

No. 19-7173

19-7173

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

KENNETH ROSE

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA ^{et al.}

RESPONDENT(S)

FILED

DEC 13 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KENNETH ROSE

(Your Name)

WARREN CORRECTIONAL INSTITUTION
5787 STATE ROUTE 63

(Address)

LEBANON, OH 45036

(City, State, Zip Code)

(513) 932-3388

(Phone Number)

QUESTIONS PRESENTED

- 1) Reasonable jurists would debate that appellate counsel was ineffective for failing to raise a plain error of fact material to Leon's third exception, which would have not permitted a good-faith finding, had it been factored, where, *inter alia*:

The underlying affidavit for search warrant didn't 'merely omit' the address-actually-searched, in fact, a completely different address of "1000 Mian Street" (PageID:85, Exhibit D) was averred as the location where "evidence of criminal activity will be found at..." (PageID:85, Exhibit D), thus in fact, rendering the affidavit 'bare bones' as to the warrant's "709 Elberon Av." (PageID: 82, Exhibit E) address-actually-searched.

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Christy L. Muncy, Assistant United States Attorney
221 East Fourth Street, Suite 400
Cincinnati, OH 45202

Solicitor General of the United States, Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

| | |
|--|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE. | 4 |
| REASONS FOR GRANTING THE WRIT. | 5 |
| CONCLUSION | 6 |

INDEX TO APPENDICES

APPENDIX A Sixth Circuit Court of Appeals 7/10/19 Order, Case 18-4109

APPENDIX B Sixth Circuit Court of Appeal 9/16/19 Rehearing Order

APPENDIX C District Court (S.D.OH) 9/16/18 Order, Case 1:09-cr-00047-MRB

APPENDIX D Underlying Affidavit for Search Warrant, PID 85, 1:09-cr-00047

APPENDIX E Search Warrant, PID 82, 1:09-cr-00047

TABLE OF AUTHORITIES CITED

| CASES | PAGE NUMBER |
|---|-------------|
| Haines v. Kerner, 404 U.S. 519, 520-21 (1972) | 4 & 5 |
| Strickland v. Washington, 466 U.S. 688 (1984) | 4 & 5 |
| Powell v. Alabama, 287 U.S. 45, 68-69 (1932) | 4 & 5 |
| McFarland v. Scott, 512 U.S. 849, 855-56 (1994) | 4 & 5 |
| United States v. Leon, 468 U.S. 897 (1984) | 4 & 5 |
| | |
| OTHER | |
| Due Process Clause | 4 & 5 |
| U.S. Constitution Amendment IV | 4 & 5 |
| U.S. Constitution Amendment VI | 4 & 5 |

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7/10/19

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9/16/19, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

For cases from **state courts**:

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

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Haines v. Kerner, 404 U.S. 519-21 (1972);

Powell v. Alabama, 287 U.S. 45, 68-69 (1932);

McFarland v. Scott, 512 U.S. 849, 855-56 (1994);

Pro se pleadings are to be liberally construed and interpreted to raise the strongest argument they suggest.; "[t]he right to be heard [will] be of little avail if it d[oes] not comprehend the right to be heard by counsel."; Constitutional and other claims will be articulated more ably and presented more thoroughly by counsel.

Strickland v. Washington, 466 U.S. 688 (1984)

To establish a claim that Defendant was deprived of his Sixth Amendment right to the effective assistance of counsel, a defendant must show (1) deficient performance, and (2) prejudice, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694

United States v. Leon, 468 U.S. 897 (1984)

An officer's reliance on a deficient warrant is not in good faith where "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" at 922 n.23 ...third...if the affidavit was "so lacking in indicia of probable cause as to render official belief in the existence entirely unreasonable,"...i.e. warrant was supported by 'bare bones' affidavit.

U.S. Const. Amend. IV and VI; Search Warrants; Effective Assistance to counsel

STATEMENT OF THE CASE

Petitioner filed a timely 2255 motion asserting, among other things, that appellate counsel's performance was deficient in demonstrating that clearly established law - applied to the overlooked facts in this case - prohibit a finding of good-faith under Leon, 468 U.S. 897, among others. (Doc. 190)

To the extent that the Petitioner's assertions were not liberally construed and interpreted to raise the strongest argument they suggest, Petitioner notes that appointment of counsel was requested on numerous occasions - particularly, when additional time was requested to file for COA - due in large part to hindrances caused by Petitioner's medical condition, (Doc. 194 & 196) These conditions draw upon Haines v. Kerner, 404 U.S. 519, 520-21; Powell v. Alabama, 287 U.S. 45, 68-69; McFarland v. Scott, 512 U.S. 849, 855-56.

The Sixth Circuit, on direct appeal, adjudicated the good-faith question under the erroneous fact-pattern that the underlying affidavit for search warrant 'merely' omitted the address-actually-searched, and cited to cases demonstrating omissions which were deemed 'virtually unnoticeable', thus, a foundation by which to extend good-faith to the instant underlying affidavit.

The overlooked, true-fact-pattern, is that the underlying affidavit, in fact, 'noticeably' averred an entirely different address of "1000 Mian Street" (PID 85, Exhibit D) as the location of evidence, thus, rendering the affidavit 'bare bones' under Leon to the warrant's "709 Elberon Avenue" (PID 82, Exh. F). Reasonable jurists could argue that the failure of this plain error of fact to be remedied was attributable to counsel deficient performance and but for that failure to attempt to correct this plain error of fact, suppression would have been granted as Leon's good-faith exception would not, in fact, be appropriate. These conditions draw upon Leon, 486 U.S. 897 and Strickland, 466 U.S. 688.

REASONS FOR GRANTING THE WRIT

Overlooked errors of fact, material to proper application of United States Supreme Court precedent, should be addressed to promote application of clearly established law to the complete material facts of the case.

See Statement of The Case, p.4, hereby incorporated by reference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth Rose

Kenneth Rose, pro se, #655-843, Warren Correctional Institution,
5787 State Route 63, Lebanon, OH 45036

Date: 12-13-19