No. 18-6903

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS McLAURIN – PETITIONER

vs.

NEW YORK – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

NEW YORK STATE APPELLATE DIVISION, FOURTH DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New York State appellate court's holding that a defective search warrant can be cured by an incorporated search warrant application – a conclusion also reached by all of the other New York appeals courts to have ruled on the issue – requires this Court's intervention because the issue cannot be raised in a petition for habeas corpus.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at 160 A.D.3d 1438 (4th Dep't 2018).

The decision/order of the Onondaga County Court appears at Appendix B and is unpublished.

The order of the New York Court of Appeals denying leave to appeal appears at Appendix C and is not yet reported.

JURISDICTION

The date on which the highest state court decided my case was August 24, 2018. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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.

The Fourteenth Amendment to the United States Constitution provides, in Section 1:

> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction th equal protection of the laws.

STATEMENT OF THE CASE

1. The Facts

1. On September 18, 2013, an Onondaga County Sheriff's Deputy ("the deputy") applied for and obtained a search warrant for my residence, based on controlled purchases of cocaine at my residence by an informant. Appendix A at 1.

2. Later the same day, the deputy pulled my car over and arrested me. He saw, on the floor of my car, some white debris which testified positive for cocaine. Appendix A at 1.

3. Immediately after my arrest, the deputy transported me to my residence, where I was held while he and other law enforcement officers executed the search warrant. Appendix A at 2.

4. I began complaining that I felt ill. Law enforcement officers called an ambulance and I was taken to the hospital, accompanied by a law enforcement officer. Appendix A at 2.

5. After I left for the hospital, the deputy left the residence and prepared a search warrant application. Appendix A at 2.

6. The search warrant application stated, in relevant part:

> "While in custody [during execution of the search warrant] Curtis Mclaurin was very verbal, and constantly shifting as if he had something down his pants. . . . . Several attempts were made to try and search Mr. Mclaurin however, he would refuse every time, and would turn his body away, he began limping and complaining of shortness of breath. . . . . Prior to leaving for the hospital Mr. Mclaurin was advised he would have to be searched prior to the ambulance leaving the scene. Mr. Mclaurin agreed to the search, however while attempting to search him he continually refused to allow his pants, underwear, or his groin and buttocks area to be searched. Mr. Mclaurin would intentionally move his buttocks away from view and would clench his buttocks and stiffen up his body so as not to allow a visual search of his person."

Appendix E at 2. The application stated:

> "It is also common for suspected drug dealers/traffickers to conceal narcotics, paraphernalia or money on their person in an attempt to prevent the police from detecting such items."

Appendix E at 2. The application concluded:

> "There is reasonable cause to believe that narcotics, specifically crack cocaine is being illegally sold and/or possessed on the person of a black male named Curtis Mclaurin . . . based on three controlled purchase of confirmed crack cocaine from the target and the crack cocaine that was located in the vehicle that Curtis Mclaurin was operating."

Appendix E at 3. There was no mention in the application of the possibility that I, or that drug dealers in general, might conceal narcotics in a body cavity.

7. Based on this application, a local judicial officer issued a search warrant stating:

> "You are hereby directed to search:
>
> "A black male known as Curtis L. McLaurin, described as being approximately 6'00", 180 pounds with a date of birth of 6/30/1980. Also, any motor vehicle that Curtis McLaurin is operating and/or has custody and control over, and/or being a passenger in at the time the warrant is being executed, to include any handbags and/or carrying items that he could reasonably conceal cocaine and any other illegal substances."

Appendix F. The warrant authorized a search for cocaine, paraphernalia, and drug records.

8. The deputy took this warrant to the hospital where I was being held. An x-ray examination was conducted which showed an object in my rectum. The deputy had the attending physician manually search my rectum, from which he removed a bag that contained crack cocaine. Appendix A at 2.

2. The State Court Decisions

9. I was charged in Onondaga County Court with possessing the cocaine recovered during the search of my anal cavity. I filed a motion to suppress on the ground that the warrant did not specifically authorize a manual body cavity search.

10. The County Court denied the motion to suppress, stating:

> "[T]he Court finds that subsequent search of the defendant's anal cavity by the doctors at the hospital resulting in the recovery of additional contraband from the defendant's anal cavity was lawful in all respects as such search was authorized pursuant to the search warrant signed by Judge Bogan for the person of Curtis L. McLaurin."

