

ORIGINAL

No.

Supreme Court of the United States

LARRY J. NORTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Larry J. Norton
Petitioner
06072-027
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QUESTIONS PRESENTED

Petitioner Larry Norton is serving a sentence of life incarceration which originated from evidence seized after a traffic stop for speeding in a construction zone which police admitted was pretextual but which was argued to have been a legal stop under state law. At the motion to suppress hearing, two officers swore to irreconcilably conflicting facts and petitioner proved that the construction zone was inactive so the reduced speed limit, relied on by police for the stop, was NOT in effect. The lower courts ignored the perjury by one of the officers and held that the stop and search were consistent with the Fourth Amendment.

- 1.) Does a mistake of law by police in the stopping of a vehicle render the subsequent search violative of the Fourth Amendment?
- 2.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?
- 3.) Where Petitioner's sentence statutory maximum sentence and his statutory mandatory minimum sentence was enhanced, based on the fact of prior convictions which were not pleaded in indictment, not presented to the jury, and not proven beyond a reasonable doubt, was Petitioner denied his Sixth Amendment constitutional rights?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

More specifically, the Petitioner Larry J. Norton and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Larry J. Norton, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on 6-20-18.

OPINIONS BELOW

The 6-20-18 opinion of the Court of Appeals for the Seventh Circuit, whose judgment is herein sought to be reviewed, is reported at 893 F.3d 464 *; 2018 U.S. App. LEXIS 16671 ** and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Northern District of Indiana, was entered on 9-7-17, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior Magistrate Report & Recommendation of the United States District Court for the Northern District of Indiana recommending denial of Mr. Norton's Motion to Suppress was entered on 4-28-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 69177 * and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States District Court for the Northern District of Indiana adopting the Magistrate Report & Recommendation and Denying Mr. Norton's Motion to Suppress was entered on 5-26-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 68936 and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the Northern District of Indiana Denying Mr. Norton's Motion to Supplement the Appellate Record was entered on 12-14-17, is an unpublished decision, and is reprinted in the separate Appendix E to this Petition.

**CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,
RULES AND REGULATIONS INVOLVED**

The Fourth Amendment to the Constitution of the United States provides as follows:

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. *Id.*

The Sixth Amendment to the Constitution of the United States provides:

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 defense. *Id.*

Fed. R. Crim. P. 52 provides:

Rule 52. Harmless Error and Plain Error.

- (a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
- (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On or about 1-28-15 Larry J. Norton was charged with violation of 21 U.S.C. § 846 (conspiracy to distribute and possess with the intent to distribute 1 kilogram or more of a mixture and substance containing a detectable amount of heroin, 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine, and marijuana) (Count 1).

These charges originated from evidence seized after a traffic stop for speeding in a construction zone which police admitted was pretextual but which was argued to have been a legal stop under state law.

He was arraigned on or about 3-13-15 at which time he pleaded not guilty to the charged violations.

Notably, the indictment did not charge any prior convictions.

On 6-24-15, counsel filed a motion to suppress. In this motion and at the subsequent hearing, counsel argued, *inter alia*, that the evidence seized from Mr. Norton's traffic stop was violative of the Fourth Amendment because the traffic stop was unlawful. Counsel established unequivocally that the 'construction zone' was inactive because it was only active when the flashing lights were on which they weren't. Consequently, there was no "construction zone" and the reduced speed limit, relied upon by police for the stop, was actually NOT "reduced". Additionally, counsel demonstrated that the police officers' testimony was irreconcilably conflicting. This not only established that their testimony was unreliable but also demonstrated that at least one of the officers committed perjury.

The lower courts ignored the perjury by one of the officers and held that the stop and search were consistent with the Fourth Amendment.

On 4-28-16, a Magistrate Report & Recommendation was issued recommending denial of the motion to suppress. In the Report & Recommendation the Magistrate Judge ignored the perjury by one of the officers and held that the stop and search were consistent with the Fourth Amendment. (Appendix C)

On 5-4-16, Mr. Norton filed objections to Magistrate Report & Recommendation.

On 5-26-16, the District Court adopted the Magistrate Report & Recommendation and denied the motion to suppress.

On or about 5-17-17 the government filed an “information” alleging for the first time that Mr. Norton had been previously convicted of a Drug Trafficking Crime. This information was filed ostensibly pursuant to 21 U.S.C. § 851.

