

23-6430 ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

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FILED

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SUPREME COURT, U.S.

NICHOLAS DWAYNE JONES,  
PETITIONER  
v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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BRIEF FOR THE PETITIONER

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NICHOLAS DWAYNE JONES  
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## QUESTION(S) PRESENTED

This case presents important and longstanding issues of both Fourth and Fifth Amendment law:

**Question One:** Does a defendant in a criminal proceeding still retain the right under the Fourth and Fourteenth Amendment under the United States Constitution, subsequent to the ex parte issuance of a search warrant, to a hearing to challenge the truthfulness of factual statements made in an affidavit used to support the warrant, when the government has conceded that the statements were false?

**Question Two:** Does a defendant's mere presence, coupled with his knowledge that someone other than himself intends to sell drugs, is sufficient to establish his membership in a conspiracy to sell drugs?

## LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at **Appendix A** to the petition and is reported at 74 F.4th; U.S. App. LEXIS 18690 (8th Cir. July 24, 2023)

The opinion of the United States district court

is unpublished.

The opinion of the United States Court of Appeals denying the petition for rehearing and rehearing en banc as being overlength by two pages appears at **Appendix C**.

The United States Court of Appeals mandate appears at **Appendix D**. Petitioner's request for leave to recall the mandate appears at **Appendix E**.

The United States Court of Appeals decision denying to recall the mandate appears at **Appendix F**.

## JURISDICTION

The date on which the United States Court of Appeals decided the case was on July 24,2023. A timely pro se petition for rehearing and rehearing en banc was denied by the United States Court of Appeals on September 23,2023, and a copy of the order denying rehearing and rehearing as being overlength by two pages appears at **Appendix C.**

On October 3,2023, the United States Court of Appeals issued its Mandate, and a copy of that Mandate appears at **Appendix D.** Petitioner then filed with the United States Court of Appeals a motion for reconsideration and leave to recall the mandate, and a copy of that request appears at **Appendix E.**

The petition for a writ of certiorari is filed with this Court on December 22 ,2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution states that "[t]he 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 Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

The Fifth Amendment states that no person shall be deprived of "life, liberty, or property, without due process of law..." U.S. Const. amend. V.



## STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on three counts: (1) conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and 846; (2) possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924 (c)(1)(A)(i); and (3) possession of a firearm as a prohibited person, 18 U.S.C. §§ 922(g)(1) and (g)(3), and 924(a)(2). While the case proceeded toward trial, petitioner filed several unsuccessful motions to prevent the government from introducing certain evidence. Relevant to the appeal was petitioner's motion to suppress evidence, motions in limine, and renewed motion to suppress.

Petitioner filed a motion to suppress the evidence seized during the May 4 search, arguing that the search warrant failed to establish probable cause and was based on false information. However, the district court found that probable cause somehow still supported the search of petitioner's residence. Petitioner later filed a renewed motion to suppress and a request for a Franks<sup>1</sup> hearing.

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<sup>1</sup>See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)(holding, "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request").

In this motion, petitioner took issue with the specific statements Detective Jacobs made in the affidavit to misled the issuing judge to find probable cause. The district court denied the motion. During the suppression hearing, however, the district court identified four specific inaccuracies in the affidavit with which it was "concerned and frustrated." They include the following:

1. Detective Jacobs's statement that he had received information from a CI that Jones and Nashia were involved in the sale and distribution of cocaine.  
  
The government conceded this statement was inaccurate.
2. The allegation that Ellis said "She is here," in reference to Nashia's arrival at the controlled-buy location. The audio recordings showed this was inaccurate.
3. The affidavit described Nashia's Chevrolet Avalanche as silver. The vehicle was actually tan.
4. The affidavit stated that the CI made contact with Jones and Nashia. The government again conceded that this statement in Detective Jacobs's affidavit was inaccurate because the CI only made contact with Ellis, and not, Jones or Nashia.

Despite these inaccuracies and admissions, the district court did not grant petitioner's motion because somehow it reasoned that even without the foundation for Detective Jacobs affidavit that he had received information from a CI that Jones and Nashia were involved in the sale and distribution of cocaine, that it was still

probable cause to support the search. The district court then sentenced petitioner to 322-months imprisonment.

