
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Joel Thomas Augard – Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

(1) Whether the good-faith analysis prohibits consideration of facts not included in the search-warrant affidavit?

(2) Whether the good-faith exception allows for a search over a decade after the offense occurred, in a different location from the actual offense?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Augard, 4:18-cr-00134-001 (S.D. Iowa) (criminal proceedings), judgment entered February 25, 2019.

United States v. Augard, 19-1507 (8th Cir.) (direct criminal appeal), judgment entered March 31, 2020.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	15

INDEX TO APPENDICES

APPENDIX A:	Order denying Motion to Suppress, United States District Court for the Southern District of Iowa, 4:18-cr-00134-001 October 16, 2018	1
APPENDIX B:	Judgment of the United States District Court for the Southern District of Iowa, 4:18-cr-00134-001 February 25, 2019	11
APPENDIX C:	Opinion of the Eighth Circuit Court of Appeals, 19-1507 March 31, 2020	20
APPENDIX D:	Judgment of the Eighth Circuit Court of Appeals, 19-1507 March 31, 2020	27
APPENDIX E:	Order denying Petition for Rehearing En Banc and Rehearing by Panel by Eighth Circuit Court of Appeals, 19-1507 May 15, 2020	29

TABLE OF AUTHORITIES

Federal Cases

<i>State v. Wilson</i> , 127 A.3d 1234 (Me. 2015).....	10
<i>United States v. Colbert</i> , 828 F.3d 718 (8th Cir. 2016)	11, 12
<i>United States v. Jacobs</i> , 986 F.2d 1231 (8th Cir. 1993)	14
<i>United States v. Johnson</i> , 848 F.3d 872 (8th Cir. 2017).....	11, 12
<i>United States v. Laughton</i> , 409 F.3d 744 (6th Cir. 2005)	8, 9
<i>United States v. Loy</i> , 191 F.3d 360 (3d Cir. 1999)	12
<i>United States v. McArthur</i> , 573 F.3d 608 (8th Cir. 2009)	10
<i>United States v. Stevenson</i> , 727 F.3d 826 (8th Cir. 2013)	15
<i>United States v. Summage</i> , 841 F.3d 1075 (8th Cir. 2007)	11
<i>United States v. Tellez</i> , 217 F.3d 547 (8th Cir. 2000).....	12
<i>United States v. Warren</i> , 628 F. App'x 463 (8th Cir. 2016).....	10
<i>United States v. Weber</i> , 923 F.2d 1338 (9th Cir. 1990)	8, 9, 14
<i>United States v. Williams</i> , 477 F.3d 554 (8th Cir. 2007).....	13

Federal Statutes

18 U.S.C. § 2251(a)	6
18 U.S.C. § 2251(e).....	6
18 U.S.C. § 2252A(a)(5)(B)	6
18 U.S.C. § 2252A(b)(2)	6
28 U.S.C. §1254(1)	ii

Other

U.S. Const. amend IV	2, 11
----------------------------	-------

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Joel Thomas Augard - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Joel Augard, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 19-1507, entered on March 31, 2020.

OPINION BELOW

On March 31, 2020, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is published and available at 954 F.3d 1090. Mr. Augard filed a petition for rehearing *en banc*, which was denied on May 15, 2020.

JURISDICTION

The Court of Appeals entered its judgment on March 31, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 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.

STATEMENT OF THE CASE

Mr. Augard's investigation began on April 13, 2018, when G, now 23-years old, reported sexual abuse that occurred in 2005 or 2006, when G was approximately 11 or 12 years old. (Def. Ex. A at 151).¹ The abuse occurred at Mr. Augard's then residence on the south side of Des Moines, Iowa. (*Id.*) On April 27, 2018, Detective Lori Kelly with the Des Moines Police Department obtained a search warrant for Mr. Augard's parents' house in Cherokee, Iowa – where Mr. Augard was now residing. Detective Kelly's interview of G provided the basis for the search warrant affidavit. The property described to be searched included computer systems, cellular phones, “sexual toys or tools commonly used to enhance sexual experience including but not limited to lubricants, vibrators, and penial rings,” and evidence of purchases from the online store “Adam and Eve.” (Def. Ex. A p. 140).

