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CASE NO.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

Respondent/Appellee,

vs.

EUGENE NICHOLSON

Petitioner/Appellant,

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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NOW COMES the Petitioner, EUGENE NICHOLSON, by and through his assigned attorney, SANFORD A. SCHULMAN, to grant this Petition for Writ of Certiorari and to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court, entered in the above-entitled proceeding on January 3, 2022 and the Mandate issued January 24, 2022 affirming the district court's denial of Nicholson's motion to suppress. The Sixth Circuit Court of

Appeals erroneously affirmed the federal district court's denial of the petitioner's the trial court erred when it a motion to suppress arguing the affidavit supporting the warrant did not create probable cause, as there was not a nexus between the place to be searched and the evidence sought. Therefore, any and all evidence obtained pursuant to such warrant was illegally seized in violation of the appellant's constitutional rights as protected under the Fourth and Fourteenth Amendment to the United States Constitution.

Petitioner further contends that the good faith exception to the exclusionary rule does not apply and that the suppression of the evidence is an appropriate remedy.(R. 64, Motion to Suppress, PgID 224-234 and Affidavit in Support of Search Warrant, PgID 235-254). To remedy this, the petitioner would urge this Court to accept this petition for writ of certiorari and find that the good faith exception to the exclusionary rule does not apply and that the suppression of the evidence is an appropriate remedy.

### **OPINIONS BELOW**

The petitioner, EUGENE NICHOLSON, timely raised this issue before the US District Court for the Norther District of Ohio On June 26, 2019, the petitioner,

EUGENE NICHOLSON, was charged by way of an Indictment with one count of CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND DISTRIBUTION OF A CONTROLLED SUBSTANCE. (R. 1, Indictment, PgID 1-22)

On November 27, 2019, the petitioner filed a motion to suppress the evidence seized arguing the affidavit supporting the warrant did not create probable cause, as there was not a nexus between the place to be searched and the evidence sought. Therefore, any and all evidence obtained pursuant to such warrant was illegally seized in violation of the petitioner's constitutional rights as protected under the Fourth and Fourteenth Amendment to the United States Constitution. Petitioner further contends that the good faith exception to the exclusionary rule does not apply and that the suppression of the evidence was an appropriate remedy.(R. 64, Motion to Suppress, PgID 224-234 and Affidavit in Support of Search Warrant, PgID 235-254).

Just prior to the Court's written opinion the defense filed a reply brief raising the issue of the particularity of the warrant. (R. 75, Defendant's Reply Brief, PgID 310-318)

On February 5, 2020, the trial court entered an order denying the defendant/appellant's motion to suppress the evidence noting that if the defendant prevails on appeal, he may then withdraw his guilty plea and left open the issue of



the particularly of the warrant. Specifically, the Court denied the appellant's motion to suppress as to the issues of probable cause and the nexus between defendant's criminal activity and his apartment. The motion to suppress was otherwise held in abeyance as to the issue of particularity. (R. 76, Opinion and Order Denying Motion to Suppress, PgID 319-333).

On May 12, 2020, the appellant appeared before the Court for a change of plea hearing and pursuant to Rule 11(c)(1)(A) the appellant entered a conditional guilty plea to the Indictment reserving the right to challenge whether the search warrant authorizing the search of the defendant's apartment was supported by probable cause and provided a nexus between the place to be searched and the things to be seized. (R. 121, Plea Agreement, PgID 669-679; R. 238, Change of Plea Hearing, PgID 1762-1798)

On September 22, 2020 the Court sentenced the appellant to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Defendant to be imprisoned for a term of 120 months as to Count 1 of the Indictment; to serve 8 years supervised release; and to pay 100.00 special assessment; no fine or restitution. (R. 235, Sentencing Hearing, PgID 1720-1737; R. 194, Judgment PgID 1356-1361). A timely Claim of Appeal was filed on June 4, 2019 (R. 200, Notice of Appeal, PgID 1386-1387).

