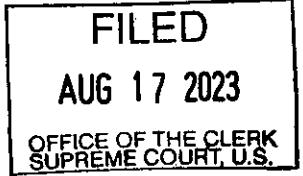


No. 23 - 5475



IN THE
SUPREME COURT OF THE UNITED STATES

ELMER WAYNE ZAHN - PETITIONER

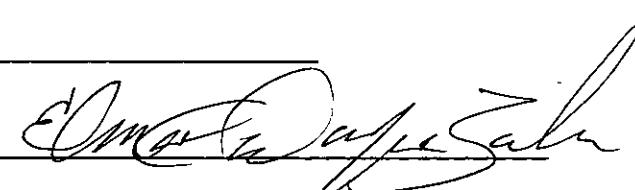
VS.

UNITED STATES - RESPONDENT

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

22-1408

PETITION FOR WRIT OF CERTIORARI

X 
Elmer Wayne Zahn

PRO SE REPRESENTATION

Reg. No. 28693-509

U.S.P. Florence High

U.S. Penitentiary

P.O. Box 7000

Florence, Colorado 81226-7000

QUESTIONS PRESENTED FOR REVIEW

When police threaten individual liberty of the citizens whom they serve, lack responsibility to maintain the integrity of their warrant system database, simply because "We don't have the money or the time to be reviewing the system, along with no safeguards in place to prevent errors," and should this cause a Fourth Amendment violation;

1. Does this police misconduct become a reckless disregard of the constitutional requirements of the citizens whom they serve?
2. Is this reckless, deliberate, intentional, or flagrant police misconduct towards maintaining their own warrant system database in which they totally depend upon for accuracy?
3. Does this become gross negligent police misconduct considering the testimony given "We don't have the money or the time to be reviewing the system for errors."?

"Leon admonished that we must consider the actions of all police officers involved." Herring [555 U.S. 140]. "An assessment of the flagrancy of police misconduct constitutes an important step in the calculus of applying the exclusionary rule." Herring [555 U.S. 143];

QUESTIONS PRESENTED FOR REVIEW

(CONTINUED)

4. To what degree is the police misconduct if police intentionally never informed the defense that;
 - A. No active warrant ever existed for his 2019 arrest?
 - B. The police remained in the hotel room for hours waiting on the search warrant in 2020 arrest?
5. To what degree is the police misconduct if the police violated the State Law Statute to make the 2019 arrest and is the officer "under color of authority" to make an arrest?
6. To what degree is the misconduct if the prosecutor failed to provide defense with exculpatory evidence from Officer Chris Gross which would show false or misleading testimony made by Drug Investigator Wes Graff in 2020 arrest? U.S. v. Bagley 473 U.S. 667 (1985). U.S. v. Agurs 427 U.S. 97, 103, 96 (1976).

"The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search." Herring [555 U.S. 148].

QUESTIONS PRESENTED FOR REVIEW

(CONTINUED)

7. Does the "Fruits of the Poisonous Tree" doctrine protect an individual from arrest in 2020, when the evidence of probable cause originates from a suppressed unconstitutional arrest in 2019?

What if police "Sit on the stash of drugs" alone in a protected area awaiting the search warrant for that area while handling possible evidence then questioning a possible suspect about such evidence?

8. When exactly did the search begin, did the search begin when police attempted to obtain information? U.S. v. Jones 565 U.S. 400, 132 S. Ct. 945, 181 L.Ed. 2d 911, 2012.
9. If an officer is left alone in the protected area to be searched how can one assume that the evidence was not handled?

PARTIES TO THE PROCEEDINGS

Elmer Wayne Zahn - #28693-509 - Petitioner,
U.S.P. Florence High, U.S. Penitentiary
P.O. Box 7000, Florence, Colorado 81226-7000

PRO SE REPRESENTATION for Petitioner

Attorney for Respondent,

United States

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RELATED CASES

- United States v. Elmer Wayne Zahn No. 1:21-cr-10005
CBK-1, United States District Court of South Dakota
for the Northern Division. Judgement entered

February, 22, 2023.

- United States v. Elmer Wayne Zahn - USCA8 No.22-1408,
United States Court of Appeals for the Eighth Circuit.
Judgement entered March 23, 2023.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Elmer Wayne Zahn, prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the below proceeding on March 23, 2023.

_____*

I.

CITATIONS OF OPINIONS AND ORDERS IN CASE

The opinion of the United States Court of Appeals for the Eighth Circuit is ~~unpublished~~ and is attached hereto as Appendix A. 22-1408 63 F.4th 699 (8th Cir. 2023)

The opinion and order of the United States District Court for the Northern District of South Dakota adopting the United States Magistrate Judge's report and recommendation is unpublished and attached hereto as Appendix B.

The report and recommendation of the United States Magistrate Judge for the Northern District of South Dakota on the Suppression hearing motion is unpublished and attached hereto as Appendix C.

The original judgment of conviction of Petitioner was appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the conviction and sentence in an unpublished opinion attached hereto as Appendix D.

The original judgment of conviction of Petitioner in the United States District Court for the Northern District of South Dakota was not reported and is attached hereto as Appendix E.

II.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 23, 2023.

an extension of time to file the petition for a writ of certiorari was granted to and including August 20, 2023 on June 22, 2023 in Application No. 22A1101.

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

_____*

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment of the United States Constitution provides:

"The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(CONTINUED)

South Dakota State Law Statute - 23A-2-9 (Rule 4(d)(3))

Warrant executed by arrest--Advice to defendant as to warrant-Manner of service of summons.