In denying petitioner's appeal, the Court of Appeals stated that they share the district court's concern and frustration regarding the "inaccuracies," and agree with the district court's conclusion that the statements were not necessary to the finding of probable cause and a nexus between petitioner's residence and the contraband. Id. at 8. July 24, 2023. See **Appendix A**.

Petitioner then filed in the United States Court of Appeals for the Eighth Circuit a pro se combined petition for panel rehearing and rehearing en banc. September 23, 2023. See **Appendix C**.

## REASONS FOR GRANTING THE PETITION

Petitioner contends that the court of appeals erred in determining that the false statements made in the supporting affidavit for a search warrant were not necessary to the finding of probable cause. previously in *Franks*, this Court held that the Constitution allowed defendants, in some circumstances, "to challenge the truthfulness of factual statements made in an affidavit supporting the warrant," even after the warrant had issued. 438 U.S., at 155-156, 98 S. Ct. 2674, 57 L.Ed. 2d 667. If those false statements were necessary to the Magistrate Judge's probable-cause determination, the warrant would be "voided." *Ibid*. But this Court did not find all false statements relevant: Noting that "there must be allegations of deliberate falsehood or reckless disregard for the truth," and "[a]llegations of negligence or innocent mistake are insufficient." *Id.*, at 171, 98 S. Ct. 2674, 57 L.Ed. 2d 667.

1. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As that text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L.Ed. 2d 650 (2006).

Petitioner has disputed the findings of the court of appeals in this case that the statements made in the supporting affidavit for a search warrant were necessary to the finding of probable cause, and

that this determination has violated his Fourth Amendment rights under the United States Constitution and the precedent of this Court.

In Leon, this Court recognized that Leon identified four situations that per se fail to satisfy the [Leon] good[-] faith exception. In these situations, this Court found that, 'the officer will have no reasonable grounds for believing that the warrant was properly issued.'" Leon, 468 U.S., at 922-23.

One of those situations occurs as acknowledged by this Court, when "the affiant recklessly or knowingly place false information in the affidavit that could misled the issuing judge." Id. Leon, 468 U.S., at 922-23. "[T]he deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." Leon, 468 U.S., at 914. This Court then stated that, "indeed, 'it would be an unthinkable imposition upon [the magistrate's] authority if the warrant affidavit, revealed after the fact to have contained a deliberately or recklessly false statement, were to stand beyond impeachment.'" Id., at 914 n.12 (alteration in original)(quoting Franks v. Delaware, 438 U.S. 154, 165, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)).

Petitioner contends that the district court and the court of appeals, has allowed that very "unthinkable imposition" that was the basis of this Court's concern[s] in Leon to take place.

As stated above, before the district court, the government conce-

ded that the statements made by the affiant in the affidavit were in fact false statements. The affiant, himself, after being confronted by these facts acknowledged that the statements he made in the affidavit of receiving information from a confidential informant that that the petitioner was involved in the sale and distribution of cocaine in the Des Moines Metro Area during the month of March 2020, were false.

As noted by the Court of Appeals for the Seventh Circuit in United States v. Mullins, 803 F.3d 858 (7th Cir.2015). Id., at 861.

Specifically,

[a] defendant is entitled to a Franks hearing-an evidentiary hearing regarding the veracity of information included in a search warrant application-if he can make a substantial preliminary showing that: (1) the warrant affidavit contained false-statements, (2) these false statements were made, intentionally or with reckless disregard for the truth, and (3) the false statements were material to the finding of probable cause.

Id., at 861-62.

Petitioner therefore contends that the court of appeals decision not to remand this case back to the district court to conduct a Franks hearing, violated petitioner's Fourth Amendment rights and the rule outlined by this Court in Franks v. Delaware, 438 U.S. 154, 155-56, 57 L.Ed. 2d 667, 98 S. Ct. 2674 (1978), "that the Constitution allowed defendants, in some circumstances," 'to challenge the truthfulness of factual statements made in an affidavit supporting the warrant,'" even after the warrant had issued. 438 U.S. at 155-156. If those false statements were necessary to the Magistrate Judge's

probable-cause determination. Ibid.

It was therefore not disputed in the district court or the court of appeals in this case that: (1) the warrant affidavit did not contain false-statements, or that (2) that these false statements were not made, intentionally or with reckless disregard for the truth. The only dispute is whether the false statements were material to the finding of probable cause.

