NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

AKUNNA BAIYINA EJIOFOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a reviewing court uphold a search by reading a statement in a search-warrant affidavit contrary to its plain meaning, as the Tenth Circuit did in this case?

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PRAYER

Petitioner, Akunna Baiyina Ejiofor, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on October 23, 2018.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. Ejiofor, No. 17-6211, slip op. (10th Cir. Oct. 23, 2018), is found in the Appendix at A1. The district court's decision denying Mr. Ejiofor's suppression motion, United States v. Ejiofor, No. 16-cr-00029-2, slip op. (W.D. Okla. Dec. 22, 2016), is found in the Appendix at A12. The district court's denial of the suppression motion of Ms. Ejiofor's codefendant, United States v. Ezeah, No. 16-cr-00029-1, slip op. (W.D. Okla. Dec. 22, 2016), which the court referenced in its order denying Ms. Ejiofor's motion, is found in the Appendix at A17.

JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C.

§ 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, May 7, 2019, see A27, so this petition is timely.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

STATEMENT OF THE CASE

This case raises an issue about the validity of a search warrant. The warrant was issued to obtain evidence of wire fraud in connection with an internet-dating scheme. The government has never disputed that the warrant affidavit contained only three facts that could possibly be said to connect Akunna Ejiofor, or her apartment, to the scheme. And the government did not contend in the Tenth Circuit that if the search was unconstitutional, the erroneous admission of the fruits of the search at Ms. Ejiofor's trial could be considered harmless.

The application for a warrant to search Ms. Ejiofor's apartment

The warrant affidavit described a dating scheme associated with the online persona of Edward Peter Duffey. A2. Mr. Duffey would correspond with women who used various dating websites, and would profess his love for them. Id. Some of the women would receive a call from a woman claiming to be Mr. Duffy's daughter, who would express her happiness about the relationships. Id.

Mr. Duffy would also inquire about the finances of the women he had met online. A3. He would tell each woman that he was friends with

the chairwoman of the Securities and Exchange Commission (or a member of the SEC's investigative committee), A3 & n.2, and that the SEC was investigating her bank or asset manager, A3. He would urge the women to send their money to him so that he could invest the money for them. Id. A woman purporting to be the chairwoman (or a member of the committee) would telephone some of the women and back up the claim. A3 & n.2.

Some of the women did wire money as requested. A3. The warrant affidavit described how $50,000 was sent to an account that had been opened in the name of Anthony Benson. A4.

The affidavit drew a link between Mr. Benson and the home of Ken Ezeah. Mr. Benson was a Nigerian national, who in September 2015 came to Houston, where Mr. Ezeah lived. Id. On his arrival, Mr. Benson gave Mr. Ezeah's address as the place where he intended to live. Id.

The warrant affidavit contained only three facts that the government would claim linked Ms. Ejiofor and her apartment to the dating scheme. One was an allegation that Mr. Ezeah was involved in an "employment scam," in which a credit-union customer deposited a counterfeit check into her account, and then withdrew the funds. Id. That customer, on June 22,

2015, deposited $5,500 into an account that Mr. Ezeah had opened for a company of which he was the president. Id. That same day, Mr. Ezeah transferred $3,000 from that account to his personal checking account. Id. A week *earlier* (on June 15) he had transferred $500 to Ms. Ejiofor, and he also transferred $200 to her the day after the deposits (on June 23). Id.

The second fact was that the telephone number Mr. Duffey used to communicate with the women in the internet-dating scheme was used (over a two-month period that was a fraction of the length of the scheme) "in close proximity" to both Mr. Ezeah's home and Ms. Ejiofor's apartment. Id.; Supp. Vol. 1 at 28-29. The affidavit did not explain what it meant by this claim. Supp. Vol. 1 at 28-29. The two residences are a little over three miles apart. See Ms. Ejiofor's Corrected Opening Brief at 37 & n.2.[1]

The last fact involved a debit card that was twice used, in March 2015, to send flowers in connection with the dating scheme. Supp. Vol. 1 at 7, 22. A month after the second of the two purchases, on April 30, the debit

[1] For this Court's convenience in the event it deems it necessary to review the record to resolve the petition, see Sup. Ct. R. 12.7, this petition contains citations to the record on appeal to the Tenth Circuit.

card was used to buy something from iTunes for the account of Linda Poll. Id. at 22. On July 1, someone bought something on that same iTunes account using the Internet Protocol address at Ms. Ejiofor's apartment. Id. at 23.

