No. 21-5602

IN THE

SUPREME COURT OF THE UNITED STATES

Charles E. Garza — PETITIONER
(Your Name)

vs.

State of Nebraska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Nebraska Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Charles E. Garza
(Your Name)

P.O. Box 22500, 4201 So. 14th Street
(Address)

Lincoln, Ne. 68542-2500
(City, State, Zip Code)

402.471.3161
(Phone Number)

Questions Presented for Review

1. a. Whether or not the petitioner had an expectation of privacy in his parked vehicle.

   b. If the search and seizure of the petitioner outside of his vehicle violated his constitutional rights.

2. a. Did the seizures outside of the warrant's scope beyond the express limitations imposed by the magistrate violate the petitioner's constitutional rights?

   b. Whether or not a facially deficient warrant may be cured by an unaccompanying affidavit.

3. Whether or not probable cause to arrest an individual suspected of narcotic tracking establishes probable cause to search his residence without an additional nexus to the individual's home.

4. Whether or not the petitioner had a reasonable expectation of privacy in a 600 lb safe in a residence as luggage does in a vehicle.

5. Whether or not the petitioner's constitutional rights were violated by the district court failing to recuse itself as required by state and federal law.

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:

RELATED CASES

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Authorities Cited

Authorities Cited

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 _____ 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[ ] is unpublished.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 United States district court appears at Appendix _____ to the petition and is

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[ ] is unpublished.

[X] For cases from **state courts**:

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

[X] reported at A-19-000474; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Nebraska Court Of Appeals court appears at Appendix B to the petition and is

[X] reported at 29 Neb. App. 223 (State v. Garza); 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 _____.

[ ] 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] 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 March 21,2021 A copy of that decision appears at Appendix ___A___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] 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).

Constitutional Provisions Involved

The pertinent portions of the Constitution are set out below:

United States 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 warrant 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."

United States Const. Amend. V

"No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; ..."

United States Const. Amend. XIV

"...Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ne. Rev. St. CONST. Art. 1 §3 Due process of law; Equal protection

No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protections of the laws.

Ne. Rev. St. CONST. Art. 1 §7 Search and seizure

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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched ; and the person or thing to be seized.

Ne. Rev. St. CONST. Art. 1 § 12 Evidence against self

No person shall be compelled, in any criminal case, to give evidence against himself,…

Command n. (14c)
An order; a directive. In legal positivism, the sovereign's express desire that a person act or refrain acting a certain way, combined with the threat of punishment for failure to comply. <***You are hereby Commanded***>; etc.

Black's Law Dictionary (11th ed. 2019)C18650
Bryan A. Garner, Editor in Chief

Statutes and Rules

Neb. Rev. St. § 5 - 302.11 (A) Neb. Code of Judicial Conduct

Neb. Rev. St. § 28 - 105 Felonies; Classification of felonies; Sentences

Neb. Rev. St. § 28 - 202 Conspiracy, defined; Penalty

Neb. Rev. St. § 28 - 416 Prohibited Acts; Violations; Penalties

Neb. Rev. St. § 28 - 431 Seized without warrant: subject to forfeiture

Neb. Rev. St. § 28 - 1206 Possession of a deadly weapon by a prohibited person; Penalty

