No.

In the

Supreme Court

of the

United States

Term,

LAVONE GANITHUS DIXON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1.

As Courts of the United States are Courts of Record, is it structural error for the federal Prosecution to rely upon a state search warrant for the admission of evidence without making such search warrant part of the formal record of the United States District Court by filing it with the District Court? Does the virtually universal practice of federal prosecutors of obtaining state search warrants, then using those state search warrants in federal prosecutions without filing those state search warrants with the District Court, constitute structural error as said warrants usually are critical to the outcome of the case?

Is the Constitutionally mandated structure for a search of Petitioner's residence, i.e., the existence of a search warrant, violated by holding that an unfiled document not included in the formal record of the state court of record constitutes a search warrant? Does this constitute structural error?

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The Petitioner, Lavone Ganithus Dixon, Jr., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on July 13, 2022.

OPINION BELOW

The opinion of the Sixth Circuit in this matter was not published and is attached hereto in the Appendix 1. The opinion of the District Court in this matter was not published and is attached hereto in the Appendix 2. The opinion of the Magistrate Judge in this matter was not published and is attached hereto in the Appendix 3.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on July 13, 2022. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, [a] 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.

The Fourteenth Amendment to the United States Constitution states:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was accused of being a felon in possession of a firearm and with possession with the intent to distribute fifty grams or more of a mixture containing a detectable amount of methamphetamine.

Petitioner's residence had been searched on September 22, 2019. There is no record number nor page identification numbers for the search warrant in the formal record of the district court because the state search warrant never was filed in the district court. The state search warrant came to light only as an attachment to pleadings. The search of Petitioner's residence yielded three firearms, which were the basis of the firearms charge of which he was convicted.

Petitioner pled not guilty to the charges.

Petitioner filed a Motion to Suppress, claiming that there had been no search warrant for the search of his residence on September 22, 2019.

Petitioner argued that the warrant and related documents bore a number of indicia that they were of dubious authenticity because of their numerous incompatibilities with the required Kentucky template for search warrants and associated documents.

Petitioner argued that there was no search warrant at the time of the search of his residence, in violation of the Fourth Amendment, and that the fruits of any such search must be suppressed. A certification by the appropriate Kentucky clerk of courts on June 6, 2020, more than eight months after the search occurred, certified

that no search warrant for Petitioner's residence was in the Kentucky court's record as of the date of the certification. When a search warrant finally was produced, it did not have the file stamp of a court.

Petitioner argued that in light of these facts, there was a legitimate basis to conclude that the warrant was fraudulent. Petitioner claimed that the warrant was fabricated shortly before it was disclosed the June following the search. Petitioner attached the applicable state court docket sheet demonstrating that no search warrant for his residence was on file in the formal record of the state court on September 23rd, which was the date on the court file stamp.

Petitioner requested an evidentiary hearing. Petitioner argued that an evidentiary hearing is required if a motion to suppress asserts facts which are sufficiently definite, specific, detailed, and non-conjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question. Petitioner argued that he had met that burden.

The government acknowledged "irregularities" in the search warrant with regard to checkboxes, fonts, and the failure to use the mandatory template for Kentucky courts in Petitioner's search warrant, but claimed that they were trivialities. The government did eventually agree to a holding a hearing to determine the validity of the search warrant. The court, however, refused to hold a hearing.

The magistrate judge issued a Report and Recommendation recommending

that Petitioner's suppression motion be denied without a hearing. The district court followed the magistrate judge's recommendations.

> The Magistrate Judge noted that the Government offered no substantive response to explain the three differing fonts on the warrant, the use of checkmarks when the required template uses Xs, an inadequate space for a judge's signature, and failure to use the template Kentucky requires for search warrant documents, but called them trivialities. The Magistrate Judge noted that the Government did not respond to the suspicion Petitioner cast on two copies of the search warrant return for containing a handwritten case number on one copy of the return and a typed number on the other copy. Petitioner argued that the warrant and associated documents were a "cut and paste" job concocted months after the search, using a xerox copy of another warrant.

There are two standards at play in determining whether or not to hold a hearing regarding the validity of a search warrant or of a search. The first concerns allegations of knowing false statements in an affidavit, and the second concerns general facts casting doubt upon the validity of a search.

The court addressed only the standard applicable when an accused claims that police made intentional false statements in the search warrant affidavit. The court required that Petitioner make a substantial preliminary showing that a false statement included by the affiant in the warrant affidavit was made knowingly and intentionally, or with reckless disregard for the truth. This claim was not raised by

Petitioner. Petitioner had no quarrel with the allegations in the affidavit. Nevertheless, the court equated Petitioner's allegations to alleging false averments in the affidavit.

The court did not apply the general standard for granting a hearing when there are contested issues of fact going to the validity of the search.

