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IN THE

SUPREME COURT OF THE UNITED STATES

_____

Jeffrey Allen Ware — PETITIONER
(Your Name)

vs.

State of Florida — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey Allen Ware
(Your Name)

P.O. Box 900
(Address)

Raiford, Florida 32083
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

Petitioner's cellphone was searched without a warrant upon his arrest and then a year later with a warrant. The illegality of a warrantless search of a cellphone not clearly defined until the pendancy of Petitioner's direct appeal:

> **Q**: Is the exclusionary rule properly limited solely to the purpose of deterring police misconduct or can/should it be used to enforce a clear constitutional violation (4th Amendment) irregardless of past police misconduct?

LIST OF PARTIES

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

[X] 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:

Pamela J. Bondi - Respondent - Flo. Atty General
Jule Jones - Respondent - Secy Flo. Department of Corrections

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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

[X] 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,
[X] is unpublished.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,
[X] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 14, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 3, 2018, and a copy of the order denying rehearing appears at Appendix "B".

[X] An extension of time to file the petition for a writ of certiorari was granted to and including September 30, 2018 (date) on July 19, 2018 (date) in Application No. 18 A 44.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the U.S. Constitution.

TABLE OF AUTHORITIES CITED

Page No.:

Cases:

Rules and Statutes:

STATEMENT OF FACTS

Petitioner, Jeffery Ware, is serving Life without Parole for a collection of Rico and Continuing Criminal Enterprise (CCE) charges all based on illegal prescription drug transactions. According to the State, the basic underlying scheme common to all of these offenses was that a phony prescription would be written for Oxycodone and Petitioner would arrange for someone to present it to a pharmacy. When the pharmacist called the doctor listed on the prescription to verify it, it would be Petitioner answering the phone as he had listed his telephone number on the prescription.

It was not, however, Petitioner's phone number on the prescription form as stated and used by the Court and State as a key consideration in determining that the search of the cell phone was legal.

On August 4, 2009, two of Petitioner's co-defendant's were apprehended by the police while attempting to pass a fraudulent prescription at Vintage Pharmacy in Lake County, Florida, after Petitioner had earlier dropped them off at that location. Acting on police directive, one of the co-defendant's called Ware to come to the pharmacy to pick him up. Upon arrival, Ware was ordered out of the pickup truck and searched by police. During this arrest/pat down, Petitioner's cell phone was discovered and taken.

The police obtained permission from the Petitioner to search the pick up truck. The consent to search was withdrawn prior to the search of the loaded tool box[1]. The State Court ruling on the issue was unreasonable but, is not now the issue before the court. (Appx. "G").

Without permission and without a warrant the officers at the scene and then shortly later at the police station accessed the information on Petitioner's cellphone. They used this information to complete their investigation, get a complete picture of the enterprise and the relationship of everyone to each other. Also included in this search was Petitioner's call log and Petitioner's pictures which were later used at trial.

Petitioner was arrested in August 2009, but it was not until April 2010, that the State finally got around to requesting a court order to obtain cellphone records from the carrier and not until December 2010, that they applied for and was granted a search warrant to search Petitioner's phone. (Appx. "H").

The affidavit in support of the search warrant request does not accurately reflect what information

[1]During the search the police recovered various prescription forms.

the State relied upon on or how they actually obtained it.

Petitioner presented his claim to the State court as one of ineffectiveness of counsel (6th Amend) for failing to challenge these actions as they occurred. (Appx. F). In summarily denying this claim, the State court in order to judge the sufficiency of counsel's efforts/lack of effort was forced to analyze the constitutional claims they are based on (Appx. G).

This denial was appealed to the State appellate court and per curiam affirmed. Later Petitioner's section 2254 petition (Appx. D) was also summarily denied. (Appx. C). No COA was granted (Appx. A) and the Eleventh Circuit denied the motion for reconsideration (Appx. B). A request for enlargement of time was made and granted by this Court. This present petition is being turned over to prison officials for mailing within this time limitation.