In general, the affidavit discussed how the abuse began in 2005 or 2006. (Def. Ex. A). G went over to Mr. Augard's house to play video games. (Def. Ex. A p. 151). During the initial visits, nothing out of the ordinary occurred. (*Id.*). On the sixth visit, Mr. Augard briefly turned on a pornographic movie, but quickly shut it off. (Def.

¹ In this brief, the following abbreviations will be used:

“DCD” -- district court clerk's record, followed by docket entry and page number, where noted;
and

“PSR” -- presentence report, followed by the page number of the originating document and paragraph number, where noted. The defendant's suppression exhibits are filed at DCD 27.

Ex. A. p. 152). In later visits, Mr. Augard would again turn a pornographic movie on, but would leave the movie on for longer periods of time. (Def. Ex. A p. 152). Eventually, Mr. Augard sat with G and the two watched the pornographic movie together. (*Id.*). Mr. Augard asked G how he felt about the movie. (*Id.*).

After this incident, the sexual abuse began. (*Id.*). Mr. Augard would play pornographic movies during the sexual abuse. (*Id.*) The abuse occurred on multiple occasions, over the course of a year. (Def. Ex. A p. 153). Mr. Augard used sexual toys and lubricants from the online store “Adam and Eve” during the abuse. (*Id.*). Mr. Augard eventually started photographing and videotaping the abuse. (Def. Ex. A p. 154). G stated that Mr. Augard downloaded the photos and videos of the abuse to his computer. (*Id.*). Mr. Augard would show G the videos and photographs. (*Id.*).

The abuse stopped when Mr. Augard was fired from his job and moved to Iowa City for a new position at the University of Iowa. (Def. Ex. A pp. 154-55). After that, G briefly saw Mr. Augard once in 2009 or 2010 while at the University of Iowa to watch his sister in a swim meet. (*Id.*). G was with his family. (*Id.*). No abuse occurred. (*Id.*). The only other contact was in October 2016 when Mr. Augard sent G a Facebook message about G’s wedding. (Def. Ex. A p. 155).

In her affidavit, Detective Kelly also reported that she determined, based on the Polk County Assessor’s website, that Mr. Augard purchased a home in Des Moines, Iowa, on October 14, 2004, and that the home went into foreclosure and was sold on November 11, 2009. (Def. Ex. A p. 155.) Detective Kelly reported that Polk

County Human Resources employed Mr. Augard from January 2000 to February 2006. (*Id.*) She also noted in her affidavit that Mr. Augard was employed by the University of Iowa from September 2009 through September 2014. (*Id.* at 156.)

According to a search by Detective Kelly of DOT records, Mr. Augard obtained an Iowa driver's license in December 2017, and registered a vehicle in March 2018, at the Cherokee, Iowa address. (*Id.*) Officers observed Mr. Augard's vehicle, during surveillance on April 19 and 20, 2018, at the Cherokee residence. (*Id.*)

However, records produced by the government, with a date stamp of April 16, 2018, suggested that Detective Kelly was aware that, from 2009 to 2018, Mr. Augard moved five times across the state of Iowa, from Des Moines, to Marion, to Iowa City, to Coralville, to North Liberty, to Cherokee. (Def. Ex. B.) In about February 2009, Mr. Augard moved to Marion, Iowa. (*Id.*) In about October 2009, Mr. Augard moved to Iowa City, where he had obtained a job with the University of Iowa. (*Id.*) In October 2010, Mr. Augard moved to Coralville, Iowa. (*Id.*) In October 2011, Mr. Augard moved to North Liberty, Iowa. (*Id.*) Then, after losing his job at the University of Iowa, Mr. Augard moved across the state to Cherokee, Iowa, located in the northwest part of the state, to live with his parents. (*Id.*)

Investigation reports also note that the post master reported to Detective Kelly that Mr. Augard did not have a mail forwarding request to the Cherokee residence. (Def. Ex. C.) The post office reported that Mr. Augard's parents "have lived [at the

Cherokee residence] for many years.” (Def. Ex. C.) Detective Kelly learned that Mr. Augard’s father owned the residence. (Def. Ex. C.)

