

20-8022

No. _____

Supreme Court, U.S.
FILED

APR 16 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Tillman T. Henderson — PETITIONER
(Your Name)

vs.

Scott Frakes "et al" — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tillman T. Henderson
(Your Name)

P.O. Box 900
(Address)

Tecumseh, Nebraska 68450
(City, State, Zip Code)

(Phone Number)

ORIGINAL

LIST OF PARTIES

- [] 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:

RELATED CASES

Douglas County District Court, For the District of Nebraska

Nebraska Supreme Court

The United States District Court for the District of Nebraska

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is

☐ reported at 4:19-CV-03022-BGK; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

☐ reported at 4:19CV3022; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Douglas County District Court of Nebraska court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 2, 2020.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 13, 2021, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was November 30, 2018. A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: February 4, 2019, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED

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STATUTES AND RULES

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254

AMENDMENT. 4

AMENDMENT. 5

AMENDMENT. 6

AMENDMENT. 14

STATEMENT OF THE CASE

- 1.) Petitioner Filed a motion For post-conviction relief. in the Douglas County district Court For the district of Nebraska, which was denied
- 2.) Petitioner Filed an appeal to the Nebraska Supreme Court Challenging the denial of his post-conviction relief in the district court, which the Nebraska Supreme Court denied.
- 3.) Petitioner Filed a Federal Habeas Corpus. challenging the denial of his appeal to the Nebraska Supreme Court, which was denied.
- 4.) Petitioner Filed a motion For a C.O. A. To the Eighth Circuit Court of appeals, which was denied.

QUESTION(S) PRESENTED

1.) where Cellphone Search warrants are ruled invalid, Should the opposing Party be allowed to raise the Goodfaith defense argument for the First time on appeal?

2.) When otherwise hearsay evidence is admitted into evidence for a limited purpose. Is the Court also required to give a limiting instruction to the jury whether or not requested?

REASONS TO GRANT THE WRIT

QUESTION ONE:

where Cellphone Search Warrants are ruled invalid, should the opposing party be allowed to raise the good faith defense argument for the first time on appeal?

Before trial the petitioner had filed a motion to suppress a search warrant used to search a cellphone in petitioner's possession the night of his arrest. Counsel for the state called Detective Dave Schneider to testify about why he got the search warrant and how the search was executed. Detective Schneider testified that at the time of the incident he worked homicide for three and a half years, and that he was contacted shortly after the incident was reported and requested to report to Central Police Headquarters. Schneider testified that he had a briefing with his sergeant as well as other detectives about information that was gathered by responding officers. Schneider's role was to conduct interviews with witnesses that had been transported downtown, and after that he was given assignment to obtain a search warrant for a cellphone that was found on a suspect (BOE p. 15-22). On cross-examination by counsel for petitioner Det. Schneider testified that he never came into contact with the cellphone just observed it. Schneider also testified that he had completed at least 50 search warrants as a homicide detective. Both counsel for the petitioner and the state stated they didn't have any more witnesses to call and agreed to argue for the rest of the hearing. Were counsel counted out that the search warrants did nothing

to tie the Cellular phone in petitioner's possession to the Crime under investigation. But was rather used for a fishing expedition, and arguing that the search warrant lacked Probable Cause and the Particularity requirement Counsel also stated good faith doesn't fit this situation, and the State never objected or stated why good faith did fit the situation. At the close of the suppression hearing both the State and Counsel for the petitioner agreed to file briefs on the motion to suppress before the district court could rule on the motion to suppress the State asked the court to withhold it's ruling while the State obtained another search warrant. A second suppression hearing was held where the State again called Detective Schneider to testify about the second search of the cellphone and about the added lines in the search affidavit Wick stated, "Due to officer's training and experience suspects use their phones to talk about shootings before during and after" At the hearing the State argued that those added lines proved probable cause to search the cellphone. On cross-examination Counsel for petitioner asked Det. Schneider why did he get the second search warrant when a suppression ruling was already pending on the first search, and did he tell the County Court judge that this was the second warrant and that the case was already in district court. Schneider testified that the prosecution told him, they had to add a few more details of training experience in there and that he did not advise the County Court judge that there had been a prior search warrant or