On appeal the Sixth Circuit Court of Appeals issued an Opinion on January 3, 2022 and a Mandate on January 25, 2022 affirming the district court's denial of

the Petitioner's motion to Suppress. The appellate court held that "[b]ecause the evidence in this affidavit directly connects Nicholson's residence with suspected drug dealing, the judge had a substantial basis for finding probable cause."

(Opinion, pg. 5)

## **JURISDICTION**

The mandate and opinion and order denying the Petitioner, EUGENE NICHOLSON's appeal was entered by the Sixth Circuit Court of Appeals on January 25, 2022. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the January 25, 2022 mandate as required by Rule 13.1 of the United States Supreme Court Rules. This Court has jurisdiction to grant this Petition for Writ of Certiorari and address the issue of whether

Jurisdiction is proper under the Supreme Court Rule 10(a) and 10(c) and 28 USC § 1254(1) and Article III, §2 of the United States Constitution.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **1. USCS Const. Amend. 4**

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. To protect that interest, a search warrant may issue only upon a showing of probable cause. "Probable cause is 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. King*, 227 F.3d 732, 742 (6th Cir. 2000). Probable cause requires more than mere suspicion. *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008).



Review of the affidavit and search warrant is based on a "totality of the circumstances" determination with deference to the magistrate judge's finding of probable cause. *Id.*; *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (en banc). That deference is not absolute, and a reviewing court must ensure that the issuing magistrate did "not serve merely as a rubber stamp for the police." *United States v. Leon*, 468 U.S. 897, 914 (1984). The reviewing court is "limited to information presented in the four corners of the affidavit." *United States v. Jackson*, 470 F.2d 306 (6th Cir. 2006).

In determining whether an Affidavit for Search Warrant creates probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision, whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of person supplying hearsay information, there is a fair probability that contraband evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 at 2332. This Court, in reviewing the magistrate's decision, has a duty "to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *State v. Sheppard* (1998), 84 Ohio St.3d 230, 236. A merely conclusory affidavit will not create probable cause. An affiant must give enough specific information regarding his basis for knowledge to allow a magistrate to make an independent determination that probable cause exists.

## INTRODUCTION

The petitioner, EUGENE NICHOLSON The case focused on the admissibility of evidence seized from a residence at 603 Wayne Street, Apartment 1, in the City of Sandusky, Ohio 44870 pursuant to a search warrant executed on August 24, 2018 at 6:30 A.M. The defense argued that the affidavit supporting the warrant did not create probable cause, as there was not a nexus between the place to be searched and the evidence sought and as such any and all evidence obtained pursuant to such warrant was illegally seized in violation of the Defendant's constitutional rights as protected under the Fourth and Fourteenth

Amendment to the United States Constitution.

The petitioner further contends that the good faith exception to the exclusionary rule does not apply and that the suppression of the evidence is an appropriate remedy

#### STATEMENT OF THE CASE

On August 23, 2018, Detective Ronald Brotherton, III of the Sandusky Police Department signed an affidavit for Search Warrant for the search of persons: Siron K. Mills, Daryl B. Castille, and Eugene Nicholson; along with the residences of: 317 Perry Street, Apartment 2, Sandusky, Ohio 44870; 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The Affidavit for Search Warrant went on to state that the 603 Wayne Street residence, “is further described as a multi-level, multi-unit apartment building. The residence is on the south west corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers “603” are on the east side of the building. The vehicle is further described as a 2001, White, GMC Truck, Bearing Ohio Registration GVM, 4631, VIN #2GTEX19V611100398.” (R. 64, Affidavit for Search, PgID 235-254)

Detective Brotherton testified in his affidavit that Drug Enforcement Agent, Kenneth Meier (SA Meier) believed Castille and Nicholson were “working



together to distribute large quantities of drugs in Sandusky, Ohio.” (R. Affidavit in Support of Search Warrant, PgID 235-254)

He further testified in his affidavit that SA Meier believed that “[O]n August 22, 2018, Castille obtained an unknown quantity of heroin and/or cocaine or other type of drug from Nicholson at 603 Wayne Street and then drove his Chevrolet Tahoe directly to the parking lot of Metro Housing parking where he provided Mills the drugs in exchange for US Currency. SA Meier believes that after Castille completed the transaction with Mills, Castille returned to the 603 Wayne Street to provide Nicholson the proceeds of the drug deal he had just completed with Mills.” (R. 64, Affidavit for Search, PgID 235-254)

As it pertains to the petitioner, Eugene Nicholson, the Detective Brotherton supported these allegations with the following information:

1. SA Meier conducted a criminal history check of Castille and observed a prior drug conviction in 2003, and was aware that Nicholson was convicted as part of this same drug conspiracy.

