No. 18-6810

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY HICKMAN-SMITH,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

Timothy Hickman-Smith, pro se

Federal Prison Camp

P.O. Box 700

Yankton, South Dakota 57078

QUESTIONS PRESENTED FOR REVIEW

1. Did inventory search violate this Court's decisions in South Dakota v. Opperman and Colorado v. Bertine, as well as the Fourth Amendment to the Constitution?

2. Did Petitioner's counsel render ineffective assistance during pre-trial proceedings by his failure to present evidence and testimony refuting Government's allegation that law enforcement acted in good faith when they towed Petitioner's vehicle due to a "parking violation," when in fact Petitioner had permission for over 10 years to park in his mother's driveway?

3. Did the appellate court err by not addressing Petitioner's claim that the District Court failed to appoint him counsel pursuant to Rule 8(c) of the Rules Governing § 2255 Proceedings, a reversible error?

LIST OF PARTIES IN COURT BELOW

The caption set out above contains the names of all the parties.

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TABLE OF AUTHORITIES CITED

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Other Cases:

United States v. Hickman-Smith (direct appeal)
Case No. 15-3661

Hickman-Smith v. United States (appeal of denial of § 2255 motion)
Case No. 17-1953

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the United States District Court for the District of Nebraska was not reported, but is set forth at Appendix ("App'x") pgs. 72-77.

The original conviction of Petitioner was appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the conviction in all respects in an opinion not reported, but is set forth at App'x pg. 82.

The decision of the United States District Court for the District of Nebraska on Petitioner's § 2255 motion is not reported, but is set forth at App'x pgs. 128-133.

The opinion of the Court of Appeals below is not reported, but is set forth at App'x pg. 150.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on **November 21, 2017**. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "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."

2. The statute under which Petitioner was prosecuted, was 21 U.S.C. § 841(a)(1) & (b)(1), which provide:

> "**Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.
>
> **Penalties.** Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows: (1)(A)(iii) In the case of a violation of subsection (a) of this section involving 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base."

3. The statute under which Petitioner sought post-conviction relief was 28 U.S.C. § 2255, which provides:

> "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.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from final judgment on application for writ of habeas corpus.

An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

4. Rule 8(c) of the Rules Governing § 2255 Proceedings provides:

"**Appointing counsel; time of hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding."

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

I. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE NOW BEFORE THIS COURT.

On December 11, 2014, in a cause then pending in the United States District Court for the District of Nebraska, entitled United States v. Timothy Hickman-Smith, Criminal No. 8:14CR367, a one count indictment charging violation of 21 U.S.C. § 841(a)(1) & (b)(1), a hearing was held on Petitioner's motion to suppress. The motion was denied by the magistrate judge and with an exception, upheld by the Senior District Court judge upon Petitioner's objections to the findings and recommendation of the magistrate judge.

Petitioner's counsel advised that the denial was not an appealable matter and Petitioner filed a petition to enter a plea of guilty on May 6, 2015.

On August 7, 2015, the District Court entered judgment and Petitioner was sentenced to 120 months imprisonment at Count One.

On October 20, 2015, acting pro se, Petitioner filed a motion requesting leave to file pro se brief to appeal motion to suppress. This was in response to Petitioner's counsel's failure to file the notice of appeal and was construed by the United States Court of Appeals for the Eighth Circuit as such.

The Eighth Circuit, at Case No. 15-3661, entered judgment on February 1, 2016, dismissing the appeal as untimely.

On July 28, 2016, Petitioner filed the motion in the case at bar under 28 U.S.C. § 2255 to vacate and set aside the judgment of conviction. On September 15, 2016, the District Court ordered the Government to answer the following issues raised by Petitioner: 1) claims of ineffective assistance of counsel; and 2) claims of prosecutorial misconduct. An affidavit was submitted to the record by Petitioner's counsel (App'x pgs. 123-125) and the Government answered Petitioner's claims on November 2, 2016. The District Court granted Petitioner's motion for permission to reply and upon receipt, ordered a hearing to determine whether Petitioner instructed counsel to file an appeal.

