No. 19-7983

IN THE

SUPREME COURT OF THE UNITED STATES

Eric Samuel Newton Jr. — PETITIONER, pro se
(Your Name)

vs.

STATE OF OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court Of Ohio
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Eric Samuel Newton Jr. 750-935
(Your Name)

NCCI P.O. Box 1812
(Address)

Marion, Ohio 43302
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Was the Ohio Supreme Court in error when it refused to accept jurisdiction over a matter that, like the instant petition, involves a substantial Constitutional question, to wit, violation of the petitioner's clearly established Fourth Amendment rights, when police officials deliberately misidentified the cell phone's owner as belonging to someone else because they knew that there was no probable cause to warrant a search of petitioner's phone under his own name?

2. Was the Eighth District Court in error when it upheld the trial court's ruling that the mere presence of a cell phone in the vehicle at the time of the applicant's arrest constituted in itself and alone probable cause to search the cell phone's contents?

3. Did the Eighth District err when it held that probable cause to search the applicant's phone did not require showing individual ownership of the cellphone and so that applicant's counsel's failure to introduce the body cam evidence to support his theory that law enforcement knew the phone was the applicant's was not deficient and would not have by itself been sufficient reason for the trial court to deny the petitioner's motion to suppress?

4. If a police officer intentionally or with reckless disregard for the truth makes a false statement in an affidavit to obtain a search warrant, is it permissible that the search warrant issue notwithstanding that other statements in that same affidavit standing alone may establish probable cause for the warrant to issue?

Question(s) Presented [continued]

5. Did the 8th District Court of Appeals err when it let stand the trial court's overruling of the appellant's Motion to Suppress where Cleveland Police officers knowingly misidentified the applicant's cellphone as Jose Rivera's in a warrant affidavit related to a burglary investigation 6 months later and then used the evidence obtained from that cellphone to link the applicant to the completely unrelated case for the pandering, which the FBI, a completely different police agency, had already been independently investigating during that prior 6 months and which the Cleveland Police had known nothing about until they had searched the applicant's phone with the warrant naming Rivera as the phone's owner?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. Cuyahoga County Court Of Common Pleas -Cr-17-620243-A

2. Cuyahoga County Of Appeals, Eight District Court CA: 107200

3. Cuyahoga County Of Appeals, Eight District Court- Application to Re-open under App. 26 B - State v. Newton 2018-Ohio-1392 36,110 N.E 3d 816 (8th Dist)

4. The Supreme Court Of Ohio CA: 107200

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

[■] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

[■] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[■] is unpublished.

The opinion of the Eighth District of Appeals(Ohio) court appears at Appendix A to the petition and is

[■] reported at 110 NE 3d 816 (Eighth District); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was Dec. 17, 2019. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Proposition of Law I: It is reckless disregard for the truth to affirmatively name the owner of property in a search warrant affidavit when, in fact, the owner is unknown.

In this case, Sergeant Lally affirmatively stated in his warrant affidavit that a cell phone belonged to Jose Rivera when, in fact, Lally would later testify that he did not know who owned the phone. Notwithstanding the Eighth District's attempt to characterize Lally's statement as speculative, Lally named the owner of the phone as a fact. As argued below, the police should have known that the phone belonged to Newton. However, even if Lally was unaware of the phone's true owner, he should have stated that he was did not know who owned the phone. Either way, Lally's sworn statement was false.

In affirming the lower court on the suppression issue, the Eighth District included as part of its analysis that Sergeant Lally's misstatement was permissible because the naming the phone's owner was "inherently speculative or preliminary." *Newton* (CA 107195) at ¶36. The Eighth District's decision is incorrect in two ways. One, it is "reckless disregard for the truth" to affirmatively name the owner of the phone if, in fact, the owner was unknown or if the police knew it belonged to someone else. See *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). And, two, the Eighth District's decision ignores this Court's holding in *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, because it allows an affiant to make guesses, or inferences, or speculate and usurp the role of the issuing judge or magistrate.

In *Franks v. Delaware*, the United States Supreme Court said:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-6.