But the affidavit stated that there was no reason to believe that either Ms. Poll or her address were not legitimate. The affiant, Christine Beining, who had been an FBI Special Agent for more than seventeen years, id. at 5, wrote:

> On January 13, 2016, [FBI Special Agent Timothy J. Scmitz] conducted a search of the CP Clear commercial database for Linda Poll and [the address associated with her iTunes account]. The search resulted in no information leading SA Schmitz to believe the name and address associated with iTunes account 389355873 to be fictitious.

Id. at 27; see also A3 (quoting record).

Based on the affidavit, a federal magistrate judge issued a warrant to search both Mr. Ezeah's house and Ms. Ejiofor's apartment. The search of Ms. Ejiofor's apartment yielded a large number of gift and pre-paid debit cards, twenty-eight of which had been used to make purchases from a dating website or florist. Vol. 4 at 336; Exhibits 19, 49. Agents also found a notebook with references to dating websites, and what looked to be user

names and passwords, as well as credit or debit-card numbers. Exhibit 35. While the search of Ms. Ejiofor's small apartment was ongoing, agents also elicited statements from Ms. Ejiofor that were used against her at her ensuing trial.

The district court's denial of Ms. Ejiofor's suppression motion, and the trial and sentencing

Ms. Ejiofor moved to suppress the fruits of the search of her apartment. She alleged that the warrant affidavit was lacking in probable cause, requiring the suppression of the fruits of the search. Vol. 1 at 115-21.

The district court denied the motion. A13. The court said it was doing so for the same reason it had denied Mr. Ezeah's suppression motion, which asserted that the inclusion of the employment-scam information violated Franks v. Delaware, 438 U.S. 154 (1978). See A13. In that other order, the district court had said that even without that information, there was a sufficient link between Mr. Ezeah's house and the online-dating scheme. A24.

Ms. Ejiofor was convicted at trial of conspiracy to commit wire fraud, substantive counts of wire fraud, and a single count of aggravated identity

theft. The district court varied downward from the guideline range of 97-121 months for the conspiracy and wire-fraud counts to a term of sixty months, and imposed the mandatory-minimum, consecutive sentence of twenty-four months for the identity-theft conviction. The court also ordered Ms. Ejiofor to pay more than $4.6 million dollars in restitution.

Ms. Ejiofor's appeal to the Tenth Circuit

On appeal, Ms. Ejiofor argued that the district court had erred in denying suppression, and that her convictions therefore had to be vacated. The Tenth Circuit, which stressed the importance of its ability to make common-sense inferences from the facts stated in the affidavit, A8, rejected the claim.

The Tenth Circuit did not put any reliance on the affidavit's assertion that the phone used in the dating scheme was used "in close proximity" to both Mr. Ezeah's house and Ms. Ejiofor's apartment. Id. at 8-9. Instead, it first concluded that the affidavit supported an inference that Mr. Ezeah had engaged in fraudulent conduct. Id. at 8. The court looked in part to the fact that Mr. Benson, who was connected to the dating scheme, intended to live at Mr. Ezeah's house. Id. But the Tenth Circuit did not

claim the affidavit allowed an inference that Mr. Ezeah was actually involved in the dating scheme. It wrote only that the affidavit's "account of the payments to Mr. Benson, who at one time intended to reside at Mr. Ezeah's house, and of Mr. Ezeah's apparent connection to an employment scam, created an inference of Mr. Ezeah's fraudulent conduct." Id.

