No. 19-7014

IN THE

SUPREME COURT OF THE UNITED STATES

GEOFFREY SCOTT GAFFNEY – PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CETIORARI TO

EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

GEOFFREY SCOTT GAFFNEY
FCI Terre Haute
P.O. Box 33
Terre Haute, IN 47808

QUESTION PRESENTED

SHOULD THIS COURT GRANT THIS PETITION TO ADDRESS THE OBVIOUS FAILURE OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REQUIRE A DISTRICT COURT TO CONDUCT AN EVIDENTIARY HEARING WHERE EVIDENCE AND FACTS BY THIS COURT'S STARE DECISIS MANDATING AN EVIDENTIARY HEARING UNDER PROCUNIER V. ATCHLEY, 400 U.S. 446 (1971)?

LIST OF PARTIES

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

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STATUTE AND RULES

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari is issued to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals decided my case was September 17, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals on October 23, 2019, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

Criminal actions – Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer... without due process of law; nor shall private property be taken for public use, without just compensation.

§ 2255... Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or...

(b) 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 judgement 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 judgement vulnerable to collateral attack, the court shall vacate and set judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF FACTS

At trial below, the testimony showed that "Officer Albert Bovy was stopped at a red light. Directly in front of him, he saw Petitioner's vehicle approaching the intersection from the opposite direction. As the light changed to green, the vehicle moved through the intersection. The officer made a u-turn and turned on his lights. Petitioner immediately braked and made a right hand turn at the next street and pulled over.

Officer Bovy approached and said "do you know why I stopped you"? Petitioner replied "no, I wasn't speeding". Officer Bovy stated the Petitioner was going 55-65 mph. IN Court Bovy stated that Petitioner said he was only going in the 40's. (This can't be disputed because Officer Bovy turned off his body mic). While Officer Bovy was awaiting a license check dispatch told Bovy that Petitioner had previous narcotics history and was told by Officer Gann that "Gaffney was still involved in illegal activity'. Returning to the vehicle the officer states he noticed Petitioner appeared nervous with beads of sweat on his forehead and a shaky voice and hands, and heavy breathing. The officer asked Petitioner if there were any drugs or weapons in the vehicle. Petitioner answered 'no' but declined permission to search his vehicle. The officer ordered him to exit the vehicle to prepare for a dog sniff (the officer was a K-9 unit). Petitioner told officer

he could go ahead and walk the dog around but he did not want to exit the vehicle. Officer Bovy told Petitioner he had to exit the vehicle or be removed. Petitioner conceded after several requests. Officer Bovy told Petitioner he wanted to conduct a pat down search for weapons. Petitioner raised his hands to be searched and Bovy asked Petitioner to move out of the road for the search. Petitioner moved in between the Officers vehicle and his own and again raised his hands for a search. Bovy asked Petitioner to 'move out of the way of traffic', Petitioner was confused as they were not in the way of traffic. Bovy guided Petitioner up the curb and intentionally out of the view of officers' dash cam. During the pat down search for weapons Officer BOvy claims he detected a 'long tube with a bulb at the end which was known to him to be a meth pipe'. He asked Petitioner it as he had the other officer cuff him. Petitioner stated there was nothing in his pocket. Petitioner was then arrested and Officers conducted a search of Petitioner's vehicle which uncovered 2 large bags of meth.

Petitioner moved in State Court to suppress any evidence from the traffic stop, challenging the lawfulness of the stop, prolonged terry stop, the Pretext of the stop, and the pat down search. The State charges were dropped by prosecutors as they wanted a continuance and decided they could not win the case and dropped all charges. The Petitioner was held on a no bond hold and then charged in Federal Court. Petitioner's Federal Public Defender was given the case and all materials

from the State Attorney as it was presented and won in State Court. She chose to only challenge the lawfulness of the stop and the pat down search against the wishes of the Petitioner. At the suppression hearing, Officer Bovy testified he received training in identifying speed more than a decade earlier. He stated that he 'typically did not do much in the way of speeding violations', and did not remember if he "ever" turned on his in car radar unit. He said his estimate of 55-65 mph was based on his general experience with traffic stops and his familiarity with the area. He did not know the distance the car traveled from when it first appeared until it passed him. Petitioner presented evidence that his vehicle travelled 470 ft. in 9 seconds which calculated to a maximum speed of 35.8 mph. **United States v. Gaffney**, 789 F.3d 866 (2013).

