No. 20-_____

In The

Supreme Court of the United States

NATHAN RAY FOREMAN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Law enforcement obtained a warrant to search a business. The affidavit in support of the warrant application did not include a request to seize computers. Nor did it describe any facts tending to support even an inference that the business had any surveillance equipment or computers. They seized computers and video surveillance equipment containing a video that was introduced into evidence. The Texas Court of Criminal Appeals determined that probable cause existed to seize the computer and surveillance equipment based solely on inferences drawn from the affidavit's description of the building searched. Based on this Court's decisions in *Nathanson v. United States*, 290 U.S. 31 (1933); *Brinegar v. United States*, 338 U.S. 160 (1949); *Illinois v. Gates*, 462 U.S. 213 (1983); and *United States v. Sokolow*, 490 U.S. 1 (1989), the question presented is:

Whether the decision of the Texas Court of Criminal Appeals constitutes an unreasonable application of this Court's clearly established precedent, by inferring facts from a building's description to justify the conclusion that the seizure of computers, not mentioned in the affidavit, containing a surveillance video, did not violate the Fourth Amendment.

PARTIES TO THE PROCEEDINGS

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State of Texas..... Respondent

RELATED PROCEEDINGS

State of Texas v. Nathan Ray Foreman, cause number 1374837, judgment entered on November 19, 2015.

State of Texas v. Nathan Ray Foreman, cause number 1374838, judgment entered on November 19, 2015.

Foreman v. State, 2017 Tex. App. LEXIS 7584 (Tex. App. 14th 2017), cause numbers 14-15-01005-CR and 14-15-1006-CR (opinions issued on August 10, 2017. Rehearing en banc granted, opinion issued *Foreman v. State*, 561 S.W.3d 218 (Tex. App. 14th 2018) (en banc August 31, 2018)

Foreman v. State, 565 S.W.3d 371 (Tex. App. 14th 2018). Order releasing Foreman on bond pending appeal.

Foreman v. State, 613 S.W.3d 160 (Tex. Crim. App. 2020), PD-1090-18 and PD1091-18, November 25, 2020; Rehearing denied January 13, 2021.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW NATHAN RAY FOREMAN, Petitioner herein, by and through his attorneys, STANLEY G. SCHNEIDER and ROMY B. KAPLAN, and pursuant to SUP. CT. R. 14 files this petition for writ of certiorari and in support thereof, would show the Court as follows:

CITATION TO LOWER COURT OPINIONS

The Texas Court of Criminal Appeals issued one opinion. The Fourteenth Court of Appeals issued two opinions. They are (in reverse chronological order):

1. *Foreman v. State*, 613 S.W.3d 160 (Tex. Crim. App. 2020). A copy of the opinion is included as Appendix 1. Motion for Rehearing was denied on January 13, 2021. Appendix 115-116.

2. *Foreman v. State*, 561 S.W.3d 218 (Tex. App. 14th 2018) (en banc). A copy of the opinion is included as Appendix 17.

3. *Foreman v. State*, 2017 Tex. App. LEXIS 7584 (Tex. App. 14th 2017). A copy of the opinions are included as Appendix 87.

STATEMENT OF JURISDICTION

This is an appeal from the Texas Court of Criminal Appeals. The Court of Criminal Appeals denied rehearing on January 13, 2021 from its earlier opinion of November 25, 2021.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Jurisdiction is specifically authorized by Supreme Court Rule 10(c) in that the Texas Court of Criminal Appeals on direct appeal has decided an important federal question that conflicts with this Court's Fourth Amendment decisions concerning the factual requirements for a probable cause determination by magistrate before issuance of a search warrant.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. amend. IV

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrant 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 Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This application stems from the trial court's denial of a motion to suppress the search of Foreman's business pursuant to a search warrant that was issued two weeks after the alleged offense. The Texas Court of Criminal Appeals ruled that a magistrate could determine probable cause to seize computers and video surveillance equipment based on the affidavit's description of the location to be searched even though computers were not items sought by law enforcement.

