No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LEANDRE JENNINGS, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari to

The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1) Whether, in cases wherein a statute requires judicial approval before law enforcement may conduct a search, the reviewing court, before determining if good faith applies, must use the test set forth in *United States v. Leon*, or the test set forth in *Illinois v. Krull*.

List of Parties

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

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PETITION FOR A WRIT OF CERTIORARI

Leandre Jennings respectfully petitions for a writ of certiorari to the Nebraska Supreme Court in State v. Jennings No. S-18-1136.

OPINION BELOW

The opinion of the Nebraska Supreme Court is reported at 305 Neb. 809, 942 N.W. 2d 753 (No. S-18-1136) and is attached at (App. A)

STATEMENT OF JURISDICTION

The Nebraska Supreme Court issued its opinion on May 15, 2020 (App. A). This Court's jurisdiction is invoked under 28 U.S.C. Section1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

I.

The Fourth Amendment states that "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."

II.

The Fourteenth Amendment states in pertinent part that "… nor shall any State deprive any person of life, liberty, or property, Without due process of law…"

STATEMENT OF THE CASE

The Petitioner, Leandre Jennings, was convicted by a jury of Murder in the First Degree, Use of a Deadly Weapon (firearm) to Commit a Felony, and Possession of a Deadly Weapon by a Prohibited Person. He was sentenced to consecutive sentences of life in prison, 30 to 40 years and 40 to 45 years in prison respectively.

In the early evening hours of December 23, 2016, Michael Brinkman was shot and killed in his home. Brinkman's wife and teenaged son were also in the residence at the time of the shooting and reported that two masked men entered their residence, asked for money, and one of the two intruders shot and killed Brinkman during a brief struggle. Neither Brinkman's wife nor his son could identify the intruders because of their faces being covered. Petitioner Jennings was developed as a suspect and police obtained cell site location information (hereafter referred to as CSLI) from his cell phone provider, which information placed his cell phone at or near the site of the homicide at the time of the shooting. The CSLI for his phone, identified as 402-850-5695, was obtained via documents that are self identified as a search warrant obtained by police on February 14, 2017. (App. "B" and "C") Although these documents are labeled as search warrants, the body of the documents also reference the Federal Stored Communications Act, 18 U.S.C. Section 2703(d) (hereafter referred to as FSCA). Jennings was arrested on February 17, 2017, and charged with the aforementioned offenses.

Jennings filed a motion to suppress the CSLI, and a hearing was held on that motion. By agreement of the parties, the trial court agreed to withhold its ruling until after the pending case of *Carpenter v. U.S.* was decided by this Court. However, prior to this Court's decision in *Carpenter*, the police obtained search warrants dated April 11, 2018,(App. "D") and May 8, 2018,(App. "E") for the CSLI that they already had in their possession pursuant to the earlier order under the FSCA.

On June 22, 2018, this Court determined that individuals have a reasonable expectation of privacy in their cell phones CSLI and that pursuant to the Fourth Amendment, a search warrant, supported by probable cause, was required to obtain CSLI. *Carpenter v. U.S.*, ___ U.S.___, 138 S. Ct. 2206, 201L. Ed. 2d 507 (2018). As a result, a second motion hearing was

held, and the trial court ruled that the affidavits in support of the 2018 search warrants provided ample probable cause and particularity to pass Fourth Amendment scrutiny. The order of the trial court (App. "F") analyzed the validity of the 2018 search warrants and did not address the initial seizure, other than to interpret it as a court order under the FSCA. The trial court ruled that, pursuant to *Carpenter* supra, the original seizure violated the Fourth Amendment. The trial court further ruled that the subsequent 2018 search warrants were constitutionally sound and therefore cured any error involving the initial seizure. Several months thereafter, the case went to trial and a jury convicted Jennings on all charges.

On direct appeal, the Nebraska Supreme Court opted not to address the trial court's ruling on the constitutional validity of the search warrant, and went directly to a determination that the "good faith exception" to the exclusionary rule applied. Citing *Illinois v. Krull* 480 U.S. 340, 107 S. Ct. 1160, 94 L.Ed. 2d 364 (1987), the Nebraska Supreme court determined that the police originally obtained the CSLI pursuant to a statute, i.e. the FSCA, that was later determined to be unconstitutional. They therefore reasoned that the good faith exception as outlined in *Krull* applied and suppression of the evidence was not appropriate. The Nebraska Supreme Court concluded that the trial court did not err in denying Jennings motion to suppress, stating, "A proper result will not be reversed merely because it was reached for the wrong reason."

