

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE TERRELL,
Petitioner,

v.

ED SHELDON,
Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit
Case No. 19-00061

MOTION TO CLERK TO FILE PETITION

Andre Terrell
A725142
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

RECEIVED

NOV 22 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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ANDRE TERRELL,
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MOTION TO CLERK TO FILE PETITION

To the Supreme Court of the United States:

Andre Terrell, respectfully files this motion to direct the clerk to file his petition for writ of certiorari.

- 1) Terrell's cert petition was due June 12, 2021.

- 2) Terrell filed his cert petition, Appendix, and motion for in forma pauperis on August 31, 2021, via regular U.S. Mail postage pre-paid.
- 3) Lebanon Correctional Institution Law Library was under COVID-19 protocol until Mid-July 2021, this was due to LeCI, having the lowest numbers of vaccination rated per staff and inmates.
- 4) LeCI had a vaccination rate of 42% and the Director of Ohio Department and Corrections, Ms Chambers-Smith, required a vaccination rate of at least 55%, for a prison to move from co-horts in relation to inmates being permitted to interact with other inmates of other Housing Units.
- 5) LeCI's Law Library had been closed since Ohio Prisons went on COVID-19 protocol the month of March 2020.
- 6) LeCI's Law Library did not open until Mid-July, 2021 and due to security screening, did not receive a Law Clerk until August, 2021.
- 7) As soon as the Memo was released that the Law Library would be re-opening Petitioner kited to be put on the pass list. LeCI is a Level-3 Institution all movement is controlled-movement, by Class-A pass only, meaning an inmate is not permitted to leave his block without a written permission.
- 8) Petitioner perfected cert, and mailed it, and received it back with letter from this Court's Clerk's office (See Attached), Petitioner's daughter had contacted Clerk's office and was advised to have Petitioner get memo from Librarian at LeCI verifying the above mentioned facts in support of his untimely petition. (See letter attached to Mr. Levitan.)

- 9) Petitioner received returned cert, in mail and letter advising him to file a Motion to the Court directing the Clerk to file Petition. Petitioner has diligently pursued and attempted to file his cert, being unduly prevented from doing so, due to the restrictions imposed through the pandemic.
- 10) Petitioner humbly pray this Court will direct the Clerk to file petition.

Respectfully submitted this 9th day of

November 2021,

By Andre Terrell

Andre Terrell #725-142

Lebanon Correctional Inst.

P.O. Box 56

Lebanon, Ohio 45036

**IN THE
SUPREME COURT OF THE UNITED STATES**

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AFFIDAVIT OF ANDRE TERRELL

I, Andre Terrell, having been duly cautioned and sworn, hereby attest to the following:

1. Terrell filed his cert petition, Appendix, and motion for in forma pauperis on August 31, 2021, via regular U.S. Mail postage pre-paid.

2. Lebanon Correctional Institution was under COVID-19 protocol until Mid-July 2021, this was due to LeCI, having the lowest numbers of vaccination rate per staff and inmates.
3. LeCI had a vaccination rate of 42% and the Director of Ohio Department of Rehabilitation and Corrections, Ms. Chambers-Smith, required a vaccination rate of at least 55%, for a prison to move from co-horts in relation to inmates being permitted to interact with inmates in other Housing Units.
4. LeCI's Law Library had been closed since Ohio Prisons went on COVID-19 protocol the month of March 2020.
5. LeCI's Law Library did not open until Mid-July, 2021, and due to security screening protocol, did not receive a Law Clerk until August, 2021. The current Librarian is a assistant, and is not versed in assisting *pro se* litigants in the Law area of the Library, the full-time Librarian retired during the pandemic in the summer of 2020.
6. As soon as the Memo was released that the Law Library would re-open, Petitioner kited to be put on the pass list. Due to LeCI being a Level-3 Institution all movement is controlled-movement, by Class-A pass only,

meaning an inmate is not permitted to leave his Housing Unit without written permission.

