No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ELTON WHITTLE,

***Petitioner*,**

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly* describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV (emphasis added). The particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925). "In applying this requirement to searches aimed at residences within multi[-]unit buildings, such as the search in the present case, courts have declared invalid those warrants that fail to describe the targeted unit with enough specificity to prevent a search of all the units." *Maryland v. Garrison*, 480 U.S. 79, 90 (1987) (Blackmun, J., dissenting). For example, in *Garrison*, when officers and the search warrant failed to recognize that the third floor of an apartment had two separate apartments, not one, the search was valid only because the officers reacted to the information learned at the scene and refrained from searching the incorrect apartment on that floor. *Id*. at 86-89.

In this case, officers obtained a search warrant for an apartment in a four-unit building. The affidavit submitted in support asserted that the door to the apartment would be marked with the letter B on the door. The affidavit referred to unit or apartment "B" 12 times. The warrant described the unit as being marked with a "B" but on the second floor. Petitioner had never been seen leaving an apartment on the second floor. He had been seen entering a door on the first floor and reappearing with drugs. When officers arrived on the scene, the special weapons unit had busted down a door that was not marked with a "B." And yet the officers entered and searched anyway, without looking to see if any other unit was marked with a "B." Evidence showed that there was an apartment door on the first floor marked with a "B." The first question, then, is whether the state courts errs and rules contrary to this Court's precedent in failing to find that a warrant fails to describe the place to be searched with sufficient particularity and therefore a high probability existed that the wrong residence would be searched.

An invalid warrant does not lead to suppression if the officers reasonably believe the search warrant was valid. *United States v. Leon*, 468 U.S. 897, 922-23 (1984). In this case, by finding that the search was authorized, the state courts did not reach the question of whether the *Leon* good faith exception applied. Because the Court should accept this case for review and find that the search was invalid, *Leon* would become relevant. The officer that investigated the case and crafted the affidavit leading to the search warrant was on the scene of the execution of that warrant. He was the officer that was told by confidential informants that the apartment to be searched would be marked with a "B" on the door. He could not have reasonably believed that the warrant was valid when he reached the scene and discovered that the door of the apartment to be searched was not marked B, especially when evidence introduced in the case showed that another apartment was marked with a B and the officer admitted that he did not bother to look around at other apartments on the day of the search or afterward. Accordingly, the second question is whether the *Leon* good faith exception would not apply so that exclusion of the evidence would be required.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Elton Whittle respectfully petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio, which declined discretionary review.

OPINIONS BELOW

The Supreme Court of Ohio's decision not to accept jurisdiction, thereby affirming the decision of the Ohio Court of Appeals for the First District, was a decision without published opinion. *State of Ohio v. Elton Whittle*, 2024-0604, 2024-Ohio-2718 (Ohio, Jul. 23, 2024), Pet. App. 1a. The First Appellate District's is unpublished. *State of Ohio v. Elton Whittle*, 1st Dist. Hamilton Nos. C-230288, C-230318, 2024-Ohio-1023 (Mar. 20, 2024). Pet. App. 3a.

STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court of Ohio entered its decision not to accept discretionary jurisdiction on July 23, 2024. Through that decision, the Supreme Court of Ohio affirmed the Ohio Court of Appeals for the First District's decision dated March 30, 2024. The Ohio First Appellate District's opinion was the last memorandum decision addressing the issues herein.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as Petitioner is filing this petition within 90 days of the Supreme Court of Ohio's decision. See Sup. Ct. R. 13.1 and 29.2. The Court has jurisdiction over the legal questions presented because the opinion of the state court (1) relies on a state constitutional provision and state cases as well as the Federal Constitution's Fourth Amendment and federal cases, (2) does not contain any plain statement that the decision rests upon adequate and independent state grounds, and (3) indicates that the state constitutional provision is construed in pari materia with the federal constitutional provision. See *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

RELEVANT CONSTITUTIONAL PROVISIONS

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Ct.*, 407 U.S. 297, 313, 92 S. Ct. 2125 (1972). Accordingly, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly* describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV (emphasis added).

The particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925). "In applying this requirement to searches aimed at residences within multi[-]unit buildings, such as the search in the present case, courts have declared invalid those warrants that fail to describe the targeted unit with enough specificity to prevent a search of all the units." *Maryland v. Garrison*, 480 U.S. 79, 90 (1987) (Blackmun, J., dissenting) (citing *United States v. Higgins*, 428 F.2d 232 (7th Cir. 1970); *United States v. Votteller*, 544 F.2d 1355, 1362-63 (6th Cir. 1976)).

1. In February 2019, law enforcement sought a search warrant for a two-floor, four-unit apartment building in Cincinnati, Ohio. Officer Scott Brians was the case agent and the author of an affidavit submitted in support of seeking the search warrant.

2. Brians' six-page affidavit described information obtained from confidential sources including one source asserting that Petitioner was selling drugs out of Apartment B of the four-unit building. The affidavit described zero observations of Petitioner coming or going from any apartment confirmed to be marked as Unit B or any apartment on the second floor. But while monitoring a suspected drug transaction, Brians personally observed Petitioner go to a side door on the first floor of the apartment building, "retrieve something from just inside the door" and the complete the sale to a confidential informant. Despite Brians only seeing Petitioner come and go through a first-floor door, the affidavit asserted that Apartment B, which would have "the letter B affixed" to the entry door, would be "located on the second floor, North West corner." The affidavit provided zero information to support the claim that Apartment B was on a second floor. The affidavit made only one reference to the apartment being on the second floor. The affidavit made no less than 12 references to the apartment being Apartment B and made clear that the wooden door of the apartment to be searched would be marked with the letter B.

3. A magistrate signed the search warrant. The warrant authorized the search of "2840 Winslow Avenue #B." Like the affidavit, the warrant expressly and clearly reported, "Entry to apartment B will be thru a brown wooden door with the letter B affixed to it." The warrant described this apartment as being on the second floor at the northwest corner.

4. Law enforcement executed the warrant. Brians, case agent and author of the affidavit and warrant, did not lead the search. Instead, he sent a special weapons and tactics (SWAT) team in ahead, which had kicked down the door and entered an apartment on the second floor in the northwest corner before Brians even approached.

5. When Brians arrived at the door, he saw that, directly contrary to the affidavit's claims and warrant's descriptions, the door for this unit did not have the letter B affixed to it. Rather than look at whether any another apartment door had the letter B affixed to it, Brian and other law enforcement agents simply entered, searched, and seized evidence.

6. The record showed that there was a different apartment, on the first floor, that had a door with the letter B on it. This was not an outlier. This boots-on-the-ground evidence corroborated Brians' earlier observation of Petitioner entering a first floor door when engaging in a drug transaction, that apartment clearly marked with a "B" on the door was on the first floor. This also explained why there had been no observation of Petitioner entering or leaving a second-floor unit.

7. In March 2019, the Grand Jury for the Hamilton County Court of Common Pleas returned an indictment naming Petitioner and charging him with offenses including trafficking in drugs found in the building, including the apartment searched.

8. Petitioner moved to suppress evidence, noting, among other things, that while the search warrant authorized the search of Apartment B, the door of the unit through which SWAT had forcibly entered had no letter at all, that law enforcement had entered and searched Apartment D, no officer bothered to look at other doors after discovering that the door busted down was not marked "B," and another door of the building (which happened to

be on the first floor, the floor from which Petitioner had been seen coming and going) was marked "B." Petitioner noted that officers did not bother to seek a new search warrant based on accurate information, and had this accurate information been presented, probable cause would not have justified search of the apartment for which SWAT had just forcibly entered.

9. After an evidentiary hearing on the motions, the trial court denied them. The trial court's did not issue a memorandum decision. The order simply stated that the court "finds said motion not to be well taken, and the same is hereby overruled." (For this reason, the decision is not included in the Appendix.)

10. Following presentation of evidence and deliberation, the jury found Petitioner guilty on all charges. The court went on to sentence Petitioner to serve a term of imprisonment of 11 years with mandatory post-release control of not less than two years and not more than five years.