Neb. Rev. St. § 29 - 404 Complaint; filing; procedure; warrant; issuance

Neb. Rev. St. § 29 - 404.02 Arrest without warrant; when

Neb. Rev. St. § 29 – 404.03Arrest without warrant; conditions

Neb. Rev. St. § 29 - 814.01 Search warrant; issuance on affidavit; procedure

28 U.S.C.A. §455 Disqualification of justice, judge, or a magistrate judge

Statement of the Case

On February 15, 2017, an information was filed in the Scottsbluff County District Court charging Garza with conspiracy to distribute methamphetamine within 1,000 feet of a school zone, conspiracy to distribute more than 10 grams of methamphetamine but less than 27 grams, conspiracy to distribute more than 28 grams of methamphetamine but less than 140 grams, conspiracy to manufacture marijuana, 4 counts of possessing a firearm by a prohibited person, 1 count of possessing controlled substance ("Zanex" and Lorazepam), and "Use of Money to violate Drug Laws" under Neb. Rev. Stat. §28-431 (Reissue 2016). (T1-8). The first two conspiracy charges and four counts of possessing a firearm as a prohibited person are Class 1D felonies punishable by a mandatory minimum of 3 years and up to 50 years of imprisonment. Neb. Rev. Stat. §§28-202 (Reissue 2016); 28-105 (Reissue 2016). Conspiracy to manufacture marijuana is a Class 2A felony, punishable by up to twenty years imprisonment. Possessing a firearm as a prohibited person is a class 3 felony, punishable by nine months post-release supervision to four years imprisonment and two years post-release supervision or twenty-five thousand dollars fine, or both, if imprisonment is imposed. Neb. Rev. Stat. §§28-1206(3)(a) (Reissue 2016);

28-105 (Reissue 2016). Possessing controlled substances like Zanex and Lorazepam are Class IV felonies, punishable by up to two years imprisonment and twelve months post-release supervision, or ten thousand dollars fine or both. Neb. Rev. Stat. §§ 28-416(3) & 28-105 (Reissue 2016). Finally the original information also provided notice of its intent to seek forfeiture of various property seized from Mr. Garza and his family members. After a Motion to Quash was successfully litigated, an Amended information was filed which amended the conspiracy charges to distribution charges alleging the same amounts and locations. (T25-30) As litigation proceeded, the Information was further amended. On September 21, 2018, the State filed a "Second Amended Information and Petition for Forfeiture," which reduced the 1C distribution charge alleging an amount between 28 and 140 grams to an amount between 10 and 28 grams. (T85-89). It also abandoned the marijuana manufacturing allegation and simple possession charges relating to Zanex and Lorezepam. (Id.) On February 22, 2019, another Amended Information was filed dropping the school zone allegation contained in count 1, making the resulting charge a Class 2 felony, punishable by one to fifty years imprisonment. Neb. Rev. Stat. §§ 28-416(1)(a); 28-105 (Reissue 2016).

At trial, Garza was found not guilty of one of the firearms charges and found guilty of simple possession of methamphetamine rather than distribution between 10 and 28 grams. (T150-153). Sentencing occurred on April 18, 2019, after an investigation by the adult probation office. (T155-159). The Court ordered counts 5, 6, and 7 to be served concurrent to one another but consecutive to counts 1, 2, and 3. Further, counts 1, 2, and 3 were ordered to be served consecutive to one another. (Id.).

Reasons for Granting the Petition

The unlawful seizure and false imprisonment of Mr. Garza was unconstitutional and violated due process

The Nebraska Courts, to include, the Nebraska Supreme Court, Nebraska Court of Appeals, and the Scottsbluff County District Court, in Nebraska; all said courts involving the petitioner's convictions disregard constitutional safeguards guaranteed by the 4th, 5th, and 14th Amendments, of the United States Constitution, and Nebraska Constitution §3, §7, and §12 respectively.

Throughout the course of the trial there was a multitude of instances that established the petitioner did not want to distribute and was not going to show up. The jury concluded this as well by finding the arrest, count 3, of only possession without the intent to distribute (729: 9-10). From Detective Jackson, who was in charge of the entire operation (296: 10-21), to Investigator Holcomb who located the defendant (494: 15-24), to even the Prosecuting Attorney dave eubanks (266: 8-16). Although one of the petitioner's vehicles was initially located, it was not seized as there was no suggestion or belief that it contained contraband (495: 1-6). When the

