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In the  
SUPREME COURT OF THE UNITED STATES

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SENECA LOYAL NEAL,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent,

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On Petition for Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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**Petition for Writ of Certiorari**

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## **Question Presented**

Whether the Court of Appeals for the Ninth Circuit erred in affirming the District Court's denial of Mr. Neal's 28 USC 2255 claim, where the District Court found Troopers' entry into the apartment building (where key evidence was gathered) to be illegal, where trial counsel failed to utilize the Trooper's body audio in advocating for suppression, and where the Court of Appeals found that even if trial counsel had been ineffective in failing to utilize the body audio, Mr. Neal suffered no prejudice. Here, the audio established that Mr. Neal's constitutional rights had been violated multiple times, the government's best evidence linking Mr. Neal to the drug conspiracy was discovered during the search following the illegal entry, and the remainder of the government's evidence was the testimony of witnesses who lacked credibility. Considering the above, did the Ninth Circuit err in dismissing the 28 USC 2255 claim where Mr. Neal's Constitutional rights were repeatedly violated?

## **PARTIES TO THE PROCEEDINGS**

Seneca Loyal Neal, petitioner.

United States of America, respondent.

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AR Appellate record in Ninth Circuit Court of Appeals Case 21-35452

CR Clerk's Record in the District Court for the District of Alaska,  
Case nos. 4:19-cv-00021-RRB  
4:14-cr-00027-RRB-1

## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Seneca Loyal Neal hereby petitions this Court for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which affirmed the District Court's denial of Mr. Neal's 28 USC 2255 motion. Mr. Neal's 2255 motion alleged ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for counsel's failure to utilize the Trooper's body audio to zealously advocate for suppression of tainted evidence due to the repeated violation of Mr. Neal's constitutional rights that are preserved on the audio.

### **Opinions Below**

The Ninth Circuit Court of Appeals previously affirmed the district court's finding that the officer's observation of Neal violated the Fourth Amendment, but that probable cause for the warrant remained after excising that tainted evidence in *United States v. Neal*, 747 F. App'x 501 (9th Cir. 2018). Mr. Neal appealed the Alaska District Court's denial of his 2255 motion in *United States v. Neal*, No. 21-35452 (9th Cir. June 14, 2022) (unpublished); the Ninth Circuit Court of Appeals' disposition can be found at APP-002. The

District Court's order denying Mr. Neal's 28 USC 2255 claim in case no. 4:14-cr-00027-RRB-1 at CR 316, dated May 26, 2021, is at APP-006 et seq. The magistrate's findings regarding the denial of Mr. Neal's 2255 motion are included at APP-016 et seq.

## **Jurisdiction**

The Ninth Circuit affirmed the denial of petitioner's 2255 motion on June 14, 2022. [APP002] The jurisdiction of this Court is, thus, timely invoked under 28 USC sec. 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

## **Constitutional and Statutory Provisions**

The **Fourth Amendment** to the United States Constitution provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The **Fifth Amendment** to the United States Constitution provides in relevant part:

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

offence 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.

The **Sixth Amendment** to the United States Constitution provides in relevant part:

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.

**28 USC § 2255.** Federal custody; remedies on motion attacking sentence:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

## **STATEMENT OF CASE AND FACTS**

Mr. Neal was charged with drug crimes after Troopers undisputedly,

illegally entered his apartment building and seized evidence.<sup>1</sup> [APP-013]

Mr. Neal argued in his 2255 motion that his trial attorney should have moved to suppress the fruits of the illegal search and seizure due to the Troopers' illegal conduct that could have been proven by a body audio that trial counsel did not adequately utilize. The District Court agreed that the Trooper's conduct was unlawful but found that Troopers would have nonetheless obtained the evidence even without the illegal conduct, and therefore no relief was warranted. [APP-008, APP-013-015] On appeal, The Court of Appeals for the Ninth Circuit affirmed the District Court's order denying the ineffective assistance claim, reasoning that even if the attorney had acted incompetently, the result of the proceeding would not have been different because Troopers would have nonetheless discovered the evidence. [APP-004-005]

