No. _____

In the Supreme Court of the United States

_____

ELFRED WILLIAM PETRUK,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

_____

The Petitioner, Elfred William Petruk, through his counsel, Mark D. Nyvold, and under Supreme Court Rule 39.1, moves for leave to proceed *in forma pauperis* in this case.

Petitioner does not submit an affidavit of indigency in support of this motion because he sought leave to proceed *in forma pauperis* in the Eighth Circuit Court of Appeals, leave to so proceed was granted, and that court appointed counsel for

Petitioner under the Criminal Justice Act of 1964, 18 U.S.C. 3006A, as amended, to represent Petitioner in his direct appeal.

Dated this ___ day of October, 2019

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QUESTION PRESENTED

Did the Eighth Circuit erroneously rule, in conflict with this Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983), that the search-warrant for a Chrysler vehicle alleged to be associated with Petitioner stated probable cause, where the supporting affidavit, by a straw affiant, contains no facts making it probable that vehicle currently contained drug-related evidence, owing to the cited confidential informants not being shown to have current, reliable information, the affidavit relying on stale information from a prior, unexecuted search warrant, and the affidavit not making it probable that the Chrysler would even be in the County where the warrant had to be executed, and where earlier-issued the GPS tracking-warrants for other vehicles allegedly associated with Petitioner had similar informant-reliability and basis-of-knowledge defects, and the Chrysler warrant included information from two of those warrants?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Elfred Petruk, petitions for a Writ of *Certiorari* to review the judgment in his case, as affirmed by the United States Court of Appeals for the Eighth Circuit.

PROCEEDINGS BELOW

Petitioner Petruk seeks review of the Eighth Circuit Court of Appeals's judgment entered in *United States v. Petruk*, 929 F.3d 952 (8th Cir. July 11, 2019), 8th Cir. Case 17-3824, affirming Petitioner's conviction in United States v. Elfred William Petruk, U.S. District Court, D. Minn., 16-CR-285 (ADM), entered Dec. 14, 2017, convicting Petitioner of the Count 1, conspiracy to distribute methamphetamine under 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846, and Count 2, possession of methamphetamine with intent to distribute under 841(a)(1) and (b)(1)(A). The Eighth Circuit also entered its judgment on July 11, 2019.

Petitioner did not seek rehearing in the Eighth Circuit.

The District Court sentenced Petruk on December 13, 2017 to 372 months confinement, imposed a consecutive 30-month sentence for a supervised release violation, and ordered a $100 special assessment.

The District Court did not publish an opinion.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) to review a circuit court's decision via a writ of *certiorari*.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> 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 things to be seized.

STATUTORY PROVISIONS INVOLVED

Not applicable.

STATEMENT OF THE CASE

Before trial, Petruk filed a motion to suppress the drug and other evidence seized from the Chrysler 300 automobile he was driving, and from his person, when stopped by law enforcement. Police made the seizure under an Oct. 19, 2016 Chisago County, Minnesota search warrant for the Chrysler (Motion Hrg. Ex. 4). See Petitioner's Separate Appendix Volume (hereafter "App."), at 93a.

Petruk's motion also applied to the GPS tracker-warrants obtained by police in September, 2016 for three vehicles he allegedly utilized in the meth-dealing the warrant-affidavits alleged to be occurring (Motion Hrg. Exs. 1-3), at App. 66a, 74a, 83a.

The relevant issue-related facts are in the Eighth Circuit's opinion in Petruk's case, at App. 2a-6a, which Petruk incorporates here.

Magistrate's and District Court's rulings on the search warrants

A Magistrate Judge recommended denial of Petruk's suppression motion. See District Court Docket ("DCD") 45 in 16-cr-285 (D. Minn.), at App. 64a-65a.

The Magistrate's Report and Recommendation (R & R) (DCD 45) denied Petruk's motion to suppress (DCD 28) the evidence obtained from the above-discussed search warrants, finding that the warrant-affidavits to install the GPS tracking devices, and to search the Chrysler 300, were supported by reliable informants, whose information, viewed in its totality, permitted the respective issuing judges a substantial basis for finding probable cause. R and R, at App., 30a-60a.