See Appendix F. for details of law. Pages 3 of 2

SDCL 22-11-4

SDCL 22-11-5

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IV.

STATEMENT OF THE CASE

LOWER COURTS

On February 2, 2021, a federal grand jury for the Northern District of South Dakota returned a three count indictment charging Elmer Wayne Zahn with the offenses of; possession of methamphetamine with intent to distribute [count 1] possession of methamphetamine with intent to distribute [count 2] possession of heroin [count 3]. See Title 21 United States Code, Section 841 (a)(1); Title 21 United States Code, Section 841 (a)(1) Title 21 United States Code, Section 841(a)(1)

IV.

STATEMENT OF THE CASE

LOWER COURTS

(CONTINUED)

On February 09, 2021, Zahn appeared before the Magistrate Judge for his initial hearing at which time he was appointed counsel, Thomas J. Cogley, and was read the charges. Arraignment was also held at this time. Zahn was asked what his plea is to the three charges, he plead not guilty to all charges.

On July 13, 2021, the suppression hearing was held. The prosecution had four witnesses and Zahn had one. During the hearing the prosecution's two witnesses had conflicting testimony about the 2020 case. The judge didn't question either witness as to why their testimony is different from each other. Yet this testimony would decide an important deciding issue in the case.

See transcript Appendix _____ pages _____.

On August 25, 2021 the Magistrate returned his report and recommendation on this case and denied to suppress any evidence. The defense filed 12 objections to the facts of the case presented at the hearing. These facts were addressed incorrectly by the Magistrate Judge. See Objections Appendix K

On September 23, 2021, the District Court Judge returned his opinion which adapted the Magistrate Judge's R & R. The District Judge denied all the objections of fact. App. _____

On November 1, 2021, the defendant appeared in District Court to a change of plea hearing. Zahn plead guilty to count 2 of the indictment according to a plea agreement. Conditional to that he could appeal the suppression hearing. The other two charges were dismissed.

On February 21, 2022, Zahn was sentenced using video, to 175 months imprisonment under category V. Objections were made as to drug calculations and to a charge that was reversed in SD Supreme Court, but still used against him at sentencing.

V.

SUMMARY OF FACTS IN 2019 CASE

This case involves two separate arrests from law enforcement in Brown County, Aberdeen, South Dakota. First arrest on November 7, 2019 for possession with intent to distribute methamphetamine. The second arrest on November 23, 2020 for possession with intent to distribute methamphetamine. The two cases are connected only through a bond condition violation from the first arrest. The second arrest resulted from this bond condition violation.

1. Zahn was arrested on November 7, 2019 by Deputy Scott Kolb, who worked at the Brown County Sheriff's Department, Kolb believed that Zahn had an active warrant for his arrest. When in fact, it was discovered three months later, by Zahn himself, that no active warrant existed for his arrest. Zahn found out in February 2020 that the warrant was recalled by the Clerk of Courts on July 29, 2019. The Sheriff's Department did not inform Zahn or his defense of this information at any time.

Kolb doing his routine business had noticed Zahn outside his apartment building on November 7, 2019, Kolb then checked his on-car computer for Zahn's warrant. It indicated that Zahn had an active warrant, Kolb depended totally on the accuracy of his own warrant system, Kolb did not check the accuracy of his warrant system with the Clerk Of Courts first. Kolb stopped in front of the apartment,

SUMMARY OF FACTS IN 2019 CASE

(CONTINUED)

walked up to Zahn and told Zahn he has a warrant for his arrest. Zahn told Kolb that he doesn't have any warrant for his arrest, Zahn asked Kolb what is the warrant about. Kolb did not know what the arrest warrant was for because he did not have a copy of the warrant with him. Kolb told Zahn after I get you in handcuffs I will find out. Zahn was taken to the ground because he would not put his hands behind his back. After Zahn was on the ground, Kolb told Zahn that if you would have listened to my command I would not have put you on the ground like this. Zahn was then searched and methamphetamine was found in a container in his pocket and other paraphernalia. Zahn was taken to the Brown County Jail.

2. Kolb brought Zahn to the jail and told the jail staff to charge Zahn with the drugs and he would be back with a copy of the arrest warrant. Kolb did not come back to the jail with a copy of the warrant as required by the State Law Statute. Kolb proceeded to go get a search warrant for Zahn's apartment. The South Dakota State Law Statute _____ requires the Deputy to give a copy of the warrant to the arrestee as soon as possible after the arrest. Refer to the Appendix _____ for statute.

Even on the ride to jail, Kolb told Zahn the warrant is for a bond violation and that is all he knew. Zahn replied "He was not on any bond at that time."

SUMMARY OF FACTS IN 2019 CASE

(CONTINUED)

Kolb totally depends on the accuracy of his own in-car computer database. Kolb and Kathy Neitzel were the two system managers for his warrant system. Both had been doing warrants for the past 30 years. Both testified about the maintenance and procedures in their warrant system. Refer to Appendix _____ for testimony, Pages _____.

3. When Neitzel was asked about the warrant system and how often it was reviewed and checked for errors responded "We have only reviewed the system a few times in the past. We don't have the time or the money to be doing any "check and balances" on the system." Refer to Appendix _____ Pages _____ for transcript exact words during testimony.

