

*RCR*

No. 20-7074

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY LEE NAVÉ JR.,

Petitioner,

v.

FRANK VANIHEL, WARDEN,

Respondent.

Supreme Court, U.S.  
FILED

APR 20 2021

OFFICE OF THE CLERK

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

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**PETITION FOR REHEARING**

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## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities.....	ii
Petition for Rehearing .....	1
Statement of Facts .....	1
Reasons Meriting Rehearing .....	2
Suggestions in Support of Rehearing.....	7
Conclusion.....	11
Appendix	
Order denying Certiorari.....	A
Decision of the United States District Court, Southern District of Indiana.....	B

## TABLE OF AUTHORITIES

### CASES

Beck v. Ohio, 379 U.S. 89, 91 (1964).....	2
Bonte v. U.S. Bank N.A., 624 F.3d 461, 466 (7 <sup>th</sup> Cir. 2010).....	5, 6
Fils v. City of Aventura, 647 F.3d 1272, 1295 (11 <sup>th</sup> Cir. 2011).....	5
Franks v. Delaware, 438 U.S. 154, 155-156 (1978).....	2, 3, 8
Hunter v. Bryant, 502 U.S. 224, 228 (1991).....	2
Notredan LLC v. Old Republic Exch. Facilitator Co., 531 F. App'x 567, 569 (6 <sup>th</sup> Cir. 2013).....	5
Sims v. State, 771 N.E. 2d 734, 737-738 (Ind. Ct. App. 2002).....	10
United States v. Olano, 507 U.S. 725, 733 (1993).....	5
United States v. Rajaratnam, 719 F.3d 139, 154 (2 <sup>nd</sup> Cir. 2013).....	3
United States v. Ranney, 298 F.3d 74, 78 (1 <sup>st</sup> Cir. 2002).....	3
United States v. Schmitz, 181 F.3d 981, 986-87 (8 <sup>th</sup> Cir. 1999).....	3
United States v. Wade, 388 U.S. 218, 230-231 (1967).....	9
United States v. Williams, 737 F.2d 594, 602 (7 <sup>th</sup> Cir. 1984).....	3
Wiggins v. Smith, 539 U.S. 510, 520-521 (2003).....	9
Williams v. Taylor, 529 U.S. 362, 405-406 (2000).....	7
Wilson v. Russo, 212 F.3d 781, 788 (3 <sup>rd</sup> Cir. 2000).....	3
Wilson v. Sellers, 138 S. Ct. 1188, 1191-1192 (2018).....	9

### STATUES

28 U.S.C. §2254.....	7
Indiana Post-Conviction Rule 1 §6.....	10
Supreme Court Rule 44.....	1

## **PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT**

COMES NOW Petitioner, Jimmy Lee Nave Jr., Pro Se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the decision of the United States District Court, Southern District of Indiana.

In support of petition, Mr. Nave states the following.

### **STATEMENT OF FACTS**

Mr. Nave filed a habeas corpus petition with the United States District Court, Southern District of Indiana, challenging his state conviction for Kidnapping on the grounds that his trial counsel rendered constitutionally ineffective assistance of counsel.

Mr. Nave argued that his trial counsel was ineffective for failing to object to Mr. Nave's warrantless arrest on the grounds that the probable cause affidavit was defective, in that the probable cause affidavit contained false statements that were necessary to the finding of probable cause, in violation of the Fourth Amendment to the United States Constitution. In determining the veracity of the probable cause affidavit, the district court improperly relied on evidence obtained at Mr. Nave's trial, in order to determine that the statements challenged by Mr. Nave were not false, thus rejecting Mr. Nave's ineffective assistance of counsel claim. Evidence or events occurring after an arrest does not factor into the probable cause inquiry.

Mr. Nave also argued that his trial counsel was ineffective for failing to object to witness Robert Derrickson's in-court identification of Mr. Nave on the grounds that the pretrial identification procedures were unduly suggestive and Mr. Derrickson's in-court identification of Mr. Nave was unreliable. The state never responded to Mr. Nave's reliability argument therefore, waiving the issue. In addressing Mr. Nave's argument, the district court only addressed the reliability factor and the court found that Mr. Derrickson's in-court identification of Mr. Nave was "sufficiently reliable" in order to reject Mr. Nave's ineffective assistance of counsel claim.