The district court noted that the facts presented differed from those underlying the Franks v. Delaware, 438 U.S. 154 (1978), decision, but nevertheless applied the Franks standard to combat the "specter of intentional falsification." The district court held that the absence of the warrant in the state court of record for eight months, was not suggestive of foul play in light of reasonable alternative explanations, such as an administrative delay or backlog, although this notion did not come from testimony but rather came from an email attached to a filing.

The primary controversy in the district court concerned whether or not the search warrant had been signed by the state judge before the search on September 22nd. Petitioner claimed that the search occurred on the 21st. The government was adamant that the search actually had occurred on September 22, 2019, the day the warrant was supposedly signed.

No one at the trial level realized that the file stamp of the state court on the search warrant was for September 23rd one day after the Government claimed that the search of Petitioner's residence occurred on September 22nd. The Government claimed that the file stamp on the face of the warrant was proof that the warrant had

been filed on September 23, 2019.

The Sixth Circuit would not address the question of structural error resulting from the failure to make the state warrant a part of the formal record of the district court because the search warrant had been attached as an exhibit to pleadings.

Petitioner contends that the Constitution requires that state search warrants be filed in the formal record of the court of prosecution; merely talking about search warrants or informally disclosing them between parties is insufficient. The Sixth Circuit acknowledged that the issue of the lack of a warrant authorizing the search of Petitioner's residence had been raised before the District Court. However, the precise argument noting that the state warrant was filed one day after the search had not been raised before the District Court. On that basis the Sixth Circuit deemed the argument forfeited.

The Sixth Circuit acknowledged that all arguments in support of a district court's decision may be considered on appeal, even if not raised below, but held that this was not true of arguments to reverse a decision below. The court did not address the fact that structural error may be raised at any time, including for the first time on appeal.

The Sixth Circuit deemed it to be illogical to require that search warrants be filed before being executed as that would mean that law enforcement could not conduct searches after regular business hours. This is simply not true as will be seen *infra*.

Kentucky Courts also, are "courts of record." Kentucky courts speak only through their records. Therefore, an unfiled document is not a court order because the court has not acted.

The Sixth Circuit therefore ratified a warrantless search of Petitioner's residence by holding that an unfiled document in a Kentucky court of record constituted a search warrant.

REASONS FOR GRANTING THE WRIT

1. Courts of the United States are "Courts of Record," therefore it is structural error for the Prosecution to rely upon a state search warrant for the admission of evidence without making such search warrant part of the formal record of the United States District Court by filing it with the District Court. The virtually universal practice of federal prosecutors in obtaining state search warrants, then using said state search warrants in federal prosecutions, without filing such warrants in federal court, must be corrected. Some of the time, it is impossible to know precisely what happened to allow the admission of evidence critical to the outcome of the federal case. In a Court of Record, orders critical to the outcome of a case must infallibly appear in the formal record of the court. It is structural error not to file such state search warrants.

2. The Constitutionally mandated structure for a governmental search of a residence is the existence of a search warrant. The Sixth Circuit sanctioned a warrantless search of Petitioner's residence in direct violation of the Fourth Amendment to the Constitution of the United States by holding that a state document unfiled in the formal record of a state court of record, constituted a search warrant.

First, this Court should grant certiorari to determine whether state search warrants used in federal prosecutions must be filed with the district court when prosecution is in that court, and whether or not it is structural error to fail to do so.

The Sixth Circuit held that an argument that the search of Petitioner's residence was warrantless was forfeited as it was not raised at the trial level. However, even if a structural error issue is raised for the first time on appeal, if it appears there is structure error, the result is automatic reversal of the conviction. Neder v. United States, 527 U.S. 1 (1999).

It is structural error to deny a motion to suppress evidence based upon a search warrant not found in the federal court's formal record. The state search warrant was the foundation upon which the evidence seized from Petitioner's residence was deemed admissible.

Courts of the United States are courts of record. Black's Law Dictionary defines a court of record as a court maintaining "… official written documentation of what happened…" Duhaime's Law Dictionary Court of Record Definition: "A court of law which retains written records of its proceedings …" William Blackstone wrote, in his Commentaries on the Laws of England, Book 3: "A court of record is that where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called records of the court, and are of such high and supereminent authority that their truth is not to be called in question." In Volume V of his A History of English Law, Holdsworth writes: "**It is the infallibility of its formal record which is the earliest mark of a court of record**. ..." (Emphasis added). Pivotal documents such as state search warrants must be filed with the District Court exactly as federal search and federal arrest warrants always are filed with the District Court. Moreover, this is true as state warrants are judged by federal standards and the same filing requirements into the formal record of the court should apply.