The charges against Foreman arose when the two complainants, Richard Merchant and Moses Glekiah, attempted to defraud him of $100,000. Merchant had engaged on several occasions in the "black money scam," in which the perpetrator defrauds a victim by persuading him that bundles of banknote-sized black paper in a suitcase are actually currency notes that

have been dyed to avoid detection by authorities. 3RR155; 5RR9-12.[1]

On December 24, 2012, Foreman was to exchange $100,000 for $200,000 of dyed money with Glekiah and Merchant but they duped him into taking black construction paper. 4RR153; 5RR31. Foreman became wise to the scheme because, shortly after the complainants arrived at the shop and unloaded their supplies, Appellant summoned four men from the shop's office. 4RR160. The complainants were shot and beaten.

Investigators learned about the black money scam by consulting with Secret Service agents. 4RR83. Glekiah directed police to Foreman's business which was located a short distance from where they escaped, and later identified Foreman in a photo array. 3RR157-58; SX57-58.

Two weeks after the alleged incident, police obtained a search warrant for Foreman's auto shop. The search warrant affidavit stated as follows:

> I, D. Arnold, a peace officer employed by Houston Police Department do solemnly swear that I have reason to believe that on the property of *2501-C #2 Central Parkway Houston, Harris County, Texas (Target Location)*, with the authority to search for and to seize any and all ITEMS CONSTITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT

[1] Citations to "RR" are to the record in *Foreman v. State*, Nos. 14-15-01005-CR and 14-15-01006-CR (Texas 14th Court of Appeals, filed April 13, 2016 and May 9, 2016).

AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain biological material; fingerprints; hair fiber(s); *audio/video surveillance video and/or video equipment*; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tape, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of Complainant(s) and/or Suspect(s) such as paper(s), license(s) cell phone(s).

Said location of 2501-C W1 Central Parkway Houston, Harris County, Texas is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business is made of metal and brick with dark tinted glass windows and black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is the suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

D. Arnold (Affiant) was assigned to investigate Aggravated Assault and reviewed offense report #161435712D written by Officer A. Deleon. Affiant was dispatched to 10500

Northwest Freeway, Houston, Harris County, Texas. Affiant learned from Officer A. Deleon that Cindy Davis (Witness) reported that on December 24, 2012 she observed two men (Complainants) lying injured on the side of the roadway with their hands tied and mouths duct taped. Affiant learned from HPD Officer A. Deleon that Complainants had apparent gunshot wounds to their bodies and had been transported to Ben Taub Hospital for treatment. Affiant spoke to Diane Deyoung who witnessed Complainants coming out of a white van license plate AV5-0784 before the continued down the road without stopping. Affiant learned from hospital personnel that Moses Glekiah (Complainant Glekiah) was recovering from gunshot wounds and Richard Merchant (Complainant Merchant) was in critical condition for his gunshot injuries.

Affiant spoke with Moses Glekiah (Complainant Glekiah) and learned he and his friend Richard Merchant (Complainant Merchant) had agreed to engage in business transaction at 2501-C #2 Central Parkway Houston, Harris County, Texas with a male known as "Jerry." When Complainants arrived on December 24, 2012 at the business that they describe as an autoshop, they are grabbed by several men and held against their will. Complainant Glekiah reported that Suspects grabbed Complainants, beat them with hands and feet, and tied their hands with zip ties. The suspects also stole their cash money $400 that Complainants had in their possession, wallets, cell phone and suitcase/briefcase container

belonging to Complainant Merchant. Suspect 1 poured gasoline on Complainants and held lighter near Complainants threatening to set them on fire. Suspect 1 then called two other Suspects to who put Complainants in truck at gunpoint. Complainant Glekiah says that he felt in fear for their lives. Complainants jumped out of the van because they believed they were going to be killed. As Complainant leaped out of the vehicle they were shot by Suspects.

