No.

IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN JENKINS – Petitioner

vs

UNITED STATES OF AMERICA - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

6TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Prepared by:
ANASTASE MARKOU
Levine & Levine
136 East Michigan Avenue, 14th Floor
Kalamazoo, Michigan 49007
(269) 382-0444

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE AND FRUITS OF THE ILLEGAL SEARCHES OF RESIDENCES AT CANDLEWYCK, EDWIN, AND DRAGONFLY WHERE THE AFFIDAVITS IN SUPPORT OF THESE SEARCH WARRANTS LACKED PROBABLE CAUSE AND THE GOOD FAITH EXCEPTION COULD NOT OPERATE TO SAVE THESE OBVIOUSLY DEFICIENT AFFIDAVITS?

Petitioner-Appellant Answers: Yes

Respondent-Appellee Answers: No

II. WHETHER REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN FINDING THAT MR. JENKINS LACKED STANDING TO CHALLENGE THE SEARCH OF THE SUITCASE AND REFUSING TO SUPPRESS THE EVIDENCE FOUND IN THE SUITCASE?

Petitioner-Appellant Answers: Yes

Respondent-Appellee Answers: No

III. WHETHER REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE DISCOVERED DURING THE ILLEGAL SEIZURE AND SUBSEQUENT SEARCH OF THE FORD FUSION?

Petitioner-Appellant Answers: Yes

Respondent-Appellee Answers: No

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals, Sixth Circuit, appearing at Appendix A, and is unpublished, Case Number 17-1377/1465, dated July 24, 2018.

The District Court issued two opinions relevant for this Honorable Court's consideration of this Writ. In both opinions, the District Court denied Mr. Jenkins' Motions to Suppress. (See Opinion Regarding Defendants' Motion to Suppress Evidence Obtained from Searches, Appendix B; Findings of Fact, Appendix C). Judgment in the District Court entered on March 28, 2018. (Judgment, Appendix D).

JURISDICTION

The United States Court of Appeals decided this case on July 24, 2018.

The jurisdiction of this Court is invoked under United States Constitution, Article III, and 28 USC 1254.

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution, 4th Amendment:

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.

STATEMENT OF THE CASE

I. Facts of the Case

Defendant-Appellant, Justin Jenkins, entered a guilty plea on October 7, 2016, to Count 7 which charged Possession of 100 Grams or More of Heroin with the Intent to Distribute, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(i), and Count 9 which charged Possession of Firearms in Furtherance of the Drug Trafficking, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i). (Superseding Indictment, R. 125, Page ID# 469-482) Mr. Jenkins was sentenced on March 28, 2017, to 180 months, consisting of 120 months on Count 7 and 60 months on Count 9, to be served consecutively, followed by an eight (8) year term of supervised release on Count 7 and a five (5) year term of supervised release on Count 9, to run concurrently. (Judgment, R. 286, Page ID#1780-1786)

The Plea Agreement was a conditional one. Mr. Jenkins reserved the right to challenge on direct appeal the trial court's decision on the various Motions to Suppress. (Plea Agreement, R. 239, Page ID# 1367-1377)

On October 7, 2016, Mr. Jenkins, the Defendant-Appellant in this case, pled guilty to Possession of 100 Grams or More of Heroin with the Intent to Distribute and Possession of Firearms in Furtherance of the Drug Trafficking. (Plea Agreement, R. 239, Page ID# 1367-1377). As part of the conditional plea agreement, accepted by the Government and Court, Mr. Jenkins preserved his right to challenge on direct appeal the various searches conducted in this case. (Plea

Agreement, R. 239, Page ID# 1367-1368). The trial court denied each of Mr. Jenkins' motions to suppress. The Plea Agreement specifically provides that if this Honorable Court reverses ANY of the trial court's decisions on the individual motions to suppress, Mr. Jenkins has the right to withdraw his plea. (Plea Agreement, R. 239, Page ID# 1367-1368).

Defendant, Justin Jenkins, was charged, along with co-defendants Quinton Howell, Kyle Lewis, Maurice Streeter, and Henry Hall, in a Superseding Indictment (R. 125, Page ID# 469-482) issued March 15, 2016. Of the Nine Counts, the following counts were applicable to Defendant Jenkins as part of the motions to suppress:

Count 1: Conspiracy to Distribute Heroin and Cocaine Base;

Count 5: Possession with Intent to Distribute Heroin;

Count 6: Possession with Intent to Distribute Cocaine Base and Cocaine;

Count 7: Possession with Intent to Distribute Heroin;

Count 8: Felon in Possession of a Firearm; and

Count 9: Possession of a Firearm in Furtherance of Drug Trafficking.

II. District Court Proceedings

The evidence relied upon by law enforcement to indict the Defendant in Counts 1, 5, and 6, was obtained as a result of three Search Warrants executed upon 520 Edwin, Kalamazoo, MI; 300 Candlewyck, Apartment 1203, Kalamazoo, MI; and 755 Dragonfly, Apartment 265, Oshtemo, MI. The Affidavits for Search Warrant shall hereafter be referred to as the "Edwin" warrant (Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 915-925), the "Candlewyck" warrant

(Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 926-938), and the "Dragonfly" warrant (Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 939-945), respectively.

The Defendant-Appellant challenged the searches of these residences as there was not an adequate showing of probable cause to search the residences.[1]

During the execution of the Candlewyck Warrant, the police seized physical evidence and persons on the premises, including Defendant Jenkins. Police obtained incriminating statements from Mr. Jenkins after the illegal seizure of his person during the Candlewyck warrant execution. Law enforcement seized physical evidence from the Edwin and Dragonfly searches, which Defendant Jenkins sought to suppress.

In an opinion dated August 23, 2016, the trial court assumed that the Edwin and Candlewyck Affidavits lacked probable cause. (Opinion Regarding Defendants' Motion to Suppress Evidence Obtained from Searches, R. 227, Page ID# 1297-1325). As argued below, these two Affidavits woefully lacked any semblance of probable cause to justify the searches at Edwin and Candlewyck. (Opinion Regarding Defendants' Motion to Suppress Evidence Obtained from Searches, R. 227, Page ID# 1322-1325). The trial court erred, however, in finding that the *Leon* good-faith exception to the exclusionary rule applied to permit the introduction of the evidence found during these two searches. (Opinion Regarding Defendants' Motion to Suppress Evidence Obtained from Searches, R. 227, Page ID# 1322-1325).

[1] The trial court did not take any testimony on the challenges to the Candlewyck, Edwin and Dragonfly warrants. The trial court based its decision on the underlying Affidavits for each search conducted pursuant to a warrant.

Similarly, the 6th Circuit erred in finding that the good-faith exception to the 4th Amendment exclusionary rule applied to the searches at Edwin and Candlewyck. (See Appendix A).