## REASONS MERITING REHEARING

1. The district court improperly relied on evidence received after Mr. Nave's arrest in order to determine the veracity of the probable cause affidavit, which is in conflict with this Court's standard for determining probable cause.

This Court has held that 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).

In this case, a probable cause affidavit was submitted to the court for a probable cause determinations.

Mr. Nave argued that the affiant knowingly and intentionally, or with reckless disregard for the truth, included in the probable cause affidavit two false statements that were necessary to the finding of probable cause.

It is well established that, 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 an affiant in his affidavit for a warrant, and if the alleged false statements was necessary to the finding of probable cause, the Fourth Amendment required that a hearing be held at the defendant's request so that he might challenge the truthfulness of factual statements made in the affidavit, and if at such hearing the defendant established by a preponderance of the evidence the allegation of perjury or reckless disregard, and with the affidavit's false material set to one side, the affidavit's remaining content was insufficient to establish probable cause, the warrant had to 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).

The Franks decision did not define reckless disregard for the truth, other than to suggest that the standard required more than mere negligence on the part of the affiant. Franks, 438 U.S. at 171. Most Circuit Courts have adopted a subjective test for determining whether the affiant included in the warrant affidavit a false statement intentionally, or with reckless disregard for the truth, as, whether viewing all the evidence, “the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported. United States v. Ranney, 298 F.3d 74, 78 (1<sup>st</sup> Cir. 2002); United States v. Rajaratnam, 719 F.3d 139, 154 (2<sup>nd</sup> Cir. 2013); Wilson v. Russo, 212 F.3d 781, 788 (3<sup>rd</sup> Cir. 2000); United States v. Williams, 737 F.2d 594, 602 (7<sup>th</sup> Cir. 1984); United States v. Schmitz, 181 F.3d 981, 986-87 (8<sup>th</sup> Cir. 1999).

Mr. Nave also had to point out specifically the portion of the affidavit that he claimed to be false and those allegations had to be accompanied by an offer of proof. Affidavits or sworn or otherwise reliable statements of witnesses, or their absence satisfactorily explained. Franks, 438 U.S. at 171.

Mr. Nave argued that the two following statements 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.”

In regards to the first statement, according to the affiant, the suspect was identified as Mr. Nave, which was completely false. When reviewing all of the evidence obtained prior to Mr. Nave’s arrest, there was no evidence of an identification of Mr. Nave as being the suspect. There were only two people who could have identified the suspect, the victim and the only witness and neither person identified the suspect as being Mr. Nave prior to Mr. Nave’s arrest. According to

the probable cause affidavit, the victim, Ruth Clark was able to describe the suspect as a black male after seeing the color of the suspect hands. Mrs. Clark never saw the suspect face. Mr. Nave also submitted the Transcript of Videotaped Statement of Robert Derrickson, which showed that Mr. Derrickson, the only witness to the crime, was unable to identify anyone as being the suspect from a photo lineup prior to Mr. Nave's arrest. The affiant was the detective who interviewed Mrs. Clark and Mr. Derrickson prior to Mr. Nave's arrest, therefore, the affiant must have entertained serious doubts as to the truth of his statement and had obvious reasons to doubt the accuracy of this statement because the affiant knew that the victim and the only witness had not identified the suspect as being Mr. Nave.

In regards to the second statement, when reviewing all of the evidence obtained prior to Mr. Nave's arrest, there was no evidence that Manie Vive described Mr. Nave's clothing as being the same as described by the victim and witness. As such, the affiant had obvious reasons to doubt the accuracy of this statement.

In addressing the veracity of the affiant statements, the district court improperly considered evidence obtained at Mr. Nave's trial in order to determine that "Neither of the statements challenged by Mr. Nave were false, just incomplete." The veracity of the affiant statements must be based on the evidence known to the affiant at the moment Mr. Nave's arrest was made. Evidence or events occurring after an arrest is irrelevant to the veracity of statements made in the probable cause affidavit. The fact that Mr. Nave was identified as being the suspect at Mr. Nave's trial does not mean that Mr. Nave was identified as being the suspect prior to Mr. Nave's arrest. The fact that Mr. Vive identified Mr. Nave's clothing at Mr. Nave's trial does not mean that Mr. Vive identified Mr. Nave's clothing prior to Mr. Nave's arrest.

