IN THE
Supreme Court of the United States

ADONIS MARQUIS PERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a third party's personal use and physical possession of Petitioner's cell phone transfer authority to the third party to consent to law enforcement's warrantless search of Petitioner's cell phone, or whether such a search violates the Fourth Amendment to the U.S. Constitution.

II. Whether Petitioner was unlawfully seized during the traffic stop, where law enforcement deviated from the purpose of the stop, without a reasonable suspicion of criminal activity, thereby prolonging the stop in violation of the Fourth Amendment to the U.S. Constitution.

III. Whether multiple convictions of attempted witness tampering and obstruction of justice violate the Fifth Amendment to the U.S. Constitution's prohibition against multiple punishments for the same offense.

IV. Whether the destruction of potential exculpatory evidence violates the due process clause of the Fifth Amendment to the U.S. Constitution, warranting dismissal of the indictment against Petitioner.

V. Whether Petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution, where one of Petitioner's counsel, who withdrew from prior representation based upon a personal conflict with Petitioner, was permitted to represent Petitioner in this case over Petitioner's objection.

VI. Whether the evidence was insufficient as a matter of law to sustain Petitioner's convictions for felon in possession of a firearm; witness tampering and obstruction of justice; and possession of marijuana.

VII. Whether the sentence imposed is longer than necessary to achieve the goals of 18 U.S.C. §3553, in violation of Petitioner's right to due process.

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IN THE SUPREME COURT OF THE UNITED STATES

ADONIS MARQUIS PERRY,

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v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Adonis Marquis Perry, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

By published opinion, dated February 6, 2024, the United States Court of Appeals for the Fourth Circuit affirmed Petitioner's convictions. That Order can be found at Appendix A1. On March 5, 2024, the United States Court of Appeals for the Fourth Circuit filed an order denying Petitioner's Petition for Rehearing *En Banc*. That Order can be found at Appendix A27.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, as this Petition for Writ of Certiorari arises from a decision by published opinion of the U.S. Court of Appeals for the Fouth Circuit, dated February 6, 2024; and, denial of a

Petition for Rehearing *en banc* to the same Court, dated March 5, 2024. The U.S. Court of Appeals for the Fouth Circuit acquired jurisdiction over the appeal, pursuant to 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented in this case involve the guarantees set forth in the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record in this case presented the following facts[1]:

On December 18, 2017 at about midnight, City of Norfolk Police Officers Joshua Miller [herein Miller] and Brian Para [herein Para], were traveling southbound on O'Keefe Street when a blue SUV traveling northbound passed their patrol car (JA276-279,313,952-953). Miller, the driver, noticed the SUV did not have a front license plate and the rear plate was a piece of paper with a marker on it (JA278,313,954).

Miller made a U-turn, and observed the SUV accelerate and disregard two stop signs (JA278,313,955,959). The area is known to the officers as one of high crime and gang activity (JA279). The two officers had been police officers for about one year each (JA428,436,604). Miller decided to catch up to the SUV to initiate a traffic stop to investigate the license plate and the traffic violations (JA279).

[1] References to "(JA and SA)" in this document are to the joint appendix and its supplement filed in the Court of Appeals. References to "(A)" in this document are to the appendix filed in this petition for writ of certiorari.

Miller lost sight of the SUV for approximately nine to 11 seconds between the time he made the U-turn and the stop of the SUV (JA305,419). Miller activated his emergency lights upon arriving behind the SUV, which triggered the patrol car's camera [herein dashcam] recording of the stop (JA281-282,958,969-970). The car was already parked, and the front passenger door was open (JA282,958,969-970). Miller activated his body camera [herein bodycam] as he exited the patrol car (JA280,409-410). Petitioner [herein Perry] requested several times that Miller preserve the dashcam footage, and Perry's counsel requested it, in writing, from the Commonwealth's Attorney (JA376). There was a dispute regarding whether Perry was the driver or passenger of the vehicle. Perry believed the dashcam was evidence of who was the driver, and would have captured whether there was a reaching motion toward the passenger floorboard, which the officers stated was a further basis for the detention (JA284-285).

Miller failed to preserve the dashcam video (JA602). Miller concluded that the dashcam video would not show anything different than the bodycam video (JA281-282,310,312,602,606-607). However, Miller did not look at the dashcam video (JA606). Miller stated the bodycam video appeared to be everything Miller needed (JA602).