The affidavit, the Tenth Circuit continued, also "connected Mr. Ezeah to Ms. Ejiofor." Id. The court pointed, in this regard, to the payments in June 2015. Id. Referring to the one payment after Mr. Ezeah obtained money from the "employment scam" -- and without claiming the affidavit showed Ms. Ejiofor was involved in that scam -- the court said that "at least one" of the payments "appeared to have been tainted by fraud." Id.

After adding the fact that "at least one woman was connected to the scheme," id. at 9, by virtue of the phone calls from someone claiming to be the SEC chairwoman or Mr. Duffy's daughter, the Tenth Circuit turned to what the affidavit said about Ms. Poll. Although the affidavit by its terms stated that an investigation produced no evidence that either Ms. Poll or her address were fictitious, the Tenth Circuit wrote the affidavit could be read to say precisely the opposite:

> But an equally plausible reading of the affidavit suggests that the agent believed the name and address were fictitious because the agent's search revealed no information about Ms. Poll.

Id. (emphasis in original).

The opinion did not explain why this could be so. But it evidently relied on a theory advanced by a panel member at oral argument. The critical sentence of the affidavit is as follows:

> The search resulted in no information leading SA Schmitz to believe the name and address associated with iTunes account 389355873 to be fictitious.

Supp. Vol. 1 at 27. The panel member suggested the affiant might have meant to insert a comma after the word "information." With that change, which is emphasized in the altered version of the sentence set out immediately below, the meaning of the sentence would be changed to its opposite:

> The search resulted in no information[,] leading SA Schmitz to believe the name and address associated with iTunes account 389355873 to be fictitious.

Id. (alteration emphasized).

The Tenth Circuit proceeded to hold that, even were Ms. Ejiofor correct that probable cause was lacking, the good-faith exception to the

exclusionary rule would apply. A11. The court did not explain why this would be so. Instead, it only wrote that "[b]ecause the affidavit included facts that connected Ms. Ejiofor and her apartment to the scheme," and that it would be reasonable to expect that cellphones, computers and credit cards would be in her apartment, officers acted in good-faith reliance on the warrant. Id.

REASONS FOR GRANTING THE WRIT

This Court should grant review to give content to the standard for reading search-warrant affidavits, a standard that is used routinely in the state and federal courts, where the Tenth Circuit used the standard to read a critical statement in the affidavit in the opposite manner of its plain language.

This case will allow this Court to provide content to its oft-cited instruction to read warrant affidavits in a commonsense way. With a standard so general, the only way for this Court to give meaningful guidance of the contours and limits of the standard -- one very frequently applied in the state and federal courts -- is to illustrate its application in particular cases. With the Tenth Circuit having stretched the standard beyond its breaking point, this case affords it a good opportunity to do so.

A. This case squarely presents an important issue as to how properly to interpret search-warrant affidavits.

Given the "strong preference" for searches based on warrants, Illinois v. Gates, 462 U.S. 213, 237 (1983), this Court has long held that a reviewing court is not to give a warrant affidavit a "hypertechnical" reading, United States v. Ventresca, 380 U.S. 102, 109 (1965). Instead, the affidavit is to be read in a "commonsense and realistic fashion." Id.

This familiar approach recognizes the twin interests in assessing the constitutionality of a warrant. This Court, of course, "is alert to invalidate unconstitutional seizures whether with or without a warrant." Id. at 112. At the same time, "[t]his Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course." Id.

The Tenth Circuit gave the critical sentence of the warrant affidavit a reading that was at war with it plain terms. On its face, the sentence said that investigators had no reason to think that either Ms. Poll or her address were fictitious:

> The search resulted in no information leading SA Schmitz to believe the name and address associated with iTunes account 389355873 to be fictitious.

Supp. Vol. 1 at 27.

Rather than follow the clear language of the sentence, the Tenth Circuit read it to mean the opposite of what it said. The Tenth Circuit wrote that it was "equally plausible" to read the affidavit as saying the agent "believed the name and address were fictitious because the agent's search revealed no information about Ms. Poll." A9 (emphasis in original).

But the only way to read the sentence in that manner is to insert a comma after the word "information." To do so is not to give the sentence a commonsense reading, or as the Tenth Circuit put it to draw common-sense inferences, A8, but to change the sentence.

The charge to give a commonsense reading to a warrant affidavit cannot permit a reviewing court to rewrite what the affidavit clearly says. This is so whether the counter-textual reading is in support of the issuance of a warrant or against the warrant's constitutionality. Either way, the lack of fidelity to the words the affiant chose results in slighting one of the twin interests that Ventresca holds must be served.

Search warrants are serious matters. They authorize intrusions into protected areas by law enforcement to seek evidence of a crime. Often, as in this case, the intrusion is into the home, whose sanctity has always been a cornerstone of the protections of the Fourth Amendment. E.g., Kylo v. United States, 533 U.S. 27, 37 (2001); Boyd v. United States, 116 U.S. 616, 630 (1886). Citizens have a right to expect that officers executing affidavits in aid of this awesome power will do so with care. They have a right to expect that the officers will say what they mean, and mean what they say.

The Tenth Circuit's ruling does violence to that expectation. To be sure, warrant affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Ventresca, 380 U.S. at 108. For this reason, the affidavits are not required to comply with the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings." Id. But that is a far cry from saying that the words chosen by one who swears out a warrant affidavit should not be read in their normal way.

Indeed, giving words their normal meaning is the hallmark of a commonsense reading. A magistrate issuing a warrant should assume that what is written is what is meant. A reviewing court must assuredly do the same.

At oral argument, a panel member noted that the affidavit specified details of what a similar database search of Mr. Ezeah yielded, but that the affidavit did not provide such details about Ms. Poll. Compare also Supp. Vol. 1 at 22 *with* id. at 27. That at best could lead only to speculation that the differing treatment might mean that Ms. Poll was not in fact a real person at a real address. A magistrate could inquire of the affiant about

that speculation. But a reviewing court should not be able to change the plain meaning of a direct and contrary statement in the affidavit on the basis of such speculation.

That is what the Tenth Circuit did. Its approach illustrates that, despite the fact that the standard for how to read warrant affidavits has been clearly stated, this Court's guidance is needed as to how that standard operates in practice. Granting review in this case will allow this Court to perform this important task.

B. This case is a good vehicle, as there is no dispute that the admission of the fruits of the search mattered, and as the availability of the good-faith exception turns on the whether the Tenth Circuit misread the warrant affidavit in the manner claimed.

This case is a good vehicle to decide the issue presented here. The government made no claim in the Tenth Circuit that, if the fruits of the search were excluded, it would be able to show beyond a reasonable doubt that the admission of those fruits in violation of the Fourth Amendment was harmless. Chapman v. California, 386 U.S. 18, 24 (1967). And the validity of the warrant, and of whether the good-faith exception to the

exclusionary rule obtained, hinges on the interpretation the Tenth Circuit gave to the sentence at issue here.

Apart from what the warrant said about Ms. Poll, the Tenth Circuit pointed only to two facts that supported probable cause. It rightly omitted any consideration of the affidavit's assertion that a cellphone used in the dating scheme was used in "close proximity" to both Mr. Ezeah's house and Ms. Ejiofor's apartment over a two-month period. Supp. Vol. 1 at 24-25. The affidavit did not explain what it meant by this. Id. It contained no information about celltowers in Houston. Id. For all that appears from the affidavit, what it said about Mr. Ezeah's house (which Mr. Benson listed as his intended address) and Ms. Ejiofor's apartment over those two months could be said about Mr. Ezeah's house and the homes of innumerable residents of a populous city like Houston.

The first of the other two facts the Tenth Circuit invoked was that the warrant affidavit created an inference of Mr. Ezeah's fraudulent conduct. App. 8. The inference was supported, the court wrote, by the fact that Mr. Benson, who was connected to the dating scheme, intended to live at Mr. Ezeah's house, and that Mr. Ezeah was apparently connected to an

employment scam. Id. The court then said Ms. Ejiofor was connected to Mr. Ezeah because he "made payments to her, at least one of which appeared to have been tainted by fraud." Id.

The payments did show that there was some connection between Ms. Ejiofor and Mr. Ezeah. But the fact that he transferred money to her the day after he received money from the employment scam hardly shows she had any involvement in (or even knowledge of) that scam. This is especially so as Mr. Ezeah had also transferred more money to her a week *before* he obtained money from that scam. And the transfers could not possibly be taken to link her to the internet-dating scheme that was the subject of the warrant application, and that provided the asserted basis to search her apartment for evidence of wire fraud.

The next fact to which the court of appeals pointed was that Ms. Ezeah is female. Id. at 8-9. The court attached significance to the fact that calls in furtherance of the scheme were made by a woman. Id. at 9. It is hard to see how Ms. Ejiofor's gender could aid in a showing of probable cause.

This leaves only the fact that Ms. Ejiofor's internet connection was used to buy something for Ms. Poll's iTunes account, and that a debit card associated with the internet-dating scheme had also made a purchase for Ms. Poll's iTunes account. This makes whether Ms. Poll was a real person critical. If she was not, the inference could be drawn from the use of Ms. Ejiofor's internet connection that Ms. Ejiofor was posing as Ms. Poll. And that, in turn, could yield an inference that Ms. Ejiofor was connected to the debit card and thus to the internet-dating scheme.

But if Ms. Poll were not fictitious, as the affidavit clearly stated, then none of that would follow. At most, the statements about Ms. Ejiofor's internet connection and Ms. Poll's iTunes account would suggest that Ms. Ejiofor knew Ms. Poll, and that she allowed Ms. Poll to use her internet connection to make a non-fraud-related purchase. Ms. Ejiofor's association with one presumably involved in the internet-dating scheme (Ms. Poll) would not be reason to think that Ms. Ejiofor was herself involved in the scheme. See Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"). Nor does the use

of Ms. Ejiofor's internet connection by one associated with a fraud, for a non-fraud purpose, support probable cause that Ms. Ejiofor's apartment would contain evidence of that fraud.

This is the answer to the Tenth Circuit's statement that even if Ms. Poll was real, her iTunes account "was linked to Ms. Ejiofor's apartment and a flower purchase in furtherance of the scheme." App. at 9 n.3. The link of the account was not to Ms. Ejiofor's apartment, but only to the one-time use of Ms. Ejiofor's internet connection. With the affidavit declaring that Ms. Poll's address, which was different than Ms. Ejiofor's, was legitimate, there was no reason to think Ms. Poll lived at Ms. Ejiofor's apartment. Rather, her use of Ms. Ejiofor's internet connection at most shows that the two knew each other.

If that is all there is in this regard -- and it is, by the plain terms of the warrant affidavit -- the warrant affidavit as a whole falls woefully short of probable cause. The affidavit shows only that Ms. Ejiofor knew two people involved in the internet-dating scheme, and that she is a woman. This affords no basis to search her apartment for evidence of the internet-dating scheme. If it were otherwise, knowing two people involved in criminal

activity, and not being of a gender that ruled out participation in that activity, would permit the search of a person's home. It emphatically does not.

Likewise, the Tenth Circuit's conclusion that, in any event, the good-faith exception to the exclusionary rule applies, id. at 11, would not make resolution of the question presented unnecessary. The Tenth Circuit said the affidavit "included facts that connected Ms. Ejiofor and her apartment to the scheme." Id. But that statement could only possibly be so if the critical sentence in the warrant affidavit were read to make the claim, in direct contravention to its express statement, that Ms. Poll and her address were fictitious. Otherwise, the warrant application is "so lacking in probable cause as to render official belief in its existence entirely unreasonable," making the good-faith exception inapplicable. United States v. Leon, 468 U.S. 897, 916 (1984).

So, the good-faith conclusion depends on whether the sentence at issue can be read in the counter-textual manner that the Tenth Circuit read it. That being the case, the Tenth Circuit's holding as to the good-faith exception is not an independent basis for affirming the judgment of that

court, and that holding is no impediment to reviewing the important issue that this case poses.

CONCLUSION

This Court should grant Ms. Ejiofor a writ of certiorari.

Respectfully submitted,

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