The Magistrate cited *United States v. Wright*, 145 F.3d 972, 975 (8th Cir. 1998), which holds that a reliable informant's statements suffice to establish

probable cause. R and R, at App., 32a, 37a, 43a.

The Magistrate ruled it did not matter whether the Ex. 4 warrant for the Chrysler did not make it probable that on Sept. 19, 2016, or any time afterwards, that controlled substances would be found in the Chrysler if it were stopped in Chisago County — the County where the warrant had to be executed because it was where the warrant had issued — because the supporting affidavit showed a two-month long investigation in which multiple, allegedly confidential, reliable informants (CRIs), said Petruk was selling and transporting meth, using multiple vehicles, and the Chrysler being one. R & R, DCD 45, at App. 59a.

The Magistrate also decided that even if probable cause did not exist, the warrants at issue were not so deficient in probable cause as to make an official belief in its existence entirely unreasonable, and therefore the good-faith exception applied. App., 35a, 39a, 44a.

Petruk objected to the Magistrate's recommendation (DCD 46). The District Court denied Petruk's objections to the R & R in a Memorandum and Order. DCD 57, at App., 20a. The District Court adopted the R & R in its Order denying Petruk's R and R objections, agreeing that the statements of the CRIs themselves sufficed to establish probable cause, and citing the fact of four CRIs who had a track record of helping make drug seizures, and the information they had provided

about Petruk's use of certain vehicles. Order, DCD 57, at App., 15a-16a.

The District Court cited *United States v. Henson*, 123 F.3d 1226, 1238 (9th Cir. 1997) (Reasonable inferences may be drawn about where evidence is likely to be kept, based on the kind of evidence and offense). For the Chrysler 300 warrant, the Court decided that even though the warrant did not cite GPS tracking data for the 300, and the police did not see Petruk put any drugs in it, direct evidence of the presence of drugs in a specific location is not necessary for probable cause. Order, at App. 17a.

The District Court concluded the warrant properly issued, because multiple informants said Petruk was an active meth dealer who regularly used a Chrysler 300, he was allegedly transporting large quantities of meth from the Twin Cities, and the informant-information was partly corroborated by police observations of Petruk driving the Camaro and the Chrysler. Order, at App. 16a-18a.

Inv. Sheppeck's actual affiant status.

Investigator Sheppeck, affiant for the Ex. 4 Chrysler 300 affidavit, was a straw affiant. He was not part of the Task Force that investigated this case, and had no involvement until Inv. Williams, a Duluth police officer — who legally could have sought the warrant in Chisago County himself — instead intentionally sought an officer who worked in that County to seek the warrant.

Williams called Investigator Sheppeck at the Chisago County Sheriff's Office and told him what to put in his affidavit, which Sheppeck admits in the second paragraph of his affidavit. See Ex. 4, at App. 95a, and Jan. 5, 2017 motion hrg. trans., DCD 78, p. 56. Williams also described this in his testimony at the motion hearing. *Id*., pp. 56-57.

Petruk, in his written challenge to the Chrysler 300 search-warrant, discussed that Sheppeck just cut-and-pasted verbatim what Williams told him, and from an earlier search warrant for another vehicle, a Chevy Silverado pick-up, obtained on Sept. 14, 2016, as Williams admitted at a motion hearing (Transcript, DCD 78, pp. 49, 57), and as discussed in Petruk's suppression memorandum. DCD 43, pp. 6-8.

Despite being a surrogate affiant with no personal knowledge, Sheppeck's affidavit repeatedly refers to "your affiant's own personal knowledge" in describing the sources for what the affidavit contains, including the paragraphs concerning the CRIs and their reliability. See affidavit paras. 3, 5, 7, 9, at App., 95a-96a.

Sheppeck also repeatedly refers to "affiant's training and experience" when interpreting for the issuing judge the probable-cause relevance of matters stated in the affidavit. He was thus claiming what was Williams's training and experience, whatever that was, as his own. See Chrysler warrant paras. 11 (counter-surveillance), 13 (Minneapolis a source city), 14-15, 20, (drug-dealer behavior); 23

(Petruk behavior), at App., 97a-98a.

REASONS FOR GRANTING THE WRIT

The Ex. 4 warrant to search the Chrysler failed to state probable cause to search.