Miller identified a female, Beatrice McCarr [herein McCarr] and Perry as the occupants of the SUV, who both exited the driver's side (JA283,959). Miller observed an individual come over the center console and exit the driver's side of the SUV (JA282,958). Miller moved Perry to the rear of the patrol car and requested

Perry's identification (JA285-286). A records check produced no outstanding warrants for Perry (JA293). Miller stated the response revealed that Perry did not have a concealed weapons permit, and cautioned of gang affiliation (JA293). Miller told Perry he was being detained, but he was not under arrest (JA285). Miller placed Perry in handcuffs for officer's safety, conducted a pat-down search for weapons, and placed Perry in the back of the patrol car (JA285,293,283-285,424-425).

Miller did not know who was actually driving the SUV (JA288,313). Miller concluded that McCarr was the driver based upon Perry's statement that McCarr had a car title and registration, combined with seeing McCarr exit the driver's side (JA286-292). Subsequently, Perry told Miller that he was the driver and that McCarr opened the passenger door and ran around to the driver's side (JA304,599-600,965,1340). And, that thereafter, Perry jumped over the center console into the passenger seat (JA305,599-600,976). Miller stated that this version of facts was possible (JA305,965). Miller stated that if McCarr was the passenger, then the guns found in the subsequent search of the SUV were at her feet, not Perry's (JA340-341).

McCarr stated to Para that she was the driver of the SUV (JA433). McCarr testified to the Grand Jury under oath that she was not driving the SUV at the time of the incident (JA364). According to Miller, "She [McCarr] testified that she was actually the passenger and that she had ran around the vehicle and got into the driver's seat" (JA365).

Para testified that he believed Perry was the driver based upon the hair styles of the SUV occupants that he observed when the officers passed the SUV initially (JA383,436). Miller and Para determined that McCarr was the owner of the SUV upon Para speaking with her immediately after the stop (JA334-335).

Approximately six minutes into the investigation, Para told Miller that Para observed firearms in plain view inside of the SUV as he walked McCarr to the front of the SUV, pass the open passenger side door to separate her from Perry, immediately upon the stop (JA295,312,334-337). The trial court found that Para's assertions regarding initially seeing the weapons in plain sight were patently false and that his testimony regarding the firearms was not credible (JA444).

McCarr appeared scared and nervous (JA351-352). She stated she had to get out of there and was just trying to get two blocks up the street (JA352). She wanted to get away (JA352). Miller told McCarr that if she worked with him, he would work with her (JA351). McCarr consented to the search of the vehicle, in which the revolver found was inside of McCarr's purse (JA394,421). The butt of the revolver was sticking out of McCarr's purse, on top of stuff inside of the purse on the front passenger side floorboard (JA394,421,1164). McCarr stated she was possessing the revolver at the time it was found in her purse (JA1164).

Upon finding the revolver, Para used his flashlight to search the rear, driver's side floorboard of the SUV (JA411-412). There was a lot of paper, clothes, and junk on the floorboard that Para moved around and sifted through during a thorough search of that area, which lasted about 42 seconds (JA412-413). Para then used his

flashlight to search the rear, passenger side floorboard (JA414-415). He sifted through trash, a plastic bag, a two-liter soda container, and lots of garbage – similar to what he found on the rear driver's side floorboard (JA414-415). Para stepped away momentarily, then continued his search of that area (JA414). At about two minutes, ten seconds of sifting through the trash, Para found the Glock firearm protruding from underneath the front passenger seat, into the rear passenger side area and notified Miller (JA414,416-417).

Upon retrieving the Glock firearm, McCarr stated to Para, "That's it, that's it, I swear that's it," referring to the number of firearms present in the SUV (JA419-420). McCarr initially stated that there was nothing in the SUV that the officers needed to know about, and did not tell Para of the presence of the Glock when Para found the revolver (JA406).

McCarr provided a written statement to Miller (JA357). After reviewing her statement, Miller asked McCarr if she knew who the guns belonged to and McCarr stated she did not know (JA356-357). Initially, in her oral statement, McCarr stated twice that the weapons found belonged to Perry's family (JA350,1164-1165). Subsequently, upon agreeing to "work" with law enforcement, McCarr stated that the weapons found belonged to Perry (JA351-352,972-973). Miller stated to McCarr, "Well, the weapons, you didn't say they were his," referring to the contents of McCarr's written statement (JA357). McCarr responded, "Oh, I did say they were his." (JA357). Miller told her to add it to her written statement

(JA357). A fingerprint recovered from the Glock did not match Perry's fingerprints (JA1187-1188).

Detectives C.J. Allen and Lawson spoke with McCarr off camera (JA358-359). McCarr was shown the two guns and told the penalties for possessing them (JA374-376). McCarr was not arrested, despite the revolver having been found in her purse (JA359-360). She "worked" with law enforcement that night so they let her go (JA360). Miller informed McCarr that the paper license plate on her SUV was not valid (JA361). Miller handed McCarr the SUV key and allowed her to drive the SUV away from the scene even though the license plate was not valid (JA359,361-363,368-369).

Detective Justin Matthews [herein Matthews] testified that Perry's cell phone [herein phone] was turned over to McCarr inside of her SUV at the end of the traffic stop when Perry was taken to jail, where he remained in custody (JA611-612). McCarr returned to Georgia with Perry's phone (JA612).

Perry left his phone and pass code with McCarr (JA1116-1117). Perry gave McCarr instructions regarding the use of his cell phone. Perry told McCarr to carry the phone with her (JA714). He told her to continue to hold onto/keep his phone for him, and McCarr agreed (JA168, JA612, JA715). He told her to use his phone to accept his jail calls, in which she talked to Perry four or five times per day for up to three months (JA168, JA611, JA616, JA1123). He told her to leave the phone in the car (JA714). He told her to send and receive voice calls and text messages to and

from Perry's family regarding his status and the status of Perry's case, including court hearings (JA611,714).

McCarr used Perry's phone for her personal use until she was able to add minutes to her cell phone, at which point she ceased to use Perry's phone for her personal communications (JA611,617).

During a jail phone call, McCarr stated she was viewing pictures of the two of them on Perry's phone (JA614-615). Perry inquired about McCarr's use of his phone and whether she was putting pictures on his phone (SA1). After McCarr stated she was not and made a joke about a specific picture, Perry laughed at the joke, and seemingly approved McCarr's additional personal use of Perry's phone regarding that one instance (JA614-615).

From that one call, Matthews concluded that McCarr had primary access and control of the phone (JA615-616). However, McCarr consistently referred to Perry's phone as "your" [Perry's] phone (JA627-628). McCarr told Matthews that Perry's phone belonged to Perry, not to her (JA1105). Matthews acknowledged McCarr gave him someone else's property, with the pass code; and, he received McCarr's permission, rather than Perry's consent to access Perry's phone (JA631,978,1104-1105).

Upon Matthews' request, On July 10, 2018, McCarr turned over Perry's phone and pass code to Matthews at the U.S. Attorney's office in Norfolk, while under subpoena to appear before the Norfolk Grand Jury (617-618,633,977-979).

Matthews applied to a magistrate for a search warrant to search Perry's phone (JA618-621,624-625,628-629,632-633). Matthews' request for the search warrant for Perry's phone was denied (JA618-621,624-625,628-629,632-633). After waiting about two to three days after the search warrant was denied, Matthews had the phone searched and extracted data to use against Perry (JA629,1052,1079-1080,1083).

The United States introduced recorded jail calls purportedly from Perry to McCarr, in which the United States stated Perry attempted to tamper with a witness, McCarr, and obstruct justice in the prosecution of his case (JA1072-1077,1086-1103,1341-1384). McCarr did not attend the state court preliminary hearing (JA1073-1074,1076-1077). She engaged in various schemes to avoid testifying as a witness against Perry in this case, including providing a false address at the traffic stop and refusing to correct it in order to avoiding receiving a witness subpoena (JA1125,1127-1128). McCarr pretended to be her sister rather than herself to avoid speaking with Matthews on the telephone (JA1125,1127-1128).

During the jail phone calls, Perry told McCarr to tell the truth (JA1143-1144,1148). Perry told McCarr that there was no case without her testimony (JA1129). Perry wanted McCarr to record her conversation with the [state] prosecutor and send it to Perry's lawyer (JA1126).

REASONS FOR GRANTING PETITION

I. Whether a third party's personal use and physical possession of Petitioner's cell phone transfer authority to the third party to consent to law enforcement's warrantless search of Petitioner's cell phone, or whether such a search violates the Fourth Amendment to the U.S. Constitution.

Argument

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." Mincey v. Arizona, 437 U.S. 385, 390 (1978), quoting Katz v. United States, 389 U.S. 347, 357 (1967); Coolidge v. New Hampshire, 403 U. S. 443 (1971).