REASONS FOR GRANTING PETITION

Petitioner's cellphone was searched by the police without a warrant upon his arrest and a short while later at the station. Information was obtained which was instrumental in the State unrevealing how the purported conspiracy was constructed and who all was involved.

A year later the cellphone was again searched with a warrant and the same evidence "discovered". In applying for the warrant, the police cited to information from other sources. (Appx. H). The application was less than truthful and omitted key facts regarding the earlier search.

The illegality of the first search (warrantless search) of the cellphone at time of Petitioner's arrest was not clearly established until the pendency of Petitioner's direct appeal. This case therefore presents a good opportunity to determine whether the exclusionary rule should be limited to solely addressing past police misconduct which of course requires an established legal duty; or whether the exclusionary rule should not be so narrowly interpreted.

In addition, this case presents the issue of whether the various doctrines that factor into the exclusionary rule are all properly being interpreted in a manner so favorable to police actions that it is practically impossibly to establish that a later obtained warrant is tainted by the earlier police misconduct.

AT TIME OF SEARCH THE POLICE HAD NO CLEAR AUTHORITY FOR THE WARRANTLESS SEARCH

When Petitioner's cellphone was searched without a warrant in 2009 the law was not settled to the point that the police officers who conducted the search would have been completely aware that their action violated the Fourth Amendment. On the other hand, at that time the officers really had no decision that they would reasonably understand to enable them to conduct a warrantless search.

While Petitioner was on direct appeal, the Florida First District Court of Appeal permitted the search of a cellphone without a warrant in *Smallwood v. State*, 61 So. 3d 448 (Fla. 1st DCA 2011). This decision however put Florida law officers on clear notice they could not rely on this case as authority because the First District Court certified a question to the Florida Supreme Court on this issue.

Once this question was certified, Petitioner could have remained in the "pipeline" (non-final) until the Florida Supreme Court reversed the District Court in *Smallwood*[2] and/or this court's later decision in *Riley v. California*, 134 S. Ct. 2473 (2018). The unreasonable failure of Petitioner's attorney to keep his case in the "pipeline" allows treatment of his case as if he had remained in the pipeline. See *Welch v. U.S.*, U.S. Dist. Lexis 16962 (Dist. Me. August 15, 2005).

Florida goes so far as recognizing a manifest injustice exception so that claims such as the present can be examined under the lens of the law as it existed at time of appeal and remains so now. (*Smallwood II* and *Riley*). *See Marshall v. State*, 2018 Fla. App. Lexis 2863 (Fla. 3rd DCA Feb. 22, 2018).

The result is that at the time of the search, it was not possible to establish that the police acted in disregard of clearly established law as there were no decisions clearly defining the law that controlled. But Petitioner did not have to make this showing. The unreasonableness of police action in conducting this warrantless search is demonstrated by them giving foreword in absence of clear authority. *See Burton v. State*, 2018 Fla. App. Lexis 2993 (Fla. 5th DCA March 2, 2018)(relying on *Carpenter v. State*, 228 So. 3d 535 (Fla. 2017) for the proposition that a "good faith" exception does not apply when the police are not relying on precedent that is not firmly established over a course of many years.

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[2]*Smallwood v. State*, 113 So. 3d 724 (Fla. 2013)

THE LATER SEARCH WITH A WARRANT DOES NOT VALIDATE THE EARLIER ILLEGAL SEARCH

What took place in Petitioner's case is a recurring theme in Florida. An initial warrantless search is conducted in violation of the Fourth Amendment guarantees, knowledge acquired and/or evidence secured. A later search with warrant is permitted/predicated where the application for the warrant disavows any reliance on the earlier illegal search. (Appx. H).

Unlike the search for a tangible item, the search of a telephone yields information a lot more difficult to establish that it was even acquired. The result is that here, as in most cases, the Petitioner is unable to prove that the application contains false statements or material omissions so the warrant is granted.