On April 27, 2018, a state district court judge issued a search warrant for property at the Cherokee residence. (Def. Ex. A.) The search warrant states that the judge’s probable cause finding is based on the sworn application made to the court, which is attached to the search warrant. (*Id.*) On May 1, 2018, Detective Kelly, along with other law enforcement officers, executed the search warrant. During the search, among other evidence, the officers seized certain computers, video cameras, and photo cameras. The search revealed a video recording of two instances of the sexual abuse, as well as other child pornography.

Based upon this search, on June 26, 2018, Mr. Augard was indicted in the Southern District of Iowa on two counts of production of child pornography, in violation of 18 U.S.C. §§ 2251(a) & (e), and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) & 2252A(b)(2). (DCD 2). Mr. Augard filed a motion to suppress the fruits of the warrant. (DCD 27). Specifically, Mr. Augard argued the search warrant affidavit lacked probable cause. First, the affidavit did not show a nexus between the evidence sought and the residence in Cherokee. (DCD 27). Further, the affidavit did not establish why Mr. Augard would have kept the evidence for twelve years, over the course of multiple moves. (DCD 27). Similarly, Mr. Augard argued the information was stale. (DCD 27). Mr. Augard asserted the good-faith exception did not apply. (DCD 27). Finally, Mr. Augard

requested an evidentiary hearing and *Franks* hearing, because the affidavit omitted Mr. Augard's multiple moves and failed to state that Mr. Augard did not own the residence. (DCD 27). The government resisted. (DCD 28).

The district court denied the motion to suppress, and denied the request for an evidentiary hearing or a *Franks* hearing. (DCD 29). First, the district court agreed with Mr. Augard that the search warrant affidavit did not establish probable cause for the search warrant. (DCD 29). However, the court found that the good-faith exception applied. (DCD 29). Finally, the court found that Mr. Augard was not entitled to a *Franks* hearing. (DCD 29). The court stated: "First, the affidavit shows that the residence where the alleged abuse occurred is not where the defendant currently resides. Second, it is of no consequence to this warrant to know who owned the place to be searched or that others may also live there." (DCD 29).

Mr. Augard entered a conditional guilty plea to all counts, pursuant to a conditional plea agreement. (DCD 34). After sentencing, Mr. Augard was sentenced to 480 months of imprisonment. (DCD 51).

Mr. Augard appealed the denial of his motion to suppress, and the Eighth Circuit Court of Appeals affirmed. *United States v. Augard*, 954 F.3d 1090 (8th Cir. 2020). The court did not address probable cause, but found that the good-faith exception applied. *Id.* at 1094-95. The essence of the Eighth Circuit's holding is that law enforcement could presume Mr. Augard would maintain the evidence over a decade, over several moves. *Id.* The Eighth Circuit applied this presumption even

though this expert evaluation was not in the affidavit, or in the record whatsoever. *Id.* The circuit also determined a *Franks* hearing was unwarranted, as the multiple moves were irrelevant. *Id.*

REASONS FOR GRANTING THE WRIT

A circuit split exists on whether a search warrant application must explicitly state that the suspect falls within the class of suspects likely to maintain child pornography, and explain why, to be considered as part of the good-faith analysis. Other circuits require this information to be in the affidavit for the good-faith exception to apply. *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990); *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005). This Court should resolve this circuit split.

Further, no federal court has applied the good-faith exception to allow a search over a decade after the offense, even in a child pornography case. The writ must be granted to ensure there is some time limitation on searches, regardless of the type of offense.

I. THE GOOD-FAITH ANALYSIS DOES NOT ALLOW CONSIDERATION OF OUTSIDE FACTS NOT INCLUDED IN THE SEARCH WARRANT AFFIDAVIT, INCLUDING THE APPLICATION OF ANY PRESUMPTION THAT AN INDIVIDUAL WILL MAINTAIN CHILD PORNOGRAPHY FOR AN EXTENDED PERIOD OF TIME WITHOUT A BASIS FOR THIS CONCLUSION IN THE AFFIDAVIT.

This Court should grant the writ to address a circuit split on whether courts can consider information outside of the four corners of the search warrant affidavit

as part of the good faith exception. Crucial to the Eighth Circuit’s holding was the assessment that Mr. Augard was likely to hold onto the videos and photographs, due to the nature of the offense. Other circuits require some basis to believe that the defendant is in that category of offender, and also require that information to be in the affidavit itself. This Court should grant rehearing and require the same.