In Riley v. California, 573 U.S. 373 (2014), the Court recognized that a person has a reasonable expectation of privacy in their cell phone, holding that the search of a modern cell phone – like the search of a home – must be conducted pursuant to a warrant unless one of the well-established exceptions to the warrant requirement applies.

Here, Perry placed his cell phone with McCarr, his girlfriend, at the time of his arrest to keep for him during his incarceration.

Matthews applied for a search warrant to search the phone. The warrant request was denied. However, the magistrate cited to Castella v. Borders, 404 F.App'x 800 (4th Cir. 2010)(unpublished per curiam decision), and suggested to Matthews that he did not need a warrant if he had consent from McCarr to conduct

the search. Castella is not legal precedent, and is readily distinguishable from the facts here. There, the appellant made no statements regarding the use of the cell phone upon turning it over to a third party – essentially, abandoning the device.

By contrast, Perry gave McCarr specific instructions for the use of Perry's phone while McCarr kept it for Perry. Perry instructed McCarr to use his phone instead of McCarr's phone to accept his calls from the jail; to send and receive text messages and phone calls to and from Perry's family to keep them updated on the status of his case; and, to hold on to his phone for safe keeping until he was released from jail.

Perry went to the extent of instructing McCarr to keep his phone with her even in the car, so she would not miss his calls or that of his family. From these facts, it may readily be inferred that McCarr was to keep Perry's phone with her at all times, rather than relinquish it to Matthews. McCarr would not have been able to use Perry's phone as instructed if she did not have it with her at all times, as no evidence was presented that communications were pre-scheduled rather than random occurrences. The fact that McCarr spoke with Perry on Perry's phone four or five times per day for up to three months from the time Perry was arrested is additional evidence supporting the reasonable inference that McCarr was to have the phone with her at all times, rather than give it to Matthews, in order to communicate with Perry as frequently as she did, and to carry out Perry's other instructions to McCarr regarding the use of his phone.

Moreover, Perry instructed McCarr to keep his phone until he was released from custody. At the time of the search, Perry was still in custody. Such evidence shows McCarr's lack of authority to relinquish possession of Perry's phone to anyone prior to his release from custody or to consent to the search.

Perry permitted McCarr to use his phone for her personal calls and text messages. At the time, McCarr did not have usage time on her own cell phone. Once McCarr obtained usage ability on her own cell phone, she stopped using Perry's phone for her personal calls and text messages. Given the nature of the relationship, it is reasonable that Perry would permit his girlfriend to use his phone to make and receive calls and text messages under the circumstances that McCarr did not have usage minutes on her own cell phone. This extension of curtesy to his girlfriend, McCarr, does not serve to convey upon her any authority over Perry's phone. Were it otherwise, any person who lends their cell phone to anyone, including a stranger on the street, to make a phone call or for any other limited use purpose, surrenders their right and expectation of privacy in their device to that third party. That likelihood is not supported by the Fourth Amendment. However, the U.S. Fourth Circuit essentially holds as much.

The Court found that McCarr had authority to consent to the search, because she "had at least joint, if not sole, access and control over the cell phone at the time of the search." (A 15). However, the Fourth Circuit said previously,

> ". . . third person consent, no matter how voluntarily and unambiguously given, cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or exclusive authority to permit inspection exists in the third person from

> any source, or even more certainly, when the circumstances manifest to the contrary that the absent target of the search retains an expectation of privacy in the place or object notwithstanding some appearance or claim of authority by the third person." Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965);.

The Court is not following its own precedent in this case.

The circumstances here evidence that Perry retained an expectation of privacy in his phone, and did not relinquish shared or exclusive authority to McCarr to consent to a search of Perry's phone by law enforcement. It should not be lost on this Court that Matthews knew where Perry was located and could readily have asked Perry for consent to search his phone. Matthews did not do so. Apparently, Matthews knew or believed that Perry would not consent to a search of his phone. Therefore, Matthews sought to circumvent the Fouth Amendment's constraint upon his intrusion into Perry's personal privacy interests in his phone, upon having been denied a search warrant by a magistrate, by obtaining consent from a third party. Matthews sought such third party consent from McCarr, even though Matthews knew McCarr told him the phone belonged to Perry, referred to it as Perry's phone, and that at the time of his arrest Perry placed his phone with McCarr to keep for him during his incarceration. Also, Matthews had listened to jail phone calls in which Perry gave these use instructions to McCarr and heard McCarr agree to use the phone as Perry had instructed. These facts and circumstances would not lead a reasonable person to believe that McCarr could give valid consent to a search of Perry's phone. This is the factual basis that caused Matthews to seek a search warrant, rather than McCarr's consent in the first instance. And, it is the same