On March 2, 2017, the District Court entered an order denying the motion pursuant to 28 U.S.C. § 2255. It issued a memorandum and order on the same day.

On April 25, 2017, and pursuant to this Court's decision in Houston v. Lack, Petitioner filed a notice of appeal and application for certificate of appealability. The District Court denied the application on April 28, 2017 and Petitioner filed same with the Eighth Circuit and it too was denied, on November 21, 2017, establishing this Court's jurisdiction to review this petition for certiorari.

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE 280 GRAMS OR MORE OF COCAINE BASE.

The relevant facts are contained in Petitioner's motion pursuant to 28 U.S.C. § 2255. During the hearing on Petitioner's motion to suppress, there were two essential questions at issue: 1) did law enforcement have sufficient probable cause to search Petitioner's vehicle; and 2) did law enforcement act with proper motive, in good faith, to justify an inventory search of Petitioner's vehicle while it was lawfully parked in the driveway located at his official address of record?

The suppression hearing highlighted several facts supporting Petitioner's claim that law enforcement—a detective-led gang task force—did not have sufficient probable cause to search his vehicle. This was well-established, of course, when the Senior District Court judge summarized the probable cause issue in his memorandum and order (App'x pg. 70):

> "the odor of raw marijuana detected in a vehicle during an investigative stop gives law enforcement probable cause to search the vehicle and its containers for drugs. Citation omitted. **The Court finds the evidence is tenuous in this regard since no significant amount of marijuana was found, no other officers detected the odor, and particularly given that this happened on previous occasions."**

This conclusion puts to rest any lingering doubt as to the probable cause issue and speaks volumes to law enforcement's underlying motives.

However, it is out of the judge's next conclusion that an important issue of law is borne, and it is here that Petitioner asks this Court to decide:

> "however, the Court finds that the officers had a right to stop and ultimately arrest defendant. Based on the fact that the officers believed the defendant parked on private driveway other than his own following a lawful stop, blocking other vehicles, and whereas the defendant did not tell the officers otherwise, the evidence at issue in this motion would have been discovered in any event during the inventory search. Citation omitted."

Several problems rise from this conclusion and Petitioner will argue them in forthcoming.

III. EXISTENCE OF JURISDICTION BELOW.

Petitioner pled guilty in the District Court for the District of Nebraskato one count of possession with intent to distribute 280 grams or more of cocaine base, pursuant to 21 U.S.C. § 841(a)(1) & (b)(1). A section 2255 motion was filed in that Court, and appealed to the Eighth Circuit upon denial.

IV. THE LOWER COURTS HAVE MADE CONCLUSIONS THAT CONFLICT WITH DECISIONS OF THIS COURT.

This Court presided over seminal cases addressing the constitutionality of impoundments resulting in inventory searches. In South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the Court provided

examples of lawful grounds for impoundment, such as instances in the interest of public safety and "community caretaking functions." This includes vehicle accidents and damaged or disabled vehicles. It is clear that a fully functioning vehicle parked in its owner's private driveway would, in no manner whatsoever, jeopardize public safety or impede traffic.

This Court's later decision in Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), permits police discretion so long as such is exercised according to standard criteria **and** on the basis of something **other than suspicion of evidence of criminal activity.**

Petitioner respectfully urges that the lower courts' findings concerning the inventory search are erroneous and at variance with this Court's decisions.

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT LAW ENFORCEMENT'S INVENTORY SEARCH WAS LAWFUL, THUS UPHOLDING THE ONLY EVIDENCE AT ISSUE.

This case should be reduced to a single determination—whether law enforcement impounded Petitioner's vehicle lawfully with good faith motive. The District Court, however, gifted the prosecution with a second bite at the apple by finding that the inventory search was inevitable due to "lawful" impoundment. Petitioner strongly disagrees, and for good reason.

The District Court supports impoundment for the following reasons, all of which undermine not only the law, but sound reason, logic, and typical police procedure: 1) "the officers believed the defendant parked on private driveway other than his own"; 2) "block[ed] other vehicles"; and 3) "the defendant did not tell the officers otherwise." (App'x pgs. 70-71).

In reducing the case to these three supporting claims, the trier of fact must ask him or her self the following: 1) did the gang task force detectives ever ascertain to whom the driveway belonged; 2) did Petitioner's mother's residence have its own driveway (5616 N. 29th Street); 3) does the tow policy allow for arbitrary impoundment where no complaint has been filed or no investigation has been undertaken; 4) why does the prosecution aver so adamantly that the tow and inventory

search is an incurable issue, as if a later determination of illegality does not unwind the District Court's finding and make the evidence poisonous; 5) of the six (6) bystanders to witness this arrest (App'x pg. 68), why were none interviewed to determine the owner of the driveway; and 6) why or how does the prosecution shift the burden to Petitioner to show an exception to the warrant requirement?

The suppression hearing firmly established that the same law enforcement detectives had repeatedly attempted traffic stops as a pretext to investigate Petitioner prior to the arrest at issue (App'x pgs. 12-14). Each time, these same detectives used the "odor of marijuana" banner to search Petitioner's vehicle, never once finding even a minute amount of the drug. It was also well-established that these detectives were not ordinary law enforcement, but assigned to a gang task force (App'x pg. 5). To suggest these detectives never once took notice of Petitioner's government-issued identification and did not specifically know his official address of record from the ID (5616 N. 29th Street), is preposterous. To further undermine the finding of the District Court, Petitioner's actual operator's license was retrieved by the crime scene technician as she analyzed the vehicle based on the "probable cause" of the "odor of raw marijuana," an odor she never detected (App'x pgs. 51, 68).

The suppression hearing also established the fact that when Petitioner exited his vehicle, he addressed individuals the detectives plainly concede they believed to be his mother and brother (App'x pgs. 9, 10). How could it possibly be, then, that they "believed" Petitioner parked on private driveway other than his own? Would not the logical next step be to at least interview one of the six individuals to make a determination? Or does this reek of bad faith motive, contrary to Colorado v. Bertine?

The detectives claim Petitioner actually impacted his brother's Mustang as he entered the driveway (App'x pgs. 66, 67), so if this were investigated to even the least degree fathomable, it would have been determined that Petitioner had every right to park in the driveway.

If this Court finds Petitioner's arguments to be correct, the latter two supporting claims by the District Court are immaterial. To be sure, one cannot "block other vehicles" in driveway shared by family members—at least not in the sense the detectives suggest—the sense that would necessitate police intervention. Finally, it goes against every tenet of law to suggest it was Petitioner's responsibility to tell the detectives he was parked in his mother's private driveway. Even as he was already being transported from the scene of the arrest prior to being informed of the tow, it beggars belief that a ny court of law

would adopt such an unconstitutional proposition. What follows this? Does the homeowner now confer with the police before entering his home from work lest they think he is attempting to burglarize himself? Absolutely not. Petitioner suggests the entire "parking violation" argument is moot when one considers that the detectives conducted previous surveillance activities at 5616 N. 29th Street, specifically directed at Petitioner (App'x pgs. 12-14, 15, 67). Law enforcement knew for a fact that Petitioner had been parking in that driveway for years prior to his arrest on September 11, 2014. Any other suggestion is nonsense.

Most importantly, however, is how these actions of law enforcement undermine this Court's decisions in South Dakota v. Opperman, and Colorado v. Bertine. It is clear that none of the District Court's reasons for upholding impoundment, and thus inventory search, align with these decisions. Petitioner's vehicle was not a public safety hazard, it was not damaged or disabled, nor did it impede traffic in any manner whatsoever. With Colorado v. Bertine in view, one must find that law enforcement's motives were not for "something other than suspicion of evidence of criminal activity," i.e. in good faith. To feign ignorance of Petitioner's permission to park in his mother's private driveway, in light of all the above mentioned facts, one can only conclude the impoundment and inventory search was conducted solely out of suspicion

of evidence of criminal activity, in violation of Colorado v. Bertine.