Illinois v. Gates, 462 U.S. 213, 233 (1983) says that in the totality-of-the circumstances analysis, an informant's veracity or reliability, and the informant's basis of knowledge, do not have independent status. They instead are relevant considerations. *Id*. A deficiency in one may be compensated for, in determining the overall reliability of informant-information, by a strong showing as to the other, or by some other indicia of reliability. *Id*.

Just as importantly, *Gates* says ". . . a totality-of-the-circumstances analysis . . . permits a balanced assessment of the relative weights of all the various indicia of reliability *(and unreliability)*(emphasis added) attending an informant's tip . . . . " 462 U.S. at 234.

And an affidavit supporting a search-warrant must establish a place-object nexus, showing a probability that the evidence sought will be in the place to be searched when the warrant is executed. *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000).

Applying the above-cited rules for assessing whether an affidavit states

probable cause, the affidavit supporting the Chrysler 300 search warrant falls well short of demonstrating the probable existence of the necessary informant-reliability, basis-of-knowledge, and place-object nexus as of Sept. 19, 2016, when the warrant issued.

This is because the affidavit includes no information that made it probable that under the very broad basis on which the Chrysler 300 warrant permitted a search — on any date on or after Sept. 19, 2016 the Chrysler 300 could be stopped and searched if it happened to be in Chisago County — that the Chrysler would then contain a controlled substance, let alone that it would even be in Chisago County.

To begin with, to the extent an affiant can rely on hearsay, what occurred here went well beyond that, given the earlier above-cited statements Sheppeck made reflecting personal knowledge and training and experience that was really Williams's. The issuing judge thus could not question Sheppeck on anything in the affidavit relating to these things.

The straw-affiant procedure here thus prejudiced Petruk, and undermined the fairness and validity of the issuing judge's probable-cause review, even though Sheppeck stated he obtained his information from Williams.

Sheppeck being a straw-affiant also impacts the good-faith issue discussed

ahead, because to the extent that facts outside the warrant known to the affiant can be considered in assessing good faith, Sheppeck having no personal knowledge of anything in the investigation precludes good-faith on the basis that he had valid reasons independent of the warrant-affidavit to believe the warrant stated probable cause

The Chrysler warrant-affidavit contains no information that created anything more than just a speculative inference that drug-related evidence would be found, and certainly not probable cause, given the affidavit's failure to provide non-stale information from shown-to-be reliable informants with a basis of knowledge for what they reported, as Petruk discusses ahead.

Returning here to the sequence of events, Investigator Williams emailed to Sheppeck, to include in the warrant-application for the Chrysler 300 warrant, a cut-and-paste of the affidavit Williams had drafted a week earlier for an ultimately unexecuted warrant to search the earlier-referenced Chevy pickup, which the Chrysler warrant-affidavit references (Motion hrg. trans., DCD 78, *id*., pp. 48, lines 7-14; 57, lines 1-8).

So aside from the unsupported and stale information from several alleged confidential, reliable informants, and references to the GPS tracking done on other vehicles Petruk allegedly used to traffic drugs, the affidavit for the Chrysler 300

warrant only described officers' observations of the Chevy pickup five days earlier, and that Petruk was driving it then, Sept. 14, 2016 (DCD 78, p. 57, lines 9-19).

That is why the Chrysler warrant-affidavit ends by saying in para. 23, in reference to information about Petruk and the Chevy pick-up obtained as of Sept. 14, 2016 [five days before issuance of the Sept. 19, 2016 search-warrant for the Chrysler 300] that "It is your affiant's belief that Petruk and Klobuchar are picking up a load of methamphetamine in the Minneapolis/St. Paul area and will return to the Duluth/Superior area to distribute the methamphetamine." App., at 98a-99a.

Again, this statement had nothing to do with what officers currently knew or reasonably believed on Sept. 19, 2016 when they sought the warrant for the Chrysler if it entered Chisago County, only what they believed five days earlier, when they were investigating the Chevy pick-up's movements.