factual basis that caused Matthews to be denied the warrant in the second instance. Matthews stated that in one of the phone calls Perry seemingly approved of McCarr viewing photos on his phone. In fact, Perry challenged McCarr's use of his phone for this purpose, which was the only usage of Perry's phone outside of her earlier usage to talk and text until she had minutes on her cell phone. From the fact that McCarr had to explain her usage of Perry's phone for this additional purpose, it may readily be inferred that Perry continued to maintain his expectation of privacy in his phone, even in McCarr's possession. Therefore, Matthews' bare assertion that he believed he had consent to search Perry's phone is belied by the facts.

The Fourth Circuit's finding of authority by mere fact that McCarr "had at least joint, if not sole, access and control over the cell phone at the time of the search" (A15), does not support the constitutionality of the search. McCarr had access and physical control of Perry's phone by virtue of Perry having placed it with her for his benefit and safekeeping. She had to have access and physical control over the device to accomplish his many use purposes that he requested of McCarr during his incarceration. McCarr's physical access and physical control of Perry's phone does not confer any authority upon her to use or dispose of Perry's phone at McCarr's whim. There was no evidence that the phone was in McCarr's name; that her name was on any account associated with the phone; that she paid the phone bill; or that she could change the pass code to lock out Perry. However, all of these things are true of Perry, including his authority to change the pass code to lock out McCarr. As such, it cannot be said that McCarr had shared or exclusive authority

over Perry's phone. Rather, the evidence shows the McCarr had limited use of Perry's phone as controlled by Perry.

The expectation of privacy in one's cell phone is at least the same, if not greater than, one's expectation of privacy in their own home. Riley v. California, 573 U.S. 373 (2014). That being the case, a mere house guest does not obtain authority to consent to the search of a homeowners home and effects by mere virtue of his guest status. McCarr's permissive use of Perry's phone is no different. The evidence shows Perry controlling the use of his phone while in McCarr's physical possession until Perry's release from jail, much like that of a homeowner controlling the use of his or her home by a house guest while the homeowner was away from home.

The Riley Court stated that a warrant is generally required before a search of a personal cell phone can be conducted, even when a cell phone is seized incident to arrest as an exception to the warrant requirement. Therefore, third party consent alone does not support the warrantless search in this case as an exception to the warrant requirement, where the circumstances required a warrant, which the magistrate had already denied.

In addition, there is no authority to support the warrantless search of the files and folders inside of the phone where the data was extracted. McCarr merely gave Matthews the phone, pass code to the phone, and a general consent to search the phone. Because the telephone conversations between Matthews and McCarr regarding Matthews' request that McCarr bring Perry's phone to him were not

recorded, the evidence fails to show consent to search the files and folders inside of the phone. In Riley, the Court stated,

> "But the fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a range of items contained on a phone, even though people would be unlikely to carry such a variety of information in physical form. In Riley's case, for example, it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets. But because each of those items has a pre-digital analogue, police . . . would be able to search a phone for all of those items – a significant diminution of privacy." Riley, supra, at 573 U.S. 373, 400 (2014).

Similarly, here, even if McCarr gave Matthews the pass code to unlock Perry's phone, such evidence does not support a search of the folders, files, apps, or other content within the phone without a warrant. The warrant application to search the phone, which included judicial authority to search any and all areas of the phone, was denied.

Finally, any consent McCarr gave to Matthews was tainted by the oppressive conditions under which consent was requested. McCarr was under subpoena to testify at the grand jury hearing in Norfolk, Virginia, and requested that McCarr bring Perry's phone with her from Georgia to Virginia. Matthews had previously warned McCarr of the penalties for her lack of cooperation with him when McCarr tried to avoid contact with Matthews and to avoid testifying against Perry. As such, any consent given is the product of coercion, absent evidence that it was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968).

McCarr had no authority to consent to the search of Perry's phone. Therefore, the warrantless search violated Perry's reasonable expectation of privacy in his phone, in violation of the Fourth Amendment to the U.S. Constitution. As such, any and all evidence obtained from the search of Perry's phone must be suppressed.

II. Whether Petitioner was unlawfully seized during the traffic stop, where law enforcement deviated from the purpose of the stop, without a reasonable suspicion of criminal activity, thereby prolonging the stop in violation of the Fourth Amendment to the U.S. Constitution.