defendant was eventually located, probable cause was already lacking due to the informant's false claim of the defendant not appearing because of a flat tire. It is also important to note that the informant did not disclose a vehicle description or location and that he was known to police as a liar (370:21-25, 371:1-9). This was also corroborated through his own testimony and documentation (425: 12-16, 534: 2-4). Crucial requirements in assessing probable cause are based on an informant's veracity and accuracy. Accordingly, the arrest warrant procedure "serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police to assess weight and credibility of information the complaining officer adduces as probable cause" Wong Sun v. United States 371 U.S. 471 (1963). "[P]olice must, whenever practicable obtain advance judicial approval of searches and seizures through the warrant procedure...." Terry v. Ohio 392 U.S. at 20, also Katz v. United States, 389 U.S. 347 (1967). All of the accounts corroborated that it was the petitioner they were searching for, not his vehicle. Although vehicles do have a reduced expectation of privacy, they continue to retain securities afforded by the Constitution. In justifying the petitioner's vehicle search, the Nebraska Court of Appeals relied on United States v. Ross 456 U.S. 798 (1982) which held that the automobile exception allows for "a warrantless

search of a ***mobile*** vehicle when there is probable cause to believe [the] vehicle contains evidence of a crime." The officers in the present case waited until the petitioner entered his vehicle, asked him to exit, and then seized and searched him. They then transported the petitioner to the police station and towed the vehicle to a secure lot. The Government in the present case argued that as soon as the defendant was inside of the automobile, the vehicle would be subject to the "automobile exception". If officers were allowed to lie in wait for an individual to appear in a location they desired to search, it could be used to circumvent the warrant requirement creating a serious and recurring constitutional threat to the privacy of countless citizens. The petitioner was entitled to and did have a reasonable expectation that his parked vehicle would be free from disturbance. As stated in Katz V. United States, supra, quoting Rios v. United States 364 U.S. 253 (1960), "What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The Fourth Amendment protects people not places and whenever an individual may harbor a reasonable 'expectation of privacy,' id. at 361, 88. S. Ct. at 507, he is entitled to be free from unreasonable governmental intrusion.' '[n]o less than an individual... in a taxicab,' or an individual in a phone booth 'who occupies it, shuts the door behind him, and pays the toll' is entitled to the protection of the Fourth

Amendment." Similarly, the Court in Rios held that the defendant had an expectation of privacy inside of the vehicle when he was questioned outside of his taxicab. The petitioner in the present case demonstrated the same legitimate expectation of privacy by locking his car up with the keys inside when asked to exit the vehicle before he was seized by Officer McBride (279: 1-24). If it was the petitioner's vehicle officers believed contained contraband, there was more than adequate time and personnel to secure the automobile before the petitioner arrived (495: 1-6). Prior to the petitioner's arrival, the Honda was under constant surveillance by multiple officers illustrating the complete absence of exigent circumstance and any exception to the warrant requirement. United States v. Ross 456 U.S. 798 (1982) (quoting Carroll, supra, stated that **In defining the nature of this "exception" to the general rule is that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," id., at 156, 45 S. Ct., at 285, the Court in Carroll emphasized the importance of the requirement that *808 officers must have probable cause to believe that the vehicle contains contraband. Both of the vehicles in Ross and Carroll were also pulled over on a public roadway, while the petition's vehicle had been parked for a significant period of time while the officers observed innocuous activity (494:15-25, 495:1-6). Sergeant Shulte, who was one of the officers in charge

of securing the vehicle until the tow truck arrived, confirmed that it only took about 15 minutes after being summoned thus eliminating any pretense of exigency (285: 18-25, 286: 1 -4). Police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they created. The substantial difference of time between the buy/bust initiation at 1:35pm and the arrest at 5:50pm as described and documented by Det. Jackson himself expressly indicates a 4 hour variance (397:7-13, Arrest affidavit Appendix E). ***It also substantiates that the petitioner was not arrested until after the search of the Honda*** contrary to later claims. The officers realized that the petitioner was not going to consummate the deal or they simply would have stopped him on a public road when he left the hotel as they had "planned". A pernicious buy/ bust procedure as described by Det. Jackson would allow any officer to use an informant to coerce a hypothetical transaction then send other officers to find that entrapped individual in any location, at any time and seize and search for evidence without a warrant. The government also made no effort to show that circumstances precluded the obtaining of a warrant. If officers believed that they needed a warrant to search the vehicle why did they not believe they did not need one to seize it? Seizures of automobiles are a meaningful interference with an individual's possessory interests and their continuing

means of transportation. For this reason, the duty of a magistrate is not delegable to a police officer. By equating a police officer's estimation of probable cause with a magistrates utterly disregards the value of a magistrate. Even if officers believed that they had probable cause, "probable cause in itself does not justify a warrantless search and seizure of evidence since absent exigent circumstance a search warrant must **first** obtained from an impartial officer." Coolidge v. New Hampshire 403 U.S. 443 (1971); (Neb. Rev. Stat. §29-404).

Court records also support that the Honda's search was not considered an inventory search due to the search warrant being sought and that it was not described as so at the suppression hearing. It is the government's burden to establish that the inventory exception applies. Akin to United States v. Taylor 636 F.3d 461, 464 (8th Cir. 2011), "... the police were engaging in their criminal investigatory function, not their caretaking function in searching the defendants vehicle." Katz ,supra, contributed to this stating "routine inventories of automobiles intrude upon an area in which the private citizen has a reasonable expectation of privacy" Thus despite there benign purpose they constitute "searches" for purposes of the Fourth Amendment. Security against unlawful search and seizures are more likely to be attained by resort to a warrant than by reliance upon the caution and sagacity of petty

officers while acting under the excitement that attends the capture of persons accused of a crime.

It may also be assumed that Officer McBride acted in good faith in seizing the petitioner, but officer McBride could have not have been acting in good faith believing that Det. Jackson had probable cause as the probable cause wasn't "described" for the seizures until after Det. Jackson had spoken with the petitioner. If the subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and people would be 'secure in the persons, houses, papers, and effects,' only in the discretion of police. The unlawful seizure of the petitioner would also not be considered as incident to arrest due to the fact the petitioner's statement was included in the affidavit to search the Honda. As explained in Coolidge v. New Hampshire, supra, the seizure of the car cannot be justified as incidental to arrest which took place at another location. Even assuming, arguendo, that police could have properly made a search when they arrested petitioner, they could have not done so after its removal. Pp 2032 – 2033. Under similar circumstances present here – where the police had for some time known of the probable role of the car in crime, the defendant had had ample opportunity to destroy incriminating evidence, the car was guarded at the time of arrest and the petitioner had no access to the car. This supports that

Det. Jackson had the petitioner seized in an attempt to find probable cause. The seizure led to the interrogation, the interrogation led to the search warrant, the search warrant led to the arrest. "An arrest is not justified by what the subsequent search discloses" Johnson v. United States 333 U.S. 10 (1948). Probable cause is necessary to effectuate a seizure not a seizure to establish probable cause. "The lawfulness of the arrest in this case must be tested by the Fourth Amendment, and since the arrest was without warrant, it must be based on probable cause" (Henry v. United States, 361 U.S. 98 (1959); Neb. Rev. St. §29-404.03)).

The search incident to arrest exception to the Fourth amendment requirement as defined in Arizona v Gant, 556 U.S. 332(2009) and Chimel v. California, 395 U.S. 752 (1969) also did not justify the search in the present case. Both cases agreed that "… police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning the area from within which he might gain possession of a weapon or destructible evidence." Chimel 395 U.S., at 763, 89 S. Ct. 2034. As with Gant and Chimel, the petitioner was not subject to arrest until ***after*** Det. Jackson had the petitioner seized, and ***after*** the defendant was transported to the police station, and ***after*** Det. Jackson interrogated the petitioner, and ***after*** Det. Jackson sent the petitioner to jail, and ***after*** Det. Jackson drafted the