Complainant Glekiah directed Affiant to the autoshop where this Aggravated Assault and Robbery occurred at *2501-C #2 Central Parkway Houston, Harris County, Texas.* Affiant researched the location and found the owner to be Charese Foreman. Affiant reviewed computer databases and discovered that Charese Foreman is married to Nathan Ray Foreman. Affiant reviewed criminal history of Nathan Ray Foreman and found that he had been charged with auto theft, possession of prohibited weapon and delivery of cocaine. Affiant showed Complainant Glekiah a known photograph of Nathan Ray Foreman along with five other photos of similar looking males. Complainant Glekiah positively identified Nathan Ray Foreman as Suspect 1 who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted 2 suspects to drive Complainant away from business. Affiant knows that gasoline and lighter are deadly weapons that can kill a person.

> Affiant believes that Complainants and Suspects DNA will be inside the Target Location along with property belonging to Complainant such as money, suitcase/briefcase, wallets, cell phone, identification cards. Also instrumentalities of the crime such as white van that transported Complainants, guns used to shoot Complainants, zip ties used to tie complainants may also be inside Target Location.
>
> WHEREFORE, PREMISES CONSIDERED, Your affiant respectfully request that a warrant issue authorizing your affiant, or any other peace officer of Harris County, Texas to enter the Target Location which is 2501-C #2 Central Parkway Houston, Harris County, Texas with authority to search for and to seize the property and items set out earlier in this affidavit.

Appendix 117 (emphasis added).

Recovered at Foreman's shop, police seized zip ties, an iron, a gas can, and a Dell computer tower containing surveillance video of the auto shop's interior. 3RR168-70, 205-09; 4RR33,43. State's Exhibit 28 contains excerpts of the surveillance video showing Appellant, the five codefendants, and the complainants in the auto shop on the date of the alleged offenses. 4RR44-52, 73; SX28. State's Exhibits 29, 30, 31, 32, 34, 38, and 43 are still photo images derived from the surveillance video. While most of their interactions occurred off-camera, the video corroborated portions of the complainants' testimony, as summarized in the following timeline:

11:00 a.m.: Appellant counts money before the complainants arrive. 4RR75;

11:30 a.m.: Merchant rolls a suitcase into the shop. 4RR53;

11:35 a.m.: Codefendant Darren Franklin is depicted carrying a gun. 4RR50-55;

11:45 a.m.: Appellant is seen carrying a roll of duct tape. 4RR56-56;

12:00 p.m.: Appellant is seen with codefendant Jason Washington, who is wearing his U.S. Customs Agent uniform. 4RR56-57;

1:00 p.m.: Codefendant Franklin is seen carrying the steam iron later seized during the search. 4RR59-61;

1:05 p.m.: A codefendant wipes down the complainants' car with a rag. 4RR57-58;

3:25 p.m.: A white van is backed into the shop; Appellant opens the rear door and lays a tarp on the floor of the van. 4RR63-64;

3:30 p.m.: The complainants, who are tied up, are loaded into the back of the van. 4RR64-65;

3:35 p.m.: Appellant and a codefendant load the complainants' bags into the complainants' car. 4RR93;

3:40 p.m.: Codefendant Darren Franklin drives the complainants' car out of the shop. 4RR53-94.

Foreman filed a motion to suppress the surveillance video evidence extracted from the Dell tower seized pursuant to the search warrant for the auto shop. CR29.[2] Foreman claimed that the seizure of several computer hard drives was beyond the scope of the warrant and not supported by the statement of probable cause in the warrant affidavit. CR44-46.

The return and inventory listed "3 hard drives for computer." CR38. Appellant argued that the affidavit was devoid of any facts supporting a probable cause finding that computers, "audio/video surveillance," or "video equipment" are located at the place to be searched. CR45-47.

