No. 19-6585

In The
Supreme Court of the United States

GELU TOPA,

Petitioner,

v.

ALMONTE KERBS, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to The United States Court of Appeals
for the Eleventh Circuit

Brief in Opposition

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QUESTION PRESENTED

Respondents respectfully submit that the only cognizable legal question that the Petition arguably presents to this Court for review—which Petitioner failed to preserve in the court of appeals—is whether the district court erred in dismissing Petitioner's third amended pleading on the alternative basis of failing to effectuate service properly pursuant to Fed. R. Civ. P. 4(c)(2).

PARTIES TO THE PROCEEDING

The parties to the proceedings are as follows:

Gelu Topa is the Petitioner. He was the Plaintiff in the district court and the appellant in the court of appeals.

Officers Almonte Kerbs, Rochelle Mejias, Donald Weathers, and Daniel Wolfgang are the Respondents. Officers Kerbs, Mejias, Weathers, and Wolfgang were the Defendants in the district court and the appellees in the court of appeals.

RELATED PROCEEDINGS

The related proceedings below are:

1. *Topa v. Kerbs, et al.*, No. 19-10819 (11th Cir.) — Judgment entered August 27, 2019; and
2. *Topa v. Kerbs, et al.*, No. 2:18-cv-00475-SPC-MRM (M.D. Fla.) — Judgment entered February 12, 2019.

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Pursuant to Fla. Stat. § 796.07(2)(f) (2014), "[i]t is unlawful [t]o solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation."

Pursuant to Fla. Stat. § 796.07(1)(a) (2014), "'[p]rostitution' means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses."

The Fourth Amendment to the United States Constitution states:

> 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.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' unpublished opinion affirming the district court's order of dismissal can be found at 774 F. App'x 606 (11th Cir. 2019). The district court's unpublished opinion and order dismissing Petitioner's Second Amended Complaint with prejudice may be found at 2019 WL 527968 (M.D. Fla. Feb. 11, 2019). *See also* Pet. App. 6–10.

JURISDICTIONAL STATEMENT

Respondents agree with Petitioner that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

Petitioner was arrested in Fort Myers, Florida on July 10, 2014 for soliciting a prostitute in violation of Fla. Stat. § 796.07(2)(f) (2014). On July 6, 2018, Petitioner, proceeding *pro se*, filed his initial Complaint against Respondent, Officer Almonte Kerbs, a police officer with the City of Fort Myers Police Department, an "Unknown Female," and "Unknown Undercover Officers" under 42 U.S.C. § 1983 for entrapment, false arrest, and "expose to media (TV.) [sic]." *Topa v. Kerbs*, No. 2:18-cv-475-FtM-38MRM, 2018 WL 4698462, at *1 (M.D. Fla. Oct. 1, 2018).

Petitioner did not serve Officer Kerbs properly pursuant to Fed. R. Civ. P. 4. According to the Certificate of Service, Petitioner instead personally served the "law enforcement office." *Topa*, 2018 WL 4698462, at *3. Officer Kerbs filed a motion to

dismiss asserting the defenses of failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(4). The district court granted the motion to dismiss on both grounds and ordered Petitioner to serve Officer Kerbs pursuant to Fed. R. Civ. P. 4(c)(2). *Topa*, 2018 WL 4698462, at *3.

On October 25, 2018, Petitioner filed his Amended Complaint against Respondent, Almonte Kerbs. *See Topa v. Kerbs*, No. 2:18-cv-475-FtM-38MRM, 2018 WL 6249847, at *1 (M.D. Fla. Nov. 29, 2018). The Amended Complaint included Respondents Rochelle Mejias, Donald Weathers, and Daniel Wolfgang as additional defendants, all of whom are police officers of the City of Fort Myers Police Department. *Id.* Based on a liberal reading of the Amended Complaint, Petitioner brought claims against Respondents under 42 U.S.C. § 1983 "for excessive force, false arrest, and entrapment." *Id.*

Yet again, Petitioner failed to effectuate service pursuant to Fed. R. Civ. P. 4(c)(2) properly. *Id.* at *2. Petitioner served the Amended Complaint by "personally hand-deliver[ing] the Amended Complaint to the Fort Myers City Attorney's Office." *Id.* Petitioner also failed to include a certificate of service with his Amended Complaint. *Id.* Respondents filed a motion to dismiss the Amended Complaint for failure to state a claim and for insufficient service of process. *Id.* at *1.