7. Petitioner perfected cert, and mailed it, and received it back with letter from this Court's Clerk's office (See Attached), Petitioner's daughter had contacted Clerk's office, after writ was returned, and was advised to have Petitioner get memo from Librarian at LeCI verifying the above mentioned facts in support of his untimely petition. (See letter attached to Mr. Levitan.)
8. Petitioner in the course, before attempting to file cert again, spoke with the Librarian (Ms. Woods, (513) 932-1211 Ext.28077) here at Lebanon Correctional Inst., explaining his situation and attempted to get a memo from her, Ms. Woods advised Petitioner that per policy, she could not provide any documentation, but could as other Courts have pursued, during the pandemic, verify via phone the prevention and denied access to the Courts presented to inmates due solely upon the COVID-19 protocols being enforced by the ODRC, at Lebanon Correctional Inst.
9. Due to "extraordinary circumstances" in relation to the COVID-19 pandemic Petitioner was presented with a time restraining hurdle. (An "extraordinary"

circumstance is one that is "beyond what is usual, customary, regular, or common." "Extraordinary" Black's Law Dictionary (11th ed. 2019).

10. Petitioner received returned cert from Court Clerk dated October 27, 2021 in the mail, as well as a letter advising him to file a Motion to the Court directing the Clerk to file Petition. (See Attached) Petitioner has diligently pursued and attempted to file his cert, being unduly prevented from doing so, due to the pandemic.

11. Therefore, due to situations outside of petitioner's control, he humbly requests this Court to direct Clerk to file Petition. Petitioner has diligently pursued relief and extraordinary circumstances prevented his timely filing, the COVID-19 pandemic may qualify as an extraordinary circumstance.

Andre Jemel
Affiant

Sworn to and subscribed in my presence this 10th day of November,
2021.



DEE ANN SEARS
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
12-08-2025

Dee Ann Sears
Notary Public

My Commission Expires: 12-8-2025

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**

October 27, 2021

Andre Terrell
A725142
3791 St. Rt. 63
Lebanon, OH 45036

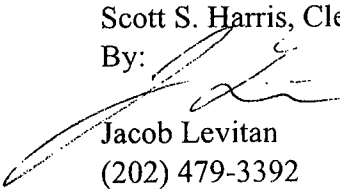
RE: Terrell v. Sheldon, Warden
USCA6 No. 20-3494

Dear Mr. Terrell:

The above-entitled petition for a writ of certiorari was originally postmarked September 8, 2021 and received again on October 26, 2021. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was January 13, 2021. Therefore, the petition was due on or before June 12, 2021. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

The Clerk cannot file any petition for a writ of certiorari that is jurisdictionally out of time. Rule 13.2. You may file a motion to the Court to direct the Clerk to file the petition out of time along with a complete copy of the petition.

Sincerely,
Scott S. Harris, Clerk
By: 

Jacob Levitan
(202) 479-3392

Enclosures

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C.**

Jacob Levitan
11ST St. N.E.
Washington D.C. 20543-0001

RE: Terrell v. Sheldon, Warden
USCA6 No. 20-3494

Dear Mr. Levitan,

I received the letter and return of writ of certiorari dated September 20, 2021. Due to an inmate in my Housing Unit (G-George) here at Lebanon Correctional Institution, testing positive for COVID-19, my Unit was on lock-down, quarantine from September 20, 2021 until October 2, 2021 and the Library being closed from October 3-10, 2021, due to the librarian being out, that is the reason for my delay in responding and refiling my Petition.

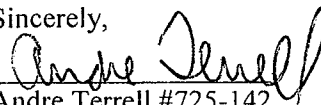
Lebanon Correctional Institutions Library/Law Library did not fully open until the middle of July 2021, due to the COVID-19 protocol mandated in March of 2020, by the Director of the Ohio DRC. Due to Lebanon Correctional having the lowest percentage of vaccinations of DRC staff and inmates, a rate of 42%, and the Director requiring vaccination rate of 55%, Lebanon was the last prison in the State of Ohio to fully reopen areas where inmates did not have to congregate in co-horts.

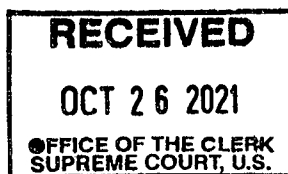
The above mentioned facts, and due to the Law Library not receiving a Law Clerk (due to security reasons) until mid-August of 2021, to assist *pro se* litigants. Petitioner did not have an adequate recourse, and was unavoidably prevented from access to the courts, to timely file and perfect his Writ of Ceriorari to the United States Supreme Court.

As the Clerk mentioned in his letter, and will see by the attached as well as declared in petition, the Writ was deposited in the Legal Mail box at Lebanon Correction on August 31, 2021, as attested to by cash slip. During the Covid-19 pandemic, there has been a delay in delivering mail to the institutions mail room and the processing of inmates mail for postage costs.