The Ninth Circuit has held that in order to rely on profiles of classes of people who are likely to keep evidence of crimes, like child pornographers, “the affidavit must lay a foundation which shows that the person subject to the search is a member of the class” for which the profile would apply. *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990) (holding that the affidavit did not establish probable cause that the defendant was a child molester when it was “clear that the ‘expert’ portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind,” and also finding the good-faith exception did not apply); *see also United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005) (rejecting that courts can consider information outside of the affidavit in the good-faith analysis, noting it would “lead to the very kind of subjectivity that the Supreme Court has repeatedly and explicitly rejected”).

The face of the affidavit contains no indication that Mr. Augard is a member of a class of individuals who are known to keep child pornography. It does not even contain boilerplate language that the crime of production or possession of child pornography is associated with hoarding behavior or that individuals tend to keep

such materials for long periods of time. In fact, based upon G's statements, it appears that the pornography was maintained by Mr. Augard to continue the sexual abuse of G, as from the very beginning Mr. Augard used pornography to groom G.

The facial deficiency of the search warrant is best shown by the search warrant's authorization for search of sexual toys and items showing evidence of purchases from "Adam and Eve." (Def. Ex. A at 139–40.) G reported that Mr. Augard used sexual toys purchased from Adam and Eve in 2005 or 2006. But that information, over a decade old, provides no logical basis, alone, for concluding that Mr. Augard may have kept such toys until today. There is no information that suggests that any class of individuals tend to keep sexual toys or evidence of purchases of such sexual toys, and no information suggesting Mr. Augard belongs to that class. And there is no information that would tend to "refresh" the staleness of the information in the search warrant.

This Court should reject this presumption because it is not based upon current times and technology. Courts have recognized, "[b]ecause of the ease of using a peer-to-peer network, it is no longer a common practice among those who seek out sexually explicit material to keep a collection of viewable images or videos on the computer." *See, e.g., State v. Wilson*, 127 A.3d 1234, 1236 (Me. 2015). Many child pornography trials involve discussions of "deleted images" or images found in the unallocated space. *See, e.g., United States v. Warren*, 628 F. App'x 463 (8th Cir. 2016); *United States v. McArthur*, 573 F.3d 608 (8th Cir. 2009). Therefore, the petition for writ of

certiorari should be granted to resolve the circuit split and ensure the Fourth Amendment jurisprudence is consistent with today's technology.

II. THE GOOD FAITH EXCEPTION DOES NOT ALLOW LAW ENFORCEMENT TO SEARCH A HOME OVER A DECADE AFTER THE REPORTED OFFENSE, IN A LOCATION WHERE THE OFFENSE DID NOT OCCUR.

The petition for writ of certiorari should be granted because the Eighth Circuit's decision allows virtually limitless time lapses between the offense and search in child pornography cases. It is especially problematic in this case, because the information is both overly stale and lacks a nexus to the home searched.

Stale information, or information that is not "sufficiently close in time to the issuance of the warrant" such that "probable cause can be said to exist as of the time of the search," may not be used in finding probable cause. *United States v. Johnson*, 848 F.3d 872, 877 (8th Cir. 2017) (quoting *United States v. Colbert*, 828 F.3d 718, 728 (8th Cir. 2016)). "The date of the occurrence of the facts relied upon in an affidavit is of importance in the determination of probable cause because untimely information may be deemed stale." *United States v. Summage*, 481 F.3d 1075, 1078 (8th Cir. 2007).

Even if the child pornographer assumption could apply here, it still is not enough to establish good faith. No federal circuit court of appeals has allowed a delay of over a decade. The length of time should render the information provided stale, and the officers reliance upon it unreasonable, regardless of any "presumption."

In addition, the obvious lack of nexus between the items to be seized and the residence establishes that the good faith exception does not apply. The information provided in the application for a search warrant must establish a “nexus” between the items to be seized and the place to be searched. *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000). “Factors to consider in determining if a nexus exists include ‘the nature of the crime and the reasonable, logical likelihood of finding useful evidence.’” *Johnson*, 848 F.3d at 878 (quoting *Colbert*, 828 F.3d at 726).