11. Petitioner appealed to the First Appellate District. Among his assignments of error, he noted that the trial court had erred in failing to suppress evidence in light of the material differences between the allegations in the affidavit and search warrant and what officers found at the scene. Once again, Petitioner noted that because Brians was the case agent and the author of the warrant, and because he was at the scene, noted that the door knocked down by SWAT did not have a letter "B" on it, because he did not bother to look for whether other apartments were marked "B," another door was, indeed marked "B," and it was on the first floor—the only floor from which Petitioner had been seeing coming and going, the officers did not have a good faith belief that the warrant was valid.

12. The Ohio Court of Appeals for the First District rejected the argument, stating, "The information known to the officers as set forth in the warrant was sufficient to locate the apartment with reasonable efforts." Pet. App. 12a (¶ 25). The First District therefore did not reach the question of whether the *Leon* good faith exception applied.

13. The Supreme Court of Ohio declined discretionary review, thereby affirming the First Appellate District's rulings. Pet. App. 1a.

Petitioner now seeks writ of certiorari, asking the Court to accept review of the state courts' rulings in contravention of the Fourth Amendment and the Court's precedent. He asks the Court to order full briefing or vacate the Ohio First Appellate district's rulings and remand.

REASONS FOR GRANTING THE PETITION FOR WRIT

The Court's reasons for granting a petition for writ of certiorari includes when a state court of last resort has decided important federal questions in ways that conflict with relevant decisions of this Court. Sup. Ct. R. 10(c). The Supreme Court of Ohio, by affirming the state intermediate court's decision, has decided a constitutional question in a way that conflicts with the Court's precedent, including but not limited to its ruling and reasoning in *Maryland v. Garrison*, 480 U.S. 79 (1987). When officers including the officer who investigated the case and swore to the affidavit seeking the search warrant finds at the scene that material assertions in the warrant are inaccurate and that carrying out the search carries a real risk that the wrong residence will be searched, the Fourth Amendment is violated. Accordingly, a state court of last resort has decided an important federal question in a way that conflicts with the relevant decisions of this court, and certiorari is warranted.

I. The Court Should Grant Certiorari to Address the State Courts' Finding, in Conflict with the Court's Precedent, that a Warrant Sufficiently "Described the Place to be Searched with Particularity" when Officers Arriving on the Scene Encountered an Apartment in a Multi-unit Building that Did Not Match the Warrant's Description and a Real Risk Existed that the Wrong Residence would be Searched.

A. The Fourth Amendment's Particularity-of-description Requirement is Not Satisfied where there is a Material Error in the Description of the Residence to be Searched and a Reasonable Probability Exists that Another Premises might be Mistakenly Searched.

The Fourth Amendment to the U.S. Constitution, which is applied to the states through the Fourteenth Amendment, provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched*, and the persons or other things to be seized." U.S. Const., amend IV (emphasis added). The Fourth Amendment was a direct response to the colonists' objection to searches of homes under general warrants or without warrants. See *Chimel v. California*, 395 U.S. 752, 761 (1969). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). See *Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679 (1961)). Accordingly, the Court has described the physical invasion of the home the "chief evil" deterred by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); see *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.").

"The proceeding by search warrant is a drastic one." *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138 (1932). Abuse of the search warrant "led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." *Id*. (citing *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524 (1885); *Byars v. United States*, 273 U.S. 28, 32, 47 S. Ct. 248 (1927); *Marron v. United States*, 275 U.S. 192, 196, 197, 48 S. Ct. 74 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S. Ct. 420 (1932)). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting *Boyd*, 116 U.S. at 635).

A warrant shall particularly describe the place to be searched. U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). "[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). The particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925). "In applying this requirement to searches aimed at residences within multi[-]unit buildings, such as the search in the present case, courts have declared invalid those warrants that fail to describe the targeted unit with enough specificity to prevent a search of all the units." *Maryland v. Garrison*, 480 U.S. 79, 90 (1987) (Blackmun, J., dissenting) (citing *United States v. Higgins*, 428 F.2d 232 (7th Cir. 1970); *United States v. Votteller*, 544 F.2d 1355, 1362-63 (6th Cir. 1976)).