that this second search warrant was at the request of the county attorney and to include certain information (B.C. 5 P. 9. 60-72). At the second hearing counsel explained how the search warrants didn't say what was expected to be found or what the investigators were looking for or even where said evidence should have been found within the cellphone. The state argued that the added information was the probable cause needed, not once did the state say anything about good faith or why it should fit. At the end of the hearing, the district court denied the motion to suppress stating that no search warrant was needed and the search stood under search incident to arrest. Petitioner's suppression hearing should have been granted under *Brice v. Wolf*.

Petitioner filed a direct appeal, where he argued that the search warrants were invalid for not having probable cause and failing to meet the particularity requirement, and that the district court erred by ruling that the search stood under the search incident to arrest doctrine. Before oral arguments were made in the instant case, this honorable court ruled a search warrant is needed before a suspect's cellphone could be searched. *Biley v. California* 134 S. Ct. 2473. When the state filed their brief on why the petitioner's appeal should be denied, they argued for the first time, that if the search warrants are to be ruled invalid, they should stand under the good faith doctrine. This argument was never raised by the state in the district court. The Nebraska Supreme Court ruled that the search warrants were invalid for not meeting the particularity requirement or stating what exactly was to be found on

Said phone, but let the search warrants stand under the good faith doctrine. *State v. Tillman T. Henderson* 289 Neb. 271

Petitioner filed motion for post-conviction relief, stating counsel was ineffective for not challenging the state raising good faith for the first time on appeal, arguing *State v. Tompkins* 272 Neb. 547. The Douglas County district court denied petitioner's post-conviction motion without an evidentiary hearing, stating that the state raised the good faith argument on appeal and the Nebraska Supreme Court so found. So counsel for the petitioner is not ineffective in failing to make an argument that has no merit.

Petitioner filed an appeal to the Nebraska Supreme Court arguing that the Douglas County District Court erred in denying his post-conviction relief, and the state use of good faith for the first time on appeal. Both sides submitted briefs and oral arguments were set. At oral arguments the court asked the state if good faith had been raised in the district court, where counsel for state said "he looked but couldn't find where good faith had been raised" and that it was up to the Supreme Court to decide if the state would be allowed to raise good faith for the first time on appeal. In it's ruling denying the petitioners appeal. The Supreme Court stated, even though it's not entirely clear that the state did not raise the good faith exception to the trial court in some fashion although the state cannot point to any indication in the record that it did. We note that Henderson's trial counsel argued that the good faith exception did not apply, and at the very least that Henderson's counsel was aware of the potential applicability of the exception and took the opportunity to

argue against it. The Court further ruled Henderson misunderstood Tompkins because Tompkins was about the Court reaching the merits of good faith on it's own, as that in reliance on *U.S. v. Hahn* 922 F.2d 248, would not extend Tompkins to say that we could not consider the good faith exception because it was not raised in the trial Court where in *Hahn* is the reason the Nebraska Supreme Court decided in *State v. Tompkins* that the Court couldn't reach good faith on it's own.

The petitioner filed a motion for Federal Habeas Corpus, arguing that the Nebraska Supreme Court made clearly faulty fact finding, where the Court misunderstood the petitioner's argument that counsel was ineffective for not arguing *State v. Tompkins* 702 Neb. 865 which is based in part off *U.S. v. Hahn* 922 F.2d 248. In Tompkins there was a question where the state stated they didn't raise good faith on appeal because they didn't bring it in the district court. The Nebraska Supreme Court stated that it would not reach the merits of that argument at this time. So counsel for the petitioner should have argued *State v. Tompkins* to get said question answered, as to have *Hahn* extend Tompkins. For the same reason the *Hahn* Court declined to apply the exception. Petitioner also argued that the Nebraska Supreme Court was wrong to rule that Henderson counsel knew the exception could be used, for the fact of once counsel said "Judge good faith doesn't fit this situation" as the state didn't object or explain why good faith should stand. the state waived that issue, a party shouldn't be allowed to smolder on a issue and use it when something doesn't go in their favor. *Pickett v. U.S.* 536 U.S. 129, 129 S. Ct. 1423. The Federal District Court of Nebraska denied petitioners Federal Habeas for the exact same reason as the Nebraska Supreme Court. Petitioner filed a C.O.A.