So rather than the Chrysler 300 warrant-affidavit concluding with facts involving the Chrysler, and that it was in, or at least possibly headed to Chisago County (which lies between Minneapolis and Duluth) and stating facts indicating it had just been to Minneapolis, and that officers had some reason to believe the Chrysler now contained methamphetamine, the Chrysler affidavit abruptly ends by recounting the circumstances set out in a search warrant officers obtained a week earlier for the Chevy pick-up, but which they never executed in order to determine

if there was methamphetamine in the pick-up. App., 98a-99a, paras. 22-25.

The stale facts from the unexecuted Chevy pick-up warrant obtained five days earlier, on Sept. 14, that were asserted in the Chrysler 300 warrant-affidavit, had practically no value in demonstrating whether it was probable that the Chrysler would be located in Chisago County on or after Sept. 19, 2016, and contain methamphetamine or other drug-related evidence.

Moreover, the Chrysler warrant-affidavit otherwise says nothing about any belief that Petruk, or anyone else, on or after Sept. 19, 2016 would even be driving the Chrysler 300 in Chisago County, because the warrant did not contain officers' observations from the preceding night that the Chrysler and Petruk were in a Minneapolis suburb the night of Sept. 19 and morning hours of Sept. 20, 2016.

The Federal Magistrate in finding the Chrysler warrant stated probable cause thus in effect made a finding of continuing probable cause, extending to all vehicles Petruk had been seen driving, based on the CRIs claiming Petruk is moving meth. In the Magistrate's view, that somehow made it probable that months after this information was obtained, Petruk would probably have meth with him if he happened to be in the Chrysler 300 and also happened to drive through Chisago County.

And officers never executed the warrant to search the Chevy pick-up on Sept.

14, 2016 to see if it then contained any methamphetamine or other drug-related evidence. As discussed ahead, this continuing probable-cause finding, which the District Court adopted, App., at 17a-19a, has no factual and legal support.

No basis of CRI-knowledge stated; stale information.

The Ex. 4 Chrysler warrant-affidavit shows that CRI-information consists of just conclusory statements, and presents nothing that describes the CRIs' basis of knowledge, *i.e*, how they know what they claim: that Petruk is back to selling meth, moving multi-pound quantities, and supplying other meth dealers. None of the CRIs, except CRI 5, whom we address ahead, say he or she ever saw Petruk with any meth, or bought any from him in a controlled buy.

But the warrant-affidavit must state more than just the bare conclusions of others. *Illinois v. Gates*, *id*., at 239. Here, the affidavit gives no indication the officers involved ever asked the informants if they witnessed or identified Petruk personally with any drugs.

The Ex. 4 Chrysler 300 warrant-affidavit does say "CRI #3 told Sgt. Erickson in "August, 2016" that "Petruk makes trips to the cities twice a week to re-up his supply of methamphetamine." Ex. 4, at App., 96a, para. 6. But not only did the CRI say this three-to-seven weeks before Sept. 19, 2016, nothing explains how CRI

3 had any basis for knowing Petruk was doing that. And the Government never corroborated this with any information that Petruk had in fact been seen obtaining meth in the Cities (Minneapolis and St. Paul).

None of the CRIs being able to reliably say they had seen Petruk distribute, or even possess, any methamphetamine, or to otherwise reliably indicate how they know Petruk is distributing meth — despite their apparent involvement in, and claimed knowledge of, the drug-distribution scene in the Duluth area — makes it apparent that they were trafficking in rumor or innuendo, if not outright falsity. This in turn shows their lack of reliability, and precluded a finding of probable cause, under the totality of the circumstances.

The Chrysler 300 affiant does quote CRI 5 saying that he or she "at one time" saw Petruk with "at least one handgun along with at least two ounces of methamphetamine," and "has methamphetamine on him at all times." Chrysler 300 warrant aff., at App., 98a, para. 18. The CRI does not say he *saw* methamphetamine on Petruk "at all times."

But the "at one time" phrase, which could mean many years ago, disqualifies the alleged two-ounce possession from having any value in making probable that Petruk as of Sept. 19, 2016, or at some unknown future time, would possess any methamphetamine, let alone the dealer-level quantity that the CRIs, who without

any semblance of a factual basis and reliability, said Petruk distributes.