The District Court dismissed Petitioner's Amended Complaint for failing to state a claim and for insufficient service of process. *Id.* at *2. In dismissing the Amended Complaint, the District Court noted "[t]he Amended Complaint represents

a confusing mixture of allegations with relevant facts, irrelevant facts, disjointed narrative, conclusory accusations, and legal argument." *Id.* at *2. The district court granted Petitioner leave to amend and ordered Petitioner once again to effectuate service pursuant to Fed. R. Civ. P. 4(c)(2). *Id.*

On December 18, 2018, after two prior unsuccessful pleading attempts, Petitioner filed his Second Amended Complaint against Respondents, attempting to assert the same claims arising out of 42 U.S.C. § 1983 as his prior Amended Complaint. Pet. App. 6–7. The Second Amended Complaint alleged, in relevant part, that Officer Mejias, who was posing as an undercover prostitute, approached Petitioner's car. Pet. App. 7. Petitioner alleged he led Officer Mejias to believe that he was soliciting her only to get Officer Mejas to leave Petitioner alone. *Id.* Moments later, Petitioner was arrested. *Id.*

This time, Petitioner "personally served [all] four Defendants." Pet. App. 10. Respondents filed their Motion to Dismiss the Second Amended Complaint on the same grounds asserted in response to Petitioner's prior pleadings. Pet. App. 6. The district court dismissed Petitioner's Second Amended Complaint with prejudice for failing to state a claim upon which relief can be granted and for insufficient service of process. Pet. App. 10. The district court entered judgment in favor of the Respondents. Pet. App. 4.

Petitioner appealed the judgment to the Eleventh Circuit Court of Appeals. The court of appeals observed that "Topa does not argue that process was properly served." Pet. App. 2; *Topa*, 774 F. App'x at 607. The court of appeals affirmed the

judgment only on the basis that Petitioner's "second amended complaint, liberally construed, does not assert facts sufficient to state a claim upon which relief can be granted." 774 F. App'x at 607.

Petitioner timely filed his Petition for Writ of Certiorari. Petitioner also filed his Motion for Leave to Proceed *In Forma Pauperis*. Respondents do not challenge that Petitioner may proceed *in forma pauperis*. *See* Sup. Ct. R. 39.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition outright for failing to comply with Sup. Ct. R. 14.4. The Petition should also be denied because Petitioner fails to present a properly-preserved, meritorious, and compelling legal question for this Court to review. *See* Sup. Ct. R. 10.

I. THE PETITION SHOULD BE DENIED FOR FAILING TO COMPLY WITH SUP. CT. R. 14.4.

The Petition fails to "present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration." Sup. Ct. R. 14.4. Like Petitioner's pleadings in the district court and Petitioner's brief in the circuit court of appeals, *see* Pet. App. 16–17, the Petition is "a confusing mixture of allegations with relevant facts, irrelevant facts, disjointed narrative, conclusory accusations, and legal argument." *See Topa*, 2018 WL 6249847, at *2. Petitioner's failure to comply with Sup. Ct. R. 14.4 is "sufficient reason for the Court to deny the Petition."

II. THE PETITION FAILS TO PRESENT A PROPERLY-PRESERVED, MERITORIOUS, AND COMPELLING LEGAL QUESTION FOR THIS COURT TO REVIEW.

The only cognizable legal question that the Petition arguably presents to this Court for review is the last of twelve questions—whether the district court erred in dismissing Petitioner's third amended pleading on the alternative basis of failing to effectuate service properly pursuant to Fed. R. Civ. P. 4(c)(2). This question was not preserved in the court of appeals. Even if Petitioner had preserved this issue, Petitioner's argument is meritless. Additionally, insofar as the Petition can be construed to fairly include the question of whether the Second Amended Complaint stated a claim under 42 U.S.C. § 1983, *see* Sup. Ct. R. 14.1(a), the court of appeals correctly affirmed the district court's order of dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Even if the court of appeals erred, which it did not, this case still falls within the category of cases that rarely merit this Court's review. *See* Sup. Ct. R. 10.