Whether the affiant statements were false, is a straightforward question: At the moment Mr. Nave's arrest was made, was the suspect identified as Mr. Nave and did Manie Vive describe Mr. Nave's clothing as being the same described by the victim and witness. There has been no evidence presented of an identification of Mr. Nave as being the suspect that occurred prior to Mr. Nave's arrest and no evidence that Manie Vive described Mr. Nave's clothing as being the same as described by the victim and witness prior to Mr. Nave's arrest.

If an affiant is able to use deliberately falsified allegations to demonstrate probable cause, in case probable cause is later developed, the requirement of probable cause for arrest has been turned upside down.

The affiant in this case, intentionally, or with reckless disregard for the truth, included two false statements in the probable cause affidavit that were necessary to the finding of probable cause, in violation of the Fourth Amendment to the United States Constitution.

This Court must grant Rehearing and issue a Writ of Certiorari because failure to do so would allow the district court to continue to address issues improperly, which would deny justice to those it is entitled to.

2. The district court's decision to not hold that the state waived its argument after the state failed to respond to Mr. Nave's argument is clearly in conflict with Circuit Courts that has held failure to respond to argument results in waiver. Notredan LLC v. Old Republic Exch. Facilitator Co., 531 F. App'x 567, 569 (6<sup>th</sup> Cir. 2013); Bonte v. U.S. Bank N.A., 624 F.3d 461, 466 (7<sup>th</sup> Cir. 2010); Fils v. City of Aventura, 647 F.3d 1272, 1295 (11<sup>th</sup> Cir. 2011).

This Court has also held that a waived issue or argument is not reviewable. United States v. Olano, 507 U.S. 725, 733 (1993). The district court improperly reviewed a waived argument.

Mr. Nave argued that witness Robert Derrickson's in-court identification of Mr. Nave was unreliable. The state has never responded to Mr. Nave's reliability argument. The State had every opportunity to respond but chose not to. As a result of not responding, the state waived the argument.

In Bonte's *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. Bonte, 624 F.3d at 466. 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 the reliability argument and left the district court no choice but to accept Mr. Nave's reliability argument that Mr. Derrickson's in-court identification of Mr. Nave was unreliable. Instead, the district court declined to accept Mr. Nave's reliability argument and made a reliability argument on behalf of the State and found that Mr. Derrickson's in-court identification of Mr. Nave was "sufficiently reliable."

This Court must grant Rehearing and issue a Writ of Certiorari because failure to do so would allow the district court to continue to be in conflict with Circuit Courts and deny justice to those it is entitled to.

3. This Court has an ethical duty by the United States Constitution to establish the law of the land and to assure the Citizens of the United States of America that the lower courts apply that law. When they do not, **it is this Court's obligation to HOLD THAT COURT ACCOUNTABLE and see to it that justice is administered fairly.** This Court **MUST** hear this case and hold the United States District Court, Southern District of Indiana accountable for failing to properly apply the law of the land and relief where relief is due.

## SUGGESTIONS IN SUPPORT OF REHEARING

A federal court may grant a state habeas petitioner relief for a claim that was adjudicated on the merits in state court only if that adjudication “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 “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.” 28 U.S.C. §2254(d)(1)(2).

In denying Mr. Nave habeas relief, the district court failed to apply 28 U.S.C. §2254(d)(1)(2) to Mr. Nave’s case. Instead, the district court exceeded its authority by ignoring the state courts adjudication of Mr. Nave’s claims and then adjudicated Mr. Nave’s claims on the merits in order to deny Mr. Nave habeas relief.

Mr. Nave argued that the Indiana Court of Appeals adjudication of Mr. Nave’s claim that his trial counsel was ineffective for failing to object to Mr. Nave’s warrantless arrest on the grounds that the probable cause affidavit was defective, in that the probable cause affidavit contained false statements that were necessary to the finding of probable cause, resulted in a decision that was contrary to, clearly established Federal law, as determined by the Supreme Court of the United States.

A state courts decision is “contrary to” clearly established Federal law if it applies a rule that contradicts the governing law set forth by the Supreme Court or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and arrives at a result different from Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000).

In considering Mr. Nave’s argument, the Indiana Court of Appeals did not dispute that the probable cause affidavit contained false statements. As such, the court was required to

state prisoners federal claims, and to give appropriate deference to that decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018).