And the warrant-affidavits' use of language not specific as to time is consistent with their overall reliance on stale information, because what the CRIs reported in July and August 2016, even if it was reliable then, which it was not shown to be, did not make it probable that many weeks later, on Sept. 19, Petruk would have meth in the Chrysler 300.

It further detracts from the CRIs' stories being reliable that the warrant-affiant, Inv. Sheppeck, does not say how the informants provided their information, *e.g.*, in person, through third parties, by phone or in writing. This matters because in-person tips allow the affiant to assess the informant's veracity. *United States v. Gabrio*, 295 F.3d 880, 883 (8th Cir. 2002).

The issuing judge hence could not reasonably have believed that the officers named in the affidavit gathered any of their information via in-person interviews, because that is never stated to have occurred.

And even more reasons exist to show why the affidavit supporting the Chrysler 300 warrant did not make it probable that a search of that vehicle on Sept. 19, or at any unspecified later time the open-ended warrant permitted a search to be conducted, that officers would find any controlled substance, or other evidence of drug-trafficking, and why the Magistrate and the District Court erred in finding to

the contrary.

The warrant-affidavit just says Petruk owned the vehicle, he had been seen driving it and two other vehicles, he was the passenger in the vehicle one day, and that law enforcement obtained a warrant to install a GPS tracker on it. See Ex. 4 warrant, at App., 97a-98a, para. 16.

A GPS-tracker had been placed on the Chrysler 300 on September 13, 2016, yet the Chrysler affidavit included no tracking data at all for the Chrysler, least of all any that showed the Chrysler had gone to Minneapolis, or any other meth source-city, on or after the Sept. 19, 2016. This greatly detracts from probable cause.

Nor does the affidavit say police observed Petruk for hours in a Minneapolis suburb appearing to be working on his vehicle the night of Sept. 19, 2016, and that the Chrysler was tracked the next day via GPS as it left Minneapolis. The GPS tracking information in Govt. Ex. 4 is only about the Camaro and the Chevy pickup. Govt. Ex. 4, at App., 96a-99a, paras. 10, 14, 22, 23.

And the Chrysler affidavit contains no information about even visual surveillance of the Chrysler 300 at all in the month of September, nor does it say that the Chrysler 300 had been seen going to or from "the cities," let alone with Petruk driving or present in it.

The warrant-affidavit only mentions the Chrysler 300 seven brief times, and none of those seven times included any allegations of that vehicle being involved in illegal activity, or Petruk driving it. This again does not surprise because Williams, not Sheppeck, wrote most of what is in the Chrysler 300 affidavit, which again Sheppeck just cut-and-pasted verbatim from Williams's search-warrant application a week earlier for the Chevy pick-up.

And the reference in the Ex. 1 Camaro and Exhibit 3 Chevy pickup GPS warrant affidavits, App., 68a, para. 9, and 86a, para. 10, respectively say that "CRI #3 told Sgt. Mike Erickson that Petruk was in possession of a very large quantity of meth and U.S. currency," but the affidavit supporting the Ex. 4 warrant to search the Chrysler 300 does not. App., 95a-99a.

The Chrysler 300 search-warrant application/affidavit at p. 2, and the warrant at p. 1 (App., 94a and 101a, respectively) say "This vehicle is currently occupied by Elfred William Petruk . . . and an unidentified white female" but the affidavit gives no factual basis to say that, nor for the issuing judge to so state in the warrant.

The District Court thus erred in its reliance on *United States v. Henson*, *id*. *Henson* says an issuing judge may draw reasonable inferences about where evidence will likely be found, depending on the kind of evidence typically involved in the offense under investigation. 123 F.3d 1226, 1239. But *Henson* said that in

the context of Henson being seen selling drugs outside a residence, and the warrant authorized the search of the adjacent residence, where he lived.

Here, because the Chrysler 300 warrant's failure to demonstrate the CRIs' reliability and basis of knowledge, and to otherwise make it probable Petruk had meth, or other evidence of drug-trafficking, in the Chrysler when the police stopped it on Sept. 20, 2016 in Chisago County, no probable cause existed to issue a warrant to search the Chrysler that day in Chisago County, or any day in any County, for methamphetamine or evidence related to the inadequately-alleged methamphetamine dealing.