On or about 5-23-17 Mr. Norton proceeded to trial. (Appendix B)

On 6-1-17, Mr. Norton was found guilty by the jury as to violation of 21 U.S.C. § 846 (conspiracy to distribute and possess with the intent to distribute 1 kilogram or more of a mixture and substance containing a detectable amount of heroin and 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine) (Count 1).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 43 and a Criminal History of II which resulted in a guideline sentencing range of “life” incarceration. This recommendation increased both the statutory maximum and the statutory mandatory minimum based on facts not pleaded in indictment, not presented to the jury, and not proven beyond a reasonable doubt. (Presentence Report, ¶¶80-81)

On 9-7-17, Mr. Norton appeared for sentencing. At sentencing, the district court relied on the Presentence Report to increase Mr. Norton’s statutory mandatory minimum and statutory maximum sentence to “life incarceration”. (Transcript of Sentencing 9-7-17, pages 5-6, 14-15)

On 9-7-17, Mr. Norton was sentenced to life incarceration for violations of 21 U.S.C. § 846 (conspiracy to distribute and possess with the intent to distribute 1 kilogram or more of a mixture and substance containing a detectable amount of heroin and 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine) (Count 1). This sentence represented enhancement of both Mr. Norton's statutory maximum and his statutory mandatory minimum based on the fact of prior convictions which were not pleaded in indictment, not presented to the jury, and not proven beyond a reasonable doubt. (Appendix B) (Transcript of Sentencing 9-7-17, pages 5-6, 14-15)

The judgment was entered on 9-7-17.

On 9-13-17, a Notice of Appeal was filed. On direct appeal, counsel argued

- I. THE DISTRICT COURT ERRED IN DENYING NORTON'S MOTION TO DISMISS.
 - A. Standard of Review
 - B. The Trial Court Committed Clear Error in Finding a Traffic Violation
 - C. Officer Shultz' Testimony Is Not Saved by the Collective Knowledge Doctrine
- II. THE DISTRICT COURT ERRED IN ADMITTING THE CHS' HEARSAY STATEMENTS
 - A. Standard of Review.
 - B. The statements of the CHS provided no context, and thus were inadmissible

(Norton USCA Brief, PDF pages 3-4)

On 6-20-18, the Court of Appeals denied Mr. Norton's appeal. In denying the appeal, the Court of Appeals, *inter alia*, ignored the perjury by one of the officers involved in the traffic stop and held that the stop and search were consistent with the Fourth Amendment.

Mr. Norton demonstrates within that (A) this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power

of supervision; (B) this Court should grant his Petition For Writ Of Certiorari to decide the viability of *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) subsequent to the Court's decisions in *United States v. Booker*, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05) and *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005).

REASONS FOR GRANTING THE WRIT

- 1.) **THIS COURT SHOULD GRANT MR. NORTON'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise its power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).¹ As the Court stated in *McNabb*:

... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

¹ See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

McNabb, 318 U.S. at 340.

1A.) A Mistake Of Law By Police In The Stopping Of Mr. Norton's Vehicle Rendered The Subsequent Search Violative Of The Fourth Amendment

“The Fourth Amendment protects individuals from unreasonable search and seizure.” *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir.), cert. denied, 534 U.S. 830, 122 S. Ct. 73, 151 L. Ed. 2d 38 (2001); U.S. Constitution Amendment IV. However, a traffic stop is a constitutional detention if it is justified by reasonable suspicion under *Terry* or probable cause to believe a traffic violation has occurred under *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996). The touchstone of the Fourth Amendment is reasonableness” *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497 (2001). Thus, in order to determine whether or not a specific Fourth Amendment requirement such as probable cause or reasonable suspicion has been met, the court must determine if the officer’s actions were reasonable. See *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62, 134 L. Ed. 2d 911 (1996).

