

No. _____

**In The
Supreme Court of the United States**

—◆—
**WADITH STOCKINGER NADER
and STACEY NICHOLE NADER,**

Petitioners,

vs.

**THE CITY OF PAPILLION; SARPY COUNTY;
BRYAN SVAJGL; BENJAMIN IVERSEN;
SCOTT A. LYONS; L. KENNETH POLIKOV;
and JENNIFER MIRALLES,**

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

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PETITION FOR WRIT OF CERTIORARI

—◆—
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I. QUESTIONS PRESENTED

1. Can an unverified tip which was the basis for a lawful search, and which was disproved during the course of the lawful search, by itself constitute sufficient probable cause to make an arrest?

2. Did the Eighth Circuit improperly apply the totality of the circumstances test in making a determination that arguable probable cause existed? *Illinois v. Gates*, 462 U.S. 213 (1983)?

3. Did the Eighth Circuit improperly expand the doctrine of absolute immunity in contradiction of *Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)?

II. STATEMENT OF RELATED CASES

Nader, et al. v. The City of Papillion, et al., No. 8:17CV83, U.S. District Court for the District of Nebraska. Judgment entered January 29, 2018.

Nader, et al. v. The City of Papillion, et al., No. 18-1402, U.S. Court of Appeals for the Eighth Circuit. Judgment entered March 8, 2019; Petition for Rehearing denied April 15, 2019.

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VI. Petition for Writ of Certiorari

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

VII. Opinions Below

The Opinion of the District Court case is unreported, and was issued on January 29, 2018. (App. B). The Opinion of the three-judge panel of the Eighth Circuit Court of Appeals was reported at 917 F.3d 1055, and was issued March 8, 2019. (App. A). The Order Denying Petition for Rehearing by the entire Eighth Circuit Panel was rendered April 15, 2019. (App. C).

VIII. Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Order Denying Petition for Rehearing was issued on April 15, 2019. This Petition for Writ of Certiorari is filed within ninety days of the Order. *See* 28 U.S.C. § 2101, Sup. Ct. R. 13.

IX. Constitutional, Statutory, and Regulatory Provisions Involved

The constitutional provision involved is the 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.

The constitutional provision involved is the Fourth Amendment. (App. D). The statute involved is 42 U.S.C. § 1983. (App. E):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

X. Statement of the Case

On March 17, 2015, a search was performed at the home of Wadith Stockinger Nader ("Mr. Nader"), and Stacey Nichole Nader ("Ms. Nader") concerning

allegations that Mr. Nader was in possession of known child pornography. During the course of the investigation on March 17, 2015, no evidence was found of any crime. In spite of the fact that no evidence of any crime was found, Mr. Nader was arrested.

Prior to the lawful search of the Nader residence, the Papillion Police Department received a tip from the National Center for Missing and Exploited Children (“NCMEC”). Upon receipt of the NCMEC tip, the Papillion Police Department assigned Detective Brian Svajgl (“Svajgl”) to handle the investigation of the case. The Papillion Police Department also relied on assistance from law enforcement in a neighboring jurisdiction, specifically, Detective Benjamin Iversen (“Iversen”), an employee of the La Vista Police Department.

After review of the images reported by NCMEC, along with a review of internet records of the Naders, Svajgl determined that it was necessary to perform a search of the Nader home. Relying on the NCMEC tip, Svajgl obtained a search warrant, and assembled a team to perform a search. But for the NCMEC tip, there would have been no basis for a search of the Naders’ residence. During the search of the Nader home, Svajgl’s role was that of interrogator of Mr. Nader, and Iversen took on the role of searching electronic devices found within the Nader home to make a determination as to whether any devices contained child pornography. Iversen used computer technology which identified digital fingerprints of files to conduct his portion of the search. Iversen’s search lasted several hours and involved searching thousands of images. The computer

software scanned the digital fingerprint of images and reported which images needed to be manually reviewed. Iversen testified that it was impossible to know whether a particular image was or was not illegal material without a human being reviewing the suspected image. Without a human being reviewing the image, Iversen acknowledged that it would not be possible for an officer to have probable cause.