Missing from the affidavit is any nexus between evidence of the criminal conduct – either computers, photographs, videos, cameras, sexual toys, or receipts relating to the sexual abuse in 2005 or 2006 – and the Cherokee residence. Other circuits require information that the individual would keep the pornography at the specific location to be searched. *See United States v. Loy*, 191 F.3d 360, 365–67 (3d Cir. 1999) (holding a search warrant application for a residence must present facts suggesting that the child pornography collector maintained his collection at his residence). The likelihood of finding useful evidence at the Cherokee address is overly tenuous. The affidavit notes that Mr. Augard lost his home on the south side of Des Moines to foreclosure in 2009, held a job in Iowa City from 2009 to 2014, and now lives in a small town in the northwest part of Iowa. The various residences are separated by hours and hundreds of miles. And the moves occurred over the prior decade, well before the investigation in this case.

Other elements of the barebones affidavit accentuate the lack of a nexus between the contraband sought and the Cherokee residence. Mr. Augard's contact with G was extremely limited since 2009. No information suggested that Mr. Augard still had the computer or cameras that he used in 2005 or 2006. Also, there are no reports that anyone has seen videos or photographs of child pornography possessed by Mr. Augard for over a decade, and no information suggested that Mr. Augard had logged onto any sites or applications that catered to viewers or producers of child pornography. Without a reason to believe that Mr. Augard may have retained videos or photos of sexual abuse of G, there is no nexus between the contraband sought and the Cherokee residence.

Finally, the district court erred in failing to hold a *Franks* hearing because the search warrant affidavit contained material omissions and misrepresentations, which rendered the good-faith exception inapplicable. "Where an issuing judge's probable cause determination was premised on an affidavit containing false or omitted statements, the resulting search warrant may be invalid if the defendant can prove by a preponderance of the evidence (1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading . . . and (2) that the affidavit, if supplemented by the omitted information would not have been sufficient to support a finding of probable cause." *United States v. Williams*, 477 F.3d 554, 557 (8th Cir. 2007) (internal quotation marks omitted).

“Under *Leon*, a *Franks* violation is not excused.” *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993).

The omissions from the search warrant affidavit that Mr. Augard had moved several times and that he did not own the house were made with reckless disregard of whether they made the affidavit misleading. In finding a *Franks* hearing was not warranted, the district court stated: “First, the affidavit shows that the residence where the alleged abuse occurred is not where the defendant currently resides. Second, it is of no consequence to this warrant to know who owned the place to be searched or that others may also live there.” (DCD 29).

The first statement misses the point. The question is whether there was sufficient evidence to establish that Mr. Augard would have retained the evidence. It is one thing to say that Mr. Augard did not currently live where the abuse occurred. It is another thing to say that Mr. Augard moved five times, across the state. By failing to include these multiple moves, the officer misled the issuing judge about the likelihood of Mr. Augard maintaining the child pornography. Further, the fact that Mr. Augard did not own the home, combined with the multiple moves, misled the judge on the likelihood of Mr. Augard maintaining illegal contraband there, instead of perhaps in a storage unit or somewhere more secure—if at all. *Weber*, 923 F.2d at 1344-45 (rejecting that probable cause to search for child pornography existed, in part because the officer assumed that the defendant kept “contraband in his house and made no attempt to dispose of it or move it to a less likely location”).

Regardless, the district court erred in refusing to hold an evidentiary hearing whatsoever. “A district court must hold an evidentiary hearing only when the moving papers are sufficiently definite, specific, and detailed to establish a contested issue of fact.” *United States v. Stevenson*, 727 F.3d 826, 830 (8th Cir. 2013). Here, in the initial motion, Mr. Augard asserted that he had moved multiple times, and put forward evidence to support this assertion. (DCD 27). The government disputed this assertion, arguing that Mr. Augard did not actually “move” to these addresses, that he was just “associated” somehow with them. (DCD 28). This contested issue was material to the suppression issues, and therefore an evidentiary hearing was warranted.

CONCLUSION

For the foregoing reasons, Mr. Augard respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/Heather Quick

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER