No. 19-7371

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BENTLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. First, this court has held that the use of a detection device by law enforcement on a citizens person, places, or things without a warrant, which reveals the presence of lawful behavior constitutes a search under the Fourth Amendment. This case poses the question of whether the same rule applies to so-called narcotics detection canines who have been proven, to a scientific certainty, to indicate only to the presence of the non-contraband odors of methyl benzoate, acetic acid, pipernol, and benzaldehyde, instead of any actual controlled substances. And further, if counsel's failure to raise such a question is one that is debatable amongst jurist of reason, or deserves encouragement to proceed further.

II. Second, this Court has held that Fourth Amendment decisions rendered by the Court while a defendant is on direct appeal do not apply retroactively to those cases if the decision announces a new rule of constitutional law, that is, one that is not clearly dicatated by prior precedent of the Supreme Court. This case poses the question of whether the same rule applies to cases in which this Court clearly states that the rule it is announcing was dictated and controlled by prior precedent, so that it should be applied retroactively to cases on direct appeal. And further, if counsel's failure to raise such a question is one that is debatable amongst jurist of reason, or deserves encouragement to proceed further.

III. Third, this Court has held that the Constitution does not permit the State to convict a citizen for exercising a privilege which the State had clearly informed the citizen was available to him. This case poses the question of whether the same rule applies to seizures under the Fourth Amendment so that when a citizen complies with the driving instructions issued by the Secretary of State's Office, their subsequent seizure would be unreasonable under the Fourth Amendment. And further, if this question is debatable amongst jurist of reason.

IV. Fourth, this Court has held that a defendant is entitled to conflict free representation by counsel, though qualifying the right to require a defendant to demonstrate prejudice when a potential, undisclosed conflict arises. This case poses the question of at what point has a defendant produced sufficient evidence to support a claim that prejudice exist and that an attorney and the government's failure to disclose potential conflicts has so undermined the right to independent counsel as to be constitutionally impermissible. And further, if this question is debatable amongst jurist of reason.

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Larry Bentley respectfully petitions the Court for a Writ of Certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Seventh Circuit on August 1 , 2019, with rehearing and suggestion for rehearing en banc denied on October 11, 2019.

Opinions Below

The decisions fo the United States Court of Appeals affirming the denial of relief pursuant to 28 U.S.C. §2255 and the denial of certificate of appealability (COA) is appended to this Petition. (App. 1A). The District Court's ruling denying relief and COA is also contained in the Appendix. (App. 2A)

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1 , 2019. (App. 1A). Rehearing and rehearing en banc were denied on October 11, 2019. (App. 3A) Bentley received notice of the denial on October 18, 2019. Bentley invokes this Court's jurisdiciton under 28 U.S.C. §1254(1), having

timely filed this petition for a writ of certiorari within ninety days of the final judgment of the Court of Appeals.

Constitutional Provisions Involved

Larry Bentley's Petition for a writ of certiorari involves the Fourth Amendment's right to be free from unreasonable searches and seizures, the Fifth Amendment's right to Due Process, and the Sixth Amendment's right to the effective assistance of counsel.

U.S. Const. Amend IV

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.

U.S. Const. Amend V

No Person shall be .... deprived of life, liberty, or property, without due process of law....

U.S. Const. Amend VI

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

Statement of the Case

In Miller-El v. Cockrell, 537 U.S. 322, 327 (2003), this Court established the proper standard for making the determination of if a COA should be granted, holding that the defendant need only demonstrate "a substantial showing of the denial of a con-

stitutional right." 28 U.S.C. §2253. In order to meet that standard a defendant must prove that jurists of reason could (a) disagree with a District Court's resolution of the defendant's constitutional claims, or (b) conclude the issues presented are adequate to deserve encouragement to proceed further. This Court has held that when performing this analysis, the appellate courts must make a threshold inquiry into the merits of the constitutional claims, and avoid ruling on the merits of the claims.

In this case, the constitutional claim is rooted in the ineffective assistance of counsel at both the district court level and on appeal. In Strickland v. Washington, 466 U.S. 668 (1984), this Court established the all to familiar standard for addressing claims of ineffective assistance. A defendant is required to show both cause and prejudice in order to prove that counsel's performance was deficient. In Kimmelman v. Morrison, 477 U.S. 365, 475-77 (1986), this Court extended the right to effective assistance to all stages of the trial proceedings.

The common theme in this line of jurisprudence is that a defendant should be afforded the opportunity to have meritorious constitutional claims fully addressed by the Courts.