#### **A. The Constitutional infirmities and the audio evidencing them.**

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<sup>1</sup> The District Court explained: “[T]he magistrate found that the Trooper’s observation of Defendant exiting Unit 3 was tainted, and his ‘ability to see Neal exit his apartment through the crack he left himself in the [red] door was a fruit of the unlawful search insofar as it was used as probable cause in obtaining the warrant.’” [APP-013; APP-004]

Law enforcement suspected Mr. Neal was engaged in drug activity in an apartment, but Troopers did not know which of 5 apartment units Mr. Neal was using. The District Court summarized the relevant facts :

#### A. The Investigation

... Units 1 through 4 were accessible through a locked red door inside an arctic entry that had an unlocked screen door to the outside, while Unit 5 had an alternative entrance. The officers arrived at the location with a warrant to search Unit 5, and observed Defendant arrive and enter the screen door, apparently accessing Unit 1, 2, 3, or 4, rather than Unit 5, *rendering their warrant invalid. The Troopers nevertheless entered the arctic entry, and then the red door, and confronted Defendant inside the building.* The Troopers recorded their activity from their approach to the building until they questioned Defendant. They then obtained a warrant for Unit 3 and found heroin in a backpack in the unit. . . .

#### B. The Recording

... When listening to the recording, it sounds like the Troopers were not able to access the building because they lacked a passcode to the red door. But Trooper Calt testified at trial that he asked someone for the door code when he saw the keypad, assuming they would need it, but it turned out the door was unlocked. Trooper Calt testified that he entered the arctic entry, and then entered the red door which was unlocked or ajar. Trooper Calt testified that after taking a look around inside the red door, he returned to the arctic entry to wait for Neal to come out. Trooper Calt testified that he was able to see Neal come out of Unit 3 from his location in the arctic entry, through a crack in the red door.

The audio then recorded Defendant stating that he was checking

on the Unit for “Shawn,” who worked on the Slope. The officers asked for “Shawn’s” phone number, ostensibly because they were trying to reach someone in Unit 3. . . .

The Magistrate did not hear this recording, relying only on the testimony of the Troopers. He nevertheless concluded that *because Trooper Calt entered the residence without a proper warrant, his observation of Neal leaving Unit 3 must be excised from the affidavit supporting the subsequent search warrant for Unit 3*, but that the remaining non-tainted evidence still supported a warrant to search that Unit. [APP-008-009 (italics added)]

Mr. Neal’s trial attorney did not utilize the body audio that would have contradicted the Trooper’s testimony on multiple points and should have been used to zealously litigate for suppression of the tainted evidence. Mr. Neal asserted in his 28 USC 2255 claim and on appeal that his attorney should have zealously litigated that all of the evidence seized in the apartment was tainted when repeatedly, without a proper warrant, Troopers ran afoul of the Fourth Amendment by entering and illegally peering into the apartment building in which they confronted Mr. Neal. [APP-011-013; *See* AR 8 at 25-30 (Appellant’s brief in Ninth Circuit case 21-35452)] When Troopers realized that the original warrant was for the incorrect apartment unit, a Trooper can be heard on the audio at 04:55 stating “we reapply for a

new warrant, easy.” [AR 8 at 10-11 citing CR 288 (audio exhibit submitted to the Ninth Circuit Court of Appeals)] Mr. Neal maintains that instead of following the proper procedure and obtaining a new warrant, Troopers illegally entered, reentered, remained in the apartment building, and confronted and questioned Mr. Neal inside the apartment building, also violating his Fifth Amendment rights. [AR 8 at 7, 25-30]

Mr. Neal asserted that Troopers made a show of force, detained Mr. Neal, took his phone, and looked through the phone on site without a warrant. [AR 8 at 7] Troopers applied for a corrected warrant for the apartment building that they had observed Mr. Neal depart from – from their illegal vantage point. [See APP-004; AR 8 at 11] Mr. Neal’s trial attorney did not utilize the audio to dispute the Trooper’s position that there was no show of force or to support Mr. Neal’s position that Troopers questioned him prior to Mirandizing him and illegally searched his phone without a warrant, when the audio revealed that Troopers yelled at Neal to take his hands out of his pockets immediately upon seeing Mr. Neal inside of the apartment building. [AR 8 at 14-15].

Trial counsel did not utilize to audio to show that Troopers obtained the subsequent warrant for apartment number 3 primarily by utilizing information that they obtained during the unconstitutional searches, questioning and seizures.

**B. The audio conflicted with the Trooper's version of events**

Mr. Neal argued in his 28 USC 2255 motion that trial counsel failed to effectively utilize the Trooper's body audios to suppress evidence gained as a result of the searches of Mr. Neal and apartment number 3. [See APP-002] Mr. Neal argued to the District Court that the audios reveal that the Trooper's entry and interaction with Mr. Neal was different than Trooper Calt's version of the event in several key ways:

(1) Trooper Calt testified that he went inside while Sergeant Nelson waited outside, but the audio reveals the Troopers talking as they entered the apartment building; (2) Trooper Calt testified that they had "no problem" getting into the red interior door, but the audio reveals that the Troopers asked two people for the code to enter the red door;[<sup>2</sup>] (3) Trooper Calt testified—and the Magistrate found—that

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<sup>2</sup> Mr. Neal argued on appeal that the Trooper's testimony that the red inner door was unlocked, ajar, Troopers needed no extra steps to open it, and it did not have a keypad was also contradicted by the audio that showed that Troopers had asked two people for the code on the keypad. [See AR 8 at 12-13]

neither Trooper looked through Defendant's phone, but "multiple beeps can be heard in the audio that would be consistent with Trooper Nelson looking through the phone"; (4) Trooper Calt indicated that they conversed with Defendant before detaining him, but Defendant alleges that the Troopers "stopped and arrested [him] almost immediately upon seeing [him] exit apartment number 3"; and (5) the statements connecting Defendant to Unit 3, which were used to obtain the search warrant for Unit 3, were made by Defendant while being detained and before being Mirandized. [APP- 002 at 6-7 (citations and footnotes omitted)]

The District Court credited the Trooper's testimony that the phone was not improperly searched because the defense offered no evidence to the contrary. [AR 8 at 14 citing CR 159 at 32 (APP-047)] The audio should have been used to discredit the Trooper's version of law enforcement's encounter with Mr. Neal and disputed show of force, important to the determination of when he was arrested, which in turn would effect whether his statements made in the apartment building should have been suppressed. Mr. Neal's trial counsel should have argued that Mr. Neal's statements connecting him to apartment number 3 were made while he was being forcibly directed what to do by Troopers, he was not free to leave, he had not been Mirandized, and as such his statements should have been suppressed. Mr. Neal's statements are key reasons why Troopers determined he was in apartment 3. As Mr.

Neal argued on appeal, it was not until *after* their encounter with Mr. Neal that the Troopers later confirmed that apartment 3 was associated with Mr. Neal. [See AR 8 at 31] At the time Troopers encountered Mr. Neal, Troopers had a warrant (albeit incorrect) for the apartment that they believed Mr. Neal to be associated with and there is no indication they were continuing to investigate whether they had the correct apartment number at the time. Indeed, if Troopers had been uncertain which apartment was associated with Mr. Neal, they should have investigated further before applying for a warrant.

Mr. Neal maintains that, had his trial attorney effectively utilized the audio, he could have shown the multiple inconsistencies in the Troopers' version of events and could have used this information in support of his motion to suppress the illegally obtained evidence. Further, that even if one of these inconsistencies, standing alone, might appear at first glance to be harmless, the cumulative effect of the repeated the Fourth Amendment violations, followed by a Fifth Amendment violation of questioning Mr. Neal inside the apartment building, should have been utilized to discredit

the Troopers' version of events and suppress the tainted evidence. Moreover, the cumulative constitutional violations should have been used to support the premise that such violations demand suppression because suppression is a tool to keep law enforcement from abusing its powers.

