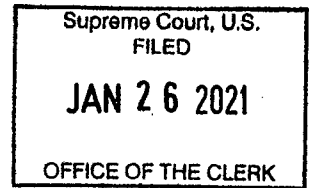


No.

20-7074

IN THE

SUPREME COURT OF THE UNITED STATES



JIMMY LEE NAVE JR. -- PETITIONER

VS.

RICHARD BROWN, WARDEN—RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Mr. Nave was arrested without a warrant and without probable cause. Mr. Nave alleged that his trial counsel was ineffective for failing to object to Mr. Nave's warrantless arrest on the basis that the affiant made false statements in the probable cause affidavit that were necessary to the finding of probable cause. The case thus presents the following question.

Did the District Court err by relying on evidence received after Mr. Nave's warrantless arrest to determine the veracity of statements made by the affiant in the probable cause affidavit when this Court has held probable cause determinations depends on the facts and circumstances present at the moment the arrest was made?

II. Mr. Nave argued that his trial counsel was ineffective for failing to object to a State witness in-court identification on the grounds that (1) the pretrial identification procedures were unduly suggestive and (2) the identification was unreliable. The State failed to respond to Mr. Nave's reliability argument. The case presents the following question.

Did the district court err by not accepting Mr. Nave's reliability argument after the State failed to respond and when Circuit Courts have held failure to respond to argument results in waiver?

LIST OF PARTIES

- [X] All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Jimmy Lee Nave Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court, rendered in these proceedings on February 12, 2020.

OPINIONS BELOW

The District Court denied petitioner's petition for writ of habeas corpus and declined to issue a certificate of appealability. The order is published, *Nave v. Warden*, 2020 U.S. Dist. LEXIS 24275, and is reprinted in the appendix to this petition at App. B, *infra*. The order of the Seventh Circuit Court of Appeals denying petitioner's request for a certificate of appealability in its Cause no. 20-1883 is reprinted in the appendix to this petition at App. A, *infra*. The order of the Seventh Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at App. F, *infra*.

JURISDICTION

The original judgment of the District Court was entered on February 12, 2020. A timely request to the Seventh Circuit Court of Appeals for a certificate of appealability was denied on December 1, 2020. The Seventh Circuit Court of Appeals then denied rehearing on December 22, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case.

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.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. §2254

- (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
- (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
 - (A) the applicant has exhausted the remedies available in the courts of the State; or

- (B)(i) there is an absence of available State corrective process; or
- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
- (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding failure of the applicant to exhaust the remedies available in the courts of the State.
- (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
- (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State Court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

- (g)** A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
- (h)** Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
- (i)** The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Mr. Nave was arrested without a warrant and charged with Kidnapping and Attempted Carjacking. At a bench trial, Mr. Nave was convicted as charged. At sentencing, the trial court vacated the Attempted Carjacking conviction on double jeopardy grounds. Mr. Nave's conviction was affirmed on direct appeal. State post-conviction proceedings were filed and relief was denied. (App. E). The Indiana Court of Appeals also denied relief. (App. D). The Indiana Supreme Court denied transfer. (App. C). Mr. Nave then filed a habeas corpus action under 28 U.S.C. §2254. The District Court denied relief and declined to issue a certificate of appealability. (App. B). The Seventh Circuit Court of Appeals denied Mr. Nave's request for a certificate of appealability. (App. A). The Seventh Circuit Court of Appeals then denied rehearing. (App. F).

First, Mr. Nave argued that his trial counsel was ineffective for failing to object to Mr. Nave's warrantless arrest. The probable cause affidavit contained false statements that were necessary to the finding of probable cause. According to the affidavit, Mr. Nave was identified as the suspect and Manie Vive described Mr. Nave's clothing as being the same described by the victim and witness. There was no evidence of an identification of Mr. Nave as being the suspect prior to Mr. Nave's warrantless arrest and no evidence that Manie Vive described Mr. Nave's clothing as being the same described by the victim and witness prior to Mr. Nave's warrantless arrest. Without the false statements, the affidavit's remaining content was insufficient to establish probable cause for Mr. Nave's warrantless arrest, in violation of the Fourth Amendment to the United States Constitution.

The post-conviction court improperly relied on Manie Vive's trial testimony and determined, "no reckless or intentional falsity has been demonstrated in the probable cause affidavit" in order

to reject Mr. Nave's argument. (App. E, 3-4).

The Indiana Court of Appeals did not dispute false statements were included in the probable cause affidavit, but held, "the State was not obligated to provide proof beyond a reasonable doubt in the affidavit" in order to reject Mr. Nave's argument. (App. D, 5-8).