Petitioner contends that the false statements were in fact material and necessary to the Magistrate Judge's probable-cause determination for the following reasons:

First, paragraph three of page 9 state that:

During the month of March 2020, the affiant received information from a confidential informant who stated that a female named Nashia Jones and a male named Nicholas Jones were involved in the sale and distribution of cocaine in the Des Moines Metro Area.

Second, paragraph(s) five, six and eight of page 10 state that:

Between the dates of March 16th, 2020 and March 18th, 2020 the affiant utilized a confidential informant to conduct a "controlled" purchase (meaning one done under the direction and control of law enforcement) cocaine from Nashia and Nicholas using an "unwitting informant" (meaning one who is unaware he/she is working with law enforcement) at a predetermined buy location in the Des Moines Metro Area.

Third, paragraph six of page 10 state that:

Detective Murillo and the affiant met with the confidential informant at a predetermined meeting location. Detective Murillo searched the confidential informant's person and vehicle for money, drugs, and contraband. Nothing was located during the search. The confidential

informant was given a sum of M.I.N.E. Task Force buy money to purchase a quantity of cocaine from Nicholas and Nashia. The confidential informant was also equipped with an electronic recording device.

Fourth, paragraph eight of page 10 state that:

Detective Howe stated he observed the confidential informant arrive at the predetermined buy location. At the predetermined buy location the confidential informant made contact with "unwitting informant." The affiant then stated in the affidavit, that he overheard the "unwitting informant" make contact with Nashia and Nicholas the (petitioner) over the electronic recording device.

Fifth, paragraphs four, five, six and seven, state that:

Detective Murillo and the affiant followed the confidential informant back to the predetermined meeting location without making any stops along the way. Detective Murillo searched the confidential informant's person and vehicle for money, drugs, and contraband. Nothing was located during the search. The confidential informant handed me (the affiant) a tied-off plastic baggie containing an amount of a white powdery substance.

The affiant then states that he then debriefed the confidential informant. The confidential informant stated that after arriving at the predetermined buy location he/she met with the "unwitting informant". The confidential informant stated a short time later the "unwitting informant" stated, "She is here." and the confidential informant handed the M.I.N.E. Task Force buy to the "unwitting informant".

The affiant then state that the confidential informant stated the "unwitting informant" met with a light-skinned, black female and a short time later the light-skinned, black female left and the "unwitting informant" gave the confidential informant an agreed upon amount of cocaine. The confidential informant stated he/she left the predetermined buy location. I showed the confidential informant a driver's license photo of Nashia and the confidential stated Nashia was the person who exchanged cocaine for the M.I.N.E. Task Force buy money. I also reviewed the audio recordings captured by the confidential informant during the "controlled buy", and it confirmed information provided by the confidential informant.



The narcotics purchased by the confidential informant were transported to the M.I.N.E. Task Force Office to be weighed and secured. The narcotics field tested positive for cocaine. The narcotics were secured in the evidence locker.

During petitioner's trial, the affiant was asked the following on cross examination:

Q. The confidential informant never told you that Nicholas and Nashia Jones were selling cocaine, did they -- did she?

A. Correct.

Q. So that is an inaccurate statement, isn't it?

A. That is basically a cumulation of my statement, yes.

Q. At what point was Nicholas Jones' (the petitioner) name ever mentioned by the CI?

A. It wasn't.

See TR. T. Vol. II., at Page 201. Attached to petitioner's request for a writ of certiorari at **APPENDIX G**.

Furthermore, during petitioner's trial the affiant admitted to a number of false statements made intentionally or with reckless disregard for the truth in his affidavit. Consider the following:

Q. Do you remember putting in the search warrant application the statement that upon the confidential informant's arrival, quote, the confidential informant then made contact with Nicholas and Nashia?

A. Yes, I do.

Q. Not the unwitting, the confidential informant made contact

with Nicholas and Nashia?

A. Correct. That was a misstatement.

Q. That was incorrect, right?

A. Yes, it was.

See TR. T. Vol. II., at Page 212. Attached to petitioner's request for a writ of certiorari at **APPENDIX G**.