At the initial search, there were no extenuating circumstances that required an immediate warrantless search. Petitioner was under arrest and the phone in custody of the police so there was no chance of wiping it. Nor was the phone properly searched under an "inventory search[3]". The phone was taken from Petitioner, nor was it properly search-able during the booking process.[4]

Nor in any way can the excuse that because the police possessed probable cause for issuance of a warrant their failure to actually apply for and obtain one is harmless[5]. The issuance later of a warrant does not validate an earlier illegal search[6]. Instead the later request for a warrant must divorce itself from any reliance on the earlier search[7].

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[3] *U.S. v. Flores*, 122 Fed. Supp. 2d 491-495 (S.D. NY 2000)
[4] *U.S. v. Park*, 2007 U.S. Dist. Lexis 40596 (N.D. Cal. May 23, 2017)
[5] *U.S. v. Mathews*, 2006 U.S. Dist. Lexis 7701 (D. Mass. March 1, 2006)
[6] *U.S. v. McLain*, 444 F.3d 537 (6th Cir. 2006) Citing *Arizona v. Hicks*, 480 U.S. 321 (1987)
[7] *Segura v. U.S.*, 468 U.S. 796 (1984) (illegal entry does not preclude admission of evidence found during later search pursuant to a warrant drown from services wholly unconnected to illegal entry.)

ILLEGAL EVIDENCE IS ROUTINELY ADMITTED AT TRIAL BECAUSE IT IS VIRTUALLY IMPOSSIBLE TO SUCCESSFULLY CHALLENGE IT

An examination of what the State did in Petitioner's case will demonstrate why Supreme Court review and intervention is needed – to better define limits on the State's ability to secure a search warrant after having illegally searched without a warrant. Now, the procedures in place do not provide a meaningful means to challenge so invariably the Florida courts find that the Petitioners have failed to prove their allegations of tainted evidence.

The affidavit provided to the Court in support of warrant application by the detective states that the phone when seized from Petitioner was then "verified" that it was the phone used to communicate with the person picking up the fraudulent prescription (Appx. H). The officer omitted critical and material facts and details[8] where – failed to explain phone was off when searched, the officer turned it on and pulled up the phone lists and history: Further that there was another warrantless search at the police station.

In challenging the later warrant search, the first and in the most cases the insurmountable hurdle of the court's almost universal policy of finding error but not reversible error. For instance, the failure to disclose in a warrant application that an earlier search was conducted is not necessary reversible error. *See State v. Hunwick*, 434 So. 2d 1000 (Fla. 4th DCA 1983).

Likewise, one line of cases provide that the omission of material facts from a warrant only merits relief if the issuing judge would have altered his finding if aware of these facts. *See State v. Panzino*, 583 So. 2d 1054 (Fla. 5th DCA 1991).

Another line of cases provide that if the evidence procured from the illegal search were removed, the question becomes would there by sufficient evidence left to support his ruling. *See U.S. v. Karv,* 468 U.S. 705 (1984) and *Nearcy v. State*, 384 So. 2d 881 (Fla. 1980).

Not two ways saying the same thing but instead two very different ways to determine whether a constitutional violation can be proved. There is not even a requirement that all facts be provided in a

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[8] *U.S. v. Coleman*, 349 F.3d 1077, 1084 (8th Cir. 2003)

warrant application[9].

There is one requirement, however, that all court's seem to agree that needs to be honored and that is the second search warrant must be independent of the first illegal search[10].

The problem encountered by petitioner and most, thus in Florida, is that it is practically impossible to prove that facts relief upon in application for the later search warrant were connected based on or brought about by the earlier illegal search. The search of a device such as Petitioner's cellphone that contained so much information can not be simply examined after the illegal search to determine what information was gleaned. When information is taken, as here, then the court is faced with accepting the police representation of what was learned unless proven wrong, which normally can't be proven.