The District Court also improperly relied on trial testimony to determine the veracity of statements the affiant made in the probable cause affidavit in order to reject Mr. Nave's argument. (App. B, 6-7).

Mr. Nave also argued that his trial counsel was ineffective for failing to object to State witness Robert Derrickson's in-court identification of Mr. Nave. Mr. Nave alleged that a detective pointed out Mr. Nave's photo to Mr. Derrickson and questioned Mr. Derrickson about Mr. Nave while Mr. Derrickson was viewing a photo lineup, rendering the procedure unduly suggestive. Mr. Nave also alleged that Mr. Derrickson's in-court identification of Mr. Nave was unreliable.

The post-conviction court only addressed the identification procedures but failed to address Mr. Nave's argument properly by misstating Mr. Nave's argument in order to reject Mr. Nave's argument. (App. E, at 5).

The Indiana Court of Appeals only addressed the identification procedures and disagreed with Mr. Nave. The Indiana Court of Appeals found that the detective's question was a general question rather than as pointing out a specific photo in the photo lineup to conclude that the identification procedures were not unduly suggestive in order to reject Mr. Nave's argument. (App. D, at 11). On appeal, the Indiana Court of Appeals was limited to the findings of the post-conviction court and the post-conviction court did not find that the detective's question was a general question rather than as pointing out a specific photo in the photo lineup. (App. E, 1-6).

The District Court only addressed the reliability factor and concluded that Mr. Derrickson's in-court identification of Mr. Nave was "sufficiently reliable" in order to reject Mr. Nave's argument. (App. B, 8-9). The State waived the reliability issue by failing to respond to Mr. Nave's reliability argument.

In denying Mr. Nave a certificate of appealability, the Seventh Circuit Court of Appeals Stated it found, "no substantial showing of the denial of a constitutional right." (App. A). The Seventh Circuit Court of Appeals then denied rehearing. (App. F).

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT'S DECISION TO RELY ON EVIDENCE RECEIVED AFTER MR. NAVE'S ARREST TO DETERMINE THE VERACITY OF THE PROBABLE CAUSE AFFIDAVIT IS IN CONFLICT WITH THIS COURT'S STANDARD FOR DETERMINING PROBABLE CAUSE.

Mr. Nave alleged that his trial counsel was ineffective for failing to object to Mr. Nave's warrantless arrest on the basis that the probable cause affidavit contained false statements that were necessary to the finding of probable cause.

This Court held, where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statements is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be voided and the fruits of the arrest excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978).

Mr. Nave argued that the two following statements made by the affiant in the probable cause affidavit were false and necessary to the finding of probable cause: (1) "The suspect was later identified as Jimmy Lee Nave after he went to Manies Garage and asked for a ride" and (2) "Manie Vive described Nave's clothing as being the same described by the victim and witness."

The probable cause affidavit was required to contain the facts upon which Mr. Nave's warrantless arrest was made so that the court could determine whether probable cause existed for Mr. Nave's warrantless arrest.

This Court has held probable cause determinations depends on the facts and circumstances present at the moment the arrest was made. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

At the moment Mr. Nave's warrantless arrest was made, there was no evidence of an identification of Mr. Nave as being the suspect and no evidence that Manie Vive described Mr. Nave's clothing as being the same described by the victim and witness, rendering the affiant's statements false.

The District Court improperly relied on trial testimony, evidence received after Mr. Nave's warrantless arrest, to determine the veracity of the statements challenged by Mr. Nave and held, "Neither of the statements challenged by Mr. Nave were false, just incomplete." (App. B, 6-7). At Mr. Nave's trial, Mr. Nave was identified as the suspect and Manie Vive described Mr. Nave's clothing.

If the probable cause affidavit was required to contain the facts upon which Mr. Nave's warrantless arrest was made, to properly determine the veracity of statements the affiant made, the District Court had to determine whether there was evidence of an identification of Mr. Nave as being the suspect prior to Mr. Nave's warrantless arrest and determine whether there was evidence that Manie Vive described Mr. Nave's clothing as being the same described by the victim and witness prior to Mr. Nave's warrantless arrest.

If neither of the statements challenged by Mr. Nave were false, one must wonder: If Mr. Nave was identified as the suspect prior to Mr. Nave's warrantless arrest, where is the evidence of that identification and if Manie Vive described Mr. Nave's clothing as being the same described by the victim and witness prior to Mr. Nave's warrantless arrest, where is the evidence of that description.

To allow the District Court to rely on this trial testimony to determine the veracity of the statements the affiant made in the probable cause affidavit would nullify the requirement that a warrant not issue “but upon probable cause, supported by Oath or affirmation.”