Q. And on the search warrant application, do you remember putting down the statement, "Using the electronic recording device, I confirmed the unwitting had already been in contact with Nashia and Nicholas. The unwitting informant advised the confidential informant Nashia and Nicholas had dropped off the predetermined amount of cocaine with the unwitting informant"?

Do you remember that statement?

A. Yes, I do.

Q. It's not true, is it?

A. Correct.

See TR. T. Vol. II., at Page 215. Attached to petitioner's request for a writ of certiorari at **APPENDIX G**.

Q. You also set out that not only did you overhear the unwitting state Nicholas and Nashia had already dropped off the drugs, do you remember making a statement in your search warrant application, "I then debriefed the confidential informant and he/she stated after arriving at the buy location, he/she made contact with the unwitting. The unwitting informant stated

Nashia and Nicholas had dropped off the cocaine already"?

A. Correct.

Q. Not true, is it?

A. Correct.

Q. You also went on or went one step further in your search warrant application and said, "I confirmed this conversation using electronic recording device."

A. Correct.

Q. And, again, that's not accurate, is it?

A. It is not accurate, no.

See TR. T. Vol. II., at Page 216. Attached to petitioner's request for a writ of certiorari at **APPENDIX G**.

The affiant also acknowledged that the one time that the confidential informant made direct contact, it was with, Nashia Jones, but also acknowledged the following:

Q. Did she make direct contact with Nashia Jones?

A. One time she did.

Q. But she did not purchase cocaine directly from them?

A. Correct.

See TR. T. Vol. II., at Page 170. Attached to petitioner's request for a writ of certiorari at **APPENDIX G**.

Petitioner also note that the above acknowledgment made by the affiant that the only time the confidential informant made direct contact with the Jones' that there was no purchase of cocaine from

them, directly. Although, the affiant's affidavit states otherwise throughout.

In this case, a search warrant was made possible by the filing of a fraudulent affidavit, that intentionally or with reckless disregard for the truth, misled the issuing Magistrate Judge to grant probable cause in this case.

The court of appeals has acknowledged that the first requirement for a Franks hearing was met by petitioner, but found that the statements made by the affiant was not necessary to the finding of probable cause to prove the second criteria for a Franks hearing. Id. (quoting Franks, 438 U.S., at 155-56).

Petitioner asserts that the fraudulent affidavit by the affiant has "necessarily affected[] the four-corners analysis as to whether the affidavit established probable cause to search petitioner's residence." Begining with the second prong of the Franks analysis because the district court, the government and the court of appeals has conceded that the first analysis has been met: whether petitioner made a substantial showing that the fraudulent affidavit would be sufficient to vitiate the probable cause determination. Petitioner contend that this question was answered by this Court in Leon, when this Court held that in these situations, 'the officer will have no reasonable grounds for believing that the warrant was properly issued ' Leon, 468 U.S., at 922-23.

In this case, the affidavit purports to establish probable cause based solely on the affiant's fraudulent and misleading omissions throughout his affidavit, not to mention, a fictitious informant who

provided him with information during the month of March 2020, that petitioner was involved in the sale and distribution of cocaine.

The only other basis for the court of appeals conclusion that the statements made by the affiant was not necessary to the finding of probable cause to prove the second criteria for a Franks hearing, meanders into petitioner's past convictions. Although, courts have held that a defendants relevant criminal history can inform the existence of probable cause, it must be coupled with other independent evidence, such as, drug paraphernalia found in a defendants garbage, or an informant's tip. See *United States v. Hohn*, 8 F.3d 1301, 1302, 1306-07 (8th Cir.1993); *United States v. Reinholz*, 245 F.3d 765, 776 (8th Cir.) and *United States v. biondich*, 652 F.2d 743, 744-46 (8th Cir.)(baggie containing small amount of marijuana and folded paper containing traces of opiates found in trash, coupled with occupant's two prior drug convictions, established probable cause for search warrant), cert. denied, 454 U.S. 975, 70 L.Ed. 2d 395, 102 S. Ct. 527 (1981).

In petitioner's case, there was no such "corroborating evidence" that would give further support to the affidavit after the falsehood or omissions is redacted or corrected. Therefore, petitioner's prior convictions is not "sufficient stand-alone evidence to establish probable cause in this case."

Petitioner therefore contend that both the district court and the court of appeals violated his Fourth and Fifth Amendment rights in not granting his request for a Franks hearing on this matter.