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to the United States Court of Appeals for the Eighth Circuit.
Wick was denied.

This Honorable Court should grant Certiorari to definitively
say whether or not a good faith exception argument can be
raised for first time on direct appeal, and to stop division within
the Court systems of the United States. The Nebraska Court rulings
are in direct opposite of other states on this same issue, in
U.S. v. Lara 815 F.3d 605. That Court ruled "the government failed to
preserve argument on appeal that even if two warrantless searches of
petitioner's cellular telephone violated the fourth Amendment a good faith
exception to the exclusionary rule should apply, where it did not make
that argument in the District Court or has consequently waived this
argument." The Nebraska Court rulings is in line with U.S. v. Carritt 982
F.2d 305 8th Cir. 1992 where that Court allowed good faith to be argued for the
first time on appeal. The Court rulings also goes against Bunnell v. State
160 N.E.3d 1142. Wick is a very similar situation with two different
rulings. The Court in Bunnell, ruled the State waived appellate review
of argument that good faith exception to the exclusionary rule applied
even if residential search warrant was not supported by probable cause,
where State raised the good faith exception for first time on appeal
State did not file a memorandum in opposition to motion to suppress,
and State did not advance an admissibility argument under
exception at suppression hearing U.S. Const. Amend. 4. just as in the
petitioner current situation, but instead the Nebraska Supreme Court and
Nebraska Federal Court's ruled that petitioner was misunderstood to believe
that the Court wouldn't allow the State to bring good faith for
the first time on appeal. The Nebraska Courts erred because of
this Honorable Court have identified several purposes underlying the

"Not pressed or passed upon" rule for the most part, these are as applicable to the state's failure to have opposed the asserting of a particular Federal right as to a party's failure to have asserted the claim first." questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana* 394 U.S. 437, 439 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1962). Also the Nebraska Court rulings is in complete opposite of *Eugene Burns v. United States* 235 A.3d 758, where that honorable court explained, good faith doesn't fit cellphone search warrants when, the search warrants for defendant's cellphones did not satisfy requirements of warrant clause, detective simply stated that it was his belief there was probable cause that evidence related to homicide would be found on phones, specifically, in subscriber and owner information, call logs, contact list, voice mail and text messages, videos, photographs, and social media, texts. There were only three categories of data for which affidavits made, proper factual findings, warrants allowed police to search for all records and any evidence on phones and expressly sanctioned search of several expansive categories of data detective never even mentioned, and warrants broadly authorized seizure of any evidence on phones and listed generic categories covering virtually all different types of data found on modern cellphones. Just as in the petitioner current situation, but instead the Nebraska Supreme Court let an offense used for the first time cure the search warrant. This honorable court is needed to create new precedent or rule that will stop courts from allowing practices in their courts that's stopping defendants from their 14th Amend right.

Petitioner prays that this honorable court grants writ on this question

QUESTION TWO:

When otherwise hearsay evidence is admitted into evidence for a limited purpose, is the Court also required to give a limiting instruction to the jury whether or not requested?

Before trial the petitioner filed a motion in limine, towards text messages found on a cellphone in the petitioner's possession the night of his arrest. Petitioner filed said motion to stop the state from using the hearsay text messages for the truth of the matter asserted, the messages in question stated "the nigga who stabbed J.B. down here" where after a series of text messages followed. At the motion in limine (B.O.E. 115-118), the state stated that they will not be using the text messages for the truth of the matter or only for the effect the messages had on the petitioner and the timing the messages came in on how long after the last message the crime happened (B.O.E. 117-118, 17-7). The District Court judge overruled the motion in limine, at the end of petitioner's trial during the jury instruction conference. Counsel for the petitioner requested a limiting instruction towards the cellphone text messages, so the jury wouldn't use the hearsay messages for the truth of the matter or just for the limited purpose the messages were admitted for (B.O.E. 1046-1052). The district court ruled you don't have to tell the jurors every time why this is going in (B.O.E. 1052.6-7). It was several instances during the jury instruction conference on this instruction where the district court judge was confused or still ruled against the petitioner.