The questions presend in this case are:

1) Whether the fact that so-called narcotics detection canines indicate to the non-contraband substances methyl benzoate, acetic acid, piperonal, and benzaldehyde, mean that canine deployments are searches under the Fourth Amendment as so defined in Kyllo. And further, if true, if counsel's failure to investigate and

present such an argument was constitutional deficient is a question that is debatable amongst jurist of reason?;

2) Whether this Court's Fourth Amendment decision in Rodriguez v. United States, 191 L.Ed. 2d 492 (2015) announced a new rule of law allowing for application of the good-faith exemption on direct review, or whether it simply adhered to clearly established prior precedence of this Court and should therefore apply to cases on direct review? And further, if counsel's failure to raise such an issue on direct appeal constitutes ineffective assistance is a question that is debatable amongst jurist of reason?;

3) Whether this Court's decision in Raley v. Ohio, 360 U.S. 423 (1959), which held that a citizen cannot be prosecuted for complying with the instructions of State actors authorizing the arresting behavior, precludes an officer from seizing an individual for complying with the driving instructions given by the Secretary of State's Office? And further, if counsel's failure to raise such a question constitutes ineffective assistance and is debatable amongst jurist of reason, or deserves encouragement to proceed further?;

4) Whether the Sixth Amendment requires counsel and the government to inform a defendant, prior to obtaining a waiver, that counsel, who along with being under federal indictment, had additional accusations of making false statements leveled against him by both the District Court and the Court of Appeals?

BACKGROUND

On October 14, 2019, Officer Veerman ran the license plate of a Chrysler Pacifica parked at a gas station. Veerman discovered that the female registered owner of the Pacifica had an expired Illinois license.

After running the Pacifica's plates, Veerman drove to an adjacent gas station and continued to observed the Pacifica. Veerman observed the Pacifica exit the gas station heading towards the entrace to I-55. Veerman testifed that he never saw anyone at, near, enter, or exit the vehicle. He further testified that he could not see into the vehicle to observe the driver.

Veerman followed the Pacifica onto I-55. As two tailgating drivers passed the Pacifica to it's left, it moved slightly right, touching the fog line. On both occassions the roadway began to curve. Veerman testified that he did not observe any erratic swerving. Veerman initiated a traffic stop for "failing to drive as nearly as practicable" within the lane, and engaged the Defendant in questioning, agreeing that he did not harbor any suspicion of impairment. Veermen testified that he did not have sufficient reason to detain the Pacifica on the basis of the registered owner's expired license.

Officer Jones arrived on the scene and was instructed to stay with the Defendant while Veerman ran a license and criminal background check, and filled out a racial profiling form. Jones called for a K-9 unit. Prior to the arrival of the canine unit, the license check and criminal history came back clear. Officer

Shively responded to the call with Lex, his canine partner. The canine was deployed on the vehicle, and Officer Shively testified that Lex had indicated to the presence of drugs. A physical search of the vehicle revealed the presence of approximately 15kilograms of cocaine inside of a hidden compartment. Bentley was indicted for violation of 21 U.S.C. §841(b)(1)(a). A suppression hearing ensued in which counsel argued that the intitial stop was unlawful, that it was prolonged beyond the time reasonably required to complete the original purpose of the detention, and that the canine involved was not reliable. The motion was denied and Bentley was convicted after a trial and sentenced to 240 months. An appeal followed in which counsel argued that the original detention was unlawful, that the canine was unreliable, and that the case was not proven beyond a reasonable doubt. Over Bentley's objection, counsel abandoned Bentley's prolongation argument. While the appeal was pending, counsel was indicted in the Northern District of Illinois. The appeal was stayed in order to allow Bentley the opportunity to waive or retain new counsel. Unbeknownst to Bentley, at that time counsel had recently been held in contempt and ordered jailed by the district court in the Southern District of Illinois for lying to the court. see United States v. Britton, 731 F.3d 745 (7th Cir. 2013). Also, counsel had been fined and publicly rebuked by the Seventh Circuit Court of Appeals for lying to that court in United States v. Johnson, 745 F.3d 227 (7th Cir. 2014). After procurring an agreement with counsel that he would amend the appeal filing

to include the abandoned prolongation argument, but without being informed of the full extent of counsel's legal troubles, Bentley retained Brindley. Brindley did not amend the appeal as agreed, but after oral arguments this Court issued an opinion in Rodriguez v. United States, 191 L.Ed. 2d 492 (2015), holding again that prolongation of a traffic stop beyond the purpose of the initial detention was unconstitutional. Brindley then filed a rule 28(j) motion, noticing the appeals court of the holding, but did not seek leave to amend. The appeal was denied. see United States v. Bentley, 795 F.3d 630 (7th Cir. 2015), rehearing and rehearing en banc denied, certiorari denied. A timely motion pursuant to 28 U.S.C. §2255 was then filed in the district court.