The two system managers who operate the system don't update their system or maintain its integrity. They both testified that they have no safeguards in place to prevent errors in the warrant system in which Kolb totally depends on for accuracy when executing arrest warrants. According to testimony, Neitzel and Kolb have no intention of maintaining the system, nor do they have any plans for using any safeguards. They testified they have no written procedures on how to proceed with recalled warrants. Refer to Appendix _____ pages _____ for verbatim testimony. The recalled warrants is what leads to unnecessary unlawful and unconstitutional arrests.

SUMMARY OF FACTS IN 2019 CASE

(CONTINUED)

4. This then leads us to the reckless disregard of the constitutional requirements of the citizens of Brown County, whom they serve. The individual liberty is at risk for these citizens, with this deliberate and reckless, intentional and flagrant misconduct by the sheriff's department. It then leads to the United States Supreme Court precedent set in *Herring v. United States* [555 U.S. 146]. "If the police have been shown to be reckless in maintaining a warrant system, exclusion would certainly be justified under our cases should such conduct misconduct cause a Fourth Amendment violation."

"When we analyze the applicability of the rule, Leon admonished that we must consider the action of all the police officers involved." 468 U.S., at 923, n 24, 104 S. Ct. 3405, 82 L. Ed. 2d 677. "It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination."

5. This is not mere employee negligence, as the Court of Appeals errered in Affirming the Conviction, this goes to Gross Negligence, "Negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to consequences of an act." The definition of Gross Negligence.

VI.

SUMMARY OF FACTS IN 2020 CASE

The second arrest occurred at a local hotel in Brown County, South Dakota. The Aberdeen, South Dakota police were called to this hotel on an unrelated incident. The police resolved the unrelated incident and while Officer Chris Gross was visiting with the hotel manager, the manager had mentioned he heard a commotion in one of the rooms. Law enforcement followed the manager to the room and stood by while the manager was talking to the occupant about paying for another nights stay.

1. Officer Gross looked into the doorway of the room to see who the manager was talking to. Gross recognized Zahn in the doorway along with Melanie Anderson. Gross then told Zahn he had a warrant for his arrest, this is because Gross knew Zahn had an active warrant, Zahn turned and went to the back of the hotel room. This is when Gross and other law enforcement rushed into the room to execute the arrest warrant on Zahn. After entering the hotel room Gross then noticed two other girls sitting on a sofa along the wall. They could not be seen from the doorway, Gross also recognized the two girls as Yvette and Amy Anderson and remembered both also had arrest warrants.

2. Gross made the arrest of Zahn, began handcuffing Zahn when another officer finished with Zahn while Gross went to attend to Yvette and Amy. This information was all in Chris Gross's police report in which Zahn had read from the State discovery

SUMMARY OF FACTS IN 2020 CASE

(CONTINUED)

evidence presented to him while he was at the Brown County Jail. What is very disturbing is that this police report of Gross's arrest was not presented to Zahn by the Government in the discovery evidence. In fact there is no indication from the Government's evidence that Chris Gross was even at the hotel arrest. The Gross police report held important cooberating evidence that could have been used to show false or misleading testimony from the Drug Investigator Wes Graff, a key witness for the government. This exculpatory evidence was withheld by the prosecution. "Prosecutors have an obligation to provide defense with exculpatory information even when no request has been made, although it does not require automatic reversal under United States v. Bagley, 473 U.S. 667 (1985). See United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

3. The prosecution theory was that Wes Graff would testify that he seen Yvette and Amy Anderson also in the doorway and Graff knew they both had active warrants for their arrest, so in testimony he would claim that is why he entered the hotel room, to execute warrants on Yvette and Amy.

Officer Gross was the first officer into the room and he states in his report who he seen in the doorway and why law enforcement entered the room. A police officer _____ testified to the same thing officer Gross had in his report, but

SUMMARY OF FACTS IN 2020 CASE

(CONTINUED)

the report is missing from the discovery evidence. The District and Appellate Judge's went with Wes Graff's theory of events.

4. Two officers remained inside the room detaining Melanie Anderson for several hours while Graff went to go get a search warrant for the room. Graff found a one-hitter paraphernalia on the floor and questioned Yvette Anderson. Then Zahn, Amy, and Yvette were taken to the Brown County Jail on the arrest warrants around 12:30 P.M..

Melanie was not under arrest but was detained until the warrant came back around 3:00 P.M.. There was four names on the warrant demanding urine samples to be tested for drugs. The four names were Zahn, Yvette, Amy, and Melanie. The police then had Melanie UA in the contaminated hotel room bathroom, and it tested positive for methamphetamine. She was at that time arrested for possessing drugs in her system. The police then searched her purse and found a baggie containing methamphetamine in it. She was then taken to the Brown County Jail.

During the subsequent warrant-authorized search of the hotel room, officers discovered methamphetamine, heroin and other evidence of drug distribution.

5. Melanie testified for the defense at the suppression hearing. She testified that while she was being held at the hotel room the officer picked up a coat and asked her whose

SUMMARY OF FACTS IN 2020 CASE

(CONTINUED)

This coat belongs to? Response "Zahn" Refer to Appendix _____ pages _____ for exact verbatim testimony. She also testified that the police rummaged through the bags laying on top of the bed. Refer to Appendix _____ pages _____ for verbatim testimony. While Melanie was detained for those hours, one of the officers took her and her dog outside to smoke cigarette. The officer took her outside twice during the detainment. The other officer stayed inside the room to keep it secured alone.