Courts have used different criteria to determine whether a warrant has identified a unit with sufficient particularity. In the Sixth Circuit, courts apply a two-prong test to determine (1) "whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort" and (2) "whether there is any reasonable probability that another premises might be mistakenly searched." *United States v. Gahagan*, 865 F.2d 1490, 1496 (6th Cir. 1989). "A warrant's description of the place to be searched need not be 'technically accurate in every detail.' *United States v. Jones*, 707 Fed. Appx 317, 320 (6th Cir. 2017) (quoting *United States v. Durk*, 149 F.3d 464, 465 (6th Cir. 1998)). Rather, the courts "must consider whether, given the circumstances of the particular case, there was a reasonable probability that another location could have been mistakenly searched because of the inaccuracies contained in the warrant." *Knott v. Sullivan*, 418 U.S. 561, 569 (6th Cir. 2005). See *United States v. Durk*, 149 F.3d 464, 465 (6th Cir. 1998) ("The test for determining whether a search warrant describes the premises to be searched with sufficient particularity is not whether the description is technically accurate in every detail, but rather whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched.") (internal quotation marks and citations omitted); see also *United States v. Pelayo-Landero*, 285 F.3d 491, 496 (6th Cir. 2002).

B. In this Case, Once Officers Arrived on the Scene and Discovered that the Apartment on the Second Floor in the Northeast Corner was not Marked with a "B"—as the Affidavit Stated it would be no less than 12 Times—the Officers Knew or Should have Known that the Warrant did not Sufficiently Describe the Place to be Searched with Sufficient Particularity and a Real Risk Existed that the Wrong Residence would be Searched.

In this case, once Officer Brians saw that the door SWAT busted open was not marked with a "B" as his own affidavit had reported it would be, he knew of his sources of or should have known that his sources of information were incorrect, there was a "real risk" the wrong residence was being searched and that the warrant was invalid.

Officer Brians arrived at the scene to find that SWAT had already entered one of the building's residences. But Brians discovered that the "northwest corner" unit described in the search warrant was not identified as Unit B. The door of the residence SWAT entered had no apartment identifier at all. Upon this discovery, Brians did not bother to look on the doors of other apartments. Had he done so, the record shows that there was another apartment with a door that had the letter B identifying it as Unit B.

The photographs introduced at this hearing show that there was a different unit labeled as Unit B. Brians and other officers either knew there was reason to question the accuracy of the information he received from the confidential informants and whether the correct residence had been entered, or they willfully blinded themselves to that reality by failing to conduct bare minimum investigation such as walking around to other doors of the building to see whether another apartment door was identified with a B.

Once Brians recognized that SWAT had busted down the door to an apartment that was in the "northwest corner" as described but that was not labeled as Unit B, he knew or should have known there was a conflict in the warrant that meant that the "place to be searched" had not been described with sufficient "particularity" to avoid a real risk that the incorrect residence had been entered (and was about to be searched) and to believe that probable cause existed to search the residence SWAT had just forcibly entered. Because a reasonably prudent person would have

reason to question whether the residence SWAT had entered was the residence for which there was probable cause to search, and because the description of the warrant contained a "real risk" that the officers had entered the incorrect residence, the warrant was invalid and the search, which failed to conform to the particularity requirement of the Fourth Amendment, was unconstitutional. See *State v. Castagnola*, 145 Ohio St. 3d 1, 2015-Ohio-1565, ¶ 89. Because the warrant was invalid and the search was unconstitutional, the trial court erred in failing to grant Whittle's motion to suppress all evidence seized on February 22, 2019.

C. The Ohio Intermediate Court Erred and Ruled in Conflict with this Court's Precedent in Finding that the Particularity of Description of the Premises to be Searched was Sufficient.