2. SA Meier reviewed the text messages obtained by search warrant from Verizon Wireless reference phone number 419-360-9272 and observed Castille in contact with an unknown person, using phone number 907-2326560. SA Meier observed that the unknown user of phone number 907-2326560 appeared to



be working in concert with Castille to distribute drugs and believe that the unknown user of that phone could possibly be Nicholson.

3. From August 7, 2018 to August 18, 2018, SA Meier observed the Chevrolet Tahoe, presumed to be Castille's, of which GPS tracking was installed on August 2, 2018, travel to 603 Wayne Street four (4) times. Three (3) times were observed via GPS tracker and one (1) unknown if physically observed or observed via GPS tracker.

4. On August 20, 2018, at approximately 7:19 PM, Detective Brotherton, via physical surveillance observed Nicholson driving a grey Ford F-150 pickup truck and park at 603 Wayne Street. At approximately 7:23 PM, Detective Brotherton observed Nicholson departing from 603 Wayne Street.

5. On August 22, 2018, at approximately 3:46 PM, SA Meier observed Castille leave the Health and Strength Gym and go to 603 Wayne Street. At approximately 4:45 PM, SA Meier observed Castille walking from the porch of 603 Wayne Street, enter the Chevrolet Tahoe and depart the area. SA Meier then observed Castille arrive at the Metro Housing at approximately 4:50 PM, located at 322 Warren, and park in the parking lot. SA Meier observed, via remote surveillance camera Mills walk toward the passenger side of the Chevrolet Tahoe that was parked in the Metro Housing parking lot, then walk to the GMC Sierra, open the door and reach toward the glove compartment area.

6. At Approximately 4:52 PM, Detective Brotherton observed the Chevrolet Tahoe depart from the Metro Housing parking lot and travel back to 603 Wayne Street, where he observed Nicholson and Castille Sitting on the front porch. At approximately 4:59 PM, Detective Brotherton observed Castile departing from Wayne Street.

SA Meier then observed, via remote surveillance, the Chevrolet Tahoe arrive and park in the driveway of 3011 E. Bayview Lane. Castille was observed exiting the vehicle, walking to the tailgate, retrieving a trash can from the curb, and walking up the driveway. The affidavit provided no information as to why SA Meier believed that 907-232-6560 was Eugene Nicholson's number. Nor did the affidavit state with any certainty that drugs or narcotics were at the residence of 603 Wayne Street, Apartment 1. Based on Detective Brotherton's affidavit, a search warrant was issued on August 23, 2018. Police executed the warrant and seized various items that are the subject of the indictment filed in the case now on appeal.



## **REASONS IN SUPPORT OF GRANTING THE WRIT**

THE TRIAL COURT ERRED WHEN IT DENIED THE PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE SEIZED AS A RESULT OF A SEARCH BASED ON AN AFFIDAVIT IN SUPPORT OF THE WARRANT (1) THAT FAILED TO ESTABLISH PROBABLE CAUSE THAT DRUGS AND RELATED ITEMS WERE ON THE PREMISES AND (2) FAILED TO SHOW A NEXUS BETWEEN THE PLACES TO BE SEARCHED AND THE THINGS TO BE SEIZED, THAT THE "GOOD FAITH EXCEPTION" SHOULD NOT APPLY AND THAT THE WARRANT FAILED TO SATISFY THE FOURTH AMENDMENT PARTICULARITY REQUIREMENT.