Appendix B at 9. The court acknowledged *Schmerber* v. California, 384 U.S. 757 (1996), but concluded:

> "[T]he court is of the opinion that the issuing magistrate was clearly informed regarding the underlying circumstances, ie, that cocaine was recovered from the defendant's vehicle, that the defendant was moving around as if he was hiding something, that the defendant requested to go to the hospital and that he refused the police to perform a search of his person, supported the conclusion and belief of Detective Clere that the defendant was hiding cocaine on his person sufficient to establish probable cause . . . .
>
> "Moreover, the Court is of the opinion that the issuance of the search warrant authorizing the search of the defendant's person included the search of the defendant's anal cavity . . . ."

Appendix B at 10-11.

11. Based on the cocaine removed from my body cavity, I was convicted of criminal possession of a controlled substance in the fourth degree in violation of New York Penal Law § 220.09(1), and sentenced to a determinate prison term of six years, to be followed by 1½ years of postrelease supervision. Appendix D. I am currently incarcerated at Mid-State Correctional Facility in Marcy, New York.

12. I appealed my conviction to the New York State Appellate Division, Fourth Department, on the ground that my conviction was based on a search that violated the Fourth Amendment and *Schmerber,* as demonstrated in *United States v.*

Nelson, 36 F3d 758 (8th Cir 1994) (evidence recovered in manual body cavity search was suppressed because the warrant authorized only a search of the defendant's "person" and did not specifically authorize a body cavity search).

13. The Fourth Department affirmed my conviction, relying on the language used in the search warrant application template – the form requires the applicant to describe the property "in or upon" which evidence may be found. Appendix E at 1. The application was neither incorporated in nor attached to the search warrant. The court did not address my citation to *Groh* for the proposition that an unincorporated search warrant application cannot cure a defective warrant. Appendix A at 2-3.

14. I applied to the Court of Appeals for leave to appeal. Appendix G. My application relied on *Groh* and *Schmerber.* It was summarily denied. Appendix C.

REASONS FOR GRANTING THE PETITION

1. Introduction

Three of the four New York State appellate divisions have upheld search warrants based on the contents of unincorporated warrant applications. None of these decisions cite *Groh*. They rely on *dictum* in a 43-year-old decision from the New York Court of Appeals, to the effect that a court reviewing a search conducted pursuant to warrant should apply common sense when looking to the "the descriptions in the warrant and its supporting affidavits." *People v Nieves,* 36 N.Y.2d 396, 401 (1975). New York's other appellate division has not confronted the issue since *Groh*. Lower court decisions within that division, however, have acknowledged *Groh* and acknowledged that it has abrogated the New York Court

of Appeals' dictum in *Nieves*. The New York Court of Appeals has denied leave to appeal in the cases that have ignored *Groh*.

2. Under *Groh v. Ramirez,* defects in search warrants cannot be cured by unincorporated applications.

In *Groh v. Ramirez,* the Supreme Court found that a search was in violation of the Fourth Amendment because the warrant failed to provide a description of the evidence sought. 540 U.S. at 557. Although the warrant application contained a detailed affidavit with that information, the Court explicitly rejected the argument that this was sufficient to save the defective warrant. *Id.* "The fact that the *application* described the "things to be seized' does not save the *warrant* from its facial invalidity." (*Id.,* emphases in original). The Court noted that courts have construed warrants with reference to supporting applications, but only when the warrant uses appropriate words of incorporation and is accompanied by the application at the time of the search. *Id.* The warrant in *Groh,* however, was neither incorporated in the warrant nor attached to it (*id.*).

3. The New York State Appellate Division ignored *Groh.*

In the present case, the Appellate Division did not address my citation to *Groh*. Instead, the court relied on the New York Court of Appeals' decision in *People v. Nieves*, which in dictum rejected "hypertechnical" requirements so long as "the descriptions in the warrant and its supporting affidavits [are] sufficiently specific to enable the searcher to identify the persons, places or things that the Magistrate has previously determined should be searched or seized." 36 N.Y.2d at 401.