This Honorable Court should grant certiorari and reverse the trial court's findings on the Candlewyck and Edwin searches, order the evidence discovered and/or obtained during these searches be suppressed, including Mr. Jenkins' statements made during the Candlewyck search, and remand the matter for further proceedings. Of particular importance to our national jurisprudence, lower courts need further guidance from this Honorable Court regarding the limits of the *Leon* good faith exception. This case, because of the particular averments in the subject Affidavits, will afford this Honorable Court the opportunity to explain that evidence must still be suppressed where an Affidavit contains no particular facts to search a residence.

Regarding the Dragonfly search, the trial court and the 6th Circuit erred in finding there was probable cause in the Affidavit to justify the Dragonfly search. (Opinion Regarding Defendants' Motion to Suppress Evidence Obtained from Searches, R. 227, Page ID# 1321-1322). Defendant-Appellant requests that this Honorable Court reverse the trial court's decision and remand the matter for further proceedings.

In that Superseding Indictment, the Government added Counts 7, 8, and 9 against Mr. Jenkins. (Superseding Indictment, R. 125, Page ID# 476-478). Further, the Government changed the initial date range of the Conspiracy Count (Count 1) from 2013 to July 15, 2015 to a range of 2013 through August 21, 2015.

(Superseding Indictment, R. 125, Page ID# 469). It appears that this change in dates was made so that the alleged conspiracy involved alleged activities engaged in by Defendants Jenkins and Hall on August 11, 2015, and referenced in Counts 7, 8, and 9. (Superseding Indictment, R. 125, Page ID# 476-478).

The evidence used to support added Counts 7, 8, 9, and the added date range for the Conspiracy Count, came from a search of a suitcase located in a home at 1934 East Britain Avenue in Benton Harbor and from the seizure and subsequent search of a motor vehicle (Ford Fusion) found at that address. Drugs were found in the home in a suitcase while the firearms and some other items were found in the motor vehicle. Mr. Jenkins challenged the search of the suitcase and the motor vehicle and requested suppression of any and all evidence found during these unconstitutional seizures and searches.

An evidentiary hearing was held in the trial court on September 1, 2016. (Transcript, R. 305, Page ID# 1971-2160). Various witnesses testified at the hearing including Kailah Lee, Officer Justin Wonders, Officer Aaron Ham, and Officer James Zehm. The trial court denied Mr. Jenkins' requests to suppress evidence found in the car and the suitcase in a written opinion that included findings of fact and legal conclusions. (Findings of Facts, R. 233, Page ID# 1346-1358).

Mr. Jenkins relies heavily on the testimony of Kailah Lee for his position that the search of the suitcase was unconstitutional. (Transcript, R. 305, Page ID# 1976-2007).

Law enforcement arrived at 1934 East Britain Avenue in Benton Harbor, to arrest Hall and/or Jenkins on August 11, 2015. (Transcript, R. 305, Page ID# 1977). Law enforcement had information that Hall occasionally resided at that residence with his significant other.

After gaining entrance to the home, law enforcement interviewed Ms. Lee. She explained that a "suitcase" located in the residence did NOT belong to her. She did not see who brought the suitcase to her home. (Transcript, R. 305, Page ID# 1980). The suitcase was not open when law enforcement entered the home. (Transcript, R. 305, Page ID# 1980). Ms. Lee never gave consent to search the suitcase. Law enforcement did not even ask if the suitcase belonged to her until after they had searched the apartment. (Transcript, R. 305, Page ID# 1992). The three officers who testified explained that when they first saw the suitcase it was open, but none of the officers could testify unequivocally that no other officer could have opened the suitcase. (Transcript, R. 305, Page ID# 2042-2144)

Mr. Jenkins maintained to the trial court that the suitcase was closed, and that law enforcement violated his 4th Amendment rights when law enforcement searched that suitcase on the authority of Ms. Lee. The trial court did not make a specific finding of fact on whether the suitcase was open when law enforcement began its search. Instead, the trial court found that Mr. Jenkins did not have legal standing to challenge that search. (Findings of Facts, R. 233, Page ID# 1351-1355).

Mr. Jenkins maintains that the trial court erred in its legal conclusion that Mr. Jenkins lacked standing to challenge the search of the suitcase. The 6th Circuit erred in finding that Mr. Jenkins lacked standing to challenge the search of the

suitcase. This Honorable Court should reverse the lower courts' decisions that Mr. Jenkins lacked standing. A person's belongings should never be subject to a government invasion of privacy merely because the person was not present during the search, particularly where multiple people live in that resident and can certainly have visitors.

Law enforcement also seized a vehicle, a Ford Fusion, outside the home. Law enforcement towed the vehicle to a different location and then obtained a search warrant to search it. The firearms, along with other items, were found in the vehicle. Law enforcement did not have a constitutionally permissible basis to seize the vehicle in the first place. Even if the seizure is of no constitutional significance, the subsequent search of the vehicle was contrary to Mr. Jenkins' 4th Amendment rights where the Affidavit in Support failed to establish probable cause to search the vehicle. (Findings of Facts, R. 233, Page ID# 1346-1358).

The trial court denied the motion to suppress evidence from the seizure and search of the Fusion. (Findings of Facts, R. 233, Page ID# 1356-1358). Mr. Jenkins believes that the trial court erred as a matter of law in finding that the automobile exception to the warrant requirement permits law enforcement to seize a parked vehicle. Any subsequent search of the vehicle is a fruit of the earlier illegal search. The 6th Circuit did not follow established precedent of this Honorable Court that the automobile exception does not apply to vehicles parked in a public space to permit the seizure of that automobile.

`Moreover, the Affidavit in support of the subsequent search of the Fusion lacked probable cause to search. This lack of probable cause in the Affidavit served

as a 2nd basis to suppress the evidence found in the Fusion. For whatever reason, neither of the lower courts took this issue seriously despite the woeful lack of substantive allegations in the Affidavit to support the search.

III. Sixth Circuit Court of Appeals

Mr. Jenkins timely appealed the trial court's decisions on the various motions to suppress. The Sixth Circuit upheld all of the decisions of the trial court. Ultimately, as already mentioned and further argued below, this Honorable Court should grant review of the Sixth Circuit opinion. Appendix A.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE AND FRUITS OF THE ILLEGAL SEARCHES OF RESIDENCES AT CANDLEWYCK, EDWIN, AND DRAGONFLY WHERE THE AFFIDAVITS IN SUPPORT OF THESE SEARCH WARRANTS LACKED PROBABLE CAUSE AND THE GOOD FAITH EXCEPTION COULD NOT OPERATE TO SAVE THESE OBVIOUSLY DEFICIENT AFFIDAVITS.

A. Review Warranted

This issue presents an opportunity for this Honorable Court to provide more guidance to the lower federal courts and state courts on the application of the *Leon* good faith exception. Since this Honorable Court decided United States v Leon, 468 US 897 (1984), federal circuit courts have essentially used the *Leon* to render the protections of the 4th Amendment meaningless. The 4th Amendment is a personal right, guaranteed under our Constitution. The 4th Amendment was not written to protect law enforcement or even magistrates/judges that issue warrants. Law enforcement can actually enter a person's home without even having probable cause to do so.