After being convicted and direct appeal denied, petitioner filed a post-conviction arguing ineffective assistance of counsel, for counsel not objection or claiming error towards the district court's denial of the

limiting instruction oral for the Nebraska Supreme Court ruling the hearsay evidence could only be used for the limited purpose they were admitted and not for the truth of the matter. Petitioner argued to the district court, that the limiting instruction towards the hearsay text messages should have been given, the instruction is a correct statement of the law, warranted by the evidence and the jury instruction was timely requested, also the jury instruction was correct under N.J.S. 2C:1-2, which states, evidence admitted for a limited purpose during this trial, I called your attention to some evidence that was received for a specified limited purpose, you must consider that evidence only for those limited purposes and for no other. The Douglas County District Court of Nebraska failed to address this issue in it's ruling on defendant's post-conviction which was denied.

Petitioner appealed the district court's ruling denying post-conviction relief to the Nebraska Supreme Court, relitigating his assignment of error. The Nebraska Supreme Court agreed with the district court and denied petitioner relief, on the issue of the limiting instruction, the court ruled it, received little danger that the petitioner didn't receive the limiting instruction towards the hearsay text messages, this is after the attorney general at oral arguments agreed that petitioner should have received the limiting instruction under State v. Schneider 296 Neb. 932.

Petitioner filed a federal Habeas where the federal District Court of Nebraska denied petitioner's motion for the exact same reason the Nebraska Supreme Court did, as if the court just copied and pasted the ruling to their's.

Petitioner filed a motion to the Eighth Circuit Court of Appeals for a C. O. A. which was denied.

This honorable court should take up this issue because, the Nebraska Court ruling is in complete opposite of this Court's finding in *Hopkins v. Brown* 524 U.S. 88 118 S.Ct. 1865. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. The Nebraska Court's should have acknowledged that the petitioner needed the limiting instruction for the hearsay evidence that was admitted into evidence. "Specifically the text messages found on the cellphone in petitioner's possession the night of his arrest were only to be used for the petitioner's train of thought on not for the truth of the matter." The instruction requested was substantially correct, was not substantially covered by other instructions actually delivered, and concerned important point of trial so failure to give it seriously impaired defendant's ability to present a given defense. *U.S. v. Andrews* 72 F.3d 1328. By the Nebraska Supreme Court ruling that it perceived little danger by the petitioner not receiving an jury instruction that was warranted by the evidence, a correct statement of the law, and was prejudiced by not receiving said instruction was just like the defendant in *Looking Cloud* 419 F.3d 781 (8th Cir.) where that Court stated, the district Court explained to the jury that the evidence was not admitted for the truth of the matter stated. The Court admitted the evidence to show "what the rumor was" not whether the rumor was true or not. We reject Looking Cloud's bare allegation that this instruction was inadequate and unclear. We hold that the district Court's decision to admit the evidence of the rumor that Agush was an informant was not an abuse of discretion and the Court's admission of the evidence subject to a limiting instruction did not constitute plain error. So far the Nebraska Supreme Court to rule it perceived little danger was the Court saying it didn't

matter that the jury was using the evidence for a improper
purposes and directing the jury to consider the evidence for
improper purposes. While limiting instructions cannot always cure
unfair prejudice they reduce the risk of it. U.S. v. Payne-Owens 845 F.3d 868
The Nebraska court ruling goes against everything the judicial system
stands for towards evidence used for a limited purpose. Because the
presence of a limiting instruction diminishes the danger of any unfair
prejudice arising from the admission of other acts evidence. U.S. v. Hall 634 F.3d 482
Petitioner prays this honorable court grants the writ towards this
quaction to stop the Nebraska courts from denying defendant's their
fundamental right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tullman T. Henderson pro se

Date: 4-5-21