

19-8281

No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 2020

LUQMAN ABDULLAH

Petitioner,

VS.

THE STATE OF NEW JERSEY

Respondent,



**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY**

Luqman Abdullah
#1125578-533039C
East Jersey State Prison
Lock Bag R
Rahway, New Jersey 07065

QUESTIONS PRESENTED

1. Whether the enhanced surveillance procedure, under Section 213 of the U.S. Patriot Act, 18 U.S.C. §3301 (Commonly known as “Sneak and Peek” or the “Delayed Notification” Provision), is presumptively unconstitutional as applied in New Jersey when the Legislature has not enacted a similar statute under the New Jersey Wiretap Act?
2. Whether the Separation of Powers Clause under the New Jersey State Constitution, Article III, Paragraph 1, is violated, requiring the suppression of unlawfully seized evidence under the Fourth Amendment, when the Judiciary endorsed a Probable Cause search warrant based on the “Sneak and Peek Provision”?
3. Whether the Tenth Amendment to the United States Constitution is violated when the “Sneak and Peek” Provision runs afoul of Federalism?

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LIST OF PARTIES

The Petitioner is Luqman Abdullah, a prisoner at East Jersey State Prison in Rahway, New Jersey. The Respondents are the State of New Jersey, and the Attorney General of the State of New Jersey.

OPINIONS BELOW

The decision of the Superior Court of New Jersey – Appellate Division appears at Appendix – A to this petition and is unpublished. The order of the New Jersey Supreme Court denying Petitioner's petition for certification appears at Appendix B to this petition and is unpublished.

JURISDICTIONAL STATEMENT

On October 18, 2019, the Superior Court of New Jersey – Appellate Division denied Petitioner's direct appeal. On February 11, 2020, the Supreme Court of New Jersey denied Petitioner's request for certification.

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

CONSTITUTIONAL PROVISIONS 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 persons or things to be seized.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF PROCEDURAL HISTORY¹

In October 2009, Petitioner Luqman Abdullah was charged in an Indictment with the following offenses: first-degree racketeering, in violation of N.J.S.A. 2C:41-2(c) and 2C:41-2(d) (Counts one and two); first-degree maintaining or operating a controlled dangerous substance production facility, in violation of N.J.S.A. 2C:35-4 (Count four); third-degree possession of a controlled dangerous substance, in violation of N.J.S.A. 2C:35-10(a)(1) (Counts five, eight, and eleven); first-degree possession of a controlled dangerous substance with intent to distribute, in violation of N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(1)(count six); third-degree possession of a controlled dangerous substance with intent to distribute or within a 1,000 feet of school property, in violation of N.J.S.A. 2C:35-7; (Counts seven, and ten); third-degree possession of a controlled dangerous substance with intent to distribute, in violation of N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3) (Count nine); second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b) (Count thirteen); second-degree possession of a firearm in the course of committing a violation of N.J.S.A. 2C:35-5 and N.J.S.A. 2C:39-4.1(a) (Count fourteen); third-degree receiving stolen property, in violation of N.J.S.A. 2C:20-7 (Count fifteen); fourth-degree prohibited device, in violation of N.J.S.A. 2C:39-3(d) (Count sixteen); third-degree financial facilitation of criminal activity, in violation of N.J.S.A. 2C:21-25(a) (Count seventeen); fourth-degree resisting arrest (by flight), in violation of N.J.S.A. 2C:29-2(a) (Counts eighteen and twenty-two); third-degree hindering apprehension, in violation of N.J.S.A. 2C:29-3(a) (Count nineteen); third-degree false government documents, in violation of N.J.S.A. 2C:21—2.1(c) (Count twenty-one);

¹ For ease of understanding the Statement of Procedural History is gleaned from the unpublished slip opinion of the Appellate Division, Docket No.: A-5547-16T1 (App. Div.) (Decided October 18, 2019), which is attached hereto as Appendix A.

and third-degree hindering apprehension, in violation of N.J.S.A. 2C:29-3(b)(1) (Count twenty-three).²

On the same date, Petitioner was charged in a second indictment with second degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7. Three years later, Petitioner surrendered to police.