REASONS FOR GRANTING THE WRIT

Pursuant to *Carpenter*, supra, both the trial court and the Nebraska Supreme Court were forced to acknowledge that the original seizure of the Petitioner's CSLI was a violation of the Fourth Amendment. However, the trial court's order that denied Petitioner's motion to suppress is based entirely on that court's determination that the 2018 search warrants were constitutionally sound. Conversely, the Nebraska Supreme Court never addressed the validity of the search

warrants and determined that the good faith exception to the exclusionary rule applied to the original seizure of the CSLI pursuant to what they described as a court order under the FSCA. In affirming the trial court's decision to deny Petitioner's motion to suppress, the Nebraska Supreme Court applied the good faith exception as set forth in *Illinois v. Krull*, supra.

In *Krull*, this Court stated that certiorari was granted "…to consider whether a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional." *Krull,* supra. 480 U.S. 340, 346, 107 S. Ct. 1160, 1165, 94 L. Ed. 2d 364. The statute in question in *Krull* was a portion of the state's regulatory scheme for licensing dealers in motor vehicles or automotive parts. The licensee was required to permit state officials to inspect their records at any time and allow examination of the premises of the licensee's place of business to determine the accuracy of their records. Pursuant to this statute, police inspected vehicles in the licensees yard and determined that several of the vehicles were listed as stolen vehicles. The licensees were arrested and charged with several offenses related to possession of the stolen vehicles.

Prior to trial, the defendant in *Krull* filed a motion to suppress the fruits of the search because on the day after the search occurred, a federal court determined the statute to be unconstitutional and a violation of the Fourth Amendment. The Illinois courts determined this warrantless search violated the fourth amendment and that the good faith exception to the exclusionary rule was limited to cases involving a police officer's good faith reliance on the validity of a search warrant subsequently found to be constitutionally infirm.

This Court reversed and determined that the good faith exception does indeed apply to the facts in *Krull.* The foundation of the *Krull* ruling is based on the premise that the

exclusionary rule is aimed at deterring future unlawful police misconduct. This Court reasoned that just as in *Leon*, where the unlawful conduct was not that of police but rather of judicial officers, good faith also applies to cases where the unlawful conduct is that of legislators, not police.

In *Krull* this Court stated "Any difference between our holding in *Leon* and our holding in the instant case, therefore, must rest on a difference between the effect of the exclusion of evidence on judicial officers and the effect of the exclusion of evidence on legislators. Although these two groups clearly serve different functions in the criminal justice system, those differences are not controlling for purposes of this case." *Krull*, 480 U.S. 340, 350, 107 S. Ct. 1160, 1167, 94 L. Ed. 2d 364 (1987).

However, "those differences" are controlling for purposes of the present case. A search under the applicable sections of the FSCA required *court* approval before police can undertake a search for an individual's CSLI. On the other hand, law enforcement requires no prior court approval to conduct a search pursuant to statutes similar to those that were the subject of this Court's scrutiny in *Krull*. Therein lies the critical difference on how a reviewing court should analyze cases involving law enforcement's searches pursuant to court authorized warrants or orders versus those searches where *no prior judicial authorization is required.*

In *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), this Court held that the Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even if the warrant is later determined to be invalid. However, the Court was quick to point out that deference to the magistrate was not boundless and identified several areas where suppression remains an appropriate remedy.

More specifically, the Court stated "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth… The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role… in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable… Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid".

Leon supra. 468 U.S. 897, 923, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677 (1984), (internal cites omitted).

Thus, the reviewing court in a *Leon* situation must take the additional step of determining if any of the exceptions to the good faith rule as outlined above, apply to the case under review. This step is not necessary in cases with a fact pattern similar to that in *Krull* because the search is conducted purely under the authorization granted by statute and no court intervention is required to assess the validity of the search. In other words, law enforcement officers in said searches are simply fulfilling their duty to enforce the statute as written. This varies significantly from the scenario here, wherein judicial approval is mandated prior to execution of the search for cell phone records.

Much like the approach taken by the Nebraska Supreme Court, appellate courts around the country have failed to recognize the difference between the good faith exception to the

exclusionary rule in a *Leon* situation and that in a *Krull* situation. See *U.S. v. Beverly* 943 F.3d 225 (5th Cir. 2019), *U.S. v. Pritchard* 964 F.3d 513 (6th Cir. 2020), *U.S. v Chavez* 894 F. 3d 593 (4th Cir. 2018), and *U.S. v.* Curtis 901 F. 3d 846 (7th Cir. 2018). These courts have simply made the erroneous determination that since the searches stem from authorization provided in federal statute, that *Krull* is the appropriate precedent to rely upon to apply the good faith exception. These decisions fail to recognize that the FSCA does not grant authority to law enforcement to make the unilateral decision to conduct a search for CSLI. To conduct such a search under the FSCA, law enforcement was first required to get court authorization. That fact makes *Krull* inapplicable. Thus, any reliance on good faith must also pass scrutiny under the exceptions to the good faith rule set forth in *Leon,* supra.