On appeal, Petitioner noted that the trial court had erred in failing to suppress evidence in light of the material differences between the allegations in the affidavit and search warrant and what officers found at the scene. Petitioner also noted that because Brians was the case agent and the author of the warrant, and because he was at the scene, noted that the door knocked down by SWAT did not have a letter "B" on it, because he did not bother to look for whether other apartments were marked "B," another door was, indeed marked "B," and it was on the first floor—the only floor from which Petitioner had been seeing coming and going, the officers did not have a good faith belief that the warrant was valid.

In response, the State of Ohio agreed that, when there is "any" reasonable probability that the wrong residence will be or is being searched, the search warrant is invalid. But the state claimed that Petitioner's "residence was clearly identified in the affidavit without reference to the letter designation of the apartment unit." This was simply false. There were 12 references to Petitioner's residence being marked with a "B." There was only one reference to the unit being

on the second floor, and the affidavit did not explain why that was believed to be true. Officer Brians' personal knowledge supported a conclusion that Petitioner's unit was on the first floor. After all, Petitioner was never seen coming and going from a second-floor unit. Meanwhile, Brians had seen Petitioner go into a door on the first floor and return immediately with what Brians claimed to be drugs.

After recognizing that a search warrant and its supporting affidavit must particularly describe the place to be searched and acknowledging the disconnect between the affidavit's claims and the facts encountered at the scene, the state appellate court rejected Petitioner's arguments with just two paragraphs (four sentences) of reasoning:

> Further, the house had been under surveillance before the search. The officer who drafted the affidavit used to obtain the warrant also participated in the execution of the warrant, which diminishes the chances of a mistaken search. See *Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, 937 N.E.3d 136, at 127. Under the circumstances, we cannot hold that the trial court erred in denying Whittle's motion to suppress. Therefore, we overrule his first assignment of error.

Pet. App. at 9 (¶¶ 25-26).

The state appellate court's legal conclusion relied on a portion of testimony from the suppression hearing. But that testimony showed that Brians was relying on an unreliable informant. As the appellate court noted in the decision, Brians testified that he "knew" that Petitioner's mother lived in the bottom right apartment, Petitioner's father lived in the top left apartment, an unknown person lived in the bottom left apartment, and Peitioner lived in the top left apartment. Pet. App. at 8 (¶ 21). But Brians came to this conclusion by relying "on information from a [single] confidential informant who" had equated the apartment in the north

west corner as the one that was marked with the letter "B." *Id*. This information was proved to be false when Brians, for the first time physically, was personally at the apartments.

The state appellate court's correct statements that the house had been under surveillance and that the officer who drafted the affidavit participated in the search did not support the denial of the motion to suppress and, indeed, supported a finding of constitutional error. That Brians had surveilled the residence and prepared the affidavit show precisely why, once he arrived at the scene of the SWAT team having busted down a door that did not have a "B" on it, he of all people would have known immediately there was a significant problem. Like the officers arriving on the scene in *Maryland v. Garrison*, addressed in more detail in the next section and who discovered the warrant wrongly assumed there was only one apartment on the third floor, not two, the officers in this case needed to recognize the material error, recognize the risk they would be searching the wrong residence, and adjust, as the officers did in *Garrison*. The officers in this case did not. Despite arriving at the scene to discover that the confidential informant was wrong about the apartment, that the affidavit's 12 references to the apartment door being marked "B" were wrong and thus that the warrant described the wrong premises, the officers trudged forward.

Accordingly, the state appellate court's statement, "The information known to the officers as set forth in the warrant was sufficient to locate the apartment with reasonable efforts" is simply false as proved by the record. Again, the affidavit stated no less than 12 times that Whittle's residence was Apartment B, and the affidavit made clear the apartment would have the letter "B" on it. The information known to the officers, then, was that they were to search Apartment B and that Apartment B would be marked. Only once in the affidavit was there an allegation that the apartment was on the second floor. But, again, nothing in the affidavit showed

why that was believed to be true, while the affidavit showed reasons to believe that Whittle was living or trafficking from a first-floor apartment. As soon as Brians arrived and saw that SWAT had bust down a door that was not marked "B," the "information known to the officers" materially changed. Brians had reason to believe that the source claiming the apartment clearly marked B was not, in fact, reliable, and reason to look at other apartment doors. Instead, Brians purposely chose to remain ignorant and continue the search.

