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18-8909

No. 19 - \_\_\_\_\_

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In The  
Supreme Court of the  
United States

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DAVID LEE GENTLES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for A Writ of Certiorari to the United  
States Court of Appeals for the Eighth Circuit*

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**PETITION FOR A WRIT OF *CERTIORARI***

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David Lee Gentles, *Pro Se*

No. 40038-044

FCI Forrest City

P.O. Box 9000

Forrest City, AR 72336

**ORIGINAL**

## **QUESTION PRESENTED**

I. Should a clear violation of the Posse Comitatus Act (18 U.S.C.A. § 1385), serve as foundation for suppression of fruits of the resulting illegal search and seizure?

## **PARTIES TO THE PROCEEDINGS**

Petitioner, David Lee Gentles was the Defendant- Movant in the United States District Court for the Eastern District of Missouri, Southeastern Division in USDC Case 1:17-cv-200, and Appellant in the United States Court of Appeals for the Eighth Circuit in USCA Case No. 18-2626

Respondent, United States of America was the named Plaintiff - Respondent in the United States District Court for the Eastern District of Missouri, Southeastern Division in USDC Case 1:17-cv-200, and Appellant in the United States Court of Appeals for the Eighth Circuit in USCA Case No. 18-2626. No other relevant parties are represented in the instant action.

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OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court's judgment is unpublished and may be found at USCA Case No. 18-2626; *David Lee Gentles v. United States* (December 3, 2018) (Appendix - A1). The Judgement of the District Court for the Eastern District of Missouri is unpublished and may be found at USDC Case No. 1:17-cv-200; *David Lee Gentles v. United States of America* (June 18, 2018) (Appendix - A2).<sup>1</sup>

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1. "DE" refers to docket entries on the docket for the United States District Court for the Eastern District of Missouri, Southeastern Division in Case No. 1:17-cv-200, which is immediately followed by the corresponding docket entry number unless so noted.

**STATEMENT OF JURISDICTION**

The instant matter is an appeal from a final judgment and denial of a Motion to Vacate. Notice of Appeal was timely filed on July 30, 2018 [DE #14](Appx. - A32), thereby vesting the Eighth Circuit Court Appeals with jurisdiction pursuant to 28 U.S.C. §2253(c)(1)(B), and Rule 22(b). The instant petition is timely and this Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that defendants in criminal trials have a right to counsel. As the Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results[,] ... the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984)(internal citation and quotation marks omitted).

The Posse Comitatus Act (18 U.S.C.A. § 1385), makes it a crime, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," to "willfully" use "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" of the United States or of any of its states or territories.

## STATEMENT OF THE CASE

### **A. Proceedings in the Courts Below**

The instant petition is the result of the denial of Petitioner's ("Gentles") application for Certificate of Appealability ("COA") in the U.S. Eighth Circuit Court of Appeals asking two questions: First, did the district court err or alternatively abuse its discretion by determining that there was no basis for, or support of, an ineffective assistance of counsel claim on any ground submitted in Motion to Vacate?

Second, did the district court err or alternatively abuse its discretion by dismissing Motion to Vacate and failing to Order an attorney response, as well as an evidentiary hearing when considering tendered Sworn Declaration by Gentles? (See, USCA Case No. 18- 2626) (Appx. at A3)

On or about March 19, 2015, a multi-count redacted second superseding criminal Indictment was returned in the Eastern District of Missouri alleging *inter alia*, violations of Title 18 U.S.C. §2252A and §1470.

(DE #131) Gentles was the named defendant in all Counts. On mis- advice of counsel, and poor communication relative to Gentles guideline exposure, he would eventually put the government to its burden and proceed to jury trial from April 28 - April 29, 2015. (DE #152, #153 & #155). He was convicted of all Counts as alleged.

Over non existent objections at sentencing on August 11, 205, the district court adopted the Presentence Investigation Report (“PSIR”) and imposed a below the advisory Guidelines range sentence of 120 months with Supervised Release of 15 years. No fine was assessed and no restitution imposed.

A timely Notice of Appeal was filed on August 18, 2015. (DE #174). After briefing on the merits, a panel of the Eighth Circuit (Wollman, Bright, and Kelly CJ.) affirmed on December 6, 2016. (See, USCA 15-2845)(672 Fed.Appx.609). No petition for a writ of *certiorari* was filed with the Supreme Court.