## **ARGUMENT**

I. THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE THE TRIAL COURT ERRED WHEN IT DENIED THE PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE SEIZED AS A RESULT OF A SEARCH BASED ON AN AFFIDAVIT IN SUPPORT OF THE WARRANT (1) THAT FAILED TO ESTABLISH PROBABLE CAUSE THAT DRUGS AND RELATED ITEMS WERE ON THE PREMISES AND (2) FAILED TO SHOW A NEXUS BETWEEN THE PLACES TO BE SEARCHED AND THE THINGS TO BE SEIZED, THAT THE "GOOD FAITH EXCEPTION" SHOULD NOT APPLY AND THAT THE WARRANT FAILED TO SATISFY THE FOURTH AMENDMENT PARTICULARITY REQUIREMENT.

### A. The Search Warrant Was Not Based on Probable Cause

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. To protect that interest, a search warrant may issue only upon a showing of probable cause. "Probable cause is 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. King, 227 F.3d 732, 742 (6th Cir. 2000). Probable cause requires more than mere suspicion. United States v. Blair, 524 F.3d 740, 748 (6th Cir. 2008).

Review of the affidavit and search warrant is based on a "totality of the circumstances" determination with deference to the magistrate judge's finding of probable cause. *Id.*; United States v. Allen, 211 F.3d 970, 973 (6th Cir. 2000) (en banc). That deference is not absolute, and a reviewing court must ensure that the issuing magistrate did "not serve merely as a rubber stamp for the police." United States v. Leon, 468 U.S. 897, 914 (1984). The reviewing court is "limited to information presented in the four corners of the affidavit." United States v. Jackson, 470 F.2d 306 (6th Cir. 2006).

In determining whether an Affidavit for Search Warrant creates probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision, whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of person supplying hearsay information, there is a fair probability



that contraband evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 at 2332. This Court, in reviewing the magistrate’s decision, has a duty “to ensure that the magistrate had a substantial basis for concluding that probable cause existed.” State v. Sheppard (1998), 84 Ohio St.3d 230, 236. A merely conclusory affidavit will not create probable cause. An affiant must give enough specific information regarding his basis for knowledge to allow a magistrate to make an independent determination that probable cause exists. For example, in U.S. v. Bennett, the Court found that, “[A]fter excising the affidavit’s false statements, all that remains in the affidavit is that an informant told Officer Horn that he saw ‘paraphernalia which is used in the sale of marihuana’ in Bennett’s house, and an anonymous informant claimed that Bennett was selling drugs from his residence and was bringing in a shipment the night of April 1, 1988. We hold that these statements are not sufficient to provide reasonable grounds to believe that sheriff’s officers would find marijuana at Bennett’s residence on April 8, 1988.” U.S. v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990).

In the situation at hand, there is not a single person stating that they witnessed the sale or possession of drugs at 603 Wayne Street, Apartment 1. There is a conclusory statement by SA Meier that he believes Nicholson and Castille were engaged in distributing large amounts of heroin and/or cocaine, but there is no evidence supporting this. SA Meier asserts that he believes that a certain

phone number is Mr. Nicholson's, and that phone number engaged in conversations indicative of drug trafficking, however SA Meier does not provide the magistrate with any verification of why this number is believed to be Nicholson's number. In fact, SA Meier asserts, "the unknown user of that phone could possibly be Nicholson," and repeatedly refers to the particular number in question as that of one of an "unknown person." (Affidavit in Support of Search Warrant, PgID 235-254)

The other evidence that is relied upon is the fact that a person previously convicted of drug trafficking, Daryl Castille, went to 603 Wayne Street four (4) times in an eleven (11) day time period. Mr. Castille then went to the 603 Wayne Street address again on August 22, 2018, after Castille met briefly with Mills at the Metro Housing. However, Detective Brotherton does not assert that a drug transaction actually took place between Mills and Castille. However, he attests that SA Meier saw both Nicholson and Castille sitting on the front porch, immediately upon Castille's return, but does not make mention of any exchange witnessed. In fact, SA Meier states that he observed Castille return to a different address, retrieve something from the back of his vehicle, and retire to the house. In the instant case the factual basis upon which the search warrant was predicated does not satisfy the threshold requirements for the issuance of a search warrant under the guidelines



set forth in the applicable case law as there is no evidence of illegal activity at the 603 Wayne Street, Apartment 1 address.