1. District Court proceedings

In his motion for relief, Petitioner argued multiple grounds warranting redress, but only four of which are relevant to this petition. In the motion, Bentley argued that his counsel was ineffective for 1) failing to investigate and argue that so-called narcotics detection canines indicate to the non-contraband substances methyl benzoate, acetic acid, piperonal and benzaldehyde, and that accordingly, they are searching under Kyllo v. United States, 533 U.S. 27 (2001).; 2) failing to argue on appeal that the stop was prolonged; 3) failing to argue that the initial seizure was unlawful because Bentley was seized for following the driving instructions issued by the State; and 4) failing, along with the government, to disclose the full extent of his legal issues prior to Bentley's conflict waiver. The district court granted an evidentiary hearing on the single issue of conflicted representation.

The district court ultimately denied the motion and denied certificate of appealability pursuant to 28 U.S.C. §2253. (see App.2A) Bentley timely appealed.

2. The Decision of The Court of Appeals

On January 4, 2019, Bentley filed a motion pursuant to 28 U.S.C. §2253 in the Seventh Circuit Court of Appeals seeking a certificate of apppealability to address the district court's procedural rulings and it's denial of the §2255 motion. On August 1 , 2019, in a one page order, a two judge panel denied COA, holding that Petitioner had not demonstrated the denial of a constitutional right. (see App.1A). Bentley filed a suggestion for rehearing by the panel and petition for rehearing en banc. These request were also denied by the Court. (see App.3A).

Reasons for Granting the Writ

The importance of the Fourth Amendment questions presented cannot be overstated. In both State and Federal Courts the rights of everyday citizens to be free from unreasonable searches and seizures are being tested by law enforcement on a daily, ongoing basis. During the proceedings following these encounters, both the defendants and the government start the analysis of the propriety of the seizures and searches with this Court's decisions on what is permissible within the confines of lawful traffic stop. However, they often differ on which cases are applicable to a particular set of circumstances and the underlying facts supporting those decisions. The singular shared is that all parties involved share a belief that the facts underlying their positions must be accurate in order to insure the integrity of the legal system. Petitioner's

first question turns on the issue of insuring the factual underpinnings of a long running legal precedent, that being that if so-called narcotics detection canines indicate to the odor of non-contraband substances, are they searching under the Fourth Amendment? This Court should resolve the question of if these deployments constitute searches under the Fourth Amendment requiring the establishment of probable cause prior to the deployments.

As to Petitioner's second question, the lower courts are divided on the question of if this Court's most recent Fourth Amendment decision on prolongation reiterated prior precedent or if it announced a new rule of law. Some court's consider the plain language of the decision as dispositive on the question of if the rule announced was new or not. Others, like the Seventh Circuit, find that even when faced with a contrary ruling from this Court, it's own circuit rulings take precendent over this Court's opinions. This Court should resolve the conflict surrounding when it's opinions adhering to prior precedent, or when they announce a new rule of constitutional law. Specifically, it should resolve the conflict related to it's recent prolongation decision.

Third, because of the broad discretion law enforcement enjoys in performing seizures, the rights of citizens to avoid those seizure by complying with State driving instructions is critical to the most basic of liberties, the right to be left alone to travel from one place to another. Because this Court's prior

opinions have held that it is unconstitutional to prosecute a citizen for compliance with State authority instructions, and the Seventh Circuit has rendered an opinion inconsistent with that conclusion, the Court should grant certiorari to maintain the judicial hiearchy and uniformity in the Court's.

Fourth, because of the ambiguity which exist in the law when determining when a defendant has been prejudiced by a potential conflict with counsel, creating a potentially insurmountable hurdle for a defendant, this Court should grant certiorari to insure the Sixth Amendment's protection of the right to conflict free representation is clearly defined.

The first three questions presented are significant, as these stops and searches play a central role in many criminal prosecutions, and more importantly, in the day-to-day lives of the traveling public. If not properly contained, full blown searches on less than probable cause, prolonged detentions, and seizures for State authorized driving behaviors, will amount to unfettered intrusions on personal liberties that could swallow the protections of the Fourth Amendment entirely. To prevent this result, this Court should grant Certiorari.