During the course of the search of the Nader home, no known images of child pornography were located. Iversen's software did flag one digital fingerprint as possible child pornography, however, Iversen was unable to manually review the image to make a determination as to whether the image was or was not child pornography. Ultimately, it was determined that this image was not child pornography. After completing his search of the electronic devices in the Nader home, Iversen reported to Svajgl, who at the time was acting as his supervisor.

Iversen acknowledged that the software alone, indicating that an image was possible child pornography, was insufficient to form a basis for probable cause and, in fact, it was necessary to personally view any possible images to make an ultimate determination as to whether or not the image was, or was not, child pornography. While at the Nader home, Iversen did not review any images. Specifically, Iversen did not find the NCMEC images on any device searching the Nader home. No officer conducting a physical search of the premises located any device which contained any illegal material, nor did the officers find any illegal

materials during the course of the search of the Nader home.

After receiving the information from Iversen, and after an extended period of questioning in which Mr. Nader did not confess to any crimes, Iversen made a phone call to the Sarpy County Attorney's Office and specifically, Jennifer Miralles (n/k/a Jennifer Hessig). Svajgl made the phone call to Ms. Miralles as he was uncertain as to whether he had basis for probable cause. Miralles told Svajgl that there were grounds for probable cause to make an arrest on the NCMEC images. Ultimately, in an extended search of Mr. Nader's devices, none of the NCMEC images would ever be located. The charges against Mr. Nader were dropped within seven months of his arrest. While the charges were dropped, the Naders suffered significant damage, both to their reputations, and to Ms. Nader's career in the Air Force which was effectively stalled as a result of the illegal arrest.

On March 15, 2017, the Naders filed their Complaint in the United States District Court for the District of Nebraska. Kenneth Polikov, Jennifer Miralles, and Sarpy County filed their Motion for Summary Judgment, on August 18, 2017. The City of Papillion, Svajgl Iversen, and Scott A. Lyons filed their Motion for Summary Judgment on September 5, 2017. On January 29, 2018, the District Court ruled finding that qualified immunity protected all parties, and that Polikov, Miralles, and Sarpy County were also protected by absolute immunity. On March 8, 2019, a three-judge panel of the Eighth Circuit Court of Appeals affirmed

the decisions of the District Court. The Nader's timely filed a Petition for Rehearing *en banc*, such Petition was denied on April 15, 2019.

XI. Reasons for Granting the Writ

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS IMPROPERLY APPLIED THE TOTALITY OF THE CIRCUMSTANCES TEST, AND IMPROPERLY FOUND THE EXISTENCE OF PROBABLE CAUSE

Qualified immunity acts to protect government actors “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In order to determine whether a party is entitled to qualified immunity, the Court must determine whether, taking the evidence in a light most favorable to the party asserting an injury, the facts show a violation of an individual's constitutional right and whether that right was clearly established. *Id.* Qualified immunity turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” *Id.* at 244.

In determining whether an officer is entitled to qualified immunity with regard to the issue of a false arrest, courts look to the objective reasonableness of an action. *Anderson v. Creighton*, 483 U.S. 635, at 639 (1987). An officer is only entitled to qualified immunity

where arguable probable cause exists. *Id.* at 641. In determining whether arguable probable cause exists, the question courts ask is fact specific whether a reasonable officer would believe that probable cause existed. *Id.* at 641.

It is well established law that a tip alone, even from a reliable source, is not sufficient to confer probable cause upon an officer. “While a reliable tip can form the basis for probable cause if it is sufficiently detailed and independently verified by a law enforcement officer using evidence other than the tip itself, **the tip is insufficient to validate an arrest where there is no evidence which supports the tipster’s allegation that the suspect was committing the crime of which he is accused.**” *Swartz v. State*, 857 So. 2d 950 (Fla. 2003). (emphasis added). Where a reliable tip is sufficient to give officers reason to conduct a search, developments which effectively negate the tip erode any basis for probable cause that the tip itself might have established. *Roane v. City of Philadelphia*, 1999 W.L. 257759 (E.D. Penn. 1999). Where an officer makes an arrest based upon an informant’s tip and that tip is not corroborated by the officer’s own observations or investigation the tip alone is not sufficient to support an arrest. *McGee v. State*, 23 S.W.3d 156 (Ct. Ap. Tx. 2000). An anonymous tip not corroborated by any other evidence thus not allowing for a reasonable belief that a Defendant has committed a crime will cause an officer to lack the probable cause to arrest a Defendant. *People v. Mosley*, 400 Mich. 181, 254 N.W.2d 29 (1997).