On November 16, 2017, Gentles advanced in his *pro se* 28 U.S.C. §2255 Motion

to Vacate and Supporting Memorandum of Law the following claims of ineffective assistance of counsel: (1) Trial counsel was ineffective by failing to gain suppression or limit trial exposure for clear violation of the Posse Comitatus Act - appellate counsel was ineffective for failure to brief preserved error; (2) Trial counsel was ineffective for failure to seek psychosexual evaluation before providing advice on proceeding to trial, or acceptance of a plea offer; (3) Counsel was ineffective in failing to adequately explain guideline exposure where favorable and beneficial plea was twice offered by the government; (4) Counsel was ineffective in failing to challenge eleven of the fifteen points of aggravating enhancements applied at sentencing; and (5) Gentles asserted an Eighth Amendment challenge to USSG §2G2.2.

The government responded in opposition on March 16, 2018 and Gentles filed a timely Reply. Just six weeks later the district court denied each claim on the merits and dismissed his §2255. The remaining procedural events are addressed above. The instant petition follows.

### SUMMARY OF THE ARGUMENT

Gentles' issue turns upon the admitted wrongful use of the Posse Comitatus Act (18 U.S.C.A. § 1385), by the investigating NCIS Agent who orchestrated local law enforcement's involvement, and was found to have illegally done the same in the past, clearly rendering the search and seizure of Gentles' property at his home illegal.

## ARGUMENT

Should a clear violation of the Posse Comitatus Act (18 U.S.C.A. § 1385), serve as foundation for suppression of fruits of the resulting illegal search and seizure?

Relevant here, The Posse Comitatus Act (18 U.S.C.A. § 1385), makes it a crime, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," to "willfully" use "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" of the United States or of any of its states or territories. The Act states that violators "shall be fined under this title or imprisoned not more than two years, or both." There is no private right of action under the Act.

The term "posse comitatus" ("power of the county") denotes a sheriff's common law authority to command the assistance of able-bodied citizens in order to enforce the law. At common law, only the sheriff could organize a posse. See, *United States v. Hart*, 701 F.2d 749 (8<sup>th</sup> Cir. 1983). Current law permits any police officer to command the assistance of able-

bodied persons when their assistance is necessary to make an arrest or recapture an escaped prisoner. Instead of organizing a posse, the modern police officer can summon one or more bystanders when necessary and the summons confers on the bystander(s) the authority to render any and all assistance that the officer requires.

Two unrelated events revived interest in the Act during the 1970's. One was the armed occupation in 1973 of the village of Wounded Knee, South Dakota by members of the American Indian Movement. During the occupation of Wounded Knee, the Army provided and maintained equipment that civilian law enforcement officers used, offered advice to the civilian officers, and made surveillance flights over the surrounding area in military helicopters. Consequently, the defendants in the criminal cases that followed the occupation, when charged with hampering a "law enforcement officer lawfully engaged in the lawful performance of his official duties," argued that the marshals and Federal Bureau of Investigation (FBI) agents who deployed at Wounded Knee had not acted lawfully because they used military personnel as a posse

comitatus.

The court decisions in these, and similar cases, interpreted the Posse Comitatus Act to prohibit participation by military personnel in traditional civilian law enforcement tasks that are "direct" and "active," that is, "regulatory, prescriptive, or compulsory in nature, either presently or prospectively." In other words, violations of the Act have been found, or have been found supportable where military personnel assisted in civilian law enforcement by making arrests, searching persons and/or property, seizing evidence, *investigating crimes*, interviewing witnesses, pursuing escaped civilian prisoners, and searching an area for suspects. *United States v. Banks*, 383 F. Supp 368 (D.S.D. 1974); *United States v. Casper*, 541 F.2d 1275 8<sup>th</sup> Cir. 1976)

The Posse Comitatus Act and the exceptions thereto reflect the principle articulated in the Constitution and federal statutes that civil power is superior to military power, except when civil power is suspended, as in times of war or public danger. The Act limits, but does not prohibit, the use of military personnel to assist in the enforcement

of civil law. Although the Posse Comitatus Act (PCA) does not directly reference the Navy, the restriction on military personnel providing direct assistance to civilian law enforcement applies to the Navy, including agents of the Naval Criminal Investigative Service (NCIS), as a matter of Department of Defense (DoD) and Naval policy. 10 U.S.C.A. § 375; 18 U.S.C.A. § 1385; 32 C.F.R. § 182.6(a)(2). *United States v. Dreyer*, 767 F.3d 826 (9<sup>th</sup> Cir. 2014).