6. Mr. Thomas J. Cogley, Zahn's attorney made a second argument on this situation claiming the search began long before the search warrant was issued. The coat that the officer picked up and asked Melanie whose coat it was, did have drugs in the pockets. It would appear that the police knew the coat contained drugs and wanted to know whose drugs were in the pocket. No drugs could be seen with the coat laying on the bed. I'm sure many questions were asked in those several hours. One could only assume what went on in the room while Melanie was outside smoking. "A search within the meaning of the Fourth Amendment occurs, at a minimum, "Where, the Government obtains information by physically intruding on a constitutionally protected area." U.S. v. Jones, [565 U.S. 400], Ante, at --, n. 3, 181 L. Ed. 2d, at 919. Refer to pages 33-35 in this Writ.

SUMMARY OF FACTS IN 2020 CASE

(CONTINUED)

7. Only one officer had testified at the suppression hearing and he testified that "they only stayed inside the hotel room so they could secure both exits in the room." Refer to Appendix _____ pages _____ for verbatim testimony. The two officers could just as well have sat outside each exit to secure the room.

8. Six weeks after the suppression hearing the magistrate judge released his report and recommendation. It was then the judge decided to impeach Melanie's testimony so Zahn had no opportunity to provide a defense for this impeachment of his only witness. There had been no mention from the Judge of impeaching Melanie Anderson at the suppression hearing.

9. In the report and recommendation from the Judge there was no ruling made on Zahn's second argument of the search beginning before the issuance of the search warrant. The District or the Appellate Court neither made any ruling in regards to Zahn's second argument. No Court yet has ever yet addressed this issue.

10. Interesting yet disturbing is the fact that in all the discovery evidence and reports there is no indication that police waited inside the hotel room, while detaining Melanie, for hours until the search warrant arrived. All this information is hidden away, the police had no intention of letting anyone find out about this type of misconduct.

SUMMARY OF FACTS IN 2020 CASE

(CONTINUED)

Zahn found out about this misconduct through letters written to Zahn from Melanie while being held in jail awaiting court. Zahn notified his attorney, Thomas Cogley, about this conduct and Mr. Cogley then filed a second argument for Zahn's defense. The search began long before the issuance of the search warrant.

Petitioner respectfully urges that all aspects of the Circuit Court and Court of Appeals decision are erroneous and at a variance with this Court's decisions and precedents as explained in the argument above and below.

VII.

EXISTENCE OF JURISDICTION BELOW

Petitioner was indicted and entered a conditional guilty plea in the United States District Court for the Northern District of South Dakota Division, to possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). He appeals the district court's denial of his motion to suppress evidence. The United States Court of Appeals for the Eighth Circuit affirmed the decision.

The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, adopting the Report and Recommendation of the Honorable Mark A. Moreno, United States Magistrate Judge for the District of South Dakota.

VIII.

REASONS AND ARGUMENTS
FOR GRANTING THE WRIT

A. THE COURT OF APPEALS HAS DECIDED A
FEDERAL QUESTION IN DIRECT CONFLICT WITH THE
APPLICABLE PRECEDENT SET BY THIS COURT.

1. On June 15, 2019, Zahn was arrested on a misdemeanor charge in Brown County, South Dakota. He was processed then released on bond the same day. On June 18, 2019 a magistrate judge issued an arrest warrant for a bond violation (a condition of the bond), from the June 15, 2019 arrest, although this warrant was issued by an error. Zahn continued with his everyday daily routine for the next five months. Zahn lived only three blocks from the Brown County Sheriff's department and never once had he encountered any law enforcement.

On July 29, 2019 Zahn pleaded guilty to the June 15, 2019 misdemeanor charge and any remaining charges were dismissed. The court clerk immediately sent an email to two sheriff employees, who handled the warrants, requesting them to return the recalled warrant to the clerk's office, as the case was resolved. The warrant was never returned by the Sheriff's office, so it remained on file and in the Sheriff's computer system. The Sheriff's office could not explain why nobody had returned the recalled warrant.

REASONS AND ARGUMENTS (CONTINUED)

B. THE COURT OF APPEALS FAILED TO ADDRESS THE ISSUE "IF THE POLICE HAVE BEEN SHOWN TO BE RECKLESS IN MAINTAINING A WARRANT SYSTEM, EXCLUSION WOULD CERTAINLY BE JUSTIFIED UNDER OUR CASES SHOULD SUCH MISCONDUCT CAUSE A FOURTH AMENDMENT VIOLATION." HERRING [555 U.S. 146].

3. Both Neitzel and Kolb testified "that only a few times in the past have they ever reviewed the warrant system." For verbatim testimony Refer to Appendix _____ pages _____ for transcript. No specifics were testified as to why the system was reviewed in the past 30 years/ Neitzel did testify as to why they don't review the system for errors. "We don't have the time or the money to be doing reviews on the warrant system." Verbatim testimony Refer to Appendix _____ Pages _____ for transcript. This testimony suggests a total or nearly total disregard for the rights of others and by a total or nearly total indifference to the consequences of an act.

Both Neitzel and Kolb testified "They know they had no safeguards in place to prevent a citizen from getting falsely arrested by police error." Both testified "They have no written procedure on how to handle recalled warrants." Verbatim testimony Refer to Appendix _____ Pages _____ for transcript.

REASONS AND ARGUMENTS (CONTINUED)

2. Office manager Kathy Neitzel and Deputy Scott Kolb testified at the suppression hearing as the governments witness. Both of them had worked at the Sheriff's department for more than 30 years. Both were responsible for handling the warrants and the Sheriff's office warrant system. Both were the system managers who were responsible to operate and monitor the performance of their warrant system. This makes it their responsibility to maintain the integrity of the system by placing safeguards in place, along with a regular routine of maintenance, to prevent these errors in their system.