The Fourth Amendment to the Constitution of the United States mandates a structure for the search of a residence. It requires a search warrant. The prosecution

should be required to file state search warrants for searches of residences in federal court before there is a federal prosecution of the home owner.

This Court has instructed that the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal prosecution. Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1907 (2017).

In Petitioner's case, this Court should ensure insistence on the basic constitutional guarantee of a search warrant by requiring that the prosecution file a state warrant in the district court when that warrant is used in a federal prosecution and when items seized pursuant to the search warrant are used at trial. This is an easy constitutional guarantee that should have defined the framework of Petitioner's prosecution.

The state search warrant was critical to Petitioner's prosecution, as the warrant was the reason the trial Court denied Petitioner's suppression motion. The state search warrant was the foundation upon which the evidence seized from Petitioner's residence was deemed admissible, which formed the basis of the firearms charge.

The Constitution of the United States requires that orders of such critical importance as search warrants be present in the District Court's formal record. Mere conversation about search warrants or informal disclosure of them between parties is insufficient for the requirements of a Court of Record.

The virtually universal practice of federal prosecutors of obtaining state search warrants, then using said state search warrants in federal prosecutions, but not filing such warrants in federal court, must be corrected. In 31 years as an Assistant U. S. Attorney and seven years as a CJA defense attorney, this attorney has yet to see a state search warrant filed in the formal record of the district court wherein the prosecution was occurring. Presently, this attorney has other appeals wherein state search warrants were utilized in federal court without their being filed in the district court record. Procedures regarding the handling of search warrants have become sloppy and lax as evidenced by two pending appeals.

In U.S. v. Justin Martin, Sixth Circuit No. 21−1377, the only record of a residential search warrant was disclosed when the defense attached the search warrant and affidavit to a document it filed. The search warrant return never was filed. There is no record that the return on the state search warrant even was disclosed to the defense or to the court. Also, evidence from a search warrant for cell telephone information was utilized, but nothing was filed and the search warrant is vaguely mentioned only in rumor. However, at the advice of the government, the district court was misled and all information known to the police, despite not having been included in the search warrant affidavit, was used by the court to augment the affidavit in determining whether the affidavit established probable cause for a search. See, also, Myron Baker v. U.S., Supreme Court No. 22-5154, wherein a state search warrant never was filed in the federal court's formal record.

Even worse, in Petitioner's case there was no state search warrant at the time of the search of Petitioner's residence. The admissibility of evidence obtained from the search of Petitioner's residence depended entirely upon an unfiled state search warrant, which was a nullity.

State search warrants used to obtain evidence used in a criminal case in federal court are judged by federal standards. Federal search warrants must be filed in the formal record of the court. State search warrants, when used in federal prosecutions, in order to comport with federal standards, also should be filed in the formal record of the court. Not to insist upon state search warrants being in the formal record of the federal court is structural error, as the court of record thereby lacks a record critical to the resolution of the case.

This Court reviewed the history of structural error beginning in Chapman v. California, 386 U.S. 18, at 23 (1967), wherein the Court noted that some errors should not be deemed harmless beyond a reasonable doubt. These errors came to be known as structural errors. Arizona v. Fulminante, 499 U.S. 279, at 309-310 (1991).

This Court stated that, "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' Id., at 310. For the same reason, a

structural error "def[ies] analysis by harmless error standards." Id., at 309 (internal quotation marks omitted). Weaver, supra, 137 S. Ct. at 1907- 08.

This Court explained that:

> "The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales.
>
> "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.' McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See Faretta v. California, 422 U.S. 806, 834 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. See United States v. Gonzalez–Lopez, 548 U.S. 140, 149, n. 4 (2006).
>
> "Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.' Ibid. (quoting Vasquez v. Hillery, 474 U.S. 254, at 263 (1986)). Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' Chapman, supra, at 24, the efficiency costs of letting the government try to make the showing are unjustified.
>
> "Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See Gideon v. Wainwright, 372 U.S. 335, at 343-345 (1963) (right to an attorney); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.
>
> "These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See e.g., Id., at 280–282. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case. See Gonzalez–Lopez, *supra*, at 149, n.

> 4, 126 S.Ct. 2557 (rejecting as 'inconsistent with the reasoning of our precedents' the idea that structural errors 'always or necessarily render a trial fundamentally unfair and unreliable' (emphasis deleted)). Weaver, U.S. 137, at 1907-1908."

The first rationale certainly applies. Requiring that the prosecution file state search warrants, affidavits, and returns of the such warrants in federal courts goes beyond protecting Petitioner. Such filings in the formal record of the district court protects the integrity of the judicial process by ensuring insistence upon a basic constitutional guarantee that a search warrant has been properly issued, which is the Constitutional framework of the criminal prosecution of a homeowner following a search of his residence. In a court of record, as Holdsworth writes: "It is the **infallibility of its formal record** which is the earliest mark of a court of record. ..." (Emphasis added). Requiring that important Constitutionally mandated documents, as are search warrants, appear timely in the formal record of a court wherein a federal prosecution occurs is an obvious component of such a constitutional framework.