4. Two of New York's three other appellate divisions are also ignoring *Groh*.

With this decision, the Fourth Department joins the Second and Third Departments which have also held, post-*Groh*, that an unincorporated search warrant application can cure a defect in the warrant. In *People v. DeMartino*, 82 A.D.3d 1260, 1261 (2d Dep't 2011), *appeal denied,* 17 N.Y.3d 858 (2011), the Second Department upheld the search of a garage, even though it was not listed in the search warrant: "[T]he garage was referenced in the search warrant application and supporting documents." Similarly, the Third Department relied on *People v Nieves* in holding that a search warrant's overly vague property description was cured by the application. *People v. Thomas,* 155 A.D.3d 1120, 1121 (3d Dep't 2017); *see People v Carpenter,* 51 A.D.3d 1149 (3d Dep't 2008) (although warrant contained wrong address, defect was cured by warrant application), *appeal denied,* 21 N.Y.3d 1073 (2008). None of these cases address or distinguish *Groh*; they appear to simply ignore the Supreme Court's holding in favor of the New York Court of Appeals's dictum.

5. These appellate divisions are in conflict with lower courts in the First Department.

By contrast, several courts in the First Department have relied on *Groh* to suppress evidence where the search warrant is defective. The supreme court in *People v. English,* 52 Misc. 3d 318, 325 (Sup. Ct., Bronx County 2016) held that, "to the extent that *Nieves* permits the consideration of unincorporated supporting documents to cure an otherwise defective search warrant, it has been abrogated by the Supreme Court's decision in *Groh v Ramirez.*" *People v. Covlin,* 58 Misc. 3d 996, 1005 (Sup. Ct., New York County 2018), contains a lengthy discussion of this

topic, noting that there does not appear to be "any New York appellate authority which has explicitly analyzed this issue". The court had no difficulty in concluding that *Groh* prohibits resort to an unincorporated application, and ordered suppression *(id.* at 1003); *see also People v Gabriel,* 58 Misc. 3d 1230[A] (Sup. Ct. New York County 2017) (cell phone search warrant was overbroad and could not, under *Groh,* be cured by unincorporated warrant application).

These cases demonstrate that there is a split of authority in the state of New York regarding the application of *Groh.* Even New York's legal treatises on the issue are confused. The New York Criminal Practice treatise states that a defect in a search warrant can be cured by reference to the application, citing *DeMartino* and two pre-*Groh* cases, but not mentioning *Groh* (2 New York Criminal Practice § 21.06 (5)(a)). The New York Search & Seizure treatise states that an application can cure a defect in the warrant under some circumstances, but in others the application must be explicitly incorporated in the warrant and attached to the warrant when the search takes place (1 New York Search & Seizure § 4.02(5)(c) and (d)).

6. New York law is in conflict with federal law.

The federal courts, by contrast, have applied *Groh* uniformly. *See Covlin,* 58 Misc. 3d at 1004 (collecting cases). Even before *Groh,* in a federal case substantially similar to this one, evidence was suppressed because it was seized in a body cavity search pursuant to a warrant authorizing merely a search of the defendant's "person." *United States v Nelson,* 36 F3d 758, 760 (8th Cir 1994). The defect could not be cured by an unincorporated application even though it (unlike the application in the present case) did seek authorization and establish probable cause for a body cavity search. *Id.*

7. This petitioner, like the defendants in the other New York cases that have refused and likely will continue to refuse to apply *Groh,* has no other recourse because of *Stone v. Powell.*

Under *Stone v. Powell,* 428 U.S. 465 (1976), a challenge to a conviction based on a suppression issue will not be entertained under 28 U.S.C. § 2254. Therefore, I have no recourse except to this Court.

Groh was decided fourteen years ago. It established a rule of constitutional law, applicable to the states through the Due Process clause of the Fourteenth Amendment. After all this time, three of New York State's four appellate divisions are still ignoring *Groh* and upholding the admission of evidence seized in violation of its ruling. This case is a most egregious example because it involves a search of the most intimate parts of a person's body. Under this decision, as long as police use New York's standard search warrant application template, they may at their discretion subject any person to be searched to a potentially dangerous medical procedure, without a magistrate's pre-authorization.

I respectfully submit that this Court's Fourth Amendment law is not being applied in the courts of New York State. Without this Court's intervention, individuals in New York State continue to be convicted and imprisoned based upon searches that violate the Fourth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: 9/9/18

Respectfully submitted,

Curtis L McLaurin

Curtis McLaurin