The responsibility then extends to Not disregard the constitutional requirements of the citizens of Brown County, whom they serve, from any unlawful arrests resulting from the reckless maintenance of their own warrant system. Testimony from Neitzel and Kolb suggest they have no intention of maintaining the system. "No Time and No Money to review the system." For verbatim testimony refer to Appendix _____ pages _____ for transcript. It is their responsibility to not disregard the constitutional requirements of the Fourth Amendment Constitution that "No warrant shall issue, but upon probable cause, supported by Oath or affirmation."

-----*

REASONS AND ARGUMENTS (CONTINUED)

4. It appeared from testimony that the sheriff's department has no intention of placing any safeguards into the system or ever reviewing or maintaining their own warrant system. This leads us to the reckless disregard of the constitutional requirements of the citizens, whom they serve. This is deliberate and intentional misconduct which is appalling of law enforcement. "No Time and No Money to Review the System." Testimony Refer to Appendix _____ Pages _____. This type of action is Flagrant to not be protecting citizens from unnecessary and unconstitutional arrests.

*

C. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS IT WAS ONLY EMPLOYEE NEGLIGENCE WHEN THE FACTS OF THE CASE SHOW GROSS NEGLIGENCE WITH RECKLESS MAINTENANCE OF ITS DATABASE.

5. Neitzel was asked at the suppression hearing how often she failed to remove a recalled warrant "there likely had been occasions during the 30 years." then was asked how often the system is reviewed "A few times in the past." For Verbatim testimony Refer to Appendix _____ pages _____ for transcript. There appears to be a correlation to reviewing the system to find errors and failing to remove recalled warrants.

REASONS AND ARGUMENTS (CONTINUED)

Neither Neitzel or Kolb could recall any names or specific incidents, Only that there had been occasions during their career that a warrant was not removed from the system after it has been recalled.

6. Deputy Kolb totally relies on his own warrant system for complete accuracy, when his in-car computer said Zahn's warrant was active he no doubt believed the accuracy of his system, even though he personally knows this system has no safeguards in place and has never checked for errors. This is not mere negligence, this is negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to the consequences of an act. The definition of GROSS NEGLIGENCE.

_____*

D. THE COURT OF APPEALS FAILED TO ADDRESS THAT OFFICER KOLB WAS NOT "UNDER COLOR OF AUTHORITY" TO MAKE AN ARREST BECAUSE KOLB HAD VIOLATED STATE LAW STATUTE.

6. Kolb was asked at the suppression hearing if he knew exactly why he was arresting Zahn and Kolb testified "He did not know why he was arresting Zahn." He testified "He did not have a copy of the warrant with him when he went to make this arrest." For Verbatim testimony Refer to Appendix

REASONS AND ARGUMENTS (CONTINUED)

_____ pages _____ for transcript. According to the South Dakota State Law Statute _____, "If an officer does not have a copy of the warrant when making the arrest, he Must inform the arrestee of what exactly the arrest is for." the statute states also "the officer must give a copy of the warrant to the arrestee soon after the arrest." Statute Law 23A-2-9 Refer to Writ III for definition of statute page 3. The contents of the warrant must be given to the arrestee before the officer makes the arrest and not after the arrest. Kolb tells Zahn "I will tell you why I am arresting you after I get you in handcuffs." Verbatim testimony Refer to Appendix _____ pages _____ for transcript. Even on the ride to jail Kolb still didn't know exactly what the warrant was about except that it had to do with a bond condition violation. Zahn told Kolb he was not on any bond.

7. South Dakota Law says "that in order to make an arrest the officer must be "under color of authority", South Dakota State Law Statute 22-11-4 22-11-5 Refer to Writ III for definition of law, page 3. Kolb did not know why he was arresting Zahn nor did he give him a copy of the warrant. He therefore violated the law and was not "under color of authority" and unable to legally arrest Zahn. No evidence was ever presented from prosecutor that Kolb ever signed the warrant and delivered a copy to Zahn or the

REASONS AND ARGUMENTS (CONTINUED)

Jail staff.

Kolb was asked at the suppression hearing if he had given Zahn a copy of the warrant, his response "I believe so" for verbatim testimony Refer to Appendix _____ pages _____ for transcript. There was not a yes or no answer given because in fact, Kolb did not give Zahn a copy of the warrant or the jail staff as required by law. Zahn's private investigator did an investigation and checked the Brown County's Jail security camera footage of that entire time after the arrest and Kolb never returned back to the jail with a copy of the warrant. Investigator notes refer to Appendix F .

Both the District Court and Appellate Court Judge's had ruled that Kolb did give Zahn a copy of the warrant and that Kolb signed the warrant. But this did not happen. Kolb thereafter obtained a warrant authorizing a search of Zahn's apartment, during which the execution thereof resulted in the discovery of additional methamphetamine and other evidence of drug distribution.

8. In the discovery evidence there is no record of the so-called "second sheet" which comes with an arrest warrant. On this sheet is where the officer signs his name and dates, time stamps, and indicates where the arrest took place. There is no such paper included in the governments discovery material presented to Zahn. During Zahn's initial bond hearing on

REASONS AND ARGUMENTS (CONTINUED)

or about November 11, 2019 the charges of this original arrest warrant complaint did not appear before the Magistrate Judge. Refer to Appendix _____ page _____ for initial bond hearing transcript. This proves that the jail staff did not receive a signed copy of the warrant otherwise this warrant would have been turned over to the courts and the warrant would have been before the Judge.