II. THE COURT OF APPEALS ERRED IN FINDING THAT PETITIONER'S COUNSEL WAS EFFECTIVE.

This Court's seminal decision in the case Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), establishes a two-prong test to weigh the effectiveness of counsel. Petitioner must offer compelling evidence of the following: 1) that counsel's performance "fell below an objective standard of reasonableness"; and 2) that he suffered prejudice as a result.

Here, counsel's failure to properly argue the issue of the inventory search, notably in his memorandum brief in support of objection to findings and recommendation of magistrate (App'x pgs. 152-156), when it was a matter of which he was clearly aware, was objectively unreasonable. To support this claim, and show his focus was directed almost exclusively on the probable cause issue and in proving the lead detective lied during his suppression hearing testimony—an otherwise reasonable and proper component of strategy—Petitioner points to the motion to amend the transcript of hearing on defendant's motion to suppress (App'x pgs. 157-159).

Further proving counsel's ineffecttiveness, it is apparent from the record that he failed to recognize the significance of law enforcement's possession of Petitioner's Nebraska operator's license on numerous occasions (App'x pg. 51). Counsel never makes

the obvious connection between the license and the detective's illogical claim of ignorance of Petitioner's authority to park in the driveway at the address on the license and how such undermines all credibility. Even as this is true, counsel was wrong in his assessment that the case was reduced solely to findings of credibility. Certainly this was true with respect to the probable cause issue, but definitely not regarding the inventory search. In the latter, the issue is wholly determined by the facts—all of which were readily available to Petitioner's counsel. But rather than call witnesses and introduce evidence to support Petitioner's defense—that he had permission for the last 10 years to park his vehicle in the private driveway at issue—counsel merely rested on the claim that proving otherwise was the prosecution's burden. While this is true, and any court of law in the U.S. would recognize this foundational tenet, it would have been objectively reasonable to show the court that Petitioner was authorized to park in the driveway, thus undermining the prosecution's lack of investigation and unsubstantiated claim of ignorance. We have several tenets of law that, even though are established as protection for all citizens, are many times waived to the benefit of justice. For example, to say that a defense attorney does not present evidence because it is "the government's burden to do so," would be like saying a criminal defendant never takes the stand to defend himself because the law provides that he shall not be subject to self-incrimination. The point is that had counsel

invalidated the prosecution's claim of an alleged parking violation, the court would have likely ruled conversely—knowing as fact that Petitioner had permission to park in the driveway and invalidated the unlawful inventory search, as the gang task force's sergeant testified at the suppression hearing (App'x pg. 48).

Petitioner's counsel was also ineffective by making contradicting statements with respect to the burden of proof during separate phases of the case. During pre-trial proceedings, counsel strongly suggested that Petitioner had no burden of proof to "show an exception to the warrant requirement" (App'x pg. 160). However, during section 2255 proceedings, counsel submitted an affidavit in which he states:

> "The defendant also testified that his mother lived at the address where he was parked and shared the driveway where he was parked with her neighbor; he also testified that he had been parking there for 10 years; however, he **never told the officers that information;** affiant mentions this because the defendant claims, in his petition, that his brother and mother could have testified about the parking arrangements and that affiant should have produced them as witnesses to testify on that specific issue; that affiant did not call the mother and brother because of the fact that the defendant had never conveyed that information to the officers and their testimony would not have proven anything...that since the defendant had never told any of the officers about his right to park in the driveway there was nothing affiant could do to successfully object to the vehicle being towed to the impound lot."

This undermines the concept of meaningful adversarial testing and the fairness of the judicial process. How could you properly argue

the issue pre-trial when your words do not align with your obvious beliefs, shared in your affidavit (App'x pg. 124). More than this, counsel's argument in his affidavit makes no sense. How can you present proof upon proof that the probable cause is illegal, but not the impound? What defense attorney would not attempt, at a minimum, to cast doubt on the matter? What would have been the cost or risk of producing Petitioner's family and neighbor as witnesses? Petitioner suggests that counsel cannot have it both ways, in one phase he claims the inventory search is a nothing issue—one he characterizes as both "reductio-ad-absurdum" and "legal schizophrenia" (App'x pgs. 164, 165)—to indicting his client and effectively placing the burden of proof on him in a later phase. Such is "reductio-ad-absurdum."