Given how Leon has been applied, there is no remedy available to a person if law enforcement invades their 4th Amendment rights. The exclusionary rule was the only real remedy for 4th Amendment violations until Leon became law. To claim otherwise is nonsense. Since Leon, the 6th Circuit has used the good-faith exception to excuse only a few 4th Amendment violations where the affidavit in support of a warrant lacks even the low standard of probable cause. In only a handful of cases for the last 30 years has law enforcement been held accountable for 4th Amendment violations.

Counsel recognizes that it is too much to ask this Honorable Court to overrule Leon. Still, this Honorable Court should provide further guidance to lower courts to protect persons from 4th Amendment violations.

This case is one that will allow this Honorable Court to provide such guidance.

The standard of review of a magistrate's decision to issue a warrant appears to rest on whether there was a "substantial basis" for the issuance of the warrant. Illinois v Gates, 462 US 213 (1983). Exactly what constitutes a "substantial basis" is unclear. See Drey Cooley, *Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v Gates and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants*, 55 Drake Law Review 85 (2006). Put bluntly, a magistrate is in no better position to read an Application for a Search Warrant to determine whether probable cause exists than is any subsequent appellate court. Either the four corners of the application contain probable cause or they do not. Also, a magistrate may be susceptible to local "political" pressure to issue warrants more routinely by law enforcement or the prosecutor. Appellate courts will not be subject to such possible pressure. As such, this Honorable Court should clarify Gates and emphasize that review a magistrate's probable cause determination should always be *de novo*.

The 6th Circuit appeared to review the district court's factual findings for clear error. Appendix A. It is unclear if the 6th Circuit actually applied a *de novo* review of the probable cause determination and the application of the good-faith exception.

B. Analysis

In determining whether probable cause exists to issue a warrant, the issuing Judge must decide whether there is a fair probability that contraband or evidence of a crime will be found in a particular place at the time of the search. US v Spikes, 158 F3d 913 (6th Cir. 1998). The Judge may draw reasonable inferences from the Affidavit in support of the Search Warrant. Id. Ultimately, the issuing Judge must make a practical, common sense decision based on the totality of the circumstances. US v Greene, supra, at 479.

Probable cause to search is concerned with facts relating to a presently existing condition. Spikes, 158 F3d 913. There must also be sufficient information in the affidavit that the place to be searched will contain evidence of criminal wrong-doing. US v Miggins, 302 F3d 384 (6th Cir 2002). The affidavit must allege facts sufficient to support an evidentiary nexus between the items to be found and the place to be searched. US v Laughton, 409 F3d 744, 746 (6th Cir 2005).

1. Insufficient Nexus Based on Facts Failing to Link the Candlewyck, Edwin, and Dragonfly Residences to the Alleged Illegal Activity

Ultimately, the Affidavits in this matter failed to establish the requisite nexus between the items to be found and the place to be searched. As an initial matter, none of the Affidavits ever allege that any person saw drugs at any of the residences. At most, the Dragonfly Affidavit alleges that Howell's girlfriend was the listed tenant at the residence, and Howell was observed entering/exiting the

apartment prior to and after a controlled buy. Yet, Howell is never surveilled carrying drugs to/from the apartment to any vehicle.

The Edwin and Candlewyck Affidavits have even less information than this. In neither of those Affidavits is any suspect observed going directly to/from a controlled buy, or even a suspicious exchange, leaving from the residence, and then coming back to the residence.

Furthermore, despite that these Affidavits provide that significant transactions were surveilled at various apartment complex parking lots, there was no mention that any controlled buy, or alleged drug exchange, occurred in the parking lots of Candlewyck Apartments, the driveway at Edwin or the Dragonfly Apartments.

The Sixth Circuit has long been wary of allowing the search of a home on the basis of peripheral drug activity near the home. In United States v Carpenter, 360 F3d 591 (6th Cir. 2004), the defendant was observed by a helicopter pilot walking on a path from a field containing marijuana plants to his nearby residence. Id. at 593. The affidavit to search the defendant's house merely stated that a police officer observed marijuana growing in a field near the defendant's residence and that the residence was connected to the field by a beaten path. Id. The Court held that the affidavit did not provide a substantial basis for the conclusion that probable cause existed to search the defendant's home for evidence of drug possession. Id. at 594. The fatal defect in the affidavit was the absence of any explanation of how or why evidence of the criminal activity would likely be found inside the defendant's house. Id.

In another Sixth Circuit Case, the Court found that an affidavit in support of a search warrant did not establish probable cause to search the defendant's home, even where the defendant was arrested at his home and crack cocaine was discovered on his person as part of a search incident to an arrest. US v McPhearson, 469 F3d 518 (6th Cir 2006). The Court noted that, ". . . the affidavit [did not] allege anything else tying McPhearson or his home to any criminal activity other than personal possession of crack cocaine (and a simple assault for which he was arrested). Instead, the evidence in the affidavit connecting the crime to the residence was so vague as to be conclusory or meaningless...." Id. at 527.

Carpenter and McPhearson are directly on point. The factual allegations in these Affidavits do not connect the residences to the suspected illegal activity. At most, the factual allegations establish that illegal activity occurred peripheral to the residences, in the parking lots and in vehicles of the various players. Thus, at most, these Affidavits should have allowed for the search of the various vehicles that were surveilled at the controlled buy operations. But, suspiciously, none of these Warrants allowed for the search of vehicles. Instead, they all focused on the residences.

Furthermore, the Sixth Circuit has considered a similar factual scenario in United States v Helton, 314 F3d 812 (6th Cir 2003), and ruled in favor of suppression. In Helton, the defendant's home was searched in connection with an investigation into a criminal conspiracy to distribute narcotics. Id. at 815. The affidavit that authorized the search was voluminous – totaling 27 pages. Id. at 816. Despite its volume, the affidavit asserted only six allegations relevant to the place

to be searched, which boiled down to a physical description of the home, that defendant and a known drug dealer communicated over the phone 31 times in 10 months, and an informant told law enforcement that the home contained monetary proceeds of drug sales being stored for someone else. Id. Despite the length of the Affidavit and these allegations, the Sixth Circuit determined there was no probable cause to search the defendant's home because the Affidavit did not provide corroboration for the only allegation related to criminal activity in the home – that being the storage of proceeds from drug sales. Id. at 823. Importantly, the Court also ruled that even the totality of all six allegations failed to establish probable cause. Id.

Comparing the Candlewyck Affidavit to the affidavit in Helton, the same result is warranted. The only allegations in the Candlewyck Affidavit that relate to apartment 1203 have minimal bearing on whether apartment 1203 would contain evidence of drug distribution. Even after 11 pages, there are only **two** allegations in the Candlewyck Warrant that relate to the actual premises: Paragraph I and Paragraph L. (Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 926-938)

Paragraph I does nothing more than name the listed tenant of apartment 1203, and it does nothing to tie that tenant to any other known suspect of the investigation other than to say that her car was seen **once** parked next to another suspect's car. This tenuous relationship is akin to the phone calls and description of the residence at issue in Helton. Affirming a search warrant on the basis of such a lax relationship between the premise and the purported crime is a blatant Fourth

Amendment violation, and it would open the door for any person that has ever had **minimal contact** with a known drug dealer to have their home invaded by the State without recourse. See Helton, 314 F.3d at 821.

Paragraph L contains the only allegation where law enforcement or a reliable informant saw anyone enter the specific apartment that was eventually searched. It specifically provides,

That on 03/04/3015, KVET conducted surveillance and observed the following:

1. KVET investigators conducted surveillance at Candlewyck apartments, building 300. KVET investigator Ham covertly surveilled the driver of the baby blue Toyota Yaris key into 300 Candlewyck drive, apartment 1203.

2. That investigator Ham observed the distinct odor of processed marijuana in the crease of the door frame after the door was shut.

There are two specific issues with this factual allegation. First, the unknown person seen entering the home is never identified as someone that has been previously surveilled engaging in either a controlled buy or other activities described as known drug deals. The driver of the Yaris is not even identified as female or male. Second, although the Yaris was seen prior to this surveillance in connection with other surveillance, it was never again seen, according to the Candlewyck Affidavit, in the course of the surveillance of this matter. One month of time passed between the surveillance of the unknown person to the apartment, yet the blue Yaris had not been seen again? There is no way to know whether investigator Ham even surveilled the right suspect! Third, the smell of marijuana

once, one month before issuance of the search warrant, is not enough to allow for a search.

It is plain and simple. If law enforcement has information that a drug dealer sometimes uses a particular house to store narcotics, a search warrant cannot be authorized, consistent with the 4th Amendment, to search that particular house, unless there is some averment that narcotics would be present at the time of the search. See Helton, 314 F.3d at 822 ("[W]ith each day that passed, the likelihood that the 'stacks' of money remained at [the residence searched] decreased."). Law enforcement cannot merely rely on the statement that the person "sometimes" uses the house. Law enforcement must aver that it is likely that the apartment will contain the **item to be seized**.

2. Insufficient Nexus Based on Lack of Particularity

Furthermore, there is a grave issue with the Candlewyck and Edwin Affidavits because they both completely lack facts alleged with particularity. Paragraphs A, C, D, E, F, J, K, L, M, O, and Q of the Edwin Affidavit are exact copies of allegations asserted in the Candlewyck Warrant. The Candlewyck Affidavit contains 22 paragraphs of factual allegation. The Edwin Affidavit contains 21 paragraphs of factual allegation. (Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 915-925) Of those, at least half are identical – and there is significant overlap in factual allegations related to the remaining paragraphs as well.

Furthermore, of those paragraphs, several are what could be called "boilerplate language." But, boilerplate language in an affidavit does not provide

particularized facts regarding an alleged crime occurring on the premises to be searched where no particularized facts are alleged. See United States v Weaver, 99 F.3d 1372, 1378-79 (6th Cir 1998).

It simply defies logic that the Edwin and Candlewyck Affidavits at issue in this case, where they are overwhelmingly similar, would satisfy the Fourth Amendment's particularity requirement.[2] Plainly, the Affidavits here are an unfair blend of boilerplate language and a rote log of surveillance that does not actually establish anything. "To justify a search, the circumstances must indicate why evidence of illegal activity will be found **'in a particular place.'"** US v Carpenter, 360 F3d 591, 594 (6th Cir. 2004)(citation omitted)(emphasis added).

3. The Good Faith Exception Cannot "Save" These Searches

There are four circumstances in which the good faith exception cannot be applied to "save" a search made after a lack of probable cause. These are detailed in United States v Leon, 468 US 897 (1984): (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as

[2] Admittedly, the Dragonfly Warrant contains at least some substantive allegations that evidence of illegal activity might be found at that particular place. Mr. Jenkins maintains, however, that the Affidavit, even for Dragonfly, fails to establish probable cause to search that residence. (Brief in Support of Motion to Suppress Evidence, R. 170, Page ID# 939-945)

to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

At the core of this Writ is Mr. Jenkins' position that the good-faith exception has rendered the need to establish probable cause to search a home meaningless. In over 30 years since Leon, the 6th Circuit has only applied the exclusionary rule to searches conducted pursuant to a warrant in only a handful of extreme cases. Counsel estimates that there has been less than one such case per year in the 6th Circuit that has applied the exclusionary rule post-Leon. Mr. Jenkins will detail some of those cases and explain why the evidence should have been suppressed in this case.

a. The Good Faith Exception Cannot "Save" These Searches Because The Affidavits Contained Nothing More Than "Bare Bones" Conclusions

In this matter, the Affidavits were "bare bones." Although the Government pointed to the volume of pages contained in the Affidavits as evidence that the Affidavits were not bare-bones – it is irrelevant how many pages the Affidavits are. If the Affidavits were a recitation of the phone book, or a reprinting of Shakespeare's Hamlet, would that mean that the Affidavits were reliable? Surely not. In this case, the Affiant drones on and on for one plain reason – that there was not sufficient evidence to establish the necessary nexus. Thus, no matter how many pages the Affidavits are, they are "bare bones." Therefore, the evidence seized on their basis **must** be suppressed, despite the good faith exception.

Courts in the Sixth Circuit have found in a few cases over the years that a "bare bones" affidavit is insufficient to support probable cause, and that such an affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable. See US v McPhearson, 469 F3d 518 (6th Cir 2006)(see discussion supra); US v Weaver, 99 F3d 1372 (6th Cir 1998); US v West, 520 F3d 604 (6th Cir 2008); US v Lester, 184 F Appx 486 (6th Cir 2006) (unpublished); US v Bethal, 245 F Appx 460 (6th Cir 2007) (unpublished); US v Davis, 2007 WL 541825 (ED Mich, 2007).

In Weaver, the affiant stated that a confidential informant had told officers that he had been in the home of the defendant within 72 hours of the drafting of the affidavit and while in the home had personally observed the defendant "...have personal possession and control over a quantity of marijuana being held expressly for the purpose of unlawful distribution...." See Id. at 1375, 1376. Of note, the informant in Weaver had previously given reliable information to the law enforcement agency.

In criticizing the Affidavit, the Weaver court stated,

> reading this affidavit in a "practical, common-sense" manner, the only claim of possible wrongdoing is the averment that within three days prior to the affidavit date, the informant was on the suspect's premises and, while there, he saw some quantity of marijuana "expressly for the purpose of unlawful distribution." [The affiant] presents no underlying factual circumstances to support the informant's knowledge regarding distribution, nor the detective's own "belief" that these quantities of marijuana were present "for the purpose or with the intention of unlawful possession, sale or transportation," or even that marijuana would be on the premises when the warrant was executed . . . . [Id. at 1378.]

The Sixth Circuit found that the affidavit was so lacking in probable cause that the officer could not objectively rely on the issuance of the warrant by the magistrate. Id. at 1380-81.

Mr. Jenkins' case, however, is most similar to United States v Laughton, 409 F3d 744 (2005). In Laughton the defendant's home was searched on the basis of an affidavit that averred the following relevant facts: (1) the affiant was familiar with the defendant through his investigations of drug activity; (2) the affiant had observed a controlled buy of drugs from the defendant by a credible informant; and (3) the affiant averred that he was familiar with the fact that the defendant would store drugs "in the crotch area of his pants and in his pants pockets [and] further that there are various stashes around his home." Id. at 746. The Sixth Circuit held that the affidavit supporting the search was "so lacking in indicia of probable cause" that is was "bare bones" because it contained nothing more than "the address of the premises to be searched, a summary of the [affiant's] professional experience, and two acontextual allegations against [the defendant.]" Id. at 751. The acontextual allegations to which the Court refers were the allegations that the officer had knowledge that the defendant would store drugs on his person and in stashes throughout his home. The Court ruled that this was simply not enough – that it did not tie the residence to the observations of illegal activity because there was no allegation of when and where the observations were made. Id.

The instant facts are even more compelling than the facts presented in Weaver and Laughton because, while the instant Affidavits detail significant informant information and surveillance based on informant information, that

informant has **never** indicated that he or she has been inside of the residences to be searched. Plainly, while informant evidence can often be reliable, it is not shielded from the particularity requirement. It is not enough that an informant simply states that illegal activity occurred at some point in time. Laughton and Weaver expressly indicate that the Affidavit must detail how the informant's information relates to the illegal activity occurring at the **particular place** to be searched. In the instant case, all of the controlled buys occurred at **other residences** than those searched. Although the Affidavits in Mr. Jenkins' case contain more particular information related to the informant, there nonetheless remains a lack of allegations that tie the illegal activity to these residences.

Furthermore, like Laughton, it is plain that the Affidavits in this case involve an extensive investigation by law enforcement of some of the suspects in this matter for quite some time, but not Defendant Jenkins. Nonetheless, the knowledge of the officer **means nothing** unless the officer's knowledge relates the alleged crime to the place to be searched. The affiant still had the requirement to relate the crime of selling drugs at the point of the search warrant to the residences that were sought to be searched. This plainly did not happen. Thus, the Affidavits were "bare bones." The skeletons of these Affidavits were artificially dressed with a whole lot of words with absolutely no meaning.[3]

This Honorable Court should clarify what constitutes a "bare bones" Affidavit and find that the evidence should have been suppressed in this case.

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[3] Again, Mr. Jenkins acknowledges that the Dragonfly Warrant differs from the Candlewyck and Edwin Warrants. Defendant maintains that there was not probable cause to search in the Affidavit for the Dragonfly residence.

b. Even if the Warrants were not "Bare Bones," it was objectively unreasonable for law enforcement to rely on the Warrants that lacked any factual nexus between the place to be searched and the items to be seized.

Even if this Court determines that the Affidavits were not "bare bones," this Honorable Court should find that it was not objectively reasonable for law enforcement to rely on the issuance of the warrant. Again, the 6th Circuit has a paucity of cases where the exclusionary rule was applied, despite good faith, because it was not objectively reasonable:

> The parameters of "objective reasonableness" in the good-faith context have been explored primarily in relation to whether an affidavit established a sufficient nexus between illegal activity and a place to be searched. See Carpenter, 360 F3d at 594 (affidavit describing marijuana field near residence "fall[s] short of establishing required nexus" between criminal activity and residence); United States v Laughton, 409 F3d 744, 751 (6th Cir 2005)(no modicum or evidence connected defendant, criminal activity, and address to be searched); United States v Helton, 314 F3d 812, 821-23 (6th Cir 2003)(outgoing calls from house to known drug dealer did not create substantial basis to believe evidence could be found in house); United States v Van Shutters, 163 F3d 331, 337 (6th Cir 1998)(affidavit did not establish any connection between target of investigation and home to be searched); United States v Weaver, 99 F3d 1372, 1378-79 (6th Cir 1998)(boilerplate language in affidavit failed to provide particularized facts regarding allege crime occurring on premises to be searched); United States v Leake, 998 F2d 1359, 1365 (6th Cir 1993)(minimal surveillance did not corroborate anonymous tip that narcotics could be found in basement of specific house) . . . . [United States v Hython, 443 F.3d 480, 484-485 (6th Cir. 2006).]

Given the paucity of cases where the exclusionary rule was actually applied, this Honorable Court should revisit the Leon doctrine to ensure that there is a remedy when law enforcement enters a person's home without having probable cause to do so.

In this case, the Warrants were meant to find evidence of the distribution of narcotics. Yet, the Candlewyck, Edwin and Dragonfly Affidavits did not support, based on individualized, particularized facts, probable cause to believe that evidence of these crimes was contained in the particular residences that were authorized to be searched. The Affidavits did not even provide evidence that any of the suspects resided at the residences. Further, there were no facts in the Affidavits of evidence of these crimes **in the residences**. The only nexus provided related to the vehicles – not the homes. There simply was **no nexus** in any of the Affidavits of criminal activity (the distribution of narcotics and a conspiracy of the same) to the residences to be searched. The lack of **any** factual nexus made it objectively unreasonable for law enforcement to rely on the issuance of the warrants.

Ultimately, the good-faith exception to the exclusionary rule should not apply in this case. This Honorable Court should make clear that the good-faith exception should not swallow whole the need for law enforcement to at least establish probable cause for the issuance of a warrant. A careful examination of these Affidavits reveals that they are merely bare bones Affidavits without enough factual information to establish probable cause, or in the alternative, that the lack of any nexus contained in the Warrants made it objectively unreasonable for law enforcement to rely on them.

Defendant requested at the trial court suppression of any and all evidence obtained in violation of his 4th Amendment rights, including, but not limited to any physical evidence and statements made by the Defendant after being seized during the execution of the Candlewyck, Edwin, and Dragonfly Warrants. Wong Sun v

United States, 371 US 471 (1963); Mapp v Ohio, 367 US 643; 81 SCt 1684 (1961). The landmark case of Wong Sun affirmatively determined that the fruits of a 4th Amendment violation subject to exclusion can include both verbal and physical evidence.

The trial court erred in denying the Motions to Suppress Evidence found and/or obtained during the Candlewyck, Edwin and Dragonfly searches. Mr. Jenkins requests a reversal of these decisions and a remand for further proceedings. Ultimately, evidence found during these searches should have been suppressed.

II. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN FINDING THAT MR. JENKINS LACKED STANDING TO CHALLENGE THE SEARCH OF THE SUITCASE AND REFUSING TO SUPPRESS THE EVIDENCE FOUND IN THE SUITCASE.

Standing is never an easy concept for lower courts to understand or address. If standing were left to just pure concepts of property law, the standards would be more clear. However, questions of standing in the circuits and through this court's jurisprudence typically involve a combination of 4th Amendment privacy concepts coupled with property rights. This amalgam has created tests that are about as difficult to grasp as sand. Ultimately, it seems that property rights should be the starting point for any question of standing. If the person does not own or clearly possess an item at the time of the search, then 4th Amendment general privacy right concepts should be used. What should not happen is for courts to pick and choose between property rights and privacy tests to deny a person standing when the person's standing should be obvious.

The suitcase belonged to Mr. Jenkins. Law enforcement knew that before it searched the suitcase. There is no legitimate view of standing that would deny Mr.

Jenkins the ability to challenge the search of his own personal effects. This Court should grant review.

In assessing a challenge to the district court's ruling on a motion to suppress, the 6th Circuit Court of Appeals reviews the district court's factual findings for clear error, and its legal conclusions *de novo.* United States v. Crozier, 259 F3d 503, 510 (6th Cir 2001); United States v Waller, 426 F3d 838 (6th Cir 2005). Similarly, the trial judge's findings of fact regarding the defendant's standing to challenge alleged Fourth Amendment violations are examined for clear error, while the legal determination of standing is reviewed *de novo.* United States v Pollard, 215 F3d 643, 646 (6th Cir 2000). These standards of review seem appropriate given that standing issues often involve in-court evidence and testimony.

A search without a warrant is "per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." Katz v United States, 389 US 347, 357, 88 SCt 507, 514, 19 LEd2d 576 (1967). One of those "well-delineated" exceptions is the consent of the person searched. When one person consents to a search of property owned by another, the consent is valid if "the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." Illinois v Rodriguez, 497 US 177, 188, 110 SCt 2793, 2801, 111 LEd2d 148 (1990) (quoting Terry v Ohio, 392 US 1, 21–22, 88 SCt 1868, 1880, 20 LEd2d 889 (1968) (other citations omitted)).

If consent is given to search by an individual who has apparent authority, the Fourth Amendment's prohibition against a warrantless search does not apply.

Illinois v Rodriguez, 497 US 177, 186, 110 SCt 2793, 111 LEd2d 148 (1990). When one person consents to a search of property owned by another, the consent is valid if the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the property to be searched. United States v Jenkins, 92 F3d 430, 436 (6th Cir 1996) (citing Rodriguez, 497 US at 188, 110 SCt 2793, and Terry v Ohio, 392 US 1, 21-22, 88 SCt 1868, 20 LEd2d 889 (1968)).

Fortunately for Mr. Jenkins, there was 6th Circuit precedent directly on point that requires suppression of the evidence in this case. United States v Waller, 426 F3d 838 (2005). In that case, Waller left a closed bag in a closet at Howard's residence. Howard gave law enforcement consent to search the premises. Law enforcement, as part of that consent, searched Waller's closed bag and found guns inside. The trial court denied defendant Waller's motion to suppress.

The 6th Circuit Court of Appeals reversed the trial court and found that the search of Waller's bag violated his 4th Amendment right to be free from unreasonable searches and seizures, rejecting each of the government's arguments in support of the search. In so finding, the 6th Circuit detailed the appropriate factors to consider in deciding whether a person has the "authority" to consent to search a particular item.

Regarding the issue of "common authority," the Waller Court held that " . . . a valid consent to search the closed container must come from one who has common authority over the effects sought to be inspected, one who has mutual use of the property, and one who generally has joint access or control for most purposes . . .

The government bears the burden of establishing the effectiveness of a third party's consent." Waller, 426 F3d at 845. (Emphasis added). The Court of Appeals concluded that the government failed to establish that Howard had "common authority" over the subject bag.

The Waller Court then addressed whether Howard had the "apparent authority" to consent to the search of the bag. The Waller Court explained that officers have an affirmative obligation to investigate and resolve ambiguities concerning whether a particular person has the authority to consent to search an item. In so holding, the Waller Court explained:

> "When one person consents to a search of property owned by another, the consent is valid if 'the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.' " *United States v. Jenkins,* 92 F.3d 430, 436 (6th Cir.1996) (quoting *Rodriguez,* 497 U.S. at 188, 110 S.Ct. 2793). Whether the facts presented at the time of the search would "warrant a man of reasonable caution" to believe the third party has common authority over the property depends upon all of the surrounding circumstances. *Rodriguez,* 497 U.S. at 188, 110 S.Ct. 2793 (citation omitted). The government cannot establish that its agents reasonably relied upon a third party's apparent authority "if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to 'mutual use' by the person giving consent, 'then warrantless entry is unlawful without further inquiry.' " *United States v. McCoy,* Nos. 97-6485, 97-6486, 97-6488, 181 F.3d 105, 1999 WL 357749, at *10 (6th Cir. May 12, 1999) (unpublished table decision) (Clay, Circuit Judge, concurring) (quoting *United States v. Whitfield,* 939 F.2d 1071, 1075 (D.C.Cir.1991)). Where the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, "warrantless entry without further inquiry is unlawful [.]" *Rodriguez,* 497 U.S. at 188-89, 110 S.Ct. 2793 . . ." Waller, 426 F3d at 846. (emphasis added).

Waller, consistent with the 4th Amendment, imposes an affirmative obligation on law enforcement to resolve any ambiguous situations involving authority to consent.

In this matter, testimony at the evidentiary hearing established that law enforcement knew or should have known, before searching the suitcase, that the suitcase did not belong to Kailah Lee. The police did nothing to resolve the ambiguity concerning whether Ms. Lee had the authority to consent to the search of the suitcase. While Ms. Lee had authority, apparent or otherwise, to give consent to search the premises, she did not have any authority cognizable under the 4th Amendment to give consent to search a suitcase that she had already told the police belonged to another person.

Moreover, the trial court was wrong as a matter of law in finding that Mr. Jenkins no longer had a 4th Amendment protected interest in the contents of the suitcase, merely because the suitcase was located in someone else's home and Mr. Jenkins was not present during the search. For instance, in Waller, the bag belonged to the defendant, but the premises belonged to another. The Waller court implicitly recognized that ownership of the bag gave the person sufficient "standing" to challenge the search. The trial court incorrectly found as a matter of law, subject to *de novo* review, that because someone might be an unwanted guest in a person's home, that person no longer has any 4th Amendment protected privacy (or ownership) interest in the property.