Zahn was given a bond and bonded out on November 12, 2019. This arrest is in violation of the South Dakota State Law Statute 23A-2-9, regarding executing arrest warrants. Kolb did not inform Zahn why he was arresting him before he arrested Zahn plus did not give Zahn a copy of the warrant. This violation made Kolb "not under color of authority" to make an arrest.

9. Zahn obtained a court appointed attorney, Scott Kuck, to represent him on this charge. In all of the discovery presented to Zahn's original attorney, Scott Kuck, there was never any indication that the police did not have an active warrant to arrest Zahn on November 7, 2019. It was not until February 2020, three months after the arrest, Zahn decided to contact the Brown County Clerk's Office to check if an active warrant had existed for his arrest in November 2019. This was just before the arraignment of this charge.

REASONS AND ARGUMENTS (CONTINUED)

The clerk told Zahn there was no active warrant for his arrest. Zahn then contacted Mr. Kuck and told him of this new information on his case. Mr. Kuck then contacted the clerk of courts himself to verify this information. Mr. Kuck had the clerk print a copy of the email that was sent to the Brown County Sheriff's Department requesting the return of the recalled warrant on July 29, 2019. This all was new information regarding Zahn's case to Mr. Scott Kuck.

10. The warrant was never returned to the Clerk of Courts by the sheriff's department. This is in contrary to the Herring case [555 U.S. 135], in which the warrant was returned to the clerk's office but only the error remained on their database of the sheriff's office. The error in Zahn's case was never discovered until Zahn notified his attorney in February, three months later is also contrary to the Herring case where the error was found 15 minutes after the arrest of Herring. See Appendix _____ for warrant information.

11. "Electronic databases form the nervous system of contemporary criminal justice operations." Herring [555 U.S. 155].

"Herrings amici warn that law enforcement databases are insufficiently monitored and often out of date." Herring [555 U.S. 155].

REASONS AND ARGUMENTS (CONTINUED)

"Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty." Herring [555 U.S. 155].

"The foundational premise of tort law—that liability for negligence, i.e., lack of due care creates an incentive to act with greater care." Herring [555 U.S. 153].

"Just as the risk of respondeat superior liability encourages employers to supervise...their employees conduct [more carefully], so the risk of exclusion of evidence encourages policymakers and system managers to monitor the performance of the system they install and the personnel employed to operate those systems." Herring [555 U.S. 154].

"In analyzing the applicability of the rule, Leon admonished that we must consider the actions of all the police officers involved. 468 U.S., at 923, n 24, 104 S. Ct. 3405, 82 L. Ed. 2d 677 ("It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination").

12. The sheriff's department must be held accountable for their actions [or non-actions] with their own warrant system. They need to accept responsibility to preserve individual liberty of the Brown County citizens, whom they

REASONS AND ARGUMENTS (CONTINUED)

serve. With this Courts persausive powers the sheriff's department may remedy this situation, consider the rights of others and maintain the integrity of its own database. But then again "No Money and No Time to Review the System". ONE SMALL STEP TAKEN BY THIS HONORABLE COURT MAY WELL BE ONE GIANT LEAP FOR ALL MANKIND TOWARDS THE PROTECTION OF INDIVIDUAL LIBERTY FOR ALL.

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_____*

In early November 2020, an arrest warrant was issued for Zahn because a drug patch he was wearing for his bond conditions came back positive for methamphetamine, this is a violation of that bond condition from the November 2019 arrest at his apartment.

On November 23, 2020, law enforcement officers were dispatched to an Aberdeen, South Dakota hotel for an unrelated issue. While Officer Gross was at the hotel resolving the unrelated issue, he happened to come upon the hotel manager, who told Officer Gross of a commotion in one of the hotel rooms. The officers followed the hotel manager to the room, while the manager who was talking to Zahn and Melanie Anderson, officer Gross stood by with other officers listening to them.

REASONS AND ARGUMENTS (CONTINUED)

1. Officer Gross then stuck his head in the doorway to see who the manager was talking to and recognized Zahn. He knew Zahn had a recent warrant issued for his arrest on a bond condition violation. He immediately told Zahn he had a warrant for his arrest, then Zahn tried to shut the door and rush to the back of the hotel room. Officer Gross rushed into the hotel room along with other law enforcement to arrest Zahn for the warrant.

After Officer Gross was fully into the hotel room he then noticed two girls sitting on a sofa along the wall which could not be seen from the doorway. Gross recognized the two girls as Yvette Anderson and Amy Anderson. He knew that both of them also had arrest warrants. Officer Gross did not notice these two girls until he fully entered the room. State discovery Gross's police report, see Appendix ____

Officer Gross was the first officer inside the hotel room, so he made the arrest on Zahn. A different officer handcuffed Zahn while Gross went to attend to the arrest of Yvette and Amy Anderson. These two girls and Zahn were taken to the Brown County Jail for processing. Melanie Anderson was kept at the hotel room for unknown reasons.

When all the officers entered the room, one officer, found a one-hitter drug paraphernalia on the floor. Drug investigator Wes Graff decided after finding that and questioning the two girls he would go get a search warrant for

REASONS AND ARGUMENTS (CONTINUED)

the hotel room.

2. Two police officers stayed inside the hotel room with Melanie Zanderson while Graff went to get a search warrant. Melanie was detained inside the hotel room for several hours. During that time of waiting, One officer took Melanie outside along with her dog, the officer let Melanie have a cigarette while she was outside. This officer took Melanie outside twice during the long wait. The other officer waited inside the room while Melanie was outside. We can only assume what the other officer was doing inside the room alone with the drugs. Melanie was not under arrest at this time, and this was not her hotel room.