Based upon these allegations, defense counsel sought suppression on the issue that Petitioner was not speeding. That motion was denied, and Petitioner was transferred to State custody after a conditional plea of guilty dependent upon the outcome of the appeal of the suppression hearing. **Gaffney, Id.**

Thereafter, Petitioner filed a timely Motion under **28 U.S.C. § 2255**, asserting that he had received ineffective assistance of Counsel at suppression level where Counsel failed to follow Petitioner's request to follow prior Counsels lead on four issues as well as to further investigate and provide evidence establishing that the vehicle stop was in fact pretextual.

Counsel was alerted by Petitioner, tat his traffic stop had in fact been pretextual and based on an informants statement.

During pretrial proceeding, Petitioner consistently told defense Counsel that the Officer, who had effectuated the stop of his vehicle, had not merely observed what he claimed to be a speeding vehicle, but had stopped him due to information obtained prior to the stop. Petitioner told Counsel that he was called several times by a person wanting to know what vehicle he was in and how close he was to his home. Petitioner further advised Counsel that a review of the phone records for incoming calls by and between the informant and Petitioner would match corollary phone calls from the same number to the Officers' phone. These records were readily available to Counsel, and subject to production by way of subpoena duces tecum. As well, those records could have been readily verified by expert witnesses, had Counsel sought same.

More plainly state, had the phone records from the Petitioner's phone and from the Officer's been sought, it is evident that the Officer was given a "tip", which is the reason he stopped the Petitioner. NOT, as he falsely claimed, due to a (since discredited) claim that the Petitioner was travelling 55-65 mph in a 35 mph zone.

Petitioner argues that he had a pretextual stop claim which Counsel failed to present.

Counsel provided a statement at the District Court, essentially claiming that she had no specific recollection of the instances claimed by the Petitioner, which the Court determined to be credible, in answer to the **§ 2255** motion, and upon which the Court relied to deny the motion.

This action by the Court runs absolutely counter to established statute and case law, where Counsel's claims are controverted by evidence, and therefore credibility issues could only be denied after a full and fair hearing.

To be clear, the District Court made no mention of, nor apparently considered:

1. Petitioner sworn declaration:
2. Certified copies of video and audio records from police cars and body mics presented to the Court. Those videos establishing that the arresting officers' written report DID NOT conform to what is visible in the videos.

Further, the videos clearly show the arresting officer turning the body mic on/off, and purposely placing Petitioner outside the view of the dash camera's sight line.

Although snippets of the recorded conversation record the arresting officer saying:

A. "He did not think Petitioner would stop because he had been arguing with his girlfriend on the phone at the local store", despite the fact that the local

store at issue WAS NOT in the line of sight form where the officer claimed he was parked, and that information was clearly beyond the officer's spatial and proximal abilities.

B. During the search of the vehicle the officer can be seen activating his body mic and some conversation heard concerning the contents of Petitioners vehicle. Then after finding the contraband in the trunk, the officer again deactivates his body mic AGAIN and moves outside the view of the dash camera to make a phone call.

3. The Court took no notice of the transcripts and order from the State Court suppression hearing.

Petitioner presented to the Court a copy of the State Court Suppression Motion filed by then State Attorney Tom Frerichs, This case had its Genesis in Black Hawk County, IA before Federal authorities assumed jurisdiction.

In short, Mr. Frerichs filed a suppression hearing in State Court, arguing the illegality of the search of Petitioner. As the record from that hearing shows, Mr. Frerichs asked the Prosecutor and arresting officer to affirm there was no informant, drug investigation or prior knowledge involved in the case. Mr. Frerichs then announced that he would like to see if Officer Bovy exceeded the scope of **Minnesota v. Dickerson**. The response from both was the negative. At that time the State sought a

continuance claiming they were not prepared for this sort of defense. The charges were then dropped with prejudice the very next day. This information was provided to the Federal Public Defender Ms. Johnson in this case, but no review or use of the records was had.