Petitioner further contends that even if his prior convictions could establish probable cause for the search, without more, those convictions were stale because they occurred 9-years or more prior to his March 2020 arrest.

This Court should therefore grant a writ of certiorari in this case to resolve these issues.

2. The Fifth Amendment states that a defendant has a constitutional right to 'due process of law.' 384 US 985, 16 L.Ed. 2d 1003, 86 S. Ct. 1902 (1966).

In *Brecht v. Abrahamson*, 507 619, 113 S. Ct. 1710, 123 L.Ed. 2d 353 (1993) this Court found that relief for a constitutional violation is proper when the error "had a substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623.

Petitioner contend that the court of appeals exclusively relied on two cases to deny relief in this case: *United States v. Lewis*, 976 F.3d 787, 794 (8th Cir.2020) and *United States v. Bradshaw*, 955 F.3d 699, 705 (8th Cir.2020)). The court of appeals held that in viewing the evidence in the light most favorable to the jury's verdict, that there was a reasonable inference from the facts and circumstances that there was a conspiracy between Ellis and Jones (petitioner) to distribute cocaine of which petitioner (Jones) knowingly became a part.

Petitioner argued that the evidence against him in this case was not similar to the evidence in *Lewis* or *Bradshaw* for which the court based its findings.

First, unlike both of the defendants Lewis and Bradshaw, there was no evidence or testimony at trial of a testifying co-defendant that petitioner was involved in a conspiracy with them to distribute drugs. Petitioner's case is therefore distinguishable from that of Lewis and Bradshaw.

In both Lewis and Bradshaw, the government produced evidence from cooperating witness that they were involved in a conspiracy to distribute drugs with them. Id.

In petitioner's case the government never produced a cooperating witness who testified that petitioner even knew about or intentionally joined a conspiracy to distribute drugs. The record in this case does not support the court of appeals conclusion that there was a reasonable inference from the facts and circumstances of the case, that there was a conspiracy between petitioner and Ellis to distribute drugs.

Petitioner contends that the court of appeals should have reversed his conviction in this case for conspiracy to distribute drugs in violation of 21 U.S.C. § 846, because "no reasonable jury could have concluded that he was involved in a conspiracy with anyone to distribute drugs. Furthermore, petitioner contends that the jury's verdict in this case resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the district court.

Petitioner further point out that the only information in the record of this case that petitioner was somehow apart of a conspiracy

is based on nothing more than speculation and conjecture. See *Trump v. New York*, 141 S. Ct. 530 (2020). The Eighth Circuit Court of Appeals has also recognized in *United States v. Bailey*, 54 F.4th 1037 (8th Cir.2022), "that the government is not entitled to inferences based on conjecture and speculation."

The court has also recognized that "[A] defendant's mere presence, coupled with his knowledge that someone else who is present intends to sell drugs, is insufficient to establish his membership in a conspiracy." *United States v. Rolon-Ramos*, 502 F.3d 750, 754 (8th Cir. 2007), quoting *United States v. Jimenez-Villasenor*, 270 F.3d 554, 558 (8th Cir.2001).

As noted by the decision issued by the court of appeals in this case, the district court relied on the affidavit's recitation of how petitioner would arrive at the controlled-buy location while the CI was waiting for drugs, and the CI would complete the purchase immediately afterwards. See APPENDIX A.

In *United States v Fitz*, 317 F.3d 878, 883 (8th Cir.2003), the court of appeals reversed a defendant's convictions for the very same thing, concluding that the district court erred in denying the defendant's motion for judgment of acquittal because there was insufficient evidence for the conviction because the defendant was merely present at the scene of a controlled substance buy, and there was nothing else implicating him in a conspiracy. See *Fitz*, 317 F.3d at 882-83.

Likewise, petitioner contends that there was nothing else implica-



ting him in a conspiracy with Ellis to distribute drugs. Furthermore, the court of appeals decision not to remand this matter back to the district court is in direct conflict with circuit precedents. See also United States v. Rork, 981 F.2d 314, 316 (8th Cir.1992)

### **CONCLUSION**

The petition for a writ of certiorari should be granted by this Court to resolve these issues.

Respectfully submitted,

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Dated this 22nd day of December 2023