A review of the court documents authorizing the search for Jennings CSLI clearly demonstrates that the magistrate wholly abandoned his judicial role and served as a rubber stamp for police. "A magistrate failing to manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer cannot provide valid authorization for an otherwise unconstitutional search. *Leon* supra, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677 (1984).

The documents authorizing the search for Petitioner's CSLI include are self-identified as "Affidavit and application for Issuance of a search warrant for cellular records" and "Search warrant for Cellular Records". Although the affidavit states "That the officer has just and reasonable grounds to believe…" that the cell records contain evidence of the homicide, the affidavit concludes "Wherefore the officers pray that a search warrant be issued according to law." Furthermore, the magistrate approved of a document identified as a search warrant. The document asserts that the court has jurisdiction pursuant to Section 29-812 of Nebraska statutes.

That statute states "A search warrant … may be issued by any judge of the county court, district court, Court of Appeals, or Supreme Court for execution anywhere within the State of Nebraska or for service upon any publicly or privately held corporation… located within or outside the State of Nebraska". Neb. Rev. Stat. Section 29-812.

The document further states "That based upon the sworn affidavit and application of issuance for a search warrant of Officer Derek Mois… that there is probable cause…" to believe that evidence of the homicide will be found in the cell phone records. The document then continues "The Court finds that the applicant has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation." The document then states "You are therefore ordered pursuant to Title 18 United States Code Section 2703(d) that …" the cell provider turn over the Petitioners cell records. Finally the document states that this "search warrant be executed forthwith."

These documents are at best confusing, and at worst indecipherable. To perform the function of a neutral and detached magistrate must require, at a minimum, that the magistrate at least read the affidavit and "search warrant" or "court order" before approving it. It is abundantly clear that the magistrate in this case truly acted as a rubber stamp for the police and totally abandoned any semblance of neutrality or detachment. No police officer who actually read these documents could reasonably believe that they are constitutionally valid. The police obtained the CSLI employing shoddy work and capitalized on the egregious ambivalence of the magistrate to Fourth Amendment protections. The documents authorizing the original seizure are obviously boilerplate documents drawn up by the Omaha police department and are likely to be replicated

in future requests for cell phone records of suspects. Suppression of the CSLI in this case is the only way to deter future police conduct of this type.

A second exception to the application of the *Leon* good faith rule is also applicable to this case. The 2017 document authorizing seizure in this case is so patently overbroad that no officer could reasonably rely on its validity. The documents providing court authorization state as follows, "IT is further ordered, that any other person, device, computer, and/or number that is in communication with the target device shall be considered part of the criminal investigation and shall require the disclosure of the data in Part A and Part B from any provider of electronic communications services as defined by 18 U.S.C. § 2510(15) and Nebraska Revised Statute 86-277. This shall also include the target device roaming or utilizing or utilizing any electronic communications service provider's network and/or antennas, regardless of carrier or provider".

This order authorizes police to obtain virtually all cell phone records for any and all device that came into contact with the target device during the two plus months for which the document authorizes the seizure. This portion of the authorizing document is so blatantly overbroad and lacking in particularity, that no neutral and detached magistrate could possibly authorize police to conduct a cyberspace dragnet of this magnitude. One need only look at the 2018 search warrants, which include the exact same language, to conclude that suppression is appropriate to deter future police misconduct.

CONCLUSION

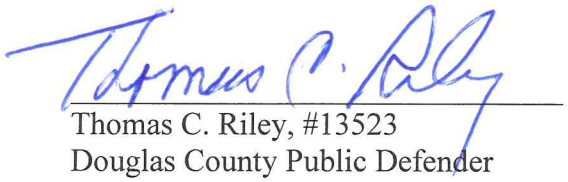
Petitioner prays that this court grant his petition for a writ of Certiorari to address the question presented and rule that

1. In cases where statutes allow police to search persons, places, or things but require court authorization before conducting the search, a reviewing court cannot rely solely

on *Illinois v. Krull* supra, and must apply the exceptions to good faith set forth in *United States v. Leon* supra;

2. That the magistrate in this case wholly abandoned his responsibility to act in a neutral and detached capacity but rather acted as a rubber stamp for the police;
3. That no reasonable police officer could rely on the validity of the judicial authorization received because the documents in support of and granting judicial authorization are indecipherable and fail to distinguish whether it is a search warrant or a court order under the FSCA;
4. That no reasonable police officer could rely on the validity of judicial authorization because the document granting judicial authorization is obviously overbroad and lacks particularity;
5. That this Court should reverse and remand this case for a new trial or, in the alternative, remand to the Nebraska Supreme Court instructing that body that reliance on *Illinois v. Krull* is erroneous and require it to review the 2017 authorization for collecting CSLI applying the exceptions to good faith set forth in *Leon.*

RESPECTFULLY SUBMITTED:



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