Petitioner spoke with the Librarian here at Lebanon Correctional, and they do not provide any type of documentation per their policy, but can and will, as other Courts have inquired, verify the above mentioned facts, via phone. Lebanon Correctional Library (513) 932-1211 Ext.28077

Sincerely,


Andre Terrell #725-142
Lebanon Correctional Inst.
P.O. Box 56
Lebanon, Ohio 45036



Personal A / C Withdrawal
Check Out-Slip

Dollars:

8

Cents:

25

Institution:

LECF

Date:

8-31-21

Name:

United States Supreme Court

Address:

1st St. N.E.

City:

Washington

State:

D.C.

ZIP Code:

20543



Postage



Copies



ID



Misc.



Check-Out CK#

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature:

Andre Terrell

Number:

725-142

Block & Cell Number:

1-D-29

Approved By:

Witnessed:

Blevins 519

Ship VIA:

Date Processed:

DRC 1004 (Rev.3/01)

DISTRIBUTION:

WHITE - Cashier

CANARY - Inmate

PINK -

PAID SEP 07 2021

ACA 4046

NOT RECOMMENDED FOR PUBLICATION

File Name: 21a0028n.06

No. 20-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 13, 2021
DEBORAH S. HUNT, Clerk

ANDRE TERRELL,)	
)	ON APPEAL FROM THE UNITED
Petitioner-Appellant,)	STATES DISTRICT COURT FOR
)	THE SOUTHERN DISTRICT OF
v.)	OHIO
)	
ED SHELDON, Warden,)	
)	OPINION
Respondent-Appellee.)	

Before: SILER, GIBBONS, and KETHLEDGE, Circuit Judges.

SILER, Circuit Judge. Andre Terrell appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas petition alleging error in the Ohio state courts' resolution of his Fourth Amendment violation argument. We **AFFIRM**.

In 2016, Terrell was convicted of various drug offenses in Ohio state court. Before his trial, Terrell moved to suppress certain evidence, in part, because the search warrant used to search his hotel room and seize items therein was allegedly "defective." Although Terrell made numerous arguments attacking the validity of the search warrant, he impliedly concedes that he did not specifically make the argument that the warrant lacked sufficient particularity; rather, Terrell argues that he did not need to specifically make such an argument because "[t]he Ohio Supreme Court's decision in [*State v.*] *Castagnola*[, 46 N.E.3d 638 (Ohio 2015)] holds that the issue of particularity of a search warrant is implicit in a probable cause analysis." Therefore, Terrell argues, by challenging probable cause at the suppression hearing, his particularity argument was

Case No. 20-3494, *Terrell v. Sheldon*

preserved, and the Ohio Court of Appeals erred when it found that Terrell “waived all but plain error [review]” of that issue.

“[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” *Stone v. Powell*, 428 U.S. 465, 482 (1976). “*Stone* precludes habeas review ‘where the State has provided an opportunity for full and fair litigation of a fourth amendment claim’ This circuit . . . [has] concluded . . . that the state court need do no more than ‘take cognizance of the constitutional claim and rule in light thereof.’” *Riley v. Gray*, 674 F.2d 522, 525 (6th Cir. 1982) (citations omitted). “*Stone* and *Moore v. Cowan*, [560 F.2d 1298 (6th Cir. 1977),] . . . require a district court to make two distinct inquiries in habeas proceedings. Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism.” *Id.* (citations omitted).

Terrell concedes a sufficient procedural mechanism in the abstract but argues a failure of that mechanism. Specifically, he argues that the Ohio Court of Appeals’ decision to review his particularity argument for plain error rather than de novo “frustrated” the presentation of his Fourth Amendment claim. A review of the Ohio Court of Appeals’ opinion rejecting Terrell’s particularity argument, however, reveals that Terrell’s contentions are meritless. *State v. Terrell*, 95 N.E.3d 870, 895–97 (Ohio Ct. App. 2017).