Argument

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure'" under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809 (1996). As such, all occupants of the vehicle are seized during the duration of the stop. Arizona v. Johnson, 555 U.S. 323, 327 (2009) (quoting Brendlin v. California, 551 U.S. 249, 255 (2007)).

In order to justify a seizure, the officers must point to objectively reasonable, articulable suspicion, based upon specific facts, that the person is engaged in criminal activity. Florida v. Bostick, 501 U.S. 429 (1991); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Terry v. Ohio, 392 U.S. 1 (1968). Reasonable suspicion is dependent upon the content of information possessed by police. Alabama v. White, 496 U.S. 325, 330 (1990).

Here, Perry was seized within the meaning of the Fourth Amendment, where officers Miller and Para stopped their patrol car behind the SUV and ordered Perry along with McCarr out of the vehicle. Miller told Perry he was detained, immediately placed Perry in handcuffs, patted him down for weapons, and placed Perry inside of the back of the police patrol car. Para escorted McCarr to the front of the SUV.

The officers' basis for the stop was to investigate the validity of the paper license plate on the SUV; the reason the SUV appeared to accelerate and failed to stop at two stop signs; and, the fact that the stop occurred late at night in a high crime area. Upon stopping the vehicle, the officers' added that Perry crossing the console and exiting through the driver's side door amounted to suspicious activity. Also, the officers believed Perry made an unspecified reaching motion toward the front passenger floorboard.

The Officers did not know who the driver was; however, they determined that McCarr was the driver and requested consent to search the SUV. The officers did not have a reasonable suspicion that a crime was afoot, or that evidence of such crime would likely be found inside of the SUV. Rather, the officers were acting upon a hunch, based upon Miller's subjective belief that Perry exiting through the driver's side door behind McCarr or the unspecified movement inside of the SUV provided a reasonable suspicion of criminal activity, in requesting consent to search the SUV.

In Rodriguez v. United States, 575 U.S. 348 (2015), the Court held that the permissible duration of a traffic stop, "is determined by the seizure's mission – to address the traffic violation that warranted the stop," and it may "last no longer than is necessary to effectuate that purpose." Id. at 354. A lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [the] mission" of the stop. Id., quoting, Illinois v. Caballes, 543 U.S. 405, 407 (2005). An officer is permitted to investigate matters unrelated to the reasons for the stop as long as it "[does] not lengthen the roadside detention" . . . "even for a *de minimus* period of time." Rodriguez, at 355-356.

Here, the officers stopped the vehicle to investigate the traffic infractions and license plate. The officers' need to investigate why Perry crossed the center console and exited the driver's side, or appear to make some vague movement in the SUV is not an objective basis to prolong the detention for investigatory purposes, or to request consent to search the SUV. Where particular conduct is, on its face, lawful or at least susceptible to a legitimate explanation, the Fourth Amendment requires the presence of additional factors that, under the totality of the circumstances, objectively point to legal wrongdoing. United States v. Brignoni-Ponce, 422 U.S. 873, 895 (1975). Therefore, the investigation into the stop was limited to the traffic violations and the license plate.

Consequently, the moment the officers requested McCarr's consent to conduct a search of the car, without a reasonable suspicion of criminal activity, the officers prolonged the stop as it applied to Perry. This prolonged seizure of Perry is

objectively unreasonable and violates his right against unlawfully seizure, pursuant to the Fourth Amendment of the U.S. Constitution. The officers cannot articulate any facts that are objectively reasonable to justify the continued detention of Perry in order to obtain McCarr's consent to search the car, or to conduct the actual search. Para's assertion to Miller that Para had observed weapons in plain view at the initial encounter with McCarr and Perry does not provide a basis for the request for consent to search the SUV, because the assertion was false. As such, it does not provide a reasonable suspicion of criminal activity, justifying the request to conduct the search. Regarding any movement by Perry inside of the SUV, the officers were not able to articulate the suspected criminal nature of Perry's movement in order to support a finding of a reasonable suspicion of criminal activity to justify Perry's prolonged detention.

Because law enforcement deviated from the purpose of the stop to request consent to search the SUV, obtained consent to conduct the search, and conducted the search of the SUV for evidence of criminal activity, without a reasonable suspicion of criminal activity, Perry was unlawfully seized during the traffic stop. As a result, all evidence derived from the stop must be suppressed as the fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

III. Whether multiple convictions of attempted witness tampering and obstruction of justice violate the Fifth Amendment to the U.S. Constitution's prohibition against multiple punishments for the same offense.