Prior to trial, defense counsel filed a motion to suppress the evidence seized during the sneak and peek search, asserting law enforcement lacked probable cause to obtain the warrant.³ The trial judge disagreed, noting that:

[the warrant judge is] looking for probable cause that . . . There are criminal activities that are happening in that particular apartment in that particular location and whether there's probable cause for that. And he's looking at the totality of the activities vis-à-vis that apartment, not just probable cause relating to . . . the defendant here. [emphasis supplied].

(Appendix A at page 11)⁴

Trial was held from August 2016 through November 2016, whereupon a jury returned guilty verdicts on all counts. On June 21, 2017, the trial court imposed a term of 32-years imprisonment subjected to the No Early Release Act (NERA), with a condition that five-years be

2 Counts seven, ten, twenty-one, and twenty-three were dismissed before trial.

3 The motion was originally filed as a motion to dismiss the indictment; counsel amended his request during argument on the application.

4 The Panel further noted that, “[b]ecause the sneak and peek only required probable cause that the apartment had a connection to drug activity, the judge denied the suppression motion.” (*Id.*) As shall be discussed elsewhere in this Petition, that observation misapprehended the graveman of Petitioner’s substantive challenge to the “sneak and peek’s constitutional infirmities.

served on post-release supervision.⁵ Appropriate fines and penalties were also imposed. A timely-appeal was filed.

On October 18, 2019, a panel of the Superior Court of New Jersey – Appellate Division affirmed Petitioner’s conviction and sentence. (Appendix A)

On February 11, 2020, the Supreme Court of New Jersey denied Petitioner’s petition for Certification. (Appendix B) This Petition for Certiorari follows:

STATEMENT OF THE CASE⁶

In 2009, numerous law enforcement agencies in Union County, including the Federal Bureau of Investigation, began a joint narcotics investigation, targeting a suspected drug distribution network. A wiretap of a local drug dealer revealed the identities of the dealer’s drug suppliers—one was Abdul Hassan. Petitioner was observed at Hassan’s residence. Further investigation disclosed Petitioner frequented several homes. Petitioner was observed driving numerous vehicles, only one of which was registered in his name.

Tracking devices on Petitioner’s vehicles showed him frequently at an apartment building located on Chancellor Avenue in Newark. After police observed Petitioner enter the Chancellor Avenue parking lot several times, only remaining in the building ten to fifteen minutes, they suspected the residence was a “stash house,” “a place where drugs were sold . . . or kept.”

Since the Chancellor Avenue residence was an apartment complex, law enforcement did not know which apartment was being used to manufacture and distribute drugs. A review of the

⁵ The NERA term was made consecutive to a 4-year term, and consecutive to an 18-month term. Petitioner’s aggregate term was thus 37.5 years subjected to NERA.

⁶ For ease of understanding the Statement of the Case is gleaned from the unpublished slip opinion of the Appellate Division, Docket No.: A-5547-16T1 (App. Div.)(Decided October 18, 2019), which is attached hereto as Appendix A.

electric bills for the entire complex showed apartment D2's bill was "unusually low," roughly ten dollars a month.⁷ In order to ascertain whether D2 was the correct apartment, an undercover detective walked into the building at the same time as Hassan, and observed him entering D2. As a result, law enforcement installed a camera in the hallway facing doors D1, D2, and D3. The camera captured Petitioner at the Chancellor Avenue residence on April 12, and April 14, 2009.

Shortly thereafter, a detective for the Union County Prosecutor's Office sought authorization via a "sneak and peek" warrant in order "to plant . . . a 'bug' or a listening device" in apartment D2. A 127-page affidavit supported the application for the warrant. The search warrant was issued on April 17, 2009.