In focusing so heavily on the probable cause issue, counsel shows his incompetence of the two-fold nature of this case and opened the door for the court to rule in the Government's favor (App'x pgs. 59, 60). Just as a boxer has two hands that must be defended against, so this case had two issues—equally important—to strategically defend. While counsel was certainly correct in his assessment that if the probable cause was debunked, the case "goes down the drain," that is only effectively true if law enforcement's motives are lawful. However, because counsel was well aware of the prosecution's intent to keep the evidence at all costs, even falling back on a frivolous claim of a "lawful" inventory search, he had a constitutional duty to argue this issue, present evidence supporting the defense, and he failed to

do so. Such is objectively unreasonable, and the appellate court erred in not making this determination. It goes without saying that Petitioner was prejudiced by counsel's deficiencies, as the only evidence against him in this case was preserved by these faulty decisions.

III. THE COURT OF APPEALS ERRED BY IGNORING PETITIONER'S CLAIM THAT THE DISTRICT COURT FAILED TO APPOINT HIM COUNSEL FOR AN EVIDENTIARY HEARING.

The appellate court erred by failing to address Petitioner's argument, stated in his application for certificate of appealability (App'x pg. 140), wherein he claims the District Court erred by failing to appoint counsel during an evidentiary hearing on a matter before the court. At issue was whether or not Petitioner instructed counsel to file a notice of appeal, supporting his ineffective assistance of counsel claim.

After the evidentiary hearing, the court issued a memorandum and order (App'x pgs. 128-133), wherein it states at footnote no. 1:

> "The court also received a phone log from Tassha Teamer, defendant's girlfriend at the time in question. Filing No. 99. The Exhibit does show that Ms. Teamer may have called Mr. Gallup's office on three occasions. However, the court finds this is very limited evidence, as there is no testimony regarding these phone calls, the content of these phone calls, and how they relate to a possible request for appeal. Again, Ms. Teamer did not appear and testify at the defendant's recent hearing on the appeal issue. Thus, the court discounts the relevance and evidentiary value of this Exhibit."

Had the court appointed counsel, who would have been able

to ensure the appropriate legal actions were taken to present evidence at the hearing, it is possible the outcome would have been markedly different. The Eighth Circuit's rulings on this issue are indisputable.

In Roney v. United States, 205 F.3d 1061 (2000), the Eighth Circuit held:

> "Roney's two trial attorneys testified that he did not ask either of them to file a notice of appeal. The district court made a finding to that effect and again denied § 2255 relief. Roney appeals, arguing that the district court erred in not appointing counsel to represent him at the § 2255 evidentiary hearing, an issue that does not require a certificate of appealability."

It is incumbent, under these circumstances, the Rule 8(c) violation is not a harmless error as Roney was remanded for further proceedings not inconsistent with the Eighth Circuit's opinion.

IV. THE QUESTIONS RAISED IN THIS PETITION ARE IMPORTANT UNRESOLVED.

A decision should be made by this Court, regarding the case at bar and as to the questions presented, to ensure that the Eighth Circuit is properly applying this Court's decisions in past cases, to similar cases in the future.

Whereas the Eighth Circuit has not properly applied the decisions of South Dakota v. Opperman and Colorado v. Bertine, as well as making determinations at variance with other constitutional law, Petitioner respectfully suggests that his questions provide a firm basis for granting certiorari in this case.

CONCLUSION

The judgment below is a departure from decisions of this Court that require impoundment not be made against any U.S. citizen—assuming the criteria of South Dakota v. Opperman are met—for the sole purpose of investigating suspected evidence of criminal activity. Whereas law enforcement did not comply with either South Dakota or Colorado, this petition for writ of certiorari should be granted. The ineffective assistance of counsel issue, as well as the violation of a § 2255 rule further support this argument.

Dated: February 16, 2018

Respectfully submitted,

Timothy Hickman-Smith, pro se
Federal Prison Camp
P.O. Box 700
Yankton, South Dakota 57078