In some cases, the consequences of a timely disclosure of a state search warrant may affect the outcome of a case. In the current case, requiring timely disclosure by filing would have exposed the lack of a state search warrant.

It is hardly a heavy burden to require that if the government uses a state search warrant, the government must file the warrant and the documents pertaining to it in the federal record. This process merely involves handing the documents to a clerk and asking that they be filed. It takes all of five minutes.

This Court views all structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal." The errors in Petitioner's prosecution are such errors and automatic reversal of the suppression decision and of the concomitant conviction is warranted.

Secondly, it is established law that new arguments in support of affirming a decision of the district court, despite not having been raised before the trial court still may be considered on appeal. There is no law concerning whether new arguments in support of reversing a decision of the district court, despite not having been raised before the trial court, still may be considered on appeal. This needs clarification.

"Formal record" must mean that court orders be filed in the court of prosecution. Orders defining the course of a case must be orders in the court's docket. Merely finding search warrants as attachments is insufficient for a number of reasons. Suppose no motion to suppress is filed? In that event no search warrant ever will appear in the record. Yet it may be the search warrant which directs the course of the case.

Many defense attorneys give up when the detect any kind of a search warrant, no matter how badly it is drafted or how badly it is supported by probable cause because of the "good faith" exception to the "exclusionary rule." Courts often give great leeway to what an ignorant layman might believe is probable cause. The government could argue that justification in this case.

It is worth noting that "probable cause" is a minimal requirement to begin with. Probable cause is merely a "reason to believe." Facts which fail to provide even a "reason to believe" that contraband will be found in a residence ought not be sufficient to justify a search. The Fourth Amendment does not say that a search warrant may issue upon probable cause or a jumble of information which does not provide a reason to believe that contraband will be found on the premises but which an ignorant person might believe does. The "good faith exception" is having a corrosive effect upon the probable cause requirement of the Fourth Amendment. The Fourth Amendment standard set by the "good faith exception" is based upon what an ignorant person might erroneously think is a "reason to believe" that contraband will be found in a residence. This cannot be what the Founders of our Constitution intended. The Fourth Amendment ought not be determined by what ignorant people mistakenly believe.

The formal record of court orders must be those orders filed with the court. The court's docket is its formal record. One should not have to comb through the records of minor state courts to determine if federal evidence was deemed admissible by means of a state warrant. By the same token one should not have to comb through attachments to pleadings, if there are such attachments, to determine if there are critical court orders which affect the course of the federal case.

The Sixth Circuit held it to be illogical to require that search warrants be filed before being executed as that process would mean that law enforcement could not

conduct searches after regular business hours. This is simply not true. If law enforcement desires to search premises after regular business hours, there are a number of options which could be taken, all of which this attorney experienced as a state and federal prosecutor:

1) Courts often assign a judicial officer to approve search warrants after regular business hours. Typically, these judges have their own file stamps to stamp a search warrant, if not, these judges could call a member of the clerks' office to come to the judge's home to stamp the search warrant. If a court did not have such a designated judicial officer it could designate one. The file stamped warrant is filed at the opening of business the next business day.

2) Law enforcement could secure the premises and surveille it until the opening of business when they could approach a judicial officer to obtain a search warrant.

3) If exigent circumstances are involved, such as drugs which might be flushed down a toilet, law enforcement could search the premises without a search warrant.

The above practices are a small price to pay for enforcing the Fourth Amendment.

Another problem with "unfiled search warrants" is that when police attempt to compel a resident to allow a search using a document which is not issued by a court violence could ensue.

An unfiled state document is not a court order. There was no state search warrant on the date of the search of Petitioner's residence. Kentucky Courts are "courts of record." The manner in which these courts speak is well established. The court in Town of Wallins v. Luten Bridge Co., 291 Ky. 73, 163 S.W.2d 276, (1942), stated that, "A (Kentucky) court speaks only through its records…" The Sixth Circuit therefore ratified a warrantless search of Petitioner's residence by holding that an unfiled document in a Kentucky court of record constituted a court order, i.e., a search warrant.

The Constitutionally mandated structure for the search of a residence is the existence of a search warrant. It was structural error to prosecute Petitioner based upon evidence obtained by means of a state document which was not part of the formal record of the applicable state court in derogation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

Petitioner requests that this Court grant certiorari, reverse the Sixth Circuit's affirmance, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER July 13, 2022
2. Decision of the District Court March 10, 2021
3. Decision of the Magistrate Judge February 12, 2021