I. The question of whether the Fourth Amendment tolerates canine sniffs without probable cause given that so-called narcotics dogs only detect non-contraband odors is a question of exceptional importance.

The issue presented in this petition is important to both

law enforcement officers and the citizens they detain. Though the Seventh Circuit chose to accept the conclusion that these canines indicate only to controlled substances and that Illinois v. Caballes, 543 U.S. 405 (2005), controls their deployments, that position is inconsistent with the undisputed conclusions of the scientific community that these canines actual indicate to non-contraband substances. It also undermines the judiciary's truth seeking function. And it is inconsistent with Caballes which held that a well-trained dog would only indicate to contraband, and conversely, if it were to reveal lawful behavior, it is searching under the Fourth Amendment. There is overwhelming evidence supporting the conclusion that these canines indicate to lawful behavior, and that the government was aware of this fact prior to arguing before this Court in Caballes that these canines only indicate to contraband. For example, there was a United States Patent issued in 1981 which demonstrated that these canines indicate to non-contraband methyl benzoate. (see App. 4A). Further, the United States Customs Department does not use actual drugs to train it's dogs, but instead uses only non-contraband methyl benzoate, acetic acid, piperonal, and benzaldehyde to train these canines to detect drugs. (see App. 5A) This is a fact that was known to the government prior to arguments in Caballes as detailed in the aforementioned CDC report dated 2004. And Petitioner made his counsel aware of this fact prior to the suppression hearing. Finally, the National Institute of Health has also stated that methyl benzoate is lawful to possess.

(See App. 6A) (see also 21 C.F.R. §§'s 172.515, 424.21, and 182.60). If Petitioner's allegations are true, then those canines are the equivalent of the thermal imaging device used in Kyllo v. United States, 533 U.S. 27 (2001), and they are searching under the Fourth Amendment. During oral arguments in Caballes, the Government conceded when questioned by Justice Stevens, that the results would be different if these dogs indicated to both lawful and unlawful activity. In fact, it was this distinction which formed the basis of the holding in Caballes.

Given this Court's conclusions in Caballes, the importance of the right of citizens to be free from unreasonable searches hangs in the balance. The protections afforded by the Fourth Amendment will be severly undermined if law enforcement is allowed to continue to conduct searches without probable casue. The Seventh Circuit has diminished this Court's ruling in Miller-El by failing to decide if this quesitn was one that deserved encouragement to proceed further. Under the Seventh Circuit's interpretation, a lawyer can fail to investigate information essential to a clients case and the truth seeking function of the court's, and never have that failure subjected to meaningful review. These positions so undermine the right to a fundamentally fair and accurate process, that they leave the impression of no process at all. The issue presented in Bentley's case is significant because of the potential ramifications in the areas of Fourth and Sixth Amendment jurisprudence. While the truth seeking function is being undermined in this traffic stop case,

the mannner in which the Seventh Circuit has limited review is applicable to other contexts as well. If the government is allowed to knowingly present false evidence to the courts, with defendants having no venue to test the legality of the government's actions, the system of checks and balances, which imparts on the judiciary the obligation to protect the constitutional rights of the citizens against encroachment by the State, will be permanently eroded. To stem any further erosion of the Fourth and Sixth Amendment's safeguards, this Court should grant certiorari.

II. Federal Courts are divided over whether or not this Court's decision in Rodriguez announced a new rule of constitutional law applicable to cases on direct appeal.

The Court of Appeals' decision in Benltey accepted the premise that this Court's holding in Rodriguez announced a new rule of constitutional law and is therefore inapplicable to cases on direct review represents a departure from this Court's jurisprudence. This Court has held that it announces a new rule of law when the decision is not dictated by prior precedent. see Teague v. Lane, 489 U.S. 288, 301 (1989). Contrary to this conclusion, this Court made clear that it was not announcing a new rule in Rodriguez, but was following the holding of Caballes. The Seventh Circuit has interpretted prior precedent to mean the rules of law of the circuit in which the issue is raised as opposed to those of this Court, even wehn this Court has opined on an issue in dispute. In doing so, the Seventh Circuit has extended the

reach of the good-faith exemption.