The trial court inappropriately afforded undue weight to a single factor, whether Mr. Jenkins was legitimately on the premises, despite the multifactor analysis necessary to determine if Mr. Jenkins had a legitimate expectation of privacy in the suitcase. In United States v Brown, 227 F3d 732 (6th Cir 2000),

citing to Rakas v Illinois, 439 US 128, 140 (1978), the 6th Circuit explained the factors to consider:

> "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas, 439 U.S. at 143 n. 12, 99 S.Ct. 421. The courts have considered a number of factors in identifying those expectations which qualify for Fourth Amendment protection. Although the most obvious among the factors is the person's proprietary or possessory interest in the place to be searched or item to be seized, a property right alone is not determinative of whether the individual reasonably expected "freedom from governmental intrusion." Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968). Other factors include whether the defendant has the right to exclude others from the place in question; whether he had taken normal precautions to maintain his privacy; whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion; and whether he was legitimately on the premises. *See* United States v. Cassity, 720 F.2d 451, 456 (6th Cir.1983), *vacated and remanded on other grounds,* 468 U.S. 1212, 104 S.Ct. 3581, 82 L.Ed.2d 879 (1984), *rev'd on other grounds,* 604 F.Supp. 1566 (E.D.Mich.1985), *aff'd,* 807 F.2d 509 (1986); *see also* Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); United States v. Haydel, 649 F.2d 1152 (5th Cir.1981).

The trial court ignored the majority of factors and misunderstood the importance of personal property law in finding whether Mr. Jenkins had an expectation of privacy in his own suitcase.

Put another way, Mr. Jenkins requests that this Honorable Court clarify Rakas. If a person owns a certain effect, there should not be any further inquiry into whether that person possesses standing to challenge a search of that effect. Ownership alone should be sufficient.

Ultimately, the trial court erred in finding that Mr. Jenkins had no standing to challenge the search of his own suitcase, independent of whether he had abandoned his bag.

Further, the trial court erred as a matter of law in finding that Mr. Jenkins had abandoned the bag merely because he was not present when law enforcement conducted the search. In United States v Britton, 335 Fed Appx 571, 547-575 (6th Cir 2009), the 6th Circuit summarized the appropriate factors in determining whether a person has "abandoned" their property:

> ". . . A person who abandons his property does not have a legitimate expectation of privacy in that property and therefore cannot assert any Fourth Amendment interest in it. United States v. Robinson, 390 F.3d 853, 873-74 (6th Cir.2004) (noting that "[i]f property has been 'abandoned' ... the Fourth Amendment is not violated through the search or seizure of this property") (citing United States v. Tolbert, 692 F.2d 1041, 1044-45 (6th Cir.1982)). That point, however, leads to the second reason for rejecting the government's "standing" argument: there is no evidence that Britton intended to discard or disclaim ownership of the handgun. A finding of abandonment must be based on some evidence that the defendant intended to renounce ownership of property. *Compare* United States v. Sanders, 719 F.2d 882, 886 (6th Cir.1983) (rejecting the idea that an airplane passenger abandoned his suitcase upon arrival at the airport by not picking it up by reasoning that the passenger never affirmatively disclaimed the suitcase and explained that she decided not to claim it immediately upon arrival because she was not going straight home), *with* Tolbert, 692 F.2d at 1044-45 (holding that Tolbert had abandoned her suitcase when she "insisted that she was traveling without luggage and specifically disclaimed ownership of the bag in issue"). In this case, the record does not support the finding that Britton threw the gun down. Rather, the testimony suggests no more than that the gun fell from his person when Britton jumped the fence. There is no basis to conclude, therefore, that Britton did not have a legitimate expectation of privacy in the gun he was carrying . . ."

It is not nearly enough for the government to meet its burden of establishing abandonment by showing only that Mr. Jenkins was not present with his suitcase when it was searched. This Honorable Court should clarify that a court cannot find that the owner of an effect has abandoned that effect within minutes of setting the effect down. Finding abandonment in such a circumstance renders the personal

property concept of ownership meaningless in the context of the 4th Amendment. That should not be the case.

The trial court chose not to make a finding whether the suitcase was closed when law enforcement first arrived. Absent this finding, the trial court erred as a matter of law in finding that Mr. Jenkins did not have a 4th Amendment protected interest in the search of the suitcase.

Further, the landmark case of Wong Sun v United States, 371 US 471 (1963), affirmatively determined that the fruits of a 4th Amendment violation subject to exclusion can include both verbal and physical evidence. Any testimony from any witness that is a fruit of the poisonous tree of the illegal search of the suitcase should have been suppressed, including testimony from a co-defendant regarding the contents of the suitcase.

III. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE DISCOVERED DURING THE ILLEGAL SEIZURE AND SUBSEQUENT SEARCH OF THE FORD FUSION.

It is completely unclear at this point whether the "automobile exception" to the warrant requirement permits law enforcement to seize a parked vehicle located in a public parking lot without a warrant. This Honorable Court should make clear that this "exception" does not apply to a parked vehicle, that does not have an occupant and is not running, located in a public parking spot. Review is warranted.

In reviewing a district court's decision on a motion to suppress, the Court of Appeals reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. See United States v Blair, 524 F3d 740, 747 (6th Cir 2008). The Court of Appeals reviews de novo the district court's finding of probable

cause for purposes of the automobile exception. United States v Cope, 312 F3d 757, 775 (6th Cir 2002). Defendant-Appellant challenges the district court's ruling on the application of the "automobile exception" to the seizure of the Ford Fusion. These standards seem appropriate to findings based evidence presented at a hearing.

Further, he challenges the later search of that same vehicle conducted under a warrant. As already articulated, Mr. Jenkins asserts that de novo review is the appropriate standard in the review of the issuance of a warrant where any later reviewing court is in the same position to assess probable cause as the issuing magistrate.

The Ford Fusion was seized without a warrant. It was towed away from the apartment complex. Law enforcement later obtained a warrant to search the Fusion.

The initial seizure of the Fusion cannot not be justified under any of the exceptions to the warrant requirement. A warrantless seizure of an automobile is reasonable if there is "probable cause that an automobile contains evidence or fruits of a crime plus 'exigent circumstances.' " United States v Beck, 511 F2d 997, 1001 (6th Cir 1975). A warrantless seizure of a motor vehicle cannot be justified with a mere invocation of the "automobile exception." The Supreme Court in Coolidge v New Hampshire, 403 US 443, 91 SCt 2022, 29 LEd2d 564 (1971), stated that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Id. at 461, 91 SCt at 2035; United States v Swanson, 341 F3d 524, 531-532 (6th Cir 2003) "The Court in *Coolidge* distinguished between the

seizure of an automobile parked in the defendant's driveway and one that the police have stopped and is readily mobile. Id. at 461 n. 8, 91 SCt at 2036." Swanson, at 531-532.

Swanson, at 531-532, attempted to understand the reach of the automobile exception:

> ". . . The Supreme Court's holding in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), extended only to warrantless searches of automobiles where the searching officer had probable cause and the car was stopped on the highway. *Id.* at 156, 45 S.Ct. at 286. In *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the Court held that if a warrantless search is justified under *Carroll,* the police may seize the car and search it at the station house without a warrant. *Id.* at 52, 90 S.Ct. 1975. In *Coolidge,* the Court stated that the automobile exception to the warrant requirement extended only to circumstances in which "it is not practicable to secure a warrant." *Coolidge,* 403 U.S. at 462, 91 S.Ct. at 2036 (quoting *Carroll,* 267 U.S. at 153, 45 S.Ct. at 285). . ."

In United States v Gable, 2007 WL 1577685, a Tennessee Federal District Court found that the warrantless seizure and search of a truck violated the Defendant's Fourth Amendment rights where the government failed to establish "probable cause" for the warrantless search and seizure AND also failed to establish exigent circumstances. While Gable is not binding on this Court, the District Court in Gable conducted a thoughtful analysis of the relevant factors to determine whether a warrantless seizure and/or search of a vehicle is a violation of the Fourth Amendment. Gable reiterated that the government has the burden to establish exigent circumstances.

The Coolige, Chambers, and Carroll cases have left open the applicability of the "automobile exception" to an unoccupied motor vehicle parked and not running in a public parking space.

Testimony at the evidentiary hearing established that law enforcement did not have probable cause to seize the Fusion. Law enforcement did not "stop" this car. Further, the government did not meet its burden that even if probable cause existed, there were sufficient exigent circumstances to justify the warrantless seizure. As a result, any evidence found after the unconstitutional warrantless seizure of the Fusion should have been suppressed as a fruit of the seizure. Wong Sun v United States, 371 US 471 (1963).[4]

Further, even if the car was properly seized, the search of the vehicle was not constitutional, and any evidence obtained and/or discovered as a result of that search must be suppressed. In determining whether probable cause exists to issue a warrant, the issuing judge must decide whether there is a fair probability that contraband or evidence of a crime will be found in a particular place at the time of the search. US v Spikes, 158 F3d 913 (6th Cir. 1998). The judge may draw reasonable inferences from the Affidavit in support of the Search Warrant. Id. Ultimately, the issuing judge must make a practical, common sense decision based on the totality of the circumstances. US v Greene, 250 F3d 471, 479 (6th Cir 2001).

Probable cause to search is concerned with facts relating to a presently existing condition. Spikes, 158 F3d 913. There must also be sufficient information in the affidavit that the place to be searched will contain evidence of criminal wrong-doing. US v Miggins, 302 F3d 384 (6th Cir 2002). For a more detailed analysis of 6th Circuit jurisprudence on the sufficiency of Affidavits, please see

[4] The trial court incorrectly found, as a matter of law, that the "automobile exception" applied to unoccupied parked vehicles.

Defendant-Appellant's earlier arguments raised in this Brief challenging the Candlewyck, Edwin, and Dragonfly searches.

In this matter, the Affidavit failed to establish probable cause to believe that evidence of crime would be found in the Ford Fusion. As a preliminary matter, the Fusion was found in the parking lot of an apartment complex. There was no information in the Affidavit regarding how long the vehicle had been there. There was no information that anyone saw who drove the vehicle to that parking spot.

The Affidavit attempts to tie the car to the heroin found in the home through merely conclusory paragraphs. There is not a single allegation in the Affidavit that provides factual support for the assertion that "Jenkins . . . sold large quantities of heroin in southwestern Michigan." The statement is just asserted in the Affidavit without factual basis. There is also not a single factual statement to support the conclusion that "Justin Jenkins, and Henry Hall . . . use rental vehicles to transport the narcotics . . ."

While the Affidavit states that the subject vehicle was being rented to Karnease (sic?) Langston by Budget Rental and that Langston is Mr. Jenkins' supposed girlfriend, there is no factual support that Langston is Jenkins's girlfriend. The Affidavit fails to state when law enforcement contacted Budget Rental, which office was contacted and who at Budget gave the information.

The Affidavit did not provide probable cause to search the Fusion. Further, the Affidavit failed to even allege that Jenkins used vehicles leased by Langston.

There are four circumstances in which the good faith exception cannot be applied to "save" a search made after a lack of probable cause. These are detailed in

United States v Leon, 468 US 897 (1984): (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

In this matter, the Affidavits were "bare bones." There was not sufficient factual allegations to establish the necessary nexus, and thus, no matter how many allegations exist in the Affidavit, the Affidavit is "bare bones."

Courts in the Sixth Circuit have consistently found that a "bare bones" affidavit is insufficient to support probable cause, and that such an affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable. See US v McPhearson, 469 F3d 518 (6th Cir 2006)(see discussion supra); US v Weaver, 99 F3d 1372 (6th Cir 1998); US v West, 520 F3d 604 (6th Cir 2008); US v Lester, 184 F Appx 486 (6th Cir 2006) (unpublished); US v Bethal, 245 F Appx 460 (6th Cir 2007) (unpublished); US v Davis, 2007 WL 541825 (ED Mich, 2007).

Even if this Court determines that the Affidavits were not "bare bones," it was not objectively reasonable for law enforcement to rely on the issuance of the warrant. In regard to objective unreasonableness, the Sixth Circuit has said:

> The parameters of "objective reasonableness" in the good-faith context have been explored primarily in relation to whether an affidavit established a sufficient nexus between illegal activity and a place to be searched. See Carpenter, 360 F3d at 594 (affidavit describing marijuana field near residence "fall[s] short of establishing required nexus" between criminal activity and residence); United States v Laughton, 409 F3d 744, 751 (6th Cir 2005)(no modicum or evidence connected defendant, criminal activity, and address to be searched); United States v Helton, 314 F3d 812, 821-23 (6th Cir 2003)(outgoing calls from house to known drug dealer did not create substantial basis to believe evidence could be found in house); United States v Van Shutters, 163 F3d 331, 337 (6th Cir 1998)(affidavit did not establish any connection between target of investigation and home to be searched); United States v Weaver, 99 F3d 1372, 1378-79 (6th Cir 1998)(boilerplate language in affidavit failed to provide particularized facts regarding allege crime occurring on premises to be searched); United States v Leake, 998 F2d 1359, 1365 (6th Cir 1993)(minimal surveillance did not corroborate anonymous tip that narcotics could be found in basement of specific house) . . . . [United States v Hython, 443 F.3d 480, 484-485 (6th Cir. 2006).]

The "good-faith" exception should not apply to the search of the Fusion. As already argued, the circuits need further guidance from this Honorable Court on the reach of the good-faith exception to ensure that the exception does not swallow whole the protections guaranteed under the 4th Amendment.

The evidence found in the vehicle should have been suppressed. Mr. Jenkins requests a reversal of the district court's decision and a remand for further proceedings.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

LEVINE & LEVINE

By: */s/ Anastase Markou*
Anastase Markou (P45867)
Attorney for Petitioner-Appellant
BUSINESS ADDRESS:
136 East Michigan Avenue, 14th Fl
Kalamazoo, Michigan 49007
269-382-0444
Amarkou@levine-levine.com