There is no nexus between the place to be searched and the evidence sought "To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place." United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). The affidavit in support of the warrant must set forth "a nexus between the place to be searched and the evidence sought." United States v. Beals, 698 F.3d 248, 364 (6th Cir. 2012); United States v. McPherson, 469 F.3d 518, 524 (6th Cir. 2006); United States v. Laughton, 409 F.3d 744, 747 (6th Cir. 2005); United States v. Van Shuttles, 163 F.3d 331, 336-37 (6th Cir. 1998). A defendant's status as a drug dealer alone is insufficient to find probable cause to search the defendant's residence without other facts indicating illegal activity at the residence. United States v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005) (quoting Gates, 462 U.S. at 231).

The affidavit must present information that allows the magistrate to independently determine probable cause; "his action cannot be a mere ratification of the bare conclusions of others." Gates, 462 U.S. at 239; United States v. Weaver, 99 F.3d 1372, 1376 (6th Cir. 1996). A conclusory affidavit is one which contains "only the affiant's belief that probable cause existed." United States v. Finch, 988 F.3d 349, 352 (6th Cir. 1993).

In McPherson, this Court affirmed the district court's suppression of evidence discovered during a search of defendant's residence after a pat down on the porch revealed crack on the defendant's person. Even "a high incidence of child molestation . . . may not demonstrate that a child molester is likely to possess child pornography" for purposes of establishing probable cause. United States v. Hodson, 543 F.3d 286, 293 (6th Cir. 2008). There must be some reliable evidence connecting criminal activity to the residence or place to be searched.

In U.S. v. Christian, again this Court concluded that the facts alleged in the affidavit in support of the warrant application were insufficient to support the issuance of a search warrant. U.S. v. Christian, 893 F.3d 846 (6th Cir. 2018). The affidavit for search warrant stated the following facts: (1) search warrants were executed at Christian's residence in the past; (2) Christian has a history of years' old drug convictions; (3) he engaged in one sale of drugs at the residence eight months prior to the application for a search warrant; (4) unidentified subjects of unknown reliability reported that Christian was selling drugs in the more recent past; and (5) a man with no connection to Christian was found to be in possession of drugs after leaving the area of the residence on the date of the search warrant affidavit. U.S. v. Christian, 893 F.3d 846 (6th Cir. 2018).

In comparing the evidence in the search warrant affidavit of 603 Wayne Street, Apartment to the search warrant in U.S. v. Christian, it is clear that there is



not a nexus between the place to be searched and the evidence sought. In Christian, even when the Court had evidence that the petitioner had engaged in the sale of drugs at the residence previously, and that a man leaving the residence was found to be in possession of drugs after leaving the area of the residence, the Court still found that probable cause did not exist to issue a search warrant.

The affidavit for search warrant of 603 Wayne Street, Apartment 1 lacks any evidence that drugs or proceeds from drugs were at or in the residence. There are no controlled buys at the residence, there are no controlled buys with individuals prior to them exiting or entering the residence, and there are no statements that drugs or proceeds from drug sales are at the residence. In basic terms, the affidavit presents evidence that a previously convicted drug dealer entered the residence, but provides no evidence that he was bringing drugs or proceeds of drug transactions to the residence. A neutral and detached magistrate would have to make an attenuated logical leap to find that probable cause existed to search the premises of 603 Wayne Street, Apartment 1.

Applying the requisite legal standards to the challenged affidavit here, this Court must find that the issuing judge did not have a “substantial basis” for concluding that probable cause existed from the information furnished to him in the affidavit.

B. The Good Faith Exception Does Not Apply.

The United States Supreme Court in *Leon* held that the Exclusionary rule is will not serve as an effective deterrent to Fourth Amendment violations when an officer relies on the legal sufficiency of the warrant. “The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405

However, this Court held in *Leon*, that there are certain circumstances under which an officer cannot be said to have acted in objectively reasonable reliance on the sufficiency of the warrant. “Suppression remains an appropriate remedy where; 1) the magistrate or judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, 2) the issuing magistrate wholly abandoned his judicial role, 3) an officer purports to rely upon a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or 4) where a warrant is facially deficient.” State v. George, 45 Ohio St.3d 325, 544 N.E.2d 640 at 646 citing U.S. v. Leon, 468 U.S. 897, 104 S.Ct. at 3421.