### **C. Details of Mr. Neal's 28 USC 2255 pleading.**

Because Trooper Calt's version of events conflicted with the body audio, Mr. Neal moved to vacate his convictions under 28 USC 2255 on the grounds that his trial attorney was ineffective for failing to utilize the audios to suppress evidence gained as a result of the unconstitutional searches and seizures. Mr. Neal maintains that the key reasons Troopers determined number 3 was Neal's apartment were because they observed Mr. Neal from an illegal vantage point exiting apartment number 3 and Mr. Neal made un-Mirandized statements linking himself to number 3. [AR 8 at 15] This is significant because Troopers would have had to obtain a new, corrected warrant to search apartment number 3, and would have had to convince the court issuing the search warrant that number 3 was the correct apartment. Without relying on the improperly obtained information that linked Mr. Neal to number 3, the Troopers may not have been able to determine that number 3 was the correct apartment and secure a warrant for that apartment before the lease to apartment 3 expired, just hours later. Further, trial counsel should have argued that

Mr. Neal's statements associating him with apartment number 3 were subject to suppression because they were a fruit of the unlawful, warrantless arrest of his person inside the apartment building.<sup>3</sup> Due to the timing of Mr. Neal being in the final hours of his lease, Troopers may not have inevitably discovered anything incriminating had they not illegally entered the apartment building and arrested Mr. Neal inside of it.

Further, Trooper Calt's affidavit did not accurately set forth facts in support of probable cause for a search warrant. Trooper Calt's affidavit in support of the search warrant provides that he "stood directly in front of apartment number 3" and watched Neal exit it. [See CR 85-1 at 7] Trooper Calt acknowledged "it was admittedly poor wording in the affidavit." [CR 250 at 45] and that he was actually stationed in the arctic entry, peering into the hallway when he observed Mr. Neal come out of apartment 3. [CR 250 at 45]

Mr. Neal had a strong argument that authorities would not have been aware of his connection to apartment number 3, at least for a period of time, had Troopers not viewed Mr. Neal from their illegal vantage point. By the time Troopers determined that Mr. Neal was associated with apartment 3, and *if* Troopers were

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<sup>3</sup> See *United States v. Nora*, 765 F.3d 1049, 1055-58 (9th Circuit 2014) (the Fourth Amendment forbids warrantless arrest of a suspect inside a suspect's home; physical evidence and post-arrest statements gained as a result of such arrest in the home must be suppressed as tainted fruit).

even able to muster enough probable cause to secure a warrant for apartment 3, it is far from inevitable that any evidence would still be in apartment number 3 because the lease was to expire just hours later.

Mr. Neal maintained that once improperly obtained evidence purporting to support the warrant was excised, insufficient probable cause remained to support a warrant for any of the apartments. [AR 8 at 20] That is, Troopers had never observed Mr. Neal commit any drug offenses, there was no controlled buy involving Mr. Neal, and Troopers did not observe Mr. Neal provide drugs to the government's witnesses. Mr. Neal maintains that any probable cause to support a warrant for apartment number 3 was thin and rendered even thinner when the Trooper's inconsistent statements and other infirmities are considered.

Had trial counsel made the District Court aware of the key infirmities in the warrant application, and had the defense presented evidence (including Mr. Neal's testimony and portions of the body audio) the defense would have had a powerful argument that that the cell phone had been searched during Mr. Neal's arrest, that the arrest was illegal, all evidence obtained as a result of the improper search and seizure inside the apartment building should have been suppressed, and insufficient probable cause remained for a revised search warrant for apartment number 3. Mr. Neal argued:

The exclusionary rule compels exclusion of unconstitutionally seized evidence. *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct.