The case-law the Eighth Circuit relied on concerning past informant-activity does not apply here.

In *United States v. Wright*, *id*., which the Magistrate relied on, and in *United States v. Hart*, 544 F.3d 911, 914 (8th Cir. 2008), cited by the District Court in its Order, at App. 16a, this Court said that statements from a reliable, confidential informant themselves suffice to support probable cause.

The Chrysler 300 warrant-affidavit describes two CRIs (1 and 4) as having made controlled buys, and the other CRIs as having provided reliable information in the past, leading to arrests and search warrants, and to seizure of drugs and money.

But *Wright* and *Hart* cannot salvage the warrant. In *Wright*, the informant, described as reliable in the past, in the current case actually witnessed a cocaine sale at the apartment for which the warrant was sought. 145 F.3d at 975. In Petruk's case, the affiant gives no information as to how the CRIs know what they related.

And even though Petruk was supposedly distributing multi-pound quantities of methamphetamine, of the CRIs in the relevant July-August, 2016 time-frame about which they report, only one, CRI 5, as earlier discussed, ever allegedly saw Petruk with any meth, two ounces. But that did not occur in July-August 2016, but "at one time," which could have been years earlier. App., 98a, para. 18.

The informant-information is so implausible that it greatly diminishes the reliability-value to be had from the CRIs allegedly having helped in earlier cases to bring about drug arrests, controlled buys, and search warrants. This takes Petruk's case out of *Wright*'s holding that just having provided reliable information in the past suffices to establish informant-reliability in the current case.

Furthermore, the rule *Wright* establishes that statements from a person designated as a reliable, confidential informant by themselves suffice to support probable cause is inconsistent with the *Illinois v. Gates* totality-of-the-circumstances approach to assessing the existence of probable cause, because the rule effectively excludes from the relevant circumstances the informant-reliability

problem here, which exists owing to the untimely, no-basis of knowledge information the CRIs provided. See *Gates*, *id*., 462 U.S. at 234 (informant unreliability is part of the totality of the circumstances.)

This Court should therefore grant *certiorari*, because the state of probable-cause review in the Eighth Circuit does not comply with Fourth-Amendment requirements, as set out in *Illinois v. Gates*, that the affiant must demonstrate a reasonable probability that a place-object nexus exists under the totality of the circumstances, and that informant-reliability, or the lack thereof, are part of the relevant circumstances.

The Eighth Circuit's probable cause standard instead represents a watered-down version of what *Gates* requires to be considered. This allows permitting a search warrant to issue, even if the warrant affidavit cannot make a reasonable showing of an informant's basis of knowledge and reliability.

The Leon good-faith exception does not permit admission of the illegally-obtained evidence.

The Government may argue that the insufficient probable-cause showing here does not matter because the *Leon* good faith exception makes irrelevant the lack of probable cause, because the officers' reliance on the warrant was objectively

reasonable. *United States v. Leon*, 468 U.S. 897, 922-23 (1984). But a reviewing Court should "not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Id.* at 915 (*quoting Illinois v. Gates*, 462 U.S. at 239). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; the magistrate cannot merely ratify the bare conclusions of others." *Id*.

For the reasons already discussed at preceding pages 7-15, the Chrysler 300 warrant affidavit so lacked any indicia of probable cause that it rendered any belief Affiant Sheppeck had in its existence objectively unreasonable. *Leon*, *id*., 468 U.S. at 923. Petruk argued this in the District Court in his suppression memorandum. DCD 43, pp. 16-17 (GPS-tracker warrants); pp. 22-25 (Chrysler 300 warrant).

As Petruk also argued below, the Chrysler 300 warrant's and the GPS-tracker warrants' obvious probable-cause deficiencies also mean the issuing judges in granting the warrants abandoned their role as neutral and detached third parties.

The reviewing Federal Magistrate here decided that, based on the analysis he had made finding that the warrants to place GPS-tracking devices, and to search the Chrysler 300, stated probable cause, the warrants were not so lacking in indicia of probable cause that they rendered official belief in the existence of probable cause

entirely unreasonable. R and R, at App., 34a-35a (Camaro warrant), App., 39a (Chevy pickup warrant), App., 58a-60a (Chrysler 300 warrant). (Petruk objected to the Magistrate applying the good-faith exception. The District Court's Order adopted the R and R, but did not specifically address the good-faith exception, or Petruk's objection to that exception. App. 20a.)

But in light of Petruk's argument that the warrants at issue did not state probable cause, and that reliance on the warrants was objectively unreasonable, the Magistrate clearly erred factually in finding the facts of record made it objectively reasonable to believe the warrants stated probable cause, and erred as a matter of law in finding the requirements of the good-faith exception were met here. This applies as well to the District Court's apparent adoption of the Magistrate's good-faith factual findings and analysis.

Furthermore, Chrysler 300 warrant-affiant Sheppeck having no personal knowledge of anything in the affidavit supporting the warrant to search the Chrysler 300, and just being fed the information he put in the affidavit, precludes good-faith on the basis that he had valid reasons independent of the warrant-affidavit to believe the warrant stated probable cause.

The automobile exception does not apply and cannot be raised now

As it did in the Eighth Circuit, the Government may assert the automobile exception. In its Memorandum submitted to the Magistrate and opposing Petruk's suppression motion, the Government argued that exception. DCD 44, p. 8. Petruk opposed it. DCD 43, p. 26. The Magistrate did not address the exception. R and R, DCD 45, at App. 21a-65a. But the Government submitted no response to Petruk's R and R objections (DCD 46, p. 16) opposing this exception, or otherwise asked the District Court to apply the automobile exception. The Eighth Circuit did not address this exception's applicability to the District Court.

Because the Government did not pursue this exception's applicability in the District Court, it cannot do so in response to Petruk's petition for a writ of *certiorari*. Even if it could, no factual and legal support exists for it. Petruk's preceding arguments explain why no probable cause existed to stop and search the Chrysler 300.

Even if one considers the information the investigators had that they did not put in the 300 warrant, that did not create probable cause, either. The surveillance of Petruk and his vehicle while it was in Minneapolis did not see Petruk obtain and place any methamphetamine in the 300, as discussed in Wilson's and Kopp's trial testimony (Vol. II, 193-203, DCD 144). And the officers otherwise had just the

stale information from informants, and for which no basis of knowledge was stated to exist. Stopping and searching the Chrysler, even based on all the information known to officers, would have been acting on speculation, not probable cause.

The GPS tracking-warrants did not state probable cause

Petruk in his appeal to the Eighth Circuit also challenged these warrants, because the affiants used information from the Camaro and Chevy pickup GPS warrants to support probable cause for the warrant to search the Chrysler 300, as discussed earlier.

And at Petruk's trial, information from all three warrants came in via testimony from Government witnesses that these warrants provided information about sightings and movements of vehicles the Government claimed were associated with Petruk: Officer Wilson (Vol. I, 59-63, 69-72, DCD 143); Officer Hughes (Vol I, 128); Officer Kopp (Vol. II, 176-82, 180, 183, DCD 144).

The GPS warrants all rely on the same information, which the Government pointed out in its memorandum opposing suppression. DCD 44, pp. 3-4. That information is a subset of what Petruk summarized above at pages 7-16 of this Petition.

The Magistrate and the District Court found that the three warrants to place

GPS trackers on the Camaro, the Chevy pickup, and the Chrysler 300 gave the issuing judge a substantial basis to find probable cause, on the same basis they determined that the Chrysler 300 search warrant had provided. R and R, at App., 31a-32a; 17 (Camaro), App., 42a-43a (Chevy pickup); Order, at App., 15a-17a (Chrysler 300).

Because the GPS warrants all rely on the same information, Petruk bases his challenge to these warrants on the argument he made above: no probable cause existed to believe Petruk was dealing meth because the CRI information, on which that determination hinges, came from informants who had no stated basis of knowledge and reliability for their claims that Petruk was dealing meth, and nothing else in the affidavits compensates for this deficiency, where neither the informants or anyone else saw Petruk possess or distribute meth, and neither they nor anyone else attempted to make a controlled buy from him.

It further negated the existence of probable cause to place the GPS trackers that CRI 3's statement in the affidavit supporting the warrant to search the Chrysler 300, at App., 96a, para. 6, that Petruk goes to the Cities twice a week to re-up his meth supply appears in none of the three warrants obtained to place GPS trackers on vehicles with which the tracker-warrant affidavits claimed Petruk was associated.