In the present case, there are essentially three components to the affidavit offered in support of the search warrant.



The first component of the affidavit is the reliance upon the criminal history of both Castille and Nicholson. The second component involves the unsupported assumption that Mr. Nicholson's phone number was 907-2326560, and that he was engaged in drug trafficking conversations with Castille. The third component consists of the stops by Mr. Castille at 603 Wayne Street. As stated earlier, such information cannot establish the probable cause necessary for the issuance of the warrant given the affidavits failure to set forth definite evidence of drug activity occurring at 603 Wayne Street, Apartment 1.

Similarly, Leon holds that the good faith exception to the exclusionary rule does not apply when, "an officer purports to rely upon a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id* at 3421. Under the circumstances as stated above, there existed no indicia of reliability of the conclusory statement that drug trafficking was occurring at 603 Wayne Street, Apartment 1.

Therefore, the trial court erred when it concluded that the affidavit offered in support of the search warrant contains information sufficient to support the finding of probable cause by the issuing magistrate and the good faith exceptions applies in this case and erred in refusing to suppress all evidence seized at 603 Wayne Street, Apartment 1.

The Government turns to the alleged movements of Co-Defendant

Castile in further support of its position. However, facts which establish Co-Defendant Castile's simultaneous associations with the Wayne Street residence and alleged ongoing criminal activity, do not necessarily give rise to the inference of a third association between the Wayne Street residence and the alleged ongoing criminal activity. Put another way, Co-Defendant's presence at the Wayne Street residence does not, in and of itself, implicate the residence in the Co-Defendant's ongoing criminal activities. As set forth in Defendant's Motion to Suppress, the Affidavit fails to aver facts establishing the Wayne Street residence as either the location supplying the narcotics or containing the proceeds from narcotics sales. Thus, there are no facts to establish the incriminating nature of the Co-Defendant's association with the Wayne Street residence. The case Bucio-Cabrales and Gutner cited by the Government, are therefore, factually distinguishable from those at issue herein, in that both cases dealt with affidavits which contained additional facts supporting a finding of probable cause. Accordingly, CoDefendant's connection to the Wayne Street residence, without further facts supporting the premise that narcotics were being supplied from therein, fails to establish a fair probability that evidence of a conspiracy to distribute narcotics would be found therein.

### C. PARTICULARITY OF WARRANT



It is well settled that items to be seized pursuant to a search warrant must be described with particularity to prevent "the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927). While courts have recognized that the degree of specificity in a warrant must be flexible, depending upon the type of items to be seized and the crime involved, a description is valid only if it is "as specific the circumstances and the nature of the activity under investigation permit." United States v. Ables, 167 F.3d 1021, 1033 (6th Cir.), citing United States v. Henson, 848 F.2d 1374, 1383 (6th Cir. 1988).

Here, the warrant described, in pertinent part, the place to be searched as: 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The residence is further described as a multi-level, multi-unit apartment building. The residence is on the southwest corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers "603" are on the east side of the building.

The property is a "multi-level, multi-unit apartment building" in which multiple people reside. While this further undercuts the alleged connection between the Co-Defendant's presence at the Wayne Street Residence and the Defendant, it also raises the issue of whether the warrant specifies the place to be searched with sufficient particularity.

As stated by this Court in *U.S. v. Leon*, “a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises.” *United States v. Leon*, 104 S.Ct. 3405, 468 U.S. 897, 82 L.Ed.2d 677, (1984). Similar to the facts of *Leon*, the search warrant in this case expressly and particularly describes things such as “cocaine, heroin, and other narcotic drugs used in the taking of drugs and/or preparation of illegal drugs for sale, use or shipment.” These were items that the police had no reason to believe were to be found in the home.