2535, 37 L.Ed.2d 596 (1973). Here, considering the multiple infirmities in the search and seizure of Mr. Neal, trial counsel should have zealously argued for this court to suppress all evidence gained as a result of the illegal search and seizure, on the grounds that the Fourth Amendment compels exclusion of evidence obtained under such circumstances. [AR 8 at 21-22]

**D. The District Court's dismissal of the 2255 claim and the Ninth Circuit's affirmance.**

The District Court presumed that, for the purposes of the *Strickland*<sup>4</sup> analysis, trial counsel had not made a tactical decision to fail to further utilize the audio. [APP-011] Instead, counsel did not review the audio in a timely manner and failed to seek an evidentiary hearing. [APP-011] Nonetheless, the District Court reasoned that there was not a reasonable probability that, but for counsel's failure to utilize the audio, the result of the proceeding would have been different. [APP-011-015] The District Court denied Mr. Neal's motion to vacate, reasoning that any failure on trial counsel's part would not have impacted the outcome:

Defendant now asks this Court to presume a perfect storm of events to defeat the Magistrate's and the Ninth Circuit's reasoning. His argument hinges on the assertion that because only "hours remained on the month-long lease" on Unit 3, the discovery of evidence in Unit 3 was "far from 'inevitable'" following normal police procedures. He reasons that any of the cooperating witnesses could have tipped off Defendant at any moment, and that without his own statements connecting him to Unit 3 it would have taken authorities much longer to obtain a warrant to Unit 3. He asserts that had it taken longer to obtain a warrant, all "portable personal items" would have been removed from Unit 3 in light of the imminent termination of his lease.

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<sup>4</sup> *Strickland v. Washington*, 466 US 668, 688 (1984).

This Court is not persuaded.

The officers initially observed Defendant enter the red door from well outside the building. Having thus ruled out Unit 5 as his apartment, one conversation with virtually anyone in the building would have revealed that Defendant occupied Unit 3, and law enforcement could have obtained a warrant for Unit 3 without ever confronting Defendant. Defendant's self-incriminating statements regarding his connection to Unit 3 were not necessary to secure a warrant. Indeed, the Magistrate found that "in addition to all of the other evidence supporting probable cause for the first warrant, Calt obtained and verified Neal's correct apartment number from two other sources," including information from the property manager that Neal frequented Unit 3, and a description of Neal by the tenants of Unit 2.

Nothing about the audio recording would have changed the Magistrate's findings with respect to suppression. And the Court is not persuaded that the possible termination of Defendant's lease later that day would have prevented law enforcement from discovering the drugs following normal police procedures. Finally, with respect to Defendant's argument that the officers looked through his phone before securing a warrant, there is no evidence that the officers relied upon anything in Defendant's phone to get a warrant to search Unit 3. [App. 014-015 (footnotes omitted)]

The Court of Appeals agreed with the district court that there was no reasonable probability that the use of the recording would have changed the outcome of the suppression hearing:

Even assuming the cell phone was improperly searched and Neal's statements were improperly obtained, more than ample probable cause for the warrant remained, including statements from two witnesses that Neal was selling heroin, police observations of Neal repeatedly arriving at and leaving the apartment building, and confirmation from the property manager and tenants that Neal was the occupant of the searched unit. The district court reasonably found that the officers would have questioned the manager and tenants in any event, and the

warrant application did not rely on information from Neal's phone. Accordingly, Neal was not prejudiced by any deficient performance, and his ineffective assistance claim fails. [APP-004-005]

## **REASONS FOR GRANTING THE WRIT**

**THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE REVIEWING COURT ERRED IN AFFIRMING THE DENIAL OF PETITIONER'S 2255 INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WHERE COUNSEL FAILED TO UTILIZE THE TROOPER'S AUDIO TO PROVE REPEATED CONSTITUTIONAL VIOLATIONS THAT WOULD HAVE WARRANTED SUPPRESSION.**

### **A. The importance of the Fourth, Fifth and Sixth Amendments and the question presented.**

This case involves the violation of *three* of Mr. Neal's steadfast constitutional rights, including the *knowing* violation of his Fourth Amendment right to be free of warrantless searches and seizures. The importance of each constitutional right that was violated is addressed in turn below.

The Fourth Amendment prohibits unreasonable searches and seizures. The Fourth Amendment states unambiguously that "no Warrant 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."