“Probable cause may exist when the informant’s tip is by itself insufficient but only if independent corroboration of a tip exists, and if the tip and the corroboration evidenced together ‘permits the suspicions engendered by the informant’s report to ripen into a judgment that a crime was probably being committed.’” *State v. One 1975 Lincoln Mark IV*, 1981 W.L. 390975 *2 (R.I. 1981). *See also Goettl v. State*, 842 P.2d 549 (Wyo. 1992).

In this case, the totality of the circumstances would have given any reasonable officer pause to make the arrest based upon the NCMEC images. The important fact that the District Court, and the Court of Appeals, seemed to ignore is that Mr. Nader was not arrested on the basis of suspicion of possession of child pornography. Mr. Nader was not arrested generally on counts of child pornography. Mr. Nader was specifically arrested on seven images which were never found in his possession. In all of the cases cited above, this would be impermissible. A tip alone is not enough. Svajl’s conduct further establishes that a reasonable officer would not believe he had probable cause, because he had to call someone else to make a determination as to whether probable cause existed or not. That person said to arrest on the basis of an uncorroborated tip, which Svajl should have known was not sufficient.

Mr. Nader was arrested on the basis of a tip which was uncorroborated and, in fact, which was actually disproven. In looking at the totality of the circumstances for qualified immunity, courts are not to “cherry-pick”

individual facts and make a determination. Instead, courts are to look at all of the facts in the situation and make their determination based upon those facts. In reviewing the totality of the circumstances in this case, it is clear that no reasonable person would believe there was probable cause to make an arrest on the NCMEC tips where they never found the NCMEC images. As a result, the Eighth Circuit Court of Appeals misapplied the totality of the circumstances test. However, there also appears to be an unanswered question from this Court as to whether an unconfirmed source is, by itself, basis for a probable cause arrest.

Both the District Court and the Eighth Circuit erred in their analysis in this case as they did not properly give inference of the facts to Mr. Nader, and disregarded certain key facts in the case, including the fact that the NCMEC images were never found. As a result, a Writ of Certiorari should be granted.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT MISAPPLIED THE DOCTRINE OF ABSOLUTE IMMUNITY

The Eighth Circuit Court of Appeal's opinion does not address the issue of absolute immunity. However, the District Court relied, in part, on absolute immunity in granting the Motion for Summary Judgment of Sarpy County, L. Kenneth Polikov, and Jennifer Miralles. In *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), this

court made a determination as to how absolute immunity should be applied when prosecutors engage in non-prosecutorial acts, which are administrative in nature. *Id.* Specifically, in that case, the court reiterated a clear point made in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) that “absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation. . . .” *Id.* at 343. In *Buckley* this court stated that “when the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 276.

In the case before this Court, the Court of Appeals completely ignores the issue of absolute immunity, but the District Court granted absolute immunity to Kenneth Polikov, Jennifer Miralles, and Sarpy County. This is simply not appropriate. Much like the case of *Buckley*, this is not a situation where a prosecutor is performing prosecutorial functions and instead, is advising the police in making a determination as to whether or not an arrest should be made. This is plainly a police duty, not a prosecutorial one. This court has previously ruled on a nearly identical set of facts that a prosecutor is not entitled to absolute immunity in this instance. By failing to address this issue and allowing the District Court’s opinion in that regard to stand, the Eighth Circuit Court of Appeals improperly applied a clear judgment of this court. Since the Eighth Circuit plainly failed to follow an edict from this court, a Petition for Writ of Certiorari is merited.

XII. Conclusion

For the reasons stated above, the Naders Petition for Writ of Certiorari should be granted.

DATED this 15th day of July, 2019.

Respectfully submitted,

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