The Fourth Amendment requires a warrant to "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. "The purpose of this particularity requirement is to prevent the use of general warrants authorizing wide-ranging rummaging searches in violation of the Constitution's proscription against unreasonable searches and seizures." *United States v. Logan*, 250 F.3d 350, 365 (6th Cir. 2001) (citing *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)). "[T]he degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought[, ]" *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988), and a determination as to particularity is "best resolved



upon examination of the circumstances of the particular case." Logan, 250 F.3d at 365 (citation omitted).

Pursuant to the court's holding in United States v. Blakeney, 942 F.2d 1001, 1026-1027 (6th Cir.1991), when a more specific description of the items to be seized is available, a general description will not suffice." Id., citing United States v. Cook, 657 F.2d 730, 733 (5th Cir. Unit A Sept. 1981).

Similar to U.S. v. Tucker, the Affidavit for Search Warrant failed to add any particularity, so Officers could not "readily ascertain which items were subject to seizure." United States v. Tucker, 5:17-CR-105, quoting, United States v. Anderson, 555 F. App'x 589, 595 (6th Cir. 2014). Because the officers failed to state with particularity, the items to be seized, anything that seemed like "evidence of vaguely specified [drug] crimes were up for grabs. Id. This gave officers free reign to conduct an overly broad search and seize any items they wanted.

Accordingly, the failure of to provide specific details and descriptions of the apartment unit to be searched created a high probability of a mistaken search. As such, the Warrant lacked the required particularity under the Fourth Amendment and further undermines the validity thereof and the district court judge erred when he refused to suppress the evidence seized as a result.

#### D. GOOD FAITH RELIANCE

The Government contends that even if the Affidavit lacked probable cause, the officers executing the search relied in good faith upon the warrant, such that the evidence should not be excluded. Here, the Defendant asserts that the Warrant is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” See Leon, 468 U.S. at 923.

In this situation, the reviewing court must ask, whether a “reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.” United States v. Savoca, 761 F.2d 292 (6th Cir.1985), citing Leon, *supra.*, at fn. 23. In Savoca, the court discussed an affidavit lacking in probable cause for a search of a motel room occupied by suspects for evidence of multiple bank robberies. “[T]he defect in the affidavit was that it only tenuously connected the place to be searched with two persons for whom arrest warrants were outstanding. It failed to describe the relationship of the persons to the premises ... and it did not state how recently the bank robberies had occurred.” *Id.* at 297. The court also discussed factors important to the good-faith analysis. “[W]hether a sufficient nexus has been shown to a particular location turns in part on [1] the type of crime being investigated, [2] the nature of the things to be seized, [3] the extent of an opportunity to conceal the evidence elsewhere and [4] the normal inferences that may be drawn as to likely hiding places. *Id.*



In the instant case, a review of the deficiencies addressed above and the Savoca factors suggest that the instant warrant was not executed in good faith. Herein, the appellant challenged the sufficiency of the nexus between the Wayne Street residence and the alleged narcotics conspiracy. Further, the appellant raised concerns regarding the particularity things to be seized under the warrant and the places to be searched. Suppression of the evidence in this case is justified and supported to deter officers from future violations of the individual's Fourth Amendment rights in that this case deals with officers specialized in narcotics enforcement, who upon looking at the Warrant, would not have realized that "the search was illegal, despite the magistrate's decision to the contrary." See United States v. Hodson, 543 F.3d 286, 293 (6th Cir. 2008), quoting United States v. Helton, 314 F.3d 812, 824 (6th Cir.2003). As such, the good faith exception does not apply to the facts of this case.

### **CONCLUSION**

WHEREFORE, the Petitioner, EUGENE NICHOLSON, by and through his assigned attorney, SANFORD A. SCHULMAN, respectfully requests this most Honorable Court grant this Petition for Writ of Certiorari and reverse the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court, entered in the above-entitled proceeding on January 3, 2022 and the Mandate of

January 25, 2022 because the Sixth Circuit Court of Appeals erroneously affirmed the trial court's denial of the petitioner's Fourth Amendment Right

Respectfully submitted,

/s/ Sanford A. Schulman

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