This Court has recognized the importance of the protections of the Fourth Amendment:

Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. [5]

However, the Fourth Amendment only protects against unreasonable searches and seizures if attorneys move to suppress and courts act to suppress unlawfully obtained evidence. Had trial counsel done so in the instant case, the application of the exclusionary rule could have benefitted Mr. Neal in two respects: 'in terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.'<sup>6</sup>

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<sup>5</sup> *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citations omitted).

<sup>6</sup> *Brown v. Illinois*, 422 U.S. 590, 599 (1975).

As this Court recognized in *Brown v. Illinois*, “the Fifth Amendment is in ‘intimate relation’ with the Fourth”.<sup>7</sup> Such was the case here.<sup>8</sup> Had Troopers not barged into Mr. Neal’s apartment building without a proper warrant in violation of the Fourth Amendment, Mr. Neal maintains that he would not have uttered the statements that linked him to apartment 3.

Additionally, the Sixth Amendment right to effective assistance of counsel in a criminal case is paramount.<sup>9</sup> Trial counsel had an obligation to analyze the discovery provided,<sup>10</sup> including the Trooper’s audio recording that provided evidentiary support for petitioner’s premise that his Constitutional rights were violated by repeated warrantless entries, failure to Mirandize, and other infirmities.

Trial counsel’s failure to review and utilize the evidence to suppress the fruits of the illegal searches and seizures constitutes ineffective assistance

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<sup>7</sup> *Id.* at 601.

<sup>8</sup> As in *Brown*, law enforcement unlawfully entered Mr. Neal’s apartment and confronted him without any valid warrant when he arrived. *See id.* at 592.

<sup>9</sup> *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

<sup>10</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 367 (1986).

of counsel under *Strickland v. Washington*.<sup>11</sup> The first part of the *Strickland* test, the performance prong, requires a defendant to show that “counsel’s representation fell below the objective standards of reasonableness.”<sup>12</sup> The second prong set forth in *Strickland* is the prejudice prong.<sup>13</sup> It requires a defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>14</sup>

Here, the lower courts found that although counsel had failed to review the audios in a timely manner, there was no prejudice because the courts reasoned that the government would have inevitably discovered incriminating evidence based on its investigation. [APP-004-005; APP-014-015] The lower courts incorrectly found no prejudice where, had defense counsel utilized the body audio, counsel could have successfully moved to suppress evidence gained after *multiple* Constitutional violations.

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<sup>11</sup> 466 U.S. 668 (1984).

<sup>12</sup> *Id.* at 694.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

The reviewing courts did not sufficiently consider whether, in light of the infirmities in warrant process, the warrant for apartment number 3 withstands constitutional scrutiny. Troopers remained in the apartment building even after they were fully aware that they needed a new warrant, and where Troopers can be heard on the audio acknowledging that they need a corrected warrant. [AR 8 at 10, 31-32] Under these circumstances the second warrant should not have withstood constitutional scrutiny. The value of the audio recording in a motion to suppress cannot be understated. The audio shows that not only did Troopers repeatedly violate the Fourth Amendment, the audio proves that Troopers *knew* that they were required to get a new warrant but nonetheless violated the Fourth Amendment numerous times: first, when Trooper(s) opened the red door and went inside the apartment building; second when Troopers went out to the arctic entry but peeked back into the interior of the common area; third when Troopers reentered the building without a proper warrant; fourth, when Mr. Neal's cell phone and personal property were taken from his person and his phone searched in the kitchen area of the apartment building; fifth, when

Mr. Neal was arrested, not free to leave, and questioned inside the apartment building. This was a situation where Troopers knew they needed a valid warrant, admitted as much, yet repeatedly violated the Mr. Neal's constitutional rights and used the information that they improperly learned to acquire a new warrant.

Not only did Troopers take actions without a valid warrant, the inconsistencies between the audio and the Trooper's testimony and his affidavit should have been utilized by defense counsel to show that the Trooper was misleading when he applied for the warrants and that all of these infirmities demand suppression. The audio was powerful evidence for a suppression motion that should have been utilized to support a motion to suppress all evidence gained as a result of the illegal entries.