The police entered the room at 11:45 AM and it was not until after 3:00 PM when Graff came back with a search warrant with four names on it demanding a urine sample for testing from Yvette, Amy, Melanie and Zahn. At that time they had Melanie use the contaminated bathroom at the hotel room to give her sample. It was immediately tested and tested positive for Methamphetamine. Melanie was then arrested for having meth in her system. The police then searched her purse and found a baggie containing methamphetamine. She was then taken away to the Brown County Jail.

REASONS AND ARGUMENTS (CONTINUED)

During the subsequent warrant-authorized search of the room, officers discovered methamphetamine, heroin, and other evidence of drug distribution.

3. During the suppression hearing one police officer and Wes Graff were called to testify by the prosecution. The police officer was asked why the officers stayed inside the hotel room instead of waiting outside the door of the room. His response "There was two exits in the hotel room so we both stayed inside the room to keep both exits secured." Verbatim testimony see Appendix ____ pages _____ for transcript. The room would have been secure if each sat outside of each exit of the room, there was no need for police to wait inside the room except to gather information.

4. Interestingly though is the fact that there was absolutely no evidence or reports by the police that the police waited inside the hotel room waiting for the search warrant. No evidence in the state discovery or the governments discovery. Zahn found this out through Melanie, she had written to Zahn while he was awaiting court. In May 2021, Zahn notified Mr. Thomas Cogley about the police waiting inside the room while they handled evidence and asked Melanie questions regarding a coat which contained drugs. Mr. Cogley then began developing a second argument for Mr. Zahn, The search of the room began long before the issuance of the search warrant.

REASONS AND ARGUMENTS (CONTINUED)

E. THE COURT OF APPEALS FAILED TO ADDRESS THE ISSUE OF THE HOTEL SEARCH BEGINNING LONG BEFORE THE ISSUANCE OF THE SEARCH WARRANT.

5. Officer Gross, the arresting officer, the first officer into the hotel room was not called as a prosecution witness. In fact, Officer Gross's police report was not in the discovery evidence presented to Zahn by the government. "Prosecutors have an obligation to provide defense with exculpatory information even when no request has been made although it does not require automatic reversal under United States v. Bagley, 473 U.S. 667 (1985)". See also United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

It would appear from all the discovery that Officer Gross was never even at the hotel arrest. Even the Appellant Opinion does not mention officer Gross's name. Only Graff's name is mentioned in the Appellate Court's Opinion.

Mr. Thomas J. Cogley had refused to request the missing discovery evidence from the government concerning Officer Chris Gross's police report. Mr. Cogley refused to present our private investigator as a witness, for facts concerning Kolb not returning to the jail with a signed copy of the warrant. The facts of this case are in contrast to the opinions of the District and Appellate Court. Soon after the arrest, Officer

REASONS AND ARGUMENTS (CONTINUED)

Gross retired from the police department and became a private investigator for Mr. Cogley.

6. Officer Gross had cooberating evidence as to who was standing in the doorway of the hotel room, and to why the police entered the hotel room. His report was in the States discovery evidence and Zahn had two separate opportunities to read all the State discovery while in the Brown County Jail. In the Gross police report it states "He did not see the two other girls, Yvette and Amy Anderson, until he entered the room fully," also states "He only entered the room to execute the arrest warrant on Zahn." See Appendix ____ for the Gross police report.

This is in total contrast to Graff's testimony. Graff testified "he had seen Yvette, Amy, Melanie, and Zahn standing in the doorway of the room," also testified "That is why I entered the room because he knew that Yvette and Amy had arrest warrants." Verbatim testimony see Appendix ____ Pages ____ for transcript.

Without Gross's police report the prosecutor knew Zahn would be unable to cooberate the police officers testimony at the hearing. As it stands the Judges ruled on Wes Graff's testimony, which is not factual evidence.

REASONS AND ARGUMENTS (CONTINUED)

7. The three girls, Yvette, Amy, and Melanie, came to the hotel room at 9:00 AM on November 23, 2020 to help Zahn pack up his belongings and leave the hotel. Zahn had called the front office and asked for a late check-out.

Melanie testified for the defense. This was the only witness presented by the defense at the suppression hearing. She testified "The officer picked up a coat and asked her who the coat belonged to?" she responded "Zahn's" Verbatim testimony Refer to Appendix ____ pages _____ for transcript testimony. This coat happened to contain drugs in the pocket but the police would not have known that beforehand, unless the police had went through the coat while Melanie and the other officer were outside, while Melanie had a cigarette and the dog did his thing outside. Melanie testified "The officers rummaged through the bags on the bed also." Verbatim testimony Refer to Appendix ____ pages _____ for the transcript.

The prosecution asked two questions of Melanie at the hearing. One - "Did you do any meth in the room that day?" Response "No" Two - "Why was your UA positive then?" response "I don't know" Verbatim testimony Refer to Appendix ____ pages _____ for transcript. First off the UA will test positive if you have did meth anytime in the last 3-5 days. The test will not tell you when you last did the meth only that your urine has meth in it.

REASONS AND ARGUMENTS (CONTINUED)

As Justice Brennan explained in his concurrence in *Knotts*, Katz did not erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U.S., at 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (opinion concurring in judgment).