Other federal courts, when confronted with the question of if Rodriquez announced a new rule of law, have held that it is clear from the text of the opinion thaet the decision did not announce a new rule of law, but adhered to existing law. (see United States v. Evans, 736 F.3d 779 (9th Cir. 2015); United States v. McDuffie, 671 Fed. Appx. 490 (9th Cir. 2016); United States v. Williams, 808 F.3d 238 (4th Cir. 2015); United States v. Spears, 636 Fed. Appx. 893 (5th Cir. 2016); United States v. Collazo, 818 F.3d 247 (6th Cir. 2016); United States v. Pettit, 785 F.3d 1374 (10th Cir. 2015); United States v. Waller, 105 F.Supp. 3d 683 (W.D. Texas, 2015); cf. United States v. Rodriguez, 799 F.3d 1222 (8th Cir. 2015)).

The Seventh Circuit has engaged in an expansive and disjointed development of Fourth Amendment law which has resulted in the continued application of the de minis approach, as well as the principle that traffic stops are not like Terry stops because they are based on probable cause and are subject to unlimited detention. Indeed, the body of law being developed in the Seventh Circuit in the area of traffic stops defers from case to case based on the panel of judges examining the question. Because of the uncertainty in the law within the Seventh Circuit, neither the officers, nor citizens know what conduct comports with the law.

This Court has long ago established that because our judiciary is a hierarchial one, judges of the lower courts must carry

out the decisions of the Supreme Court, even when they disagree with them. Hutto v. Davis, 454 U.S. 370, 375 (1982). The Seventh Circuit has not conformed to this mandate. Instead it has misapplied this Court's decision in Davis v. United States, 564 U.S. 229 (2011), by applying the good-faith exemption to cases pending when Rodriguez was decided, arguing that Rodriguez announced a new rule of law. Contrarily, Rodriguez merely reiterates the clearly established law announced in Caballes.

The Court should grant review in order to insure uniformity in the application of Fourth Amendment law throughout the country. Further, the Court should take the opportunity to address the hierarchical relationship between it and the Seventh Circuit. Finally, the Court should resolve the conflict between the circuits on when a case announces a new rule of law.

III. The question of whether the Fourth Amendment tolerates seizures of motorist when they comply with the driving instructions of State authorities is a question of exceptional importance.

In Whren v. United States, 517 U.S. 806 (1996), this Court granted broad discretion to officers in their seizing decisions, holding that as long as the officer had observed a traffic law violation, then the seizure conforms with the Fourth Amendment. This Court later extended Whren to authorize seizures based on mistakes of both fact and law. Heien v. North Carolina, 135 S.Ct. 530, 540 (2014). In this case the Seventh Circuit has extended Whren and Heien to allow traffic stops of citizens when they drive exactly in the manner instructed by the State. This

extension of police seizing power appears to conflict with this Court's decision in Raley v. Ohio, 360 U.S. 423, 436-37 (1959), and Cox v. Louisana, 379 U.S. 536, 571-73 (1965), which held it impermissible for the State to convict a citizen for exercising a privilege which the State had clearly informed was available to the citizen. This issue is significant because of the potential of ensnaring citizens through a form of entrapment. If the government is allowed to criminalize behavior it has authorized, then the government will have gained unfettered power to seize, a result that would effectively end all Fourth Amendment protections. To avoid such a degradation of the Fourth Amendment's safeguards, this Court should grant certiorari.

IV. The Seventh Circuit's standard for establishing conflicted representation is ambigous and does not affor a meaningful examination of counsel's representation.

The Sixth Amendment gives citizens the right to conflict free representation. This Court has recognized two possibilities of conflicted representation, potential and actual conflict. In either case the defendant is required to demonstrate that he was prejudiced by the conflicted representation. The problem is that there is no standard for determining when a defendant has proven prejudice. Ultimately, the question is how far must a defendant go in order to demonstrate that the right to conflict free counsel has been denied? The unanswered question is "When does an attorney and the government have an obligation to disclose

information pertaining to a conflict between the attorney and the client?" Currently, the lack of a coherent standard leaves the government and attorneys free to hide potential conflicts which could or would alter a defendant's belief that the attorney will effectively represent his interest in court from the defendants. This lack of transparency leaves a defendant scrambling to discover the subjective mindset of the attorney in failing to take a specific action on behalf of the client in order to prove that the conflict had a prejudicial effect. Such a burden can have a deleterious effect on the right to conflict-free counsel. Counsel can, as here, fail to disclose his legal issues in two different courts, (one of which he would be litigating on behalf of the defendant), and then have a conflict waiver enforced by the courts. Defendants are left to not only prove prejudice, but alos prove that counsel's failure to disclose was knowing and willful. Because the burden to establish prejudice is so onerous, in these circumstances the Court should grant certiorari to decide if an assumption of prejudice is appropriate in order to maintain the protections offered by the Sixth Amendment.