As a result of the District Court’s failure to properly determine the veracity of statements the affiant made in the probable cause affidavit, the District Court could not adequately determine whether Mr. Nave was denied his Sixth Amendment right to effective assistance of counsel. As such, the Seventh Circuit Court of Appeals also erred by deferring to the District Court in order to deny Mr. Nave a certificate of appealability. The Seventh Circuit Court of Appeals stated, “We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right.” (App. A).

The issue of whether Mr. Nave was denied his Sixth Amendment right to effective assistance of counsel does not require the attention of this Court. What does merit review is the District Court’s use of trial testimony, evidence received after Mr. Nave’s warrantless arrest, to determine the veracity of statements the affiant made in the probable cause affidavit when this Court has held probable cause determinations depends on the facts and circumstances present at the moment the arrest is made.

Because the District Court’s reliance on evidence received after Mr. Nave’s warrantless arrest to determine the veracity of statement’s the affiant made in the probable cause affidavit is in conflict with this Court’s standard for determining probable cause and the Seventh Circuit Court of Appeals denied Mr. Nave a certificate of appealability, Certiorari should be granted.

II. THE DISTRICT COURT'S DECISION TO NOT ACCEPT MR. NAVE'S ARGUMENT AFTER THE STATE FAILED TO RESPOND IS IN CONFLICT WITH CIRCUIT COURT'S THAT HAVE HELD FAILURE TO RESPOND TO ARGUMENT RESULTS IN WAIVER.

Mr. Nave alleged that his trial counsel was ineffective for failing to object to State witness Robert Derrickson's in-court identification of Mr. Nave on the basis that: (1) The pre-trial identification procedures were unduly suggestive; and (2) Derrickson's in-court identification of Mr. Nave was unreliable.

This Court has held that an in-court identification that follows an impermissibly suggestive pretrial identification is admissible if under the "totality of the circumstances" the in-court identification was reliable. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

The record on appeal would show, at every stage the state has failed to respond to Mr. Nave's reliability argument. The Seventh Circuit and other Circuits have held failure to respond to argument results in waiver. *Notredan LLC v. Old Republic Exch. Facilitator Co.*, 531 F. App'x 567, 569 (6th Cir. 2013); *Bonte v. U.S. Bank N.A.*, 624 F.3d 461, 466 (7th Cir. 2010); *Fils v. City of Aventura*, 647 F.3d 1272, 1295 (11th Cir. 2011).

In *Bontes* supra, the Seventh Circuit held, Bontes failure to respond to argument left the court to conclude that Bontes had waived any argument and left the court no choice but to accept U.S. Bank's argument. Similarly, the state's failure to respond to Mr. Nave's reliability argument should have left the District Court to conclude that the state had waived its reliability argument and left the District Court no choice but to accept Mr. Nave's reliability argument.

Instead of accepting Mr. Nave's reliability argument, the District Court combed the record and constructed a reliability argument on behalf of the state and concluded that Derrickson's in-court identification of Mr. Nave was "sufficiently reliable." (App. B, at 9).

The District Court's conclusion that Mr. Derrickson's in-court identification of Mr. Nave was "sufficiently reliable" finds no support in the record. The post-conviction court did not make this finding. (App. E, 1-6). On appeal, the Indiana Court of Appeals did not make this conclusion. (App. D, 8-11).

Had the District Court accepted Mr. Nave's reliability argument, Mr. Derrickson's in-court identification of Mr. Nave had to be suppressed. Without Mr. Derrickson's in-court identification, the State's case in chief would be insufficient to affirm Mr. Nave's conviction. As such, Mr. Nave was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to object to Mr. Derrickson's in-court identification of Mr. Nave.

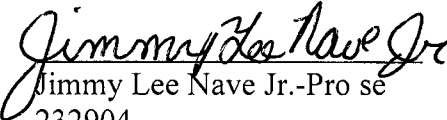
In denying Mr. Nave a certificate of appealability, the Seventh Circuit Court of Appeals stated the court had reviewed the record on appeal. (App. A). Had the Court properly reviewed the record on appeal, the record established the State had failed to respond to Mr. Nave's reliability argument, thus waiving the issue, which should have left the District Court to accept Mr. Nave's reliability argument and conclude Mr. Nave was denied his Sixth Amendment right to effective assistance of counsel.

Because the Seventh Circuit and other Circuits have held failure to respond to argument results in waiver, and the District Court failed to accept Mr. Nave's reliability argument after the State failed to respond and the Seventh Circuit Court of Appeals denied Mr. Nave a certificate of appealability, Certiorari should be granted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the District Court.

Respectfully submitted,


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