In the early morning hours of April 22, 2009, officers physically entered apartment D2. - The Detectives removed the cylinder from the door, took the cylinder to a locksmith, reinstalled the cylinder and used the key made from the locksmith to gain entry into apartment D2. - Once inside, law enforcement observed that "it appeared that no one was living there;" there was "little or no furniture," no toiletries, no silverware, no food, and no bed. As they entered the kitchen, they noticed there was powder covering the floor, the cupboards were open with "large rock-like substances in plastic bags," there was baking soda, Pyrex containers, a "scale with powder substance on it," knives and razor blades covered in powder, "[p]ackaging material, zip-lock bags, plastic bags, [and] rubber gloves." Additionally, they saw white powder covering the stove. Although the officers believed they were witnessing the production of controlled [dangerous] substances ("CDS"), specifically cocaine, they did not do a "thorough and exhaustive search" for drugs as they were there to find a location to position the device.

⁷ The trial record evidence in this case does not indicate what lawful procedures were undertaken to acquire the utility records for the entire residential complex on Chancellor Avenue.

During the sneak and peek, law enforcement also observed a rifle and a handgun in two different closets. The officers recorded what they saw upon entering the apartment for the purpose of determining where to place the listening device; however, the video also captured the evidence found in the room. A sample of powder and rubber gloves was taken for testing.

Subsequently, search and arrest warrants were executed for residences connected with Petitioner. Most notably, \$5,000.00 in cash, cell phones, mail addressed to Petitioner, and three photos were confiscated from his girlfriend's home. A search of Apartment D2 uncovered a rifle and firearm, numerous paraphernalia associated with CDS, water bottles, latex gloves, and one kilo of cocaine. Finally, law enforcement executed a no-knock warrant at a Sayreville residence frequented by Petitioner. That search resulted in three cell phones, Petitioner's checkbook, his driver's license, and \$21,995 in cash being seized.⁸

8 It should be noted, parenthetically, that the 127-page Probable Cause Affidavit detailing the investigation did not contain any "confidential informant" information, intercepted calls or text messages involving Petitioner – or even mentioning his name. Indeed, none of the 20,000 intercepted wiretapped conversations, text messages, 300 video and physical surveillances demonstrated, much less indicated, Petitioner was involved in any criminal activity. [emphasis supplied] This is particularly significant because it wholly undermined whatever probable cause the 127-page Affidavit purported provided.

REASONS FOR GRANTING THE WRIT

POINT I

THE ACQUISITION OF A “SNEAK AND PEEK” WARRANT, IN THE ABSENCE OF A SPECIFIC LEGISLATIVE STATUTE AUTHORIZING SUCH CONDUCT, IS PRESUMPTIVELY UNCONSTITUTIONAL AND CERTIORARI MUST BE GRANTED.

Based on reasons expressed elsewhere in this Petition, including the legal arguments described below, the unique and compelling circumstances in this case requires this Court to grant Certiorari. Such action is necessary to definitely address an issue of first impression in the State of New Jersey. For instance, both the trial court⁹ and the Appellate Division¹⁰ wholly misapprehended the graveman of Petitioner’s motion to suppress evidence. The question in this case did not turn on whether the 127-page Affidavit spelled out probable cause for the issuance of the “sneak and peek” warrant (which it did not), but rather: Whether the “sneak and peek” warrant was presumptively unconstitutional because New Jersey has never enacted legislation, comparable to Section 213 of the federal “U.S. Patriot Act.¹¹” As such, all evidence acquired from its execution must be suppressed.

The questions presented are appropriate and necessary for this Court’s review. Specifically, 28 U.S.C. §1257(a) provides:

⁹ The trial court denied relief on the following ground: [the warrant judge is] looking for probable cause that . . . There are criminal activities that are happening in that particular apartment in that particular location and whether there's probable cause for that. And he's looking at the totality of the activities vis-à-vis that apartment, not just probable cause relating to . . . the defendant here. [emphasis supplied]. (Appendix A; at 11)

¹⁰ The Appellate Division, similarly, concluded: “[t]he affidavit sufficiently showed there was a ‘fair probability’ and a ‘well-grounded suspicion’ that criminal activity – the production of drugs- was occurring in apartment D2. (citation omitted) Under the substantial deference we accord to the warrant-issuing judge’s finding, we are convinced there was sufficient evidence to support the sneak and peek warrant for apartment D2.” [emphasis supplied]

¹¹ To be clear, the Wiretap Statute, N.J.S.A. 2A:156A-1, et seq., has not been amended to authorize “delayed notification,” or “sneak and peek,” or any other comparable legislation for the convert installation of listening devices within a citizen’s private residence.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

In this case, law enforcement relied on the 127-page Affidavit, and specifically stated the “sneak and peek” warrant was to:

1. Authorize the interception of oral communications and video images of Abdul Hassan, Abdullah, and Darrel Brignolle, by installing a listening device and a camera within Apartment D2 of 129 Chancellor Avenue, Newark, New Jersey;
2. The temporary detention and duplication of keys to Apartment D2 of 129 Chancellor Avenue to prepare for installation of a video and/or listening device in that apartment; and
3. The installation of these devices will allow the aforementioned members of law enforcement to identify individuals who are entering Apartment D2 and engaging in conduct and conversations regarding the offense of

Since law enforcement had previously installed a camera outside Apartment D2, which ostensibly recorded images of individuals entering 129 Chancellor Avenue, the clear import of the 127-page Affidavit was to breach the sanctity of Apartment D2 and install listening devices and a camera. Quite troubling, however, is that law enforcement did not install the listening devices and camera. Instead, law enforcement converted the “sneak and peek” entry into a “sneak and steal” convert operation. That is, Apartment D2 was the staging ground to video-tape its contents, and taking weights and samples of evidence found therein. With that evidence firmly in hand, law enforcement sought arrest and further search warrants.¹² A “sneak and Peek” warrant, in the absence of any duly-enacted legislative statute, violated: (1) the separation of powers doctrine, Art. III, paragraph 1 of the New Jersey State Constitution; (2) Article I, paragraph 7 of the New Jersey State Constitution; (3) Fourth Amendment first principles; and,

12 Approximately twenty-four (24) people were arrested as a result of the investigation.

(4) the Tenth Amendment of the United States Constitution. Petitioner shall address each in turn.

First, “[o]ur State Constitution has a clause that explicitly provides for the separation of powers. Art. III, paragraph 1,” which reads:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

“This clause expressly provides for separation of state powers in the same way that the Federal Constitution separates the branches of the federal government.” General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 382 (1982). Put simply, the judiciary is constitutionally precluded from interpreting and applying a statute where none exists.

Secondly, Article I, paragraph 7 of the New Jersey State Constitution 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.” [emphasis supplied] As discussed elsewhere in this Petition, the exhaustive investigation conducted in this case did not demonstrate, much less indicate, Petitioner was involved in any criminal activity.¹³

Third, Fourth Amendment first principles are clearly implicated. Under governing New Jersey precedent, our citizens enjoy an expectation of being provided “reasonable notice” upon execution a search warrant. That is, a copy of the warrant will either be provided to the target of the subject-property, or in their absence, notice of process will be left behind for review. See New Jersey Court Rule 3:5-5(a)(collecting cases)¹⁴ Under the “delayed notification” provision

13 Out of the 20,000 intercepted wiretapped conversations, text messages, 300 video and physical surveillances, there was no evidence connecting Petitioner to any criminal activity.

14 In Wilson v. Arkansas, 115 S. Ct. 1914 (1995), the Supreme Court held that police officers must “knock and announce” before entering a house. The “knock and announce”

of Section 213 of the U.S. Patriot Act, however, the “knock and announce” principle is wholly abrogated. To be clear, Fed.R.Cr.P. Rule 41 (b) provides:

(b) Venue for a Warrant Application: At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for or seize a person or property located within the district. [emphasis supplied].

However, Rule 41(b) is glaringly misplaced because the opening clause permits “a judge of a state court of record in the district” (in the absence of a federal magistrate judge) may issue a search warrant but only “at the request of a federal law enforcement officer or an attorney for the government.” The 127-page Affidavit filed in this case was prepared by Detective Joseph Gramiak at the direction of Assistance Prosecutor Julie A. Peterman; there was neither a “federal law enforcement officer nor an attorney for the government” associated with this purely state action.

Petitioner urges that because New Jersey has not enacted comparable legislation as the federal government, “delayed notification” or “sneak and peek” is presumptively unconstitutional. Numerous commentators have generated scholarly writings on the subject. See, Gerald G. Ashdown, “The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism,” 67 U.PITT.L.REV. 753, 785-89 (2006); Seth F. Kreimer, “Rays of Sunlight in a Shadow War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency,” 11 LEWIS & CLARK L.REV. 1141 (2007).

Fourth, the Tenth Amendment to the United States Constitution, which is also an explicit statement of the governing principle of federalism, specifically provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This amendment mandates:

doctrine would seem to eliminate the ability to conduct “sneak and peek” searches. Accord State v. Rockford, 213 N.J. 424 (2013).

The Founders felt so strongly about limited federal power as a bulwark of liberty that they added the Ten Amendment as the final exclamation point in the Bill of Rights – the federal government could not trample the rights of the people by assuming powers that it did not have, and that had been reserved to the states and the people. [emphasis supplied]

George Landrith, “The Tenth Amendment: Protecting Freedom Against Big Government,” May 25, 2012; See also, ASSEMBLY CONCURRENT RESOLUTION No. 13 STATE OF NEW JERSEY 218th LEGISLATURE (January 9, 2018); pending Committee review)

The foregoing legal argument provides clear and unmistakable benchmarks requiring the grant of Petitioner’s Petition for Certiorari.

A. Importance of the Questions Presented

This Petition for Certiorari challenges the denial of Petitioner's motion to suppress evidence seized in violation of his Fourth Amendment protections against unreasonable searches and seizures. The constitutional questions presented pierce the veil on the judiciary as the bulwark law enforcement and its citizens. That gatekeeping role is a vital, indeed crucial, component of our democracy. Hence, the judiciary buffers law enforcement quest to combat and ferret out unlawful conduct, and ensures its citizenry constitutional rights are protected. The questions presented affect and ever-increasing and growing percentage of New Jersey citizenry seeking redress via pretrial motions to suppress evidence. This Court should grant Certiorari and affirm the enshrined principles that (1) New Jersey citizens, based on the broad and expansive interpretation of the New Jersey State Constitution, enjoy protections beyond the limited rights embodied in the United States Constitution; (2) the separation of powers doctrine, as embodied in New Jersey's constitution, is fundamentally breached when the state judiciary authorizes a "sneak and peek" search warrant in the absence of any duly-enacted legislation amending the New Jersey Wiretap Act; and (3) the Tenth Amendment reserves to the individual states its autonomy to enact and promulgate legislation governing New Jersey's privacy and property interests.

The questions presented are of first impression in the State of New Jersey. New Jersey courts has neither addressed nor entertained the novel constitutional questions presented. As such, this Petition for Certiorari is deserving of this Court's supervisory authority.

As discussed in this Petition, the thorny and vexing questions, in light of citizens' constitutional protections under New Jersey State Constitution, must be elevated over overbearing and aggressive laws enforcement investigatory techniques. Those "sneak and peek" techniques fundamentally alter, shapes, and unduly influence the judiciary's ostensible gatekeeping obligation. It is urged that that tension requires this Court's grant of Certiorari to

address and resolve the delicate balance of what rights New Jersey citizens under the New Jersey Constitution enjoy vis-à-vis Section 213 of the U.S. PATRIOT ACT of 2001¹⁵ (as amended).

Indeed, this Court's supervisory authority requires guidance and direction for the courts in New Jersey. This is such a case. Petitioner urges that the question presented in this case provides a unique opportunity to address those issues.

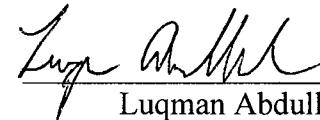
For the foregoing reason, Certiorari should be granted in this case

15 Congress passed the USA PATRIOT Act soon after the terrorist attacks of September 11, 2001. The PATRIOT Act gave federal authorities new powers to detect and prevent terrorism. One of the lesser-noticed provisions authorized “sneak and peek” searches using “delayed notice search warrants” – warrants providing for convert searches of American homes and businesses.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted,



Luqman Abdullah

Dated: March 13, 2020