Relevant here, the NCIS agent (discussed below) that wrongly investigated Gentles and orchestrated local law enforcement's involvement, has been found to have illegally done the same in the past, all in violation of the PCA. This conduct by the same agent would clearly constitute a "pattern" that should have been glaring to the district court after Gentles' suppression hearing had concluded. At a minimum, counsel should have sought interlocutory appeal of the denial of Gentles' suppression hearing once the testimony of the NCIS Agent had been made for the record.

The Ninth Circuit's opinion in *United*

*States v. Dreyer*(804 F.3d 1266), portrays the dangers and violations by the NCIS agent at issue in this case as well ... one Steve Logan. Although the Ninth Circuit did not apply the exclusionary rule in *Dreyer* (to deter further abuse), Agent Logan's own testimony clearly illustrates his premeditated and violational conduct. He testified that his duties as an NCIS agent were “[t]o investigate any federal, U.S. federal crimes, or crimes against the Uniform Code of Military Justice.” He also claimed he had authority to investigate “[p]ossession and distribution of child pornography across the [I]nternet” because it is “a federal crime” and NCIS agents “are credentialed U.S. federal agents.” Notably, at one point Agent Logan specifically disavowed that his investigative authority was limited:

Q. [Y]ou are limited in the areas that you can investigate, wouldn't that be correct?

A. No, sir, that would not be correct.

Agent Logan at no point testified that he limited his investigations to military personnel, and the foregoing testimony indicates that he did not believe his authority to be limited in any way. Indeed, Agent Logan explained that he had a standard practice of

“monitor[ing] all computers in a [certain] geographic area” without regard to military status. Yet RoundUp’s geographic accuracy is limited to “a 25– to 30–mile radius.”

As noted in *Dryer*, the Ninth Circuit “recognize that because some military bases are in remote areas, it might be possible to fashion a targeted RoundUp inquiry that would encompass only an insignificant number of civilian-owned computers. The record does not tell us whether the scope of the other NCIS investigations Logan described went beyond geographic areas that legitimately could be expected to include high concentrations of military personnel. What is clear is that the investigation in Dreyer’s case resulted from an investigative technique that NCIS did not consider to be out of bounds.” To the contrary, Logan testified that after the three-judge panel of the Ninth Circuit issued its opinion unanimously finding that his conduct violated PCA-like restrictions, NCIS put “[a]bsolutely no [ ]” restrictions on him.<sup>2</sup> NCIS’s misunderstanding about the contours of the

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2. Indeed, at Gentles’ Suppression hearing, Agent Logan made it clear he believed his conduct was authorized and approved “all the way to headquarters.” See, (DE #112), Trans at pp. 70-77.

PCA and PCA-like restrictions is further evident in the Government's emphatic assertion before the district court and the three-judge panel that Logan's actions were permissible. *United States v. Dreyer*, 804 F.3d 1266, 1276–77 (9th Cir. 2015).

Just as with the instant case, there is clear and unquestionable abuse of the PCA and NCIS does not believe any federal court will stop or penalize the abuse, and so, it blatantly and admittedly continues.<sup>3</sup>

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3. The criminal defendant who wishes to assert a defense predicated upon the Act bears the burden of demonstrating that the claimed violation occurred, provided the defendant knows that military personnel played a role in effecting his arrest. The government need only show compliance with the Act after the defendant raises a defense based upon the Act. A defendant who knows that a defense based upon the Act is applicable (e.g., knows that military personnel conducted surveillance and/or participated in the arrest), but fails to raise that defense prior to trial, waives the right to do so pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure. Therefore, counsel who represent defendants to whom this defense is available must raise it before trial, in a motion to dismiss the indictment or a motion to suppress evidence obtained by means of a search in

For counsel's failures relative to this violation of the PCA and appellate counsel's failure to brief a clearly preserved claim on direct appeal, Gentles still seeks a finding of ineffective assistance of both attorneys.

## CONCLUSION

For the reasons stated above, this Court should Grant the petition to provide clear and indisputable guidance for the lower courts on such important matters. Alternatively, Grant, Vacate and Remand to the Eighth Circuit Court of Appeals.

Dated: February 17, 2019

Respectfully submitted,

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which military personnel participated.