In Newton's case, the Eighth District recognized that "the statement as to the phone's ownership is demonstrably false" and that, in fact, the phone belonged to Newton when the affidavit said it belonged to Jose Rivera. *Newton* (107195) at ¶36. Newton maintains that the police knew the phone was actually his and points to the body cam footage to demonstrate that point. The police saw him attempting to leave the vehicle with the phone and he twice identified it as his. But, the Eighth District correctly pointed out that "Sergeant Lally, the affiant, was not present when the individuals were arrested." *Newton* (107195) at ¶36. That may be so but Sergeant Lally also averred to the following:

> Amanda Rivera has told investigating officers that she has previously used a scanner app on her cellular telephone. In particular, on October 25th, Amanda Rivera heard [SIC] using the police scanner app that officers were investigating the users of the above-described Ford Explorer in a connection with a burglary and break-in of Roses [SIC] Discount Store at 3250 W. 65th Street.

(Affidavit at ¶8.) If Amanda was cooperating with the police, she could have – and likely did – identify the phones.[2] Further, ¶9 of the warrant affidavit states that: "Jose Rivera has indicated that he was involved in the October 25th burglary of Roses [SIC] Discount

Store ..."[2] Again, Sergeant Lally averred this clear indication that Jose was cooperating with the police. If they had Jose's cooperation, along with the cooperation of his wife, they would have known the phone in question was not Jose's.

Newton argues that law enforcement knew perfectly well that the phone identified as Jose Rivera's in the warrant affidavit was, in fact, Newton's. Indeed, naming Jose Rivera as the owner of the phone – as opposed to any other statement about the ownership of the phone – could shore up otherwise insufficient probable cause. But, setting that aside, for now, Sergeant Lally testified that law enforcement determined ownership of the phone based on the contents of the phone obtained via the warrant. That means that, by Lally's own testimony, when he swore that the phone belonged to Jose Rivera, the truth was, at best, that he did not know owned the phone.

The Eighth District seized on Lally's explanation and said, "Because law enforcement is not permitted to search a phone's contents without a warrant to determine whose phone it is, any references to ownership of a phone in a search warrant are inherently speculative or preliminary." *Newton* (107195) at ¶36. And, the Eighth District concluded that "Newton has not pointed to anything that would indicate that Sergeant Lally made the false statement intentionally or with a reckless disregard for the truth."

But, surely, to make an affirmative statement when the information is unknown, is reckless disregard for the truth. In ruling as it has, like something out of Alice in Wonderland, the Eighth District has left us with the unworkable rule that police may include misinformation in their warrant affidavits so long as they do not really mean it.

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[2] It should be noted that Rose's Discount Store was not broken into until *after* the police detained Amanda Rivera et al. on October 25. The content of ¶8 clearly leads the reader to believe that the police were investigating the Rose's break-in when the police detained them which was not possible.

And, moreover, the decision leaves open the possibility that law enforcement can simply use place holders in warrant affidavits rather than be forthright with the issuing magistrate or judge about what they actually know or do not know when seeking a warrant – the outcome that *Castagnola* tells us that law enforcement must avoid.

Proposition of Law II: The mere presence of a cell phone at the time crimes are believed to have been committed or at the time suspects are taken into custody does not, without more, automatically establish probable cause to search the contents of the phone.

There is a false statement in the warrant affidavit the police used to gain access to the contents of Eric Newton's phone. As argued above, the offending fact should be struck from the warrant affidavit and what remains in the affidavit does not establish probable cause.

> The Fourth Amendment provides:
>
> '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.'
>
> The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. See *Payton* v. *New York*, 445 U.S. 573, 584, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

Kentucky v. King, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

> And, in Ohio, Criminal Rule 41 sets out that a warrant:
>
> shall issue on either an affidavit or affidavits sworn to before a judge of a court of record or an affidavit or affidavits communicated to the judge by reliable electronic means establishing the grounds for issuing the warrant. * * * [T]he affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially

> the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located.

The Eighth District held, even if a false statement was included in the warrant, the remainder of the affidavit established sufficient probable cause to search the contents of the phone. The Eighth District offered this reason:

> The affidavit stated that the affiant believed that both cell phones contained evidence of burglary crimes. The affidavit stated that the affiant based this statement on the fact that the phones were seized during a search of the vehicle that police was used by the suspects in these burglary crimes following the arrest of those suspects: namely, Amanda, Jose, Anthony Palmentara, and Eric Newton. Because of the circumstances in which the phones were obtained, probable case existed to search the phones, regardless of which of the aforementioned individuals owned the phones.

Newton (107195) at ¶37.

In fact, the warrant affidavit was very light on details and did not make a clear connection between what may be on the phone and the burglary crimes being investigated. Among other things, Sergeant Lally averred that, "based on his training and experience it is common for criminals to develop and implement criminal plans using cellular phones ..." And, further, "that in his training and experience, cell phones are capable of capturing, creating, retaining, transmitting and storing photographs, visual tape recordings, personal communications, and maintaining call logs of incoming, outgoing, and missed calls" (affidavit at ¶13) and that cell phones are capable of "GPS data" (affidavit at ¶14).

The trial court and the Eighth District have ignored a simple truth about this case: the police said that Newton's phone belonged to Jose Rivera because they needed to. Otherwise, it was an ownerless phone merely present at the time of the arrests and there would be no probable cause to search its contents. Why not say the phone's owner was

"unknown," if in fact it was? Why not assign Anthony Palmentera or Eric Newton -- other people arrested that night -- as the owner of the phone? Because, for probable cause, it needed to ~~be~~ Jose Rivera's phone – owner of the detained vehicle and husband to Amanda, and who had already admitted to involvement in the burglary crimes. Without labeling the phone as Jose's, all the warrant affidavit contains as it relates to searching a phone are the assertions that, generically, criminals use phones and the phones are technologically capable of certain things. The fact that law enforcement selected Jose Rivera, of all the options, to be the owner of the phone demonstrates the lack of probable cause in the remainder of the warrant affidavit.

Under the Eighth District's reasoning, if what remains in the warrant in this case establishes probable case, then the contents of any phone found on any suspect at or near the time of the commission of a suspected crime can be searched. Under this decision, there no longer has to be any "factual basis" for law enforcement's belief. Instead, it can be anything that law enforcement is capable of imagining.

Statement of the Case

Since 2014, the **FBI** had been investigating an IP address linked to Louise Newton, associated with the peer to peer file sharing of illicit pornography, and that IP address was linked to the physical address where Eric Newton, Jr. resided from time to time. The **FBI** conducted surveillance on the residence, and never saw Eric Newton, Jr. come or go from that property.

On April 7,2015, executed a federal search warrant for the Grimsby home address. Anderson Newton, Noland Newton, and Jerome Newton were present during the **FBI** search of the home. Eric Newton, Jr. was **not** there. Several items were seized, including computers. The items were analyzed on site and those without illicit pornography were returned. Illicit pornography was found on a laptop and it was confiscated and sent to the Ohio Internet Crimes Against Children Task Force (ICAC). The individuals who were present in the home during the search were interviewed by the **FBI**. Anderson Newton and Noland Newton admitted to using the laptop that had been confiscated, but stated they did not download or share illicit pornography on-line. They stated they believed the computer laptop belonged to Eric Newton, Jr., and testified later at trial that they had never seen Eric Newton, Jr. download or share illicit pornography. While there was evidence that Eric Newton, Jr. used the laptop as did others in the household, Eric Newton, Jr. was not indicted on any charges until after his October 28, 2015 arrest by Cleveland Police for suspected breaking and entering crimes.

On October 28, 2015, defendant Eric Newton, Jr. was arrested with several other individuals after police stopped a white SUV being driven by Amanda Rivera. The police were responding to a radio broadcast for an alarm that triggered at Dollar Mart located at 3041 Clark Avenue. The police were traveling on West 30th and Walton Ave., a "residential area", located behind Dollar Mart, where they observed a white SUV. Officer David Gallagher testified that, "The white SUV started driving, and then stopped, they started driving again, and they stopped, so we performed a traffic stop". During that traffic

stop, officers requested identities of the individuals. Officers then arrested everyone in the vehicle. The details of Newton's arrest were caught on Officer Gallagher's body cam. Newton was a passenger in the SUV and upon exiting the vehicle, Newton had his cellphone (black Verison LG model number US-985) in his hand. Officer Gallagher told Newton to leave the phone in the vehicle. Newton said, "This is *my* phone." Officer Gallagher again stated to leave the phone in the vehicle, so Newton did so. After Newton was placed in handcuffs, Newton asked Officer David Gallagher if he could get his phone. Officer Gallagher told him, "Not right now", and shut the vehicle door with Newton's phone inside. Then the officers proceeded to 3041 Clark Avenue at the Dollar Mart to respond to the alarm radio broadcast call.

Later, two cellphones were seized from the white SUV by Officer Tom Sholders. One of the phones that was seized belonged to Newton (black Verizon LG with model number LG-US-985). Two months later, on December 30, 2015, the investigating officer on the case, Detective John Lally, obtained a search warrant for two cellular phones that he claimed to say that (1) the black Verizon LG-cellphone with model number LG-US-985 belonged to Jose Rivera, Jr., and (2) the white Samsung Galaxy S-5 with model number SM-G-900T belonged to Amanda Rivera. The search warrant was based on suspicion that the cellphones contained evidence of burglary crimes", and that Amanda Rivera told investigating officers that she "used a scanner app on...(her)... cellular phone," [Emphasis added], and that the app had been overheard during an earlier stop on October 25, 2015. The warrant did not request to search the contents of any phones belonging to Mr. Newton, nor did the warrant indicate that any phones were taken from Newton. The phones were submitted to the FBI for the extraction of the forensic data. Detective Lally received the report and determined that the black Verison cell phone belonged to Newton and at some point during the investigation of Eric Newton, Jr., the Detective, John Lally, learned that the FBI had been conducting an investigation of Newton, and so the two organizations (the Cleveland Police and the FBI) shared information.

On April 14, 2016, the Cuyahoga County Grand Jury issued a 50 count indictment in the burglary matter against Anthony Palmentera, Eric Newton, Jr., Amanda Rivera, and Jose Rivera, Jr.

On August 8, 2017, Newton was indicted with 31 counts related to illicit pornography on the instant case. Prior to both of those trials, he moved to suppress the evidence of his cellphone. Newton was found guilty of all the charges in the instant case and sentenced to a term of 34 years. The trial court ordered that the terms be served consecutively. Accordingly, Newton is currently serving a 56-year sentence.

Reasons for Granting the Petition

The Court of Ohio recognized early the unique nature of a cellphone and found that a search warrant is required to search its contents State v. Smith, 124 Ohio St.3rd 163 2009-Ohio-6426, 920 N.E. 2nd 949. In 2014, inthe United States Supreme Court followed suit in Riley V. California, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In reaching its decision, the Court explained:

> Cellphones differ in both a quantitative and a qualitative sense from other objects that might be Kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of These devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape Recorders, libraries, diaries, albums, televisions, maps, or newspapers. (Id. at 393).

There, the court also observed that cell phones are ubiquitous in the modern world and that ([n]ow it is the person who is not carrying a cell phone, with all that it contains, who is the exception". (Id. At 395)

The high court's observation from 2014 holds truer every day. When the police pull over a car, chances are there will be a cellphone inside. And, when someone is arrested, it is likely that the suspect will have a cellphone. The issue this case presents is whether the mere suspicion of a crime and mere presence of a cell phone at the time of an arrest is enough to justify a search of the contents of the phone. With its decision in this case, the court of appeals of Ohio Eighth Appellate District, County of Cuyahoga, says the answer is yes. And, if that answer remains, it will essentially eviscerate the warrant requirement

as required by Riley V. California, and the court's decision in Ohio, State V. Smith, 124 Ohio St. 3rd 163, 2009-Ohio-6426, 920 NE 2nd 949.

In Newton's case, the police obtained a warrant to search a cell phone that was found in a vehicle in which burglary suspects were traveling. In the warrant affidavit, the affiant (Detective John Lally) named Jose Rivera Jr. as the owner of the phone, which was not true. And, later the affiant (Detective John Lally) testified at trial that the owner of the phone was unknown at the time he was obtaining the warrant. Law enforcement attempted to shore up the otherwise insufficient probable cause by intentionally including misinformation in the warrant affidavit regarding the cell phone's owner. Newton argued before the trial court and the appellate court that Franks v. Delaware applied. The Eighth District overruled his assignment of error and included as part of its analysis that Detective Lally's misstatement was permissible because the naming of the phone's owner was "inherently speculative or preliminary" (Newton 36).

The Eighth District's decision is incorrect in two ways: **(1) It is "reckless disregard for the truth to affirmatively name the owner of the phone if, in fact, the owner was unknown, or if the police knew it belongs to someone else (See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 {1978}); and (2) the Eighth District's decision ignores the Ohio Court's holding inn State v. Castagnola, 145 Ohio St. 3d 1, 2015-Ohio-1565, 46 N.E. 3d 638, because in contradiction to that holding, it allows an affiant to make guesses, or inferences, or speculate and usurp the rule of the issuing Judge or Magistrate.**

The affidavit stated that the affiant (Detective John Lally) believed that both cell phones contained evidence of burglary crimes. The affidavit stated the affiant based this statement on the fact that the phones were seized during a search of the vehicle that police believed was used by the suspects in these burglary crimes following the arrest of those suspects, namely: Amanda, Jose, Anthony Palmentera, and Eric Newton. Because of the circumstances in which the phones were obtained, probable

cause existed to search the phones, regardless of which of the aforementioned individuals owned the phones. [Id. At 37]

In deciding as it did, the Eighth District of Appeals in Ohio first allows law enforcement to knowingly speculate in a warrant affidavit—without admitting to speculation—in direct contravention of the State Court's ruling in State v. Castagnola, 145 Ohio St. 3rd 1, 2015-Ohio-1565, 46 N.E. 3rd 638, which does not permit even so much as speculation in a warrant affidavit, much less outright lying in the affidavit. The petitioner, when he was arrested, in fact told the arresting officer, David Gallagher, on body cam video, that the phone was his (the petitioner's), and insisted on taking the phone with him, since the vehicle in which he was a passenger was not his own. Gallagher, however, told the petitioner, "No, not right now", and ordered the petitioner to leave the phone in the vehicle; Gallagher then shut the door and took the petitioner to the county jail.

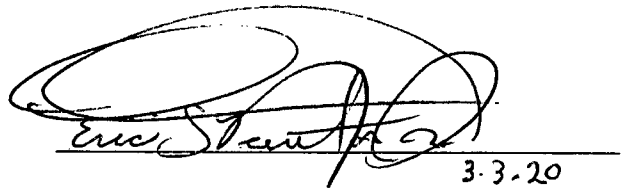
The court's decision reduces probable cause to the mere presence of a phone at the time of suspected criminal activity or when suspects are being detained. Under the Eighth District's reasoning, if what remains in the warrant in this case establishes probable cause, then **the contents of any phone found on any suspect at or near the time of the commission of a suspected crime can be searched**. Under this decision, there no longer has to be any "factual basis" for law enforcement's belief. Instead, it can be anything that the law enforcement is capable of imagining

Mr. Newton submits that if that holding stands, it violates the 4th Amendment of the United States Constitution, and it will lower the standard of probable cause for the contents of cellphones, and it will essentially eviscerate the warrant requirements as required by State v. Smith, 124 Ohio St. 3rd 163, 2009-Ohio 6426, 920 N.E.2d 949., and this court's decision in Riley v. California, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d – 430 (2014).

CONCLUSION

For the foregoing reasons, the applicant respectfully asks this court to grant the prayed writ of certiorari.

Respectfully Submitted,



3-3-20

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