The facts that Brians was the author of the affidavit and on the scene to see that SWAT had busted down a door without the letter "B" on it should have caused the First District to find Brians would have or at least should have known that assertions in his own affidavit were inaccurate. But the First District flipped that on its head to find that this "diminishes the chances of a mistaken search." Pet. App. at 9 (¶ 26). The record shows that the chances of a mistaken search were not diminished precisely because Brians chose to ignore the discrepancy, chose to ignore the fact that he had personally only seen Whittle enter and leave the building out of a first floor door, and chose not to look at other apartment doors for whether there was one marked "B."

Brians speculated that, while he did not know whether the door on the first floor shown to be marked "B" was that way on the day of the search, "this 'B' *could have been* placed there" later. Appendix at 9 (¶ 24) (emphasis added). This was more evidence of Brians choosing to ignore the realities of the facts he and law enforcement encountered during the search and not act in good faith. But this was not, as the First District tried to spin it, proof that the first-floor door was not marked "B" on the day of the search.

In sum, the state appellate court constitutionally erred in affirming the trial court's ruling that the warrant was valid. A citizen's residence was searched. Even if the warrant was valid

based on what Brians believed when he presented the affidavit to the magistrate, once Brians saw that the second-floor apartment that he had been told was Apartment B was not, in fact, marked with the letter "B," Brians knew or should have known that the warrant had been based off inaccurate claims, a "real risk" existed that officers were searching the wrong residence. The evidence needed to be suppressed in lieu of Brians returning to the magistrate to correct the errors and seek a new search warrant. Because the evidence was not suppressed, Whittle's convictions should be vacated and the matter remanded for a new trial. Thus, last state court memorandum decision conflicts with this Court's precedent, and the Supreme Court of Ohio affirmed that ruling, so that a decision of a state's highest conflicts with a relevant decision of this Court and review on certiorari is appropriate. See Sup. Ct. R. 10(c).

D. The Court's Decision in *Maryland v. Garrison* Demonstrates that the Ohio Courts have Ruled Contrary to the Court's Precedent.

In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013 (1987), the affidavit submitted in support of a search warrant and the warrant understood that there was only one apartment on the third floor of a multi-unit building. *Id*. at 80. Once on the scene, after beginning the search and discovering contraband, law enforcement learned the third floor was divided into two apartments. *Id*. at 81. The Supreme Court affirmed the search and the admission of the evidence obtained in the search using a *Leon*-good-faith type of rationale and because the officers had already begun searching before realizing the error and then immediately stopped . *Id*. "Only after respondent's apartment had been entered and heroin, cash, and drug paraphernalia had been found did any of the officers realize that the third floor contained two apartments. As soon as they became aware of that fact, the search was discontinued." *Id*. (citations to the record in *Garrison* case omitted).

The *Garrison* Court stated, "Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of [the multi-unit building], they would have been obligated to exclude respondent's apartment from the scope of the requested warrant." *Id*. at 85. This was, in other words, the Court finding that the search would have been invalid, and the evidence excludable, had the officers recognized the moment they reached the third floor of the error in the warrant. See *Navarro v. Barthel*, 952 F.2d 331, 333 (9th Cir. 1991) (interpreting *Garrison* as reenforcing that "the right to be free from a search of the wrong place, even when executed pursuant to a warrant, is secured by the Fourth Amendment) (citing *Garrison*, 480 U.S. at 84); see, also, *id*. ("The Warrant Clause categorically protects against unreasonable searches of places inadequately described.") (citing *Garrison*, 480 U.S. at 84).

Applying that principle to this case, Officer Brians knew, or absolutely should have known once arriving on the scene, that there was a material error in the warrant, as the unit's door was not marked "B." Under *Garrison*, then, Brians and other officers were obligated to exclude the second-floor apartment from the search. The proper responses were to search the other apartment doors for a B and/or to use the information obtained at the scene to seek a new warrant.