Glaringly omitted from Terrell’s briefs is any argument as to how the Ohio Court of Appeals’ review of his particularity argument under the plain error standard precluded him from

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“an opportunity for full and fair litigation of [his] Fourth Amendment claim[.]” *Stone*, 428 U.S. at 482. The Ohio Court of Appeals applied the very substantive *Castagnola* framework for analyzing particularity that Terrell would seemingly have had that court apply under de novo review. In arguing to this court that his particularity argument should have been reviewed de novo because it was preserved, Terrell heavily relies on *Castagnola* for its proposition that “[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue.” *Castagnola*, 46 N.E.3d at 655 (citation omitted) (quotation marks omitted). The Ohio Supreme Court in *Castagnola* analyzed the substance of a defendant’s particularity argument after finding that argument implicit in the defendant’s generally preserved probable-cause argument. *Id.* at 655–56. Before the Ohio Court of Appeals, Terrell heavily relied on *Castagnola* for its substantive proclamations regarding particularity. Importantly, the Ohio Court of Appeals in *Terrell* applied the same particularity framework applied in *Castagnola* to that defendant’s preserved particularity argument. *Compare Terrell*, 95 N.E.3d at 896 *with Castagnola*, 46 N.E.3d at 657. The Ohio Court of Appeals ultimately concluded that the portions of the warrant Terrell alleged were worded too broadly were sufficiently particular when viewed in the context of the entirety of the warrant. *Terrell*, 95 N.E.3d at 896.

In other words, the Ohio Court of Appeals concluded that Terrell’s particularity argument was based on an improper isolation of certain “catchall” provisions of the warrant that “must be read in conjunction with the list of particularly described items which preceded it pertaining to the crimes alleged.” *Id.* (citation omitted) (quotation marks omitted). Contrary to Terrell’s assertions, therefore, that court “addressed the constitutional issue of the particularity of the search warrant.” Terrell does not explain what more the Ohio Court of Appeals should have addressed, giving this

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court no reason to believe that he was not afforded “an opportunity for full and fair litigation of [his] Fourth Amendment claim[.]” *Stone*, 428 U.S. at 482. This is especially evident in Terrell’s failure to cite any precedent refuting the assertion that plain error review does not run afoul of *Stone*. See, e.g., *Harmon v. McCollum*, 652 F. App’x 645, 652 (10th Cir. 2016) (“Harmon argues that the trial court violated his Fourth Amendment rights by admitting evidence obtained during an illegal search of his mother’s home. . . . The [Oklahoma Court of Criminal Appeals] reviewed this claim for plain error [W]e conclude that court rejected Harmon’s argument on the merits after full and fair consideration.” (citations omitted)); *Kelley v. Jackson*, 353 F. Supp. 2d 887, 893 (E.D. Mich. 2005) (“Michigan has a procedural mechanism that presents an adequate opportunity for a criminal defendant to raise a Fourth Amendment claim. . . . The Michigan Court of Appeals concluded that Petitioner had failed to properly raise the issue, reviewed the claim for plain error, and denied relief. Given this record, it is clear that the Michigan courts were cognizant of Petitioner’s Fourth Amendment claim and that he received all the process he was due. Accordingly, any claim concerning the validity of Petitioner’s arrest is not cognizable on habeas review pursuant to *Stone v. Powell*.”).

Indeed, Ohio’s plain error test first requires “an error, *i.e.*, a deviation from a legal rule.” *State v. Barnes*, 759 N.E.2d 1240, 1247 (Ohio 2002) (citations omitted). In determining whether an error occurred, the Ohio Court of Appeals applied substantive Fourth Amendment particularity law to reject Terrell’s use of isolated statements from the warrant to allege a Fourth Amendment violation. *Terrell*, 95 N.E.3d at 896. In other words, the Ohio Court of Appeals reached the merits of Terrell’s argument in the same way it would have under a different standard of review. *Riley*, 674 F.2d at 527 (“[F]ederal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and

Case No. 20-3494, *Terrell v. Sheldon*

unforeseeable application of a procedural rule *which prevents state court consideration of the merits of the claim.*” (emphasis added)). Again, Terrell does not articulate what more the Ohio Court of Appeals needed to review to afford him a sufficient opportunity for a full and fair examination of his particularity argument. Unlike in *Riley* where this court found the petitioner’s presentation of his Fourth Amendment claim frustrated when the state court *sua sponte* rejected the petitioner’s Fourth Amendment argument on standing grounds to which the petitioner never had an opportunity to respond, *see id.* at 524, 526–27, the Ohio Court of Appeals here directly addressed the substance of Terrell’s briefed particularity argument in finding Terrell’s use of isolated statements from the warrant to be an incorrect application of the particularity doctrine.

AFFIRMED.

**Additional material
from this filing is
available in the
Clerk's Office.**