Argument

The Fifth Amendment's double jeopardy guarantee serves principally as a restraint on courts and prosecutors. Brown v. Ohio, 432 U.S. 161 (1977). It "protects against . . . multiple punishments for the same offense." Id., quoting, North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Here, the multiple counts of witness tampering and obstruction of justice manifests the various ways by means these offenses can be committed. The evidence alleged that Perry engaged in various conduct all with one single goal in mind. Therefore, the various acts or statements toward that end amount to the same act – an alleged attempt to dissuade McCarr from testifying. As a result, the multiple punishments, based upon the multiple convictions for what amounts to the same alleged act, violate double jeopardy.

IV. Whether the destruction of potential exculpatory evidence violates the due process clause of the Fifth Amendment to the U.S. Constitution, warranting dismissal of the indictment against Petitioner.

Argument

In California v. Trombetta, 467 U.S. 479 (1984), the Court held that the destruction of evidence deprives a defendant of due process of law if: (1) the

evidence was potentially exculpable; (2) the exculpatory value of the evidence was apparent before the evidence was destroyed; (3) the evidence was destroyed in bad faith; and (4) no comparable evidence could be obtained by other reasonably available means.

The dashcam video was potentially exculpable. The issue of who was the driver of the SUV is relevant to the seizure of Perry to investigate a violation of the traffic offenses, the license plate, and who had dominion and control of the SUV regarding the possession of the firearms subsequently found during the search of the SUV. Miller is not sure who was the driver. He and Para made opposite determinations of who was the driver, and McCarr and Perry gave conflicting statements in that regard. Perry requested that Miller preserve the dashcam. Perry told Miller that the dashcam would show who was the driver. The dashcam would have activated 30 seconds before Miller's bodycam, in which the inherent delay of the bodycam function did not capture the first 30 seconds of the stop that the dashcam captured.

The evidence was destroyed in bad faith because Miller failed to preserve the dashcam even after being told the importance of the evidence – to resolve the question of who the driver of the SUV was, and the ramifications of that evidence.

Miller stated he did not need to preserve the dashcam, because the bodycam captured the event. However, he did not view the entire dashcam. Therefore, he has no way of knowing what the dashcam captured in order to determine whether his bodycam captured the entire event.

The only mechanism to capture the first 30 seconds of the encounter is the dashcam, which was destroyed. Miller's bodycam is not able to replicate those 30 seconds. Therefore, no comparable evidence can be obtained by other reasonable means. The destruction of the dashcam video denied Perry the opportunity to present evidence in his favor in violation of the due process clause of the Fifth Amendment to the U.S. Constitution. Therefore, the indictment in the case must be dismissed.

V. Whether Petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution, where one of Petitioner's counsel, who withdrew from prior representation based upon a personal conflict with Petitioner, was permitted to represent Petitioner in this case over Petitioner's objection.

Argument

Perry objected to representation by trial counsel, Trevor Robinson [herein Robinson], alleging that a conflict existed between he and Robinson. Robinson withdrew from representing Perry in a prior state court proceeding, based upon a personal conflict Robinson stated he had with Perry. Robinson alleged that Perry issued a threat against Robinson. This allegation served as a basis for Robinson to withdraw as counsel in the prior state court case, and served as the basis of Perry's objection in this case.

Here, Robinson stated he was able to represent Perry, free of conflict. Over Perry's objection, the court refused to relieve Robinson, and appointed an additional attorney to represent Perry along with Robinson. Perry objected, citing to the personal conflict he has with Robinson, and Robinson's assertion of the personal conflict in withdrawing from the prior state case. Essentially, Perry asserted that the conflict continued to exist.

Even though Perry was represented by an additional attorney, his right to the effective assistance of counsel was violated because his additional attorney only assisted him with part of his representation, as the two attorneys divided up the work and the questioning of witnesses during the trial.

As such, Perry was denied the right to be represented by effective counsel, free of any conflict. United States v. Bernard, 708 F.3d 583 (4th Cir., 2013); United States v. Baldovinos, 434 F.3d 233, 239 (4th Cir. 2006); United States v. Russell, 221 F.3d 615, 619 n. 5 (4th Cir. 2000).

The Sixth Amendment's right to the effective assistance of counsel belongs to Perry, rather than to Robinson. Having previously declared a conflict with Perry, Robinson's bare assertion that he was able to now represent Perry did not permit Robinson to undertake the representation. The trial court erred in permitting Robinson to remain as Perry's counsel over Perry's objection.