affidavit, and ***after*** Det. Jackson drafted the search warrant, and ***after*** Det. Jackson found a judge to sign it, and ***after*** Det. Jackson traveled to the police impound, and ***after*** Det. Jackson searched the vehicle (Appendix F). This reiterates the point that the vehicle was not suspected of containing contraband and under constant surveillance of multiple officers who had an extensive period of time to seize the vehicle prior to the petitioner entering it (494:9-25, 495:1-6). In addition, there was no contraband found on the petitioner's person either which should have been considered another strike against the informant's credibility and reliability. Meanwhile to all of this, the petitioner was already in jail being strip searched under a false charge so there was a necessity to find grounds for his imprisonment. If nothing was found in the Honda then additional warrants would have to be signed until his confinement was rationalized. The U.S. and Nebraska Constitution both mandate that officers must have probable cause to place a person in custody (Neb. Rev. Stat. §29-404.02, U.S. Const. Amend. IV). It is also clearly established that an arrest without probable cause violates the 4th Amendment and it is also in direct violation of Neb. Rev. Stat. § 29-404 stating ... "Whenever a complaint shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this statute, it shall be the duty of such magistrate to issue a warrant for the arrest of the

person accused, if he or she has reasonable grounds to believe that the offense has been committed." This was not followed in the present case. When the petitioner was seized outside of his vehicle, Officer McBride would not disclose why he was seizing the petitioner only continually repeating that he 'did not know why' or 'know what was going on' (279: 1-24, E44). This is another flagrant violation of the Constitution which states 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.' (U.S. Const. Amend. IV; Neb. Rev. St. CONST. Art.1 §7) and 'No State shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'(U.S. Const. Amend. XIV; Neb. Rev. St. CONST. Art. 1 §3). Accordingly, in Bashir v. Rockdale City 445 F.3d 1323, 1332, 11th Cir. 2006 it was held that "if an arresting officer does not have the right to make an arrest, he does not have the right to use any degree of force in making that arrest." This would include the actions of Officer McBride when he handcuffed and forced the petitioner into his vehicle to be interrogated by Det. Jackson at the police station. Any reasonable officer in McBride's position would have known he could not have placed the petitioner under arrest. If Det. Jackson genuinely believed that he had probable cause, he

should have applied for an arrest warrant. Generally the Constitution requires that someone independent of the police and prosecution review a warrant application to determine whether there is "probable cause to believe a citizen guilty" of a crime and to issue an arrest warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Fourth Amendment also protects "the right of every individual to the possession and control of his own person, free from all restraint or interference from others, unless by clear and unquestionable authority of law." Terry v. Ohio 392 U.S. 1 (1968). (288: 15-25, 289: 1-5) Under pressure to make cases and determined to find probable cause, Det. Jackson would not allow the petitioner to be uncuffed, call out or leave during the interrogation. When the petitioner adamantly inquired as to why he was being held Det. Jackson stated that he would "get to that later" but wanted information for the petitioners supposed release (353: 10- 25, E79). For an officer to hold an individual for the sole purpose of providing information is a blatant disregard for any citizen's constitutional rights. 'No person shall be held... nor be compelled in any criminal case to be a witness against himself, nor be deprived of life,liberty, or property without due process of the law" (U.S. Const., Amend. V; Neb. Rev. St. CONST. Art. 1 §12). "...while the police have the right to ***request*** citizens to answer ***voluntarily*** questions concerning unsolved crimes they have no right to

compel them to answer." (emphasis added) Miranda v. Arizona 384 U.S. 436 (1966). "nothing is more clear than the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whatever these intrusions *727 be termed 'arrests' or 'investigatory detentions."' This was made explicit in Terry v. Ohio, 392 U.S. 1, 889 (1968). The only statement that was used from the interrogation that exhibited what Det. Jackson believed was probable cause for the search warrant was 'Charles told me that there was a backpack in his car that belongs to a friend that he dropped off at that Circle S Lodge, that he does not know what the contents of the backpack are.' After the search was completed, Det., Jackson later conceded that "The backpack contained nothing of evidentiary value" (354: 15 – 25, 355: 1-4). Against Const. Amend. IV, V, and XIV Det. Jackson unlawfully held the defendant in his attempt to establish probable cause which was condemned in Dunaway v. New York 442 U.S. 200 (1979). The Court in Dunaway suppressed the defendant's confession which had been obtained when he was taken into police custody without a warrant or probable cause. In spite of the present petitioner's statement being innocent Det. Jackson included it along with the petitioner's unlawful seizure for almost half of the Honda's search warrant affidavit. Removing this substantial section of the affidavit would only leave

the initial portion of the document explaining his need of an arrest warrant not a search warrant and the requirement of a magistrate to determine if there was probable cause. Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search and seizure" United States v Martinez-Fuerte, 428 U.S. 543, 565, 96 S. Ct. 3074, 3086, 49 L. Ed. 2d 1116 (1976). Moreover, when the search has been productive the hindsight of the magistrate is more likely to be distorted. In Dunaway v. New York, supra, the defendant was taken to a police car, transported to a police station, and placed in an interrogation room. There it was held clear that the detention was "in important respects indistinguishable from a traditional arrest" and therefore required probable cause or judicial authorization to be legal. Such involuntary transport to a police station for questioning is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause. A seizure is more likely to be a greater intrusion than an immediate search especially without exigent circumstance. Situations such as these are a prime example in which the exclusionary rule should be applied to discourage this 'jail now, justify later' conduct that is clearly not novel (162:4-25, 163:1-12, Addendum G). Regarding this, the exclusionary rule requires the suppression of not only the evidence improperly seized, but "extends as well to the indirect as the direct

products of such invasions." Wong Sun, 371 U.S. at 484, 83 S. Ct. 407. In Wong Sun, supra, narcotics were suppressed for the reason that their discovery stemmed directly from a violation of Toy's Fourth Amendment rights. Id. 371 U.S. at 487-88. Thus, while the government might lose evidence is some cases, it is evidence they were not entitled to under the Constitution. As stated in Weeks v. United States, 232 U.S. 383 (1914) "If evidence seized in violation of the Fourth Amendment can be used against an accused his right to be secure against such searches and seizures, is of no value and *** might as well be stricken from the Constitution." 232 at page 393, 34 S. Ct. at page 344. "...experience has taught us that it is the only effective deterrent to police misconduct in the criminal context, and that without it the Constitutional guarantee against unreasonable searches would be a 'mere form of words"' Mapp v. Ohio, 367 U.S. 643, (1961). Therefore, if conduct outside the realm of a lawful investigation falls beyond the pale of the Fourth Amendment, any attempt to exploit it by retrieving its fruits for subsequent use in a criminal prosecution should be condemned and suppressed under the same authority. The seizure of the petitioner was unauthorized, unlawful, and violated the guarantee of due process and securities provided by the Constitution. For the reasons presented herein the petitioner pleads the Court to grant certiorari and find the motion to suppress

for the Honda Accord and subsequent warrants derived from its issuance appropriate to deter this type of reckless and careless behavior.

The unconstitutional search and seizure of the petitioner's vehicle.

Firstly, the search warrant for the Honda only ***commands*** the search and seizure of a cell phone (Addendum E). The Fourth Amendment provides that "no warrants shall issue but upon probable cause... particularly describing the place to be searched, and persons or things to be seized" (U.S. Const. Amend. IV; Neb. Rev. St. CONST. Art. 1 §7). The requirement that warrants shall particularly describe the things to be seized makes general searches impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. The Fourth Amendment's particularity requirement is not a mere technicality; it expresses constitutional command and "confines an officer executing a search warrant strictly within the bounds set by the warrant" Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The language of the warrants affidavit also indicates where Det. Jackson suspected to find contraband within the vehicle. When the backpack was searched and nothing found it should have established an even greater representation of probable cause and his persistence in a general search for evidence to convict upon. Outside of the scope of both the warrant and affidavit, the petitioner's driver license was also taken violating the Fourth Amendment's particularity clause once again. Along with these affronts to the Constitution, the Honda's search

warrant affidavit did not state that the automobile was involved in any sort of illegal activity or why its seizure was warranted. Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched. The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. Det. Jackson also failed to be present at the Honda's location to establish probable cause for the seizure. Accordingly, under the Fourth Amendment, a warrant or seizure without probable cause is per se unreasonable. The described "probable cause" was also only eventually acquired through the illegal seizure of the petitioner. Between the lack of probable cause and lack of particularity the Honda search warrant fails the requirements of the Constitution. Disregarding this, the Nebraska Court of Appeals decided to justify these unconstitutional acts under the "cure by affidavit" doctrine held in State v. Stelly, 304 Neb. 33 (2019). State v. Stelly, supra, that holds "an inadvertent defect in a search warrant may be cured by reference to an affidavit if the affidavit is incorporated in the warrant or referred to in the warrant ***and*** the affidavit accompanies the warrant" (emphasis added). While the affidavit may have been referenced in the warrant, the affidavit failed to accompany the warrant for the search due to being sealed (Appendix E, G). If a warrant is facially defective and the affidavit does not accompany the

warrant to "cure" the defects, an objectively reasonably belief or "good faith" in a search or seizure outside of a warrants' scope of only a cell phone would be impossible. Lack of the accompanying affidavit may also be corroborated by the inventory list which precisely stated that only the warrant and inventory list were present (Appendix F). The driver's license that was listed on the Honda's Inventory was also seized beyond the warrant and affidavit's scope and later used as a basis for subsequent searches bearing similar deficiencies. For the reasons presented here, the petitioner pleads the Court to validate the motion to suppress for the Honda Accord along with the subsequent search warrants derived from its issuance and vacate the petitioner's convictions.

The unconstitutional search of the Schmid Dr. residence and petitioner's RV

The following search warrant for the Schmid dr. residence also fails by multiple Constitutional standards. Firstly, the warrant that was initially requested for the residence did not include firearms. This is due to the petitioner not being suspected of firearms as validated through multiple sources (381: 2-25, 382: 1-2, 426: 10-17). In United States v. Carpenter, supra, it was held "that because the Fourth Amendment requires a search warrant to particularly… describe the things to be seized., the affidavit supporting the search must demonstrate a nexus between the evidence sought and the place to be searched" 360 F.3d at 594. The connection between the residence and the evidence of wrong doing must be specific and concrete, not "vague" or "generalized", Id. At 595. "If the affidavit fails to include facts that directly connect the residence with suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendants home" United States v. Brown, 828 F.3d at 384 (2016). The Court in United States v. Frazier, 423 F.3d 526, 533 (6th Cir. 2005) concurred the same stating "we have never held that a suspects' status as a drug dealer, standing alone, gives rise to a fair

probability that drugs will be found in his home. Rather, we have required some reliable evidence connecting the known drug dealer's ongoing activity to the residence...." In the present case, the search warrant affidavit contained no evidence that the petitioner distributed narcotics, that he ever used it to store narcotics or firearms, or that any suspicious activity had ever taken place there. "Probable cause to arrest a suspect does not necessarily establish probable cause to search the suspect's home" United States v. Brown,supra,. The affidavits for the Schmid dr. residence and the RV were also sealed. Even if the affidavit was present for argument's sake, it was so lacking in indicia of probable cause that the officers could not in good faith relied on the warrant in conducting the search of the residence. ***With no suspicion there is most definitely not probable cause.*** Det. Jackson himself testified that it was only after they were ***discovered*** they were seized "out of an abundance of caution" (58:5 – 59:16). In addition to all of this, with the combination of the unwarranted seizure of the petitioner's driver's license and the unlawful seizure of the petitioner to establish the believed probable cause for the search of the residence, there would have been an insufficient nexus to lead to the Schmid dr. home. "The review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four corners of the affidavit United States v. Frazier, supra,. The very

fact that a second warrant was sought to include firearms illustrates Det. Jackson's determination in a general search for evidence to convict upon against the express limitations of the Constitution. General searches violate fundamental rights and are forbidden by the Constitution. The search of the Schmid dr. residence may also be considered a general search due to the multiple unrelated items that were seized outside of the warrant's scope without probable cause. Items include a DVR, 3 cameras, a box of business cards, a hard drive, a money clip, a tablet portable wifi, 2 laptops, a briefcase, a sword, and a vehicle title (Appendix E). When officers are allowed to search in wide exploratory searches without consequence, it only encourages future constitutional violations to become routine.