Justice Sotomayor, concurring, with this Court "A search within the meaning of the Fourth Amendment occurs, at a minimum, "where, the Government obtains information by physically intruding on a constitutionally protected area." *Ante*, at --, n. 3, 181 L. Ed. 2d, at 919. *U.S. v. Jones* [565 U.S. 400].

See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31-33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). Even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.*, at 33, 121 S. Ct. 2038, 150 L. Ed. 94; see also *Smith v. Maryland*, 442 U.S. 735, 740-741, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). *U.S. v. Jones* [565 U.S. 400].

REASONS AND ARGUMENTS (CONTINUED)

In Katz, this court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion." *Id.*, at 353, 88 S. Ct. 507, 19 L. Ed. 2d 576. As the majority's opinion makes clear, however, Katz's reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante*, at --, 181 L. Ed. 2d, at 920.

Thus, "when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States v. Knotts*, 460 U.S. 276, 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983) (Brennan, J., concurring in judgment); see also, e.g., *Rakas v. Illinois*, 439 U.S. 128, 144, n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). *U.S. v. Jones* [565 U.S. 400].

Justice Sotomayor, concurring, "The trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. *U.S. v. Jones* [565 U.S. 400].

A seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post*, at --, 181 L. Ed. 2d at 927 (internal quotation marks omitted). Likewise with a search. Trespass alone does not

REASONS AND ARGUMENTS (CONTINUED)

qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information. See also Post at --, 181 L. Ed. 2d, at 930 (quoting United States v. Karo, 468 U.S. 705, 713, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). U.S. v. Jones [565 U.S. 400].

A trespass on "houses" or "effects", or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy. U.S. v. Jones [565 U.S. 400]. Footnotes [5].

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F. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION BY BELIEVING INVESTIGATOR GRAFF'S TESTIMONY OVER THE POLICE OFFICER'S TESTIMONY ABOUT WHO WAS IN DOORWAY OF HOTEL AND WHY POLICE ENTERED THE HOTEL ROOM.

8. It would seem highly probable that the first officer inside the room and the officer who made initial contact with Zahn would have been included in the discovery evidence presented to Zahn from the prosecutor. This leads us to the intentional prosecution misconduct.

If Zahn would have been presented with all the discovery evidence from the government, his counsel would have

REASONS AND ARGUMENTS (CONTINUED)

been able to show that Graff gave False or Misleading testimony. His testimony should have been impeached, not Melanie's testimony. The District and Appellate Courts both ruled that since Yvette and Amy were in the doorway and had active warrants the police had a separate reason to enter the hotel room. Zahn's second argument that the police started the search long before the issuance of the search warrant was null. The fact is, they were not in the doorway of the hotel room.

9. Zahn contends in his first argument to this charge that the evidence taken from the hotel room was "fruits of the poisonous tree." If the first arrest in November 7, 2019 is suppressed, with the exclusionary rule, then Zahn would not have been put on any bond with conditions in November 7, 2019. Therefore not arrest warrant would have been issued regarding a bond condition violation in November 2020. Then the police would have no legal reason to enter the hotel room. Therefore, no search warrant would have been obtained for the hotel room and no charges filed against Zahn on November 23, 2020.

"The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search." Herring [555 U.S. 148].

10. Interestingly though, the discovery presented to Zahn, there is no indication in the evidence from the reports from

REASONS AND ARGUMENTS (CONTINUED)

all the police officers that the police ever did wait inside the hotel room, waiting for the search warrant, while detaining Melanie so they could arrest her when the search warrant arrived. It appears that the police did not want anyone to find out about this type of conduct.

Melanie told the truth at the hearing because I told those girls we are not doing any meth in this room because I am checking out today. I don't want any trouble. The Magistrate Judge did his report and recommendation in 6 weeks. After the 6 weeks the magistrate impeached Melanie in his ruling. The Judge did not say nothing about impeachment at the hearing. Zahn was then unable to provide a defense to the impeachment of his only witness.

11. Mr. Cogley filed about 12 objections to the facts of the case presented at the suppression hearing. See Appendix for objections. The District Judge denied all the objections that pertained directly to facts presented at the hearing, that the Magistrate Judge incorrectly addressed in his report and recommendation. See Appendix C for R&R. The District Judge claims he reviewed the case de novo.

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With the Court's persuasive powers with the application of the exclusionary rule, the police would be held accountable for their actions inside the hotel room in 2020. "A ruling

REASONS AND ARGUMENTS (CONTINUED)

admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." Herring [555 U.S. 152].

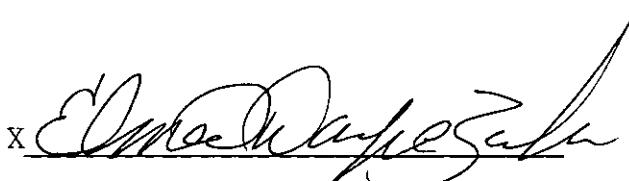
The rule serves other important purposes, It "enables the judiciary to avoid the taint of partnership in official lawlessness", and it "assures the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." Herring [555 U.S. 152].

CONCLUSION

Petitioner, Elmer Wayne Zahn, has been deprived of his basic fundamental right guaranteed by the Fourth Amendment of the United States Constitution and seeks relief in this court to restore this right. Based on the arguments and the authorities presented herein, the exclusionary rule should apply to both the 2019 and 2020 case. When this court applies it case-by-case multifactorial inquiry into the degree of police culpability, the Court would apply the exclusionary rule.

Petitioner prays this Court will issue a Writ Of Certiorari and reverse the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted on this 17 day
of August, 2023.

X 
Elmer Wayne Zahn

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