Notably, for a Fourth Amendment analysis, the difference between a mistake of law and a mistake of fact is critical. An officer’s reasonable mistake of fact may provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop, but an officer’s mistake of law may not. *United States v. Chanthalasouk*, 342 F.3d 1271, 1276, 2003 U.S. App. LEXIS 17550 **12 (11th Cir. 2003); *United States v. Campos*, 2004 U.S. App. LEXIS 13691 (9th Cir. 2004); *United States v. Colin*, 314 F.3d 439, 2002 U.S. App. LEXIS 27180, 2003 (9th Cir. 2002); *United States v. Raney*, 633 F.3d 385, 2011 U.S. App. LEXIS 2428 (5th Cir. 2011); *United States v. Sowards*, 690 F.3d 583, 2012 U.S. App. LEXIS 13255 (4th Cir. 2012).

In Mr. Norton's case, it was established that the police made a mistake of law when they decided that Mr. Norton was exceeding the posted "construction zone" speed limit when there was no active construction zone what-so-ever so there was no reduced speed either.

In spite of the clear and obvious mistake of law by the police, the lower courts held that the stop was lawful so the Fourth Amendment was not violated. This holding by the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Id.*

1B.) Multiple Errors In The Courts Below Mandate That Mr. Norton's Conviction And/Or Sentence Be Vacated.

In Mr. Norton's case, the CHS or "confidential human source" who initiated and recorded conversations and activities involving drugs "violated his cooperation agreement" with the government by using drugs and by his discussion of drug dealing. On information and belief, the CHS was also on parole or probation and the government did not follow the law in using his services under those conditions. *Cf. Maxwell v. Roe*, 628 F.3d 486, 2010 U.S. App. LEXIS 24432 (9th Cir. 2009).

Further Grounds

Mr. Norton's conviction and sentence are violative of the First, Second, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Norton's conviction and sentence are violative of his right to freedom of speech and to petition and his right to keep and bear arms and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Norton's sentence.

These claims in Argument 1B are submitted to preserve Mr. Norton's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id.* *McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973);

United States v. Jacobs, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Seventh Circuit in Mr. Norton's case.

2.) **THIS COURT SHOULD GRANT MR. NORTON'S PETITION FOR WRIT OF CERTIORARI TO DECIDE THE VIABILITY OF *ALMENDAREZ-TORRES V. UNITED STATES* SUBSEQUENT TO THE COURT'S DECISIONS IN *UNITED STATES V. BOOKER* AND *SHEPARD V. UNITED STATES*.**

United States v. Booker, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05), like *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) and *Blakely v. Washington*, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573 (6-24-04) hold that a “statutory maximum” sentence cannot be enhanced by facts not charged in indictment, not submitted to a jury, and not proven beyond a reasonable doubt, or admitted by a defendant. The cases, however, expressly create an exception from their Sixth Amendment holding for facts of prior conviction. As stated in *Booker*, “Any fact (*other than a prior conviction*) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 125 S. Ct. at 756. (emphasis added) But this exception is not consistent with the broad reasoning of these three cases, which would seem to require that any fact increasing the sentence range must be either admitted or proven to the jury. See *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

In *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005), decided after *Booker*, the Court strongly suggested that the prior conviction exception should be viewed narrowly and that *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), on which this exception is based, may soon be overturned.²

² See also *United States v. Gibson*, 2006 U.S. App. LEXIS 60 (11th Cir. 1-4-06); *United States v. Greer*, 2006 U.S. App. LEXIS 510 (11th Cir. 1-10-06)

In *Alleyne v. United States*, 133 S. Ct. 2151; 2013 U.S. LEXIS 4543 (6-17-13), the Supreme Court extended the rule of *Apprendi* to hold that any fact that imposes or increases the statutory mandatory minimum penalty for a crime beyond the default sentence statutory mandatory minimum must also be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

In Mr. Norton's case, both his statutory mandatory minimum and his statutory maximum sentence were enhanced for prior convictions which were not charged in indictment, presented to a jury and proven beyond a reasonable doubt.

His case would be an ideal case for the Court to use to determine the continuing viability of *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) subsequent to *United States v. Booker*, 543 U.S. 220, 2005 U.S. LEXIS 628 (1-12-05) and *Shepard v. United States*, 125 S. Ct. 1254; 161 L. Ed. 2d 205; 2005 U.S. LEXIS 2205 (2005). This is particularly true because the constitutional violation has resulted in a sentence of life incarceration for Mr. Norton.

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Seventh Circuit in Mr. Norton's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Larry J. Norton respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**³ to the court of appeals for reconsideration in light of the Fourth Amendment.

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³ For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).