The trial court (Judge Jim Anderson) denied the motion as to the Dell tower connected to the surveillance monitor but granted the motion with regard to the other two hard drives. CR55-56. In written Findings of Fact and Conclusions of Law, the trial court found that there was probable cause to issue the warrant as a general matter based on the complainant's detailed description of the offenses. The trial court further concluded that the seizure of the Dell tower hard drive connected to the surveillance monitor was within the scope of the warrant because it was "logical to

[2] Citations to "CR" are to the clerks record in *Foreman v. State*, Nos. 14-15-01005-CR and 14-15-01006-CR (Texas 14th Court of Appeals, filed March 18-19, 2016).

believe" that it was part of a surveillance system and that video data was stored on it. CR55.[3]

REASONS FOR REVIEW

The Texas Court of Criminal Appeals has decided an important federal question in a manner that constitutes an unreasonable application of this Court's Fourth Amendment jurisprudence so as to require that this Court exercise its responsibility to ensure a consistent application of the requirement of the Fourth Amendment in state court proceedings. This Court is the sole protector of an individual's Fourth Amendment rights from unreasonable decisions by state courts.[4]

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[3] A theory rejected by the Court of Criminal Appeals. Appendix 11.

[4] As Justice Marshall stated in his concurring opinion in *Mincey v. Arizona*, 437 U.S. 385, 402-403 (1978):

> With regard to the Fourth Amendment issue, however, we had little choice but to grant review, because our decision in *Stone v. Powell*, 428 U.S. 465 (1976), precludes federal habeas consideration of such issues. In *Stone* the Court held that, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.*, at 494 (footnotes omitted). Because of this holding, petitioner would not have been able to present to a federal habeas court the Fourth Amendment claim that the Court today unanimously upholds.

In this case, the decision by the Texas Court of Criminal Appeals conflicts with this Court's decisions in *Nathanson v. United States*, 290 U.S. 41 (1933); *Brinegar v. United States*, 338 U.S. 160 (1949); *Illinois v. Gates*, 462 U.S. 213 (1983); and *United States v. Sokolow*, 480 U.S. 1 (1989) by suggesting that a magistrate can infer probable cause to seize computers[5] and video surveillance equipment based solely on the affidavit's description of the building to be searched.

The Court of Criminal Appeals rejected the State's argument that a magistrate could infer the existence of computers at a business based on the "common knowledge" within the community or that existence of computers was logical as found by the trial court. The Texas Court of Criminal Appeals rightly concluded that:

> Like the court of appeals, we look upon the State's "common knowledge" rubric with some skepticism. Our research has revealed scant support for the idea that a magistrate, contemplating a probable-cause affidavit articulating a limited set of facts to justify the issuance of a search warrant, may supplement the articulated facts with unarticulated

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> The additional responsibilities placed on this Court in the wake of *Stone* become apparent upon examination of decisions of the Arizona Supreme Court on the Fourth Amendment issue presented here.

Federal habeas corpus review of Foreman's Fourth Amendment claim is prohibited by this Court's decision in *Stone*.

[5] Computers are not mentioned as possible evidence to be seized in the search warrant affidavit.

> facts that the magistrate deems so obvious or widespread as to constitute "common knowledge." That is not to say that probable-cause magistrates lack any authority to take cognizance of "common knowledge" whenever they perceive it. It means only that it is not how established Fourth Amendment jurisprudence would generally frame the inquiry. Established Fourth Amendment jurisprudence would instead observe that a magistrate, contemplating a probable-cause affidavit articulating a discrete set of facts to justify the issuance of a warrant, is allowed to draw all reasonable inferences from the articulated facts. And that, we conclude, is the optimal way to address the probable-cause issue before us.

Foreman v. State, 613 S.W.3d at 165-166. Appendix 11.

However, the Court of Criminal Appeals found that the affidavit provided sufficient probable cause to seize the computers and surveillance equipment based solely on inferences that it crafted from the description of the building to be searched including the name of the business on a sign.

As previously noted, in this case, the affiant described the "target location", a business, without mentioning any observation of any security cameras on the building. The complainants did not tell law enforcement that they observed cameras. There are no facts contained within the affidavit that suggests that the affiant had any knowledge that computers or video surveillance equipment existed either within or

outside the building. Or, there are no facts in the affidavit that suggest that the affiant even suspected that the business had security cameras or surveillance equipment.

An objective review of the four corners of the affidavit cannot support a determination that probable cause existed to seize any computers or video surveillance equipment at Foreman's business. Instead, the Texas Court of Criminal Appeals, Court stated:

> Based on the information that Glekiah gave, the police applied for a warrant to search Dreams Auto Customs. In addition to providing the known details of the alleged offenses and the evidence sought to be discovered, the warrant affidavit had this to say about the shop, produced here without alteration:
>
> Said location of 2501-C #2 Central Parkway Houston, Harris County, Texas is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business is made of metal and brick with dark tinted glass windows and black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

> Later in the affidavit, this location is described as an "autoshop."
>
> The hearing officer reviewing the affidavit, whom we shall hereinafter refer to as the "magistrate," found that it established probable cause. She issued a warrant for the police "to search for and seize any and all ITEMS CONSTITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein [at the listed location, Dreams Auto Customs] including," among other things, "audio/video surveillance video and/or video equipment." Pursuant to this warrant, the police seized three computer hard drives from Dreams Auto Customs. Upon analysis, one hard drive—the only hard drive at issue in this proceeding—was found to contain surveillance footage that depicted much of the incident at Dreams Auto Customs and Foreman's involvement in that incident. Foreman was charged with aggravated kidnapping and aggravated robbery.

Foreman v. State, 613 S.W.3d at 161-162. Appendix 3-4.

The Court of Criminal Appeals' probable cause review was based solely from inferences drawn from the building description. Its decision was based solely on its determination that the building's description "reasonably contributed to the magistrate's determination of probable cause" and justified the seizure of the computers and video surveillance equipment.

First, the Court stated that the affidavit described the target location as one "business" amongst other businesses within a "single story building complex." The Court concluded that:

> From the fact that the target location was a "business," *the magistrate could reasonably infer that the activities being conducted there involved money.* From the fact that this business was located within a "single story building complex," *the magistrate could infer that this business dealt in (or at least contained) tangible goods, and possibly even cash. These facts would reasonably contribute to the conclusion, at least to the degree of certainty associated with probable cause, that the target location had a heightened need to keep its premises secure.*

Foreman v. State, 613 S.W.3d at 166 (emphasis added). Appendix 12-13.

The Court further stated that:

> Second, the *existence of tinted windows* on a building provide a magistrate with the *reasonable* belief that a business had a heightened need for security.

The Court of Criminal Appeals stated that "the affidavit said that the target location was 'made of metal and brick, with dark tinted glass windows and black painted aluminum.'" From this, the Court of Criminal Appeals concluded that *the magistrate could reasonably conclude* that, not only did this business have a heightened need for security measures, it had

already adopted at least one security measure: tinted windows. Based solely on the existence of tinted windows the Court of Criminal Appeals stated that "it would not offend reason for a magistrate to infer that there was a fair probability of other security measures being employed there, as well." Appendix 13.

Based on the name on the sign, "Dreams Auto Customs," outside the building, the Court of Criminal Appeals concluded that from the name of the business, *a magistrate could infer* that the target did customized body work on automobiles which required heightened security. The affidavit explained that:

> this business was called "Dreams Auto Customs" and was in fact an "autoshop." From this, *the magistrate could reasonably infer* that the target business involved the customization of automobiles. Automobiles, *the magistrate might reasonably conclude*, are uniquely mobile and highly valuable tangible goods. And because the automobiles being worked upon at this business were customized items, *the magistrate could reasonably infer* that they warranted extra security. *These things also contributed to a reasonable inference* that, at least to the degree of certainty associated with probable cause, the target location was likelier to employ some means of keeping tabs on the comings and goings of the vehicles in its care.

Foreman v. State, 613 S.W.3d at 166-167 (emphasis added). Appendix 13-14.