Like the warrant in *Garrison*, the warrant in this case may have been valid at the time it was executed, *Garrison*, 480 U.S. at 85-86, as a material fact on which the affidavit and warrant relied had <u>not yet</u> been shown to be false. But unlike the officers in *Garrison*, Brians was not well into his search before recognizing that there was a material error in the warrant. He saw the error as soon as he saw the busted-open door without a "B" on it. And unlike the officers in

Garrison, Brians could not have believed, in good faith, that what he had observed and learned from a confidential informant together led to probable cause that this unit on the second floor, behind a door that was not marked with a "B," was the proper residence to be searched or that there was no reasonable risk they were searching the wrong residence.

In conclusion, the Supreme Court of Ohio, by affirming the state intermediate court's decision, has decided a constitutional question in a way that conflicts with the Court's precedent. Thus, a state court of last resort has decided important federal questions in ways that conflict with relevant decisions of this Court, and certiorari is warranted. Sup. Ct. R. 10(c).

II. The Court Should Grant Certiorari to Address the Question of whether *Leon*'s Good Faith Exception Applies and Rule that it Does Not Apply.

A. The Exclusionary Rule and *Leon*.

Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. 338, 347 (1974). But "the exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid." *Massachusetts v. Sheppard*, 486 U.S. 981, 922-23 (1984).

In *United States v. Leon*, 468 U.S. 897 (1984), the Court held that suppression of evidence obtained from an invalidated search warrant "is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926. In other word, this "good-faith exception" is not a license to give an otherwise insufficient warrant validity. For example, as is

relevant here, "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id*. at 923.

B. The State Courts Could Not have Properly Found that the *Leon* Good Faith Exception Applied on these Facts.

The *Garrison* Court held that the evidence seized did not need to be suppressed because the officers had a good faith belief they were in the correct apartment when obtaining evidence and ceased as soon as they discovered the disconnect between the affidavit (describing entire third floor as the apartment to be searched) and the realities of the scene (the third floor had two apartments). *Garrison*, 480 U.S. at 88. But this same principle cannot apply in this case because (1) the disconnect was apparent the moment the officers appeared and (2) yet they entered the wrong apartment anyway, searched, seized, and left—all without bothering to look at other apartment doors to see if another one was marked "B."

In this case, Brians and the other officers' reliance on the warrant was neither in good faith nor objectively reasonable. The affidavit connected the northwest unit with "Unit B" through information from a single informant. The warrant claimed the residence would be both the second floor northwest unit and marked Unit B. Once Brians arrived and learned that the northwest residence was not marked with a B—and when willfully deciding not to look at other apartments for whether they were marked with a B—the continuation of the search was not done in good faith.

Brians could not execute the warrant in blind reliance on the judge having determined that the affidavit was accurate. This is because Brians had personally authored the affidavit based

on what he reported had been told to him by informants. Assuming for the sake of this petition that Brians is a well-trained officer, he would have known or should have known immediately on arriving at the scene and seeing that SWAT had broken into an apartment not identified as Unit B that the informants' information was inaccurate and that the warrant was invalid because it failed to describe a single residence without a real risk that the officers were entering the incorrect home. Accordingly, if the Court were to agree that the Ohio courts ruled contrary to its precedent in finding that the particularity of the description of the residence was sufficient, the *Leon* good faith exception would not apply to save the unlawful search and seizure of evidence in this case, the state court decisions must be vacated, and a new trial is required.

CONCLUSION

Petitioner Elton Whittle submits that his petition for writ of certiorari should be granted for the compelling reasons noted above and under Supreme Court Rule 10(c). He asks the Court to grant his petition and either (1) remand to a lower court with instructions to find that his Fourth Amendment rights were violated and ordering suppression of the evidence or, in the alternative, (2) grant full briefing in this important matter to address and resolve these important constitutional questions.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 13 September 2024

by: /s/ Jeffrey M. Brandt

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari and the following appendix were served by U.S. Priority Mail on the date I reported below upon the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and by email to SupremeCtBriefs@USDOJ.gov; and Ohio Attorney General, Dave Yost, 30 E. Broad Street, 14th Floor, Columbus, OH 43215.

Dated: 13 September 2024

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt

APPENDIX