VI. Whether the evidence was insufficient as a matter of law to sustain Petitioner's convictions for felon in possession of a firearm; witness tampering and obstruction of justice; and possession of marijuana.

Argument

A. Felon in Possession of a firearm.

Knowing possession may be established by proving that the defendant was in actual or constructive possession of a firearm. United States v. Johnson, 55 F.3d 976 (4th Cir. 1995). Constructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item, and has knowledge of the item's presence. United States v. Laughman, 618 F.2d 1067, 1077 (4th Cir.), cert. denied, 447 U.S. 925 (1980). Knowledge may be inferred from possession, that is, dominion and control over the area where the contraband is found. United States v. Lochan, 674 F.2d 960, 966 (1st Cir. 1982).

The revolver was found inside of McCarr's purse, which constitutes actual possession. The Glock was found under piles of garbage, protruding from underneath the front passenger seat, into the rear passenger side area. It was found only after a second search, with the aid of a flashlight. This evidence fails to show Perry's knowledge of the presence of the firearm.

Moreover, the evidence is equivocal, at best, regarding who was exercising dominion and control over the SUV at the time the Glock was found. The officers determined that McCarr was the driver and owner of the SUV at the time the weapon was found. Therefore, McCarr was in constructive possession of the Glock,

in addition to being in actual possession of the revolver. The fingerprint found on the Glock did not match Perry's fingerprint. Therefore, the evidence was insufficient as a matter of law to support Perry's conviction for felon in possession of a firearm.

B. Witness Tampering and Obstruction

Perry was convicted of multiple counts of witness tampering and one count of obstruction of justice under 18 U.S.C. §1512 and its subparts, which essentially prohibit a person from knowingly using intimidation, threats, or corrupt persuasion or engage in misleading conduct toward another, with the intent to influence, delay, or prevent the testimony of that person in an official proceeding. United States v. Edlind, 887 F.3d 166 (4th Cir. 2018); 18 U.S.C. §1512(b)(1).

McCarr made it clear that she had no intention of appearing at any hearings or testifying in this case. She avoided Matthews' phone calls and pretended to be her sister to avoid contact with him from the outset. Matthews had to track down McCarr through McCarr's mother. McCarr provided police a false address at the scene, and did not correct that falsehood in order to avoid a subpoena. She can be heard on the jail calls, cursing Matthews and emphatically stating she did not want to talk to him, was not attending any hearings, or testifying in court. It is clear from the jail calls that McCarr was acting on her own volition and was not being influenced by Perry.

McCarr was taking advice from her uncle, sister, mother, friends, and other family members according to the jail phone calls. However, after Matthews made

McCarr aware that her lack of cooperation with him could cause her to be jailed, she accepted the subpoena, gave Matthews Perry's phone, and appeared at Grand Jury and trial. Thus, the evidence is insufficient to support Perry's convictions for witness tampering and obstruction of justice.

C. Possession of Marijuana

Incident to arrest, Miller retrieved what appeared to be a cigar from Perry's pocket. At trial, the Government introduced a lab report that an item received from police, was marijuana. However, the chain of custody failed to show that the item tested was the item retrieved from Perry. Therefore, there is not substantial evidence to support the conviction. United States v. Reid, 523 F.3d 310 (4th Cir. 2008).

VII. Whether the sentence imposed is longer than necessary to achieve the goals of 18 U.S.C. §3553, in violation of Petitioner's right to due process.

Argument

In Gall v. United States, 552 U.S. 38 (2007), the Court held that if the sentence is determined to be procedurally reasonable based upon calculating the appropriate guidelines range, the district court must consider certain factors, pursuant to 18 U.S.C. §3553, to determine a sentence that is substantively reasonable.

Here, the sentencing range was 168 months to 210 months, and Perry was sentenced to 210 months of incarceration. This sentence is longer than necessary to

achieve the goals of §3553; therefore, it violates Perry's right to due process. Gall v. United States, 552 U.S. 38 (2007).

The case started with a single count for the firearm charge with a maximum sentence of 120 months. Additional charges were added when Perry refused to plead guilty to the charge, and exercised his right to trial instead. Even though additional charges were added, the case is essentially the same regarding the sentencing factors. Therefore, a sentence at the low end of the guidelines range would have achieved the sentencing factors, rendering the sentence imposed unreasonable, in violation of Perry's right to due process.

CONCLUSION

For these reasons and the reasons stated previously on appeal, Petitioner, Adonis Marquis Perry, submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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