A. The Petition Fails to Raise a Properly-Preserved Question for this Court's Review.

The only legal question that Petitioner explicitly raises in the Petition relates to the portion of the district court's order dismissing Petitioner's third amended pleading on the alternative basis of failing to effectuate service properly pursuant to Fed. R. Civ. P. 4(c)(2). Pet. 2. Petitioner did not "argue that process was properly served" in the court of appeals. Pet. App. 2; *Topa*, 774 F. App'x at 607. The court of appeals affirmed the judgment only on the basis that the Second Amended Complaint failed to state a claim. *Id.*

This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *see also Adickes v. S.H. Kress & Co*, 398 U.S. 144, 188, n.2 (1970); *Lawn v. U.S.*, 355 U.S. 339, 367, n.16 (1958). Respondents object to Petitioner raising this question for the first time in the Petition. *See Canton v. Harris*, 489 U.S. 378, 384 (1989) ("Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari."). This Court should not grant the Petition to review this question.

B. Even if Petitioner Preserved the Insufficient Service of Process Issue in the Court of Appeals, Petitioner's Argument is Meritless.

Fed. R. Civ. P. 4(c)(2) provides that "[a]ny person who is at least 18 years old and not a party may serve a summons and complaint." The law is well-settled by this Court and the courts of appeal that *pro se* litigants are not excused from complying with ordinary rules of procedure. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."); *see also EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014) ("Despite our general willingness to construe *pro se* filings liberally, we still require *pro se* parties to fundamentally 'abide by the rules that govern the federal courts.'") (citation omitted); *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) ("At the end of the day, [*pro se* litigants] cannot flout procedural rules—they must abide by the same rules that apply to all other litigants."); *Albra v. Advan, Inc.*, 490 F.3d 826,

829 (11th Cir. 2007) (affirming dismissal of *pro se* litigant's pleading for failing to comply with Fed. R. Civ. P. 4(c) on grounds that *pro se* litigant was required to "conform to procedural rules").

Petitioner failed to abide by Fed. R. Civ. P. 4(c)(2). Petitioner refused to obey two district court orders dismissing Petitioner's pleadings and instructing Petitioner to serve the Respondents properly. Petitioner's argument to the contrary, which Petitioner failed to present to the court of appeals, is meritless.

C. Insofar as the Petition Can be Construed to Fairly Include the Question of Whether the Second Amended Complaint Stated a Claim Under 42 U.S.C. § 1983, the Court of Appeals Correctly Affirmed the District Court's Order of Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6).

A claim for false arrest under 42 U.S.C. § 1983 requires the plaintiff to show he was arrested without probable cause in violation of the Fourth Amendment. *See D.C. v. Wesby*, 138 S. Ct. 577, 594, n.6 (2018) ("[Plaintiffs] do not contest that the presence of probable cause defeats all of their claims."); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Probable cause exists where circumstances create a probability or substantial chance of criminal activity; probable cause is not a high bar. *See D.C.*, 138 S. Ct. at 586.

The Second Amended Complaint alleged, in relevant part, that Petitioner led Officer Mejias to believe that Petitioner was soliciting her only to get Officer Mejas to leave Petitioner alone. *Id.* "By asserting that he showed interest in the woman * *

* [Petitioner] created circumstances showing a substantial chance of criminal activity." *Topa*, 774 Fed. App'x at 607. The Second Amended Complaint facially alleged the existence of probable cause. The presence of probable cause is an absolute bar to liability for false arrest under 42 U.S.C. § 1983. The court of appeals correctly affirmed the district court's order of dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

D. Even if the Court of Appeals Erred, Which it Did Not, this Court Should Still Deny the Petition.

"This Court applies uniform standards in determining whether to grant review in cases involving allegations that a law enforcement officer engaged in unconstitutional conduct." *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (mem.) (Alito, J., concurring in denial of certiorari). This Court "may grant review if the lower court conspicuously failed to apply a governing legal rule." *Id.* Conversely, this Court rarely grants review "where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Id.* (citing Sup. Ct. R. 10).

The court of appeals correctly applied this Court's long-standing jurisprudence regarding individual police officers' liability for false arrest under 42 U.S.C. § 1983. Even if the court of appeals erred, however, the asserted error is a simple error that places this case in the latter category of cases that rarely merit this Court's review. The Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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