Further, The District Court and the Ninth Circuit erred in reasoning that the impending termination of Mr. Neal's lease later that same day would not have resulted in apartment 3 being empty by the time law enforcement would be able to summon sufficient probable cause for a valid, corrected warrant. [APP-014-015; APP-004-005] It is the government's

burden to show inevitable discovery.<sup>15</sup> Here, the District Court erroneously referred to the “possible termination” of the lease. [See APP-014-15] Here, the government did not meet its burden to show inevitable discovery where its own evidence revealed that the lease was literally about to expire at midnight that very same night, and there was insufficient evidence that the Troopers were on track to obtain and execute a valid warrant within the limited time that remained on the lease, before all items may have been removed from the apartment before the lease expired.

Finally, the evidentiary value of the phone that was seized when Mr. Neal was arrested inside the apartment building is paramount; that phone is the *only* phone that linked Mr. Neal to the conspiracy. Had defense counsel utilized the body audio to suppress the phone and its contents, a jury could have concluded that the government did not prove beyond a reasonable doubt that Mr. Neal was the person using that cell phone. In other words, any person could have been using that phone, the fact that it was seized from Mr. Neal is the government’s best evidence that he was the

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<sup>15</sup> See *United States v. Ruckes*, 586 F.3d 713, 719 (9th Cir. 2009).

individual using the phone. Without the evidence from apartment 3 the jury would likely have determined that the government did not prove that Mr. Neal committed the offenses.

Defense counsel should have urged the District Court to suppress all of the tainted evidence under the “fruit of the poisonous tree” doctrine.<sup>16</sup> As this Court has previously stated, “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.”<sup>17</sup> Trial counsel should have zealously pursued suppression after arguing that suppression was warranted due to the multiple constitutional violations in this case: the entry and reentry into the apartment, leaving the door open illegally and arresting Mr. Neal in his kitchen, seizing his phone and questioning him without proper Miranda warnings. With all of the

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<sup>16</sup> See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Nardone v. United States* 308 U.S. 338, 341 (1939); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1395 (9th Cir. 1989).

<sup>17</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *United States v. Ceccolini*, 435 U.S. 268, 275 (1978).

infirmities surrounding the first *incorrect* warrant, there still was not sufficient probable cause to get a corrected warrant.

**B. This case is a good vehicle to address the question presented.**

The instant case presents a good opportunity to address the question presented. This case involves violations of the Fourth, Fifth, and Sixth Amendments. There are no preservation issues. Facts establishing the contradictions between the body audio and the Trooper's testimony have been established in the trial court record. Here, the appellate court's resolution of the issue was unreasonable. The appellate court found no violation of a substantial constitutional right despite repeated Fourth Amendment violations, a Fifth Amendment violation, and violation of the Sixth Amendment right to effective assistance of counsel. The right to the effective assistance of counsel extends to "all critical stages of the criminal process."<sup>18</sup> 28 USC § 2255(a) authorizes this Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." Claims for relief under § 2255

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<sup>18</sup> *Nunes v. Mueller*, 350 F.3d 1045, 1052 (9th Cir 2003).

must be based on some constitutional error, jurisdictional defect, or an error resulting in a “complete miscarriage of justice” or in a proceeding “inconsistent with the rudimentary demands of fair procedure.”<sup>19</sup> Even a single error or omission can be so serious that a finding of ineffective assistance of counsel in violation of the Sixth Amendment is warranted.<sup>20</sup>

Mr. Neal has shown that relief is warranted under section 2255 where his attorney failed to utilize the audio recording to suppress illegally obtained evidence that was key to obtaining a second warrant and that resulted in evidence that was key to his convictions.

## CONCLUSION

For the reasons set forth above this court should grant this petition for writ of certiorari.

Respectfully submitted this 6th day of September 2022.

s/ Jane Martinez  
Attorney for Petitioner

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<sup>19</sup> *United States v. Timmreck*, 441 U.S. 780, 783–84 (1979).

<sup>20</sup> *United States v. Cronic* 466 U.S. 648, 657 n.20 (1984).