4. Defense Counsel's own declaration does not refute this claim (State Suppression), as she does not recall the same.
5. Likewise, Defense Counsel does not recall Petitioner asking to testify in the suppression hearing.

All of this evidence, video, audio, reports, motions, transcripts, Petitioner's sworn affidavit, the ability of Mr. Frerichs to testify as to the State Suppression Hearing, a request for subpoenas for phone records, and more were provided to the Court and the Court and prosecutor below. These items and issues are not illusionary, they are not cumulative, and they controvert statement of Defense Counsel.

Likewise, had this information been known to a jury, Petitioner would have been acquitted.

A fortiori, the District Court was required to grant an evidentiary hearing, and on plenary review by this Court, a finding that this was an error ought to have resulted.

ISSUE PRESENTED

THIS COURT SHOULD GRANT THIS PETITION TO ADDRESS THE OBVIOUS FAILURE OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REQUIRE A DISTRICT COURT TO CONDUCT AN EVIDENTIARY HEARING WHERE EVIDENCE AND FACTS WHICH ARE UNCONTOVERTED AND EXTANT, AS REQUIRED BY THIS COURT'S STARE DECISIS MANDATING AN EVIDENTIARY HEARING UNDER PROCUNIER V. ATCHLEY, 400 U.S. 446 (1971).

The Rules Governing Section 2255 Proceedings for the United States District Courts, **28 U.S.C. § 2255**, make it abundantly clear that the judge may direct that the record be expanded to include letters, documents, exhibits, answers under oath to interrogatories, requests for admission, and affidavits. **28 U.S.C. § 2255 Rule 7**. Discovery in the form of interrogatories, requests for admission, documents, and depositions may be authorized by the court. **28 U.S.C. § 2255 Rule 6**. The court may then determine whether an evidentiary hearing is required.

It is black letter law, that:

"A prisoner is entitled to an evidentiary hearing on a **28 U.S.C. § 2255** motion unless the motion, files and records of the case conclusively show that the prisoner is not entitled to relief. **28 U.S.C. § 2255**. A petition can be dismissed without a hearing if **(1)** the appellant's allegations, accepted as true, would not entitle the appellant to relief, or **(2)** the allegation cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." **Id.**

In other words:

Section § **2255** states that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief; the District Court shall conduct a hearing on the claim. **28 U.S.C. § 2255(b)**.

An evidentiary hearing on a § **2255** motion must be granted when the facts alleged would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied. **Procunier v. Atchley**, 400 U.S. 446, (1971); **Willis v. Ciccone**, 506 F.2d 1011, 1019 (8th Cir. 1974); **Shelton v. Ciccone**, 578 F.2d 1241 (8th Cir. 1978).

In his pro se § **2255** motion, Petitioner provides the details which form the basis of these claims. Much like the petitioner in **Blackledge v. Allison**, 431 U.S. 63 (1977), Petitioner has provided specific factual allegations. He indicated exactly what statements were allegedly made to him and when, where and by whom the statements were made. Compare **Blackledge v. Allison**, supra, 577 F.2d at 449050, and **United States v. Huffman**, 490 F.2d 412 (8th Cir. 1973), Cert. denied 416 U.S. 988 (1974).

Petitioner raised a substantial showing to the violation of his due process right to full protection of the law, abrogation the Fifth Amendment, where the District Court denied the Motion under **28 U.S.C. § 2255** without an evidentiary hearing, and the Appellate Court in turn abjured in applying the correct standard to the application, which mandated a remand for an evidentiary hearing. **Procunier**, supra 400 U.S. 446.

Because there is uncontroverted facts, evidence, aural and video proof submitted to the District Court, which was on the record, the District Court's denial of an evidentiary hearing, and the affirmance of the denial by the Court of Appeals conflicts with the statutory and Supreme Court precedence.

CONCLUSION

The Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted,

On this 6th day of December, 2019

GEOFFREY SCOTT GAFFNEY