INDEPENDENT SOURCE DOCTRINE

Under the independent source doctrine if the search warrant was even prompted by what was observed earlier (illegal), the second search is not permitted[11]. But like all the other doctrines applied, the chief concern is not whether the Fourth Amendment rights of Petitioner were violated but rather whether the State was going to be placed in a worse position then they would have been if no earlier illegal search had occurred[12].

In effect this doctrine and the other doctrines that are applied to the illegal search and subsequent searches are all focused on protecting the State; by making sure that the State should not be forced to pay a penalty for the earlier unconstitutional act unless the Petitioner is somehow able to conclusively establish the necessary showing, usually a practical impossibility. As pointed out above, the police have little or no incentive to seek a warrant under these circumstances[13].

Review is needed to address why the State should not pay a penalty for the illegal search just as a defendant pays a price for all his improper actions. Likewise, review is needed to determine if the police should have an incentive to obtain a warrant rather than under current law where the opposite is true – a guaranteed recipe for future illegal/improper police activity.

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[9]*Scott v. State*, 559 So. 2d 269 (Fla. 4th DCA 1993)
[10]*U.S. v. Williams*, 656 Fed. Appx. 751 (6th Cir. 2016)
[11]*Murray v. U.S.*, 487 U.S. 533 (1988)
[12]*Nix v. Williams*, 467 U.S. 431, 443 (1984) and Murray v. U.S., 487 U.S. 533, 538 (1988)
[13]*U.S. v. Bigelow*, 562 F.3d 1272, 1282 (10th Cir. 2004)

REVIEW ALSO SHOULD BE GRANTED TO CLARIFY THAT THE EXCLUSIONARY RULE IS NOT SOLELY TO DETER POLICE MISCONDUCT.

Petitioner's case demonstrates why clarification is necessary. The circumstances here are such that the "police misconduct" showed up twice. First, when the initial warrantless search was conducted without authority establishing that application to a cellphone was legal even though there was no authority saying it was illegal. The other instance is in the very misleading/false application submitted in support of search warrant to validate the evidence from the earlier non-warrant search.

While the exclusionary rule is judicially created remedy designed to safeguard through deterrence rather than directly safeguard personal constitutional rights[14], it can and should be employed as an enforcement tool for constitutional rights irrespective of police misconduct, when necessary. After all, the primary purpose of deterring unlawful police misconduct is to effect the guarantees of the 4th Amend.[15] The court's almost universally turn this "primarily" into a "solely" and never go any further in determining if the exclusionary rule has possible application.

The exclusionary rule can and should be used beyond the present "solely" (deter police misconduct). But it occurs so rarely that unless this Court gives its importance on its expanded use, it will not be widely or fairly applied.

In *Voorhees v. State*, 599 So. 2d 602 (Fla. 1997) the Florida Court took that route. The court reasoned that the rule can be used to maintain the integrity of the judicial system so the court does not become in effect an accomplice to the misconduct. The court will not become a party to the violation of the constitution they are sword to uphold. It is, however, a lone decision not followed. Review by this Court allowing for possible expansion would be enough.

It is the court's almost universal over-concern with both the ability of the State to present their case if evidence is excluded and the concern that the State not be placed in a worse position if the illegality had not occurred that needs to be addressed.

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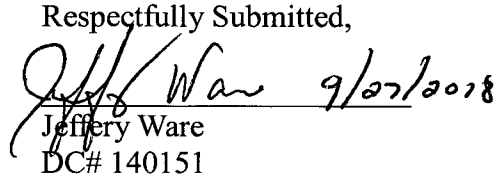
[14]*Kimmelman v. Morrison*, 477 U.S. 365 (1986)
[15]*Illinois v. Krull*, 480 U.S. 340 (1987)

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



9/27/2018

Jeffery Ware
DC# 140151
New River C.I.
P.O. Box 900
Raiford, FL. 32083