Unsurprisingly, the second search warrant for the Schmid dr. residence also failed to include safes or firearms. By the "cure by affidavit" standard the warrant may have been saved but Det. Jackson, who applied for the warrant, failed to return to the scene of the search leaving the searching officers without an affidavit or even a warrant to abide by (330: 14- 16). United States v. Leon, 468 U.S. 897 (1984) precluded qualified immunity for the officer because he was the leader of the search who did not read the warrant and satisfy himself that he understood the scope and limitations and that it was not obviously defective 298 F.3d at 1027."Where a warrant is

sufficiently facially deficient … executing officers cannot reasonably presume it to be valid" Leon, 468 U.S. at 923. Similar to Groh v. Ramirez, 540 U.S. 55 (2004), the search warrant did not meet the Fourth Amendment's unambiguous requirement that a warrant "particularly describ[e] … the persons or things to be seized." The application adequately describing those things does not save the warrant. Fourth Amendment interests are not necessarily vindicated when another document says something about the objects of the search, but that documents contents are neither known to the person whose home is being searched nor available for her inspection. A search or seizure without an affidavit of probable cause or even a warrant is undoubtedly forbidden by the Fourth Amendment and a violation of due process. This would include the two innocent people who were arrested and charged when they returned home from work (605: 17-25, 606: 1-23).

Subsequent to the search of the Schmid dr. residence, Det. Jackson discovered the physical address of petitioner. Absent legitimate probable cause or a nexus and providing only a generalization, Det. Jackson obtained a warrant for the RV. This next search of the RV led to another locked safe which was bolted to the floor and also not included in the warrant. After being destructively removed, the safe was transported to the police station

where it was unconstitutionally opened without a warrant (E73). The container was not open to the public and without an exigent circumstance it had an expectation of privacy society would recognize as reasonable thus requiring a separate warrant. The petitioner and his family held this same reasonable expectation of privacy by bolting the safe to the floor of the RV to protect the personal effects within (418: 3-25, 419: 1-25, 420: 1-7, E84, Appendix E). It should also be noted that Det. Jackson was not present during the opening of the RV safe either and the affidavit did not accompany the warrant (Appendix E). If a person's luggage in a vehicle, which has a reduced expectation of privacy and a myriad of exceptions, possesses constitutional protection, would not a locked safe bolted to the floor of a home which is considered the very essence of which the Fourth Amendment is based upon?

Included in the litany of Constitutional violations in the present case, the judge presiding over the not one but **two** suppression hearings failed to recuse himself when motioned to do so. Just recently discovered by the petitioner and under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself from a case if the judge's impartiality might be reasonably be questioned §5-302.11(A). The right to an impartial judge is guaranteed under the Due Process Clauses of the U.S. and Nebraska

Constitution (U.S Const. Amend. IV; Neb. Rev. St. CONST. Art. §3; 28 U.S.C.A §455). This was a violation of the petitioner's due process due to the initial search warrant for the Honda being signed by the same judge who presided over the suppression hearings. In the event that the initial warrant for the Honda would be found to be invalid, it would nullify subsequent warrants allowing the petitioner who had already been detained for two years and his innocent family who had already been prosecuted the opportunity to be vindicated and the county along with the officers involved being liable for their conduct. This would be more than a sufficient cause for the same deciding judge to have a strong personal interest of trial and unable to hold proper balance between State and the defendant, thus creating structural error and a violation of due process (U.S.C.A. Amend IV; Neb. Rev. St. CONST. Art. 1 §3). With the presiding judge acting as 'an adjunct law officer' ,"suppression remains an appropriate remedy where the issuing magistrate wholly abandoned his judicial role" United States v. Leon, supra,. This would also be supported by the Honda Accord search warrant that was signed after the defendant had already been strip searched and jailed along with his vehicle seized. For the foregoing reasons, petitioner respectfully requests that the Court determine the search warrants unsupported by probable cause, reverse the Scottsbluff District Court's along with the

Nebraska Court of Appeals' denial of motion to suppress, and vacate the aforementioned convictions.

Conclusion

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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