In considering Mr. Nave's argument, the Indiana Court of Appeals only addressed the pretrial identification procedures. Mr. Nave argued that while Mr. Derrickson was viewing a photo lineup, the detective pointed out Mr. Nave's photo to Mr. Derrickson and questioned Mr. Derrickson about Mr. Nave, which rendered the procedure unduly suggestive. In *United States v. Wade*, 388 U.S. 218, 230-31 (1967), this Court listed numerous instances of suggestive procedures which included when a suspect is pointed out before or during a lineup.

During an interview, a detective showed Mr. Derrickson a photo lineup and while Mr. Derrickson was viewing the photo lineup, the detective asked Mr. Derrickson, if Mr. Derrickson "remembered ever seeing this guy."

Mr. Nave argued that the detective was pointing out Mr. Nave's photo to Mr. Derrickson when the detective asked Mr. Derrickson if Mr. Derrickson "remembered ever seeing this guy" which rendered the procedure unduly suggestive.

The Indiana Court of Appeals disagreed with Mr. Nave's reading of the record and found that the detective's question was "a general question rather than as pointing to a specific picture in the photographic lineup" and concluded that the pretrial identification procedures were not unduly suggestive. The Indiana Court of Appeals ignored the unrefuted evidence that Mr. Nave submitted in order to make its factual finding. An objectively unreasonable determination of the facts occurs when the court ignores unrefuted evidence. *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003).

The post-conviction record reveals absolutely no support for the Indiana Court of Appeals factual determination that the detective's question was a general question rather than as

pointing to a specific picture in the photographic lineup. In Indiana, a post-conviction court must make findings of fact and conclusions of law on all issues presented in a petition. Indiana Post-Conviction Rule 1 §6. Review on appeal is limited to these findings and conclusions. *Sims v. State*, 771 N.E. 2d 734, 737-38 (Ind. Ct. App. 2002). The post-conviction court never made a finding that the detectives question was “a general question rather than as pointing to a specific picture in the photographic lineup.”

The Indiana Court of Appeals decision to ignore unrefuted evidence in order to find that the pretrial identification procedures were not unduly suggestive must be considered a decision that was based on an unreasonable determination of the facts. As such, the Indiana Court of Appeals decision to reject Mr. Nave’s ineffective assistance of counsel claim was a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Mr. Nave was entitled to federal habeas relief on this ground.

## CONCLUSION

For the reasons stated, this Court Must grant Rehearing of its judgment entered on April 5, 2021 and issue a Writ of Certiorari to hold the United States District Court, Southern District of Indiana accountable for failing to address Mr. Nave's arguments properly and grant Mr. Nave relief. Should Mr. Nave's cry for justice not be heard and denied relief, may this Court also cry and not be heard **“For whoever shut their ears to the cry of the poor will also cry themselves and not be heard.”** Proverbs 21:13.

Respectfully submitted,

  
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Petitioner

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, this 19th day of April 2021, to Stephen R. Creason, Office of the Attorney General, Indiana Government Center South, 302 West Washington Street, Fifth Floor, Indianapolis, Indiana 46204.

  
Petitioner

No. 20-7074

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Respondent.

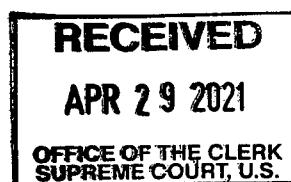
**CERTIFICATE OF GOOD FAITH**

COMES NOW Petitioner, Jimmy Lee Nave Jr., Pro Se, and makes certification that his petition for rehearing is presented to this Court in good faith pursuant to Rule 44. Mr. Nave further states the following:

1. This Court entered its judgement denying petitioner a Writ of Certiorari on April 5, 2021. Petitioner believes that he presents this Court with adequate grounds to justify the granting of rehearing in this case and said petition is brought in good faith and not for delay. Furthermore, petitioner believes that based upon the law of the land and the facts of this case, Mr. Nave is entitled to relief which has been unjustly denied him. Mr. Nave further believes that if the United States District Court, Southern District of Indiana are continually allowed to address issues improperly, a number of people will be denied their constitutional right to due process.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of April 2021.



*Jimmy Lee Nave Jr.*