Finally, from the existence of the bay doors at the back of the business, *a magistrate could infer* that there was a need for surveillance equipment to secure the premises and its content from thefts. The Court of Criminal Appeals noted that:

> The affidavit said that there was a bay door in the back of the business that opened into the interior of the business. From this fact, the magistrate could infer that the automobiles upon which Dreams Auto Customs worked were brought directly into the business; they were not handled off-site. Consequently, either for security or liability purposes, the magistrate could reasonably infer that the business needed to be able to keep an eye on the interior of the business. From these concrete indications that the target business had a unique need for security on its premises and had in fact deployed some security measures, it was logical for the magistrate to infer that to the degree of certainty associated with probable cause, the business was equipped with a video surveillance system. This does not mean that based on the articulated facts, we consider it more-than-fifty-percent probable that the target business was using surveillance equipment. That is not what probable cause demands. It means only that based on the totality of the articulated facts, it was not unreasonable for the magistrate to discern a "fair probability" of such equipment being found.

Foreman v. State, 613 S.W.3d at 166-167. Appendix 14.

Thus, while giving lip service to this Court's teachings, the Court of Criminal Appeals crafted inferences based upon inferences in order to assume facts to support a probable cause determination to seize computers and surveillance equipment.

This Court has clearly stated that the Fourth Amendment requires that a search warrant *describe with particularity the place to be searched and the items to be seized.* U.S. Const. amend. IV. And repeatedly, this Court has stated that probable cause exists when an affidavit shows a "fair probability" that the police will find evidence in the place they seek to search. *Gates*, 462 U.S. at 232, 238; *United States v. Dyer*, 580 F.3d 386, 390 (6th Cir. 2009). There must exist, within the four corners of the affidavit, a substantial factual basis for a magistrate's determination of probable cause. *Gates*, 462 U.S. at 236, 246 n.14.

While this Court has made it clear that articulating a precise meaning of probable cause is not possible, its opinions have constantly reminded that probable cause is a common sense, nontechnical concept that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)); *see United States v. Sokolow*, 490 U.S. 1, 7-8 (1989).

This Court has stated that probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable

prudence in the belief that contraband or evidence of a crime will be found, *see Brinegar*, *supra*, at 175-176; *Gates*, *supra*, at 238. Probable cause is a fluid concept that takes its substantive content from the particular contexts in which the standards are being assessed. *Gates*, *supra*, at 232; *Brinegar*, *supra*, at 175; *Ker v. California*, 374 U.S. 23, 33 (1963); *Ornelas v. United States*, 517 U.S. 690, 695-696 (1996).

Unlike the Texas Court of Criminal Appeals decisions, normally, reviewing courts will 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" to seize evidence. *Gates*, 462 U.S. at 239. Rather, reviewing courts typically require sufficient information be presented to the magistrate to allow a determination of probable cause and the decision cannot be a mere ratification of the bare conclusions of others. *Ibid. See Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958); *Nathanson v. United States*, 290 U.S. 41 (1933). Admittedly, a magistrate may reasonably infer facts to support a probable cause determination if there are *facts* stated to support the inference.

There must be some actual information in the affidavit related to the items to be seized from which an inference can be drawn. The cases are legion where appellate courts have upheld the seizure of money, drugs, photographs or weapons based on inferences drawn from the experience of police officers or the statements of witnesses. But an affidavit must contain

"particularized facts demonstrating 'a fair probability that evidence of a crime will be located on the premises of the proposed search.'" *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006); *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005).

In other words, an affidavit in support of a search warrant must contain information sufficient to establish (1) a connection between the defendant and the place to be searched and (2) a fair probability evidence being sought by law enforcement can be found at that location. *Florida v. Harris*, 568 U.S. 237, 244 (2013); see *Gates*, 462 U.S. at 235-36, 245 n.14. Thus, a search warrant comports with the Fourth Amendment if it was issued by a "magistrate [who] had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing. . . ." *Gates*, 462 U.S. 213, 236 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

> "For the magistrate to be able to properly perform this official function, the affidavit presented [in support of the search warrant] must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant." The affidavit must contain particularized facts demonstrating "a fair probability that evidence of a crime will be located on the premises of the proposed search." In other words, the affidavit must suggest "that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is

> sought" and not merely "that the owner of property is suspected of crime."

Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

Clearly, under this Court's Fourth Amendment jurisprudence, a law enforcement officer's application for a search warrant must demonstrate probable cause to believe that enumerated evidence of the offense will be found at the place to be searched. In determining whether this element is satisfied, "[t]he task of the issuing magistrate is . . . to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. More important, the facts presented to the magistrate must be sufficient for a "reasonable man of caution to believe that evidence of a crime will be found." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion). *United States v. Wallace*, 550 F.3d 729, 732 (8th Cir. 2008) (per curiam).

Long ago, in *Nathanson v. United States*, 290 U.S. 41 (1933), this Court clearly stated that an affidavit must provide the magistrate with *a substantial basis* for determining the existence of probable cause and that a conclusory statement fails to meet that requirement. A conclusory statement gives the magistrate no basis for making a judgment regarding probable cause. Likewise, an officer's statement that "[a]ffiants have received reliable information from a credible person

and do believe" that heroin is stored in a home is likewise inadequate. *Aguilar v. Texas*, 378 U.S. 108 (1964).

It is impossible that a description of a brick building with tinted windows and bay doors gave rise to sufficient facts to justify the seizure of computers or surveillance equipment without some other specific fact that suggested the existence of particular evidence. An affidavit cannot establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. *Jones v. United States*, 362 U.S. 257, 269 (1960); *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Likewise, the affidavit must at least suggest that computers exist before a warrant justifies their seizure.

Repeatedly, this Court has ruled that while magistrates are allowed to draw inferences from known facts to support a probable cause determination, this Court has made it crystal clear that there has to be a clear factual basis from which an inference can be derived to support a determination of probable cause. Facts must exist to warrant a reasonable person to believe that evidence of a crime exists at a particular location. *See Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

In this case, the affidavit is clear. It is divided into three parts.

The first paragraph describes the items sought as evidence without mentioning computers. In the second

paragraph, the affiant describes with great specificity the building to be searched. The building description is essential so that officers do not search the wrong place. The third part of the affidavit begins with this statement in capital letters:

MY BELIEF IS BASED UPON THE FOLLOWING FACTS. Appendix 118.

The affiant did not intend for the magistrate to consider the building description in her probable cause determination.

Rather than determine whether probable cause exists within the affidavit's facts, it is the description of the business or "target location" to be searched that the Court of Criminal Appeals derives inferences from which it creates probable cause for the seizure of computers. The affidavit is without any factual statement that supports a conclusion that the owner of the business has a need for security that requires any type of surveillance of the interior of the business. Speculation, like conclusory statements, are not sufficient to justify the seizure of the computers in Foreman's business.

The Texas Court of Criminal Appeals decision constitutes an unreasonable application of this Court's precedent that requires this Court to exercise its responsibility to protect citizens from unreasonable interpretation of the Fourth Amendment. Notwithstanding the deference that is normally due magistrates, a warrant is invalid if the probable cause determination reflects an improper analysis of the

totality of the circumstances. *Gates*, 462 U.S. at 238-239; *United States v. Leon*, 468 U.S. 897, 915 (1984) This Court has made it clear that probable cause to seize evidence must derive from specific facts that justify the seizure or a reasonable inference from specific articulable facts contained within the affidavit that lead a reasonable person to believe that the evidence exists and can be located at the location to be searched.

That is not what the Texas Court of Criminal Appeals did in this case.

This Court should not permit the Texas Court of Criminal Appeals to create inferences to support a probable cause determination from an affidavit's description of a building to be searched. Rather, the Texas Court of Criminal Appeals should be required to identify particularized facts that demonstrate a fair probability that specific identified evidence of a crime would be located on the premises of the proposed search. In this case, the search warrant affidavit did not seek to seize computers let alone identify any facts that would support the magistrate's probable cause decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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