And as already discussed, no good-faith exists to uphold these warrants in the

absence of probable cause, for the same reason good faith does not exist to save the warrant to search the Chrysler 300, as discussed above at pages 20-22 of this Petition. Petruk incorporates that discussion here.

The seizure and search of Petruk's person and his smartphone.

The Magistrate also recommended denial of the aspect of Petruk's motion that argued the illegality of his detention and later arrest in connection with the search and seizure of the Chrysler 300, because case law authorized detaining Petruk in those circumstances, citing *Michigan v. Summers*, 452 U.S. 692 (1981). App., 54a.

Petruk on appeal has argued that seizure of the phone and its later search were the illegal derivative fruit of the seizure of Petruk's person and the phone he had, owing to the warrant for the Chrysler 300 not stating probable cause. Because no probable cause existed to obtain the search warrant for the Chrysler 300, no basis existed to detain and later arrest Petruk in connection with executing the warrant for that vehicle. Furthermore, the Chrysler 300 warrant did not authorize searching Petruk's person.

And Petruk at the motion hearing said he was relying on the fruit-of-the-poisonous-tree doctrine as to evidence derivative of the GPS tracking warrants and

the warrant to search the Chrysler 300 (Jan. 5, 2017 Motion hrg. trans., DCD 78, p. 20).

This means seizure of the phone on Petruk's person while outside the vehicle had no legal basis, thus requiring suppression of the text messages obtained from the phone and used at trial (Vol. II, 372-87). That evidence helped convict him because the Government argued that it showed he and Michelle Clement were co-conspirators in the charged meth conspiracy. The Government argued in closing:

> But recall also that there was text messages between the defendant and Clement. These also provide overwhelming evidence supporting the elements of conspiracy including the agreement or understanding.

(Vol. IV, DCD 146, 614-15). The Government went on to quote from specific text messages to support this argument.

This Court's *certiorari* review of the search warrants at issue is therefore further necessitated to obtain suppression of the evidence directly derivative of the stop, search and arrest of Petruk pursuant to the Chrysler 300 and the GPS tracker-warrant affidavits the Chrysler warrant incorporated.

The facts here show that the fruit-of-the-poisonous-tree doctrine applies. Under *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), the question to be answered as to derivative evidence is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at

by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*.

Relevant factors to consider are: (1) the temporal proximity between the Fourth Amendment violation and the search; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the officer's Fourth Amendment violation. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

Here, the police seized Petruk immediately prior to seizing the Chrysler, as testified to by Inv. Williams (Jan. 5, 2017 motion hrg. trans., 40). There were no intervening circumstances. *Id*. The preceding discussion of the obvious probable-cause deficiency in the warrant to search the Chrysler makes apparent the illegality of seizing the Chrysler.

Petruk has already discussed at pages 20-22 of this Petition why the good-faith exception does not extend to the seizure and search of the Chrysler 300, and that discussion applies here to preclude application of the good-faith exception to justify Petruk's detention and seizure of his phone.

Relief requested on certiorari review

The evidence seized from the Chrysler 300 — the direct result of stopping and searching the Chrysler under the search warrant — was crucial to persuading

the jury to convict Petruk on the methamphetamine possession and conspiracy-to-distribute methamphetamine counts.

This evidence gained included the bag of methamphetamine in the Chrysler, the only physical evidence of drugs the Government had, and Petruk's phone, on which incriminating text messages were found. Without this evidence the Government would have had virtually no chance of convicting Petruk of possessing methamphetamine with intent to distribute, and conspiracy to distribute.

Also important to the Government's case was the evidence from the GPS tracker warrants, the data from two of which, the Camaro and the Chevy pick-up trackers, were important to obtaining the Chrysler search warrant, and because all three of the warrants produced evidence of Petruk's movements that the Government used at trial. (Vol. II, 173-74; 176-77, 182 (Camaro); 180, 183-84 (Chevy pick-up).

CONCLUSION

For the reasons stated in the preceding discussion, Petruk requests that this Court grant the Writ.

Dated October ___, 2019.

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