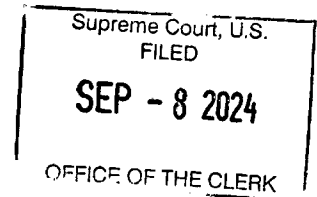


No. 24-5702

**ORIGINAL**

IN THE  
SUPREME COURT OF THE UNITED STATES



James Robert Bailey — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Robert Bailey 11673-509 F-Unit  
(Your Name)

Federal Correctional Institution, P.O. Box 7000  
(Address)

Texarkana, TX 75505  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

Whether the district erred by applying the good-faith exception to a warrant that was void ab initio?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

There are no related cases.

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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**

☐ 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 2024 U.S. App. LEXIS 15210 (5th Cir. 2024); or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix   B   to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 24, 2024.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. VI cl. 2

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Amend. 4

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.

1866 Treaty, Cherokee July 19, 1866 14 Stats, 799 Art. 13

The Cherokees also agree that a Court may be established by the United States in said Territory, which such Jurisdiction and organized in such manner as may be prescribed by laws; Provided, that judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation, by nativity or adoption shall be the only parties, or where the Cause of action shall arise is the Cherokee Nation, except as otherwise provided in this Treaty.

Treaty of New Echota with the Cherokees, 29 December 1835. 7 Stat. United States Statutes at Large 478.

Indian Territory (New Oklahoma) promising that it would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory" the United States also promises to "secure to the Cherokee Nation the right to make and carry into effect all such laws as they may deem necessary".

## STATEMENT OF THE CASE

On May 13, 2020, the wife of James Bailey reported to Oklahoma state law enforcement that she had discovered nude photographs of her daughter on Mr. Bailey's cell phone.<sup>1</sup> Two days later, a Sand Springs Police detective obtained a state warrant to seize Mr. Bailey's phone. The detective executed the warrant on the same day and seized Mr. Bailey's cell phone, which contained at least nineteen sexually explicit images depicting Mr. Bailey sexually abusing his 14-year-old stepdaughter.

Subsequently, several months after McGirt v. Oklahoma, -US-, 140 S.Ct. 2452, 207 L. Ed. 2d 985 (2020), federal authorities indicted Mr. Bailey on multiple child sex offenses, including sexual abuse of a minor in Indian Country. Mr. Bailey moved to suppress the evidence, arguing that the search warrant was "improper" because "the court lacked subject matter jurisdiction" when it issued the warrant, and the detective was aware of Mr. Bailey's tribal affiliation before he obtained the warrant. Although Mr. Bailey--an enrolled member of the Cherokee Nation--is not a member of the Creek Nation, the conduct for which Mr. Bailey was charged occurred within the Creek Nation "portion of Tulsa County." As a result, the crime fell under federal jurisdiction because it happened in Creek Nation territory, regardless of Mr. Bailey's specific tribal affiliation.

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1. Unless otherwise noted, the Summary of the Case is taken from the Background section of the Order and Judgment of the Tenth Circuit Court of Appeals. See, Appendix A at 2-3.

The government countered that the detective had relied in good faith on a warrant issued by a neutral state magistrate judge. The district court agreed with the government, concluding that "the good-faith exception applie[d] to state-issued search warrants issued and executed pre-McGirt within tribal jurisdiction against property of Native Americans." Suppression, therefore, was not warranted.

Mr. Bailey pleaded guilty to Coercion and Enticement of a Minor but reserved his right to appeal the denial of his motion to suppress. The district court sentenced Mr. Bailey to ten years of imprisonment and imposed lifetime supervision with strict "Special Sex Offender Conditions."

Mr. Bailey filed a timely notice of appeal with the Tenth Circuit Court of Appeals. The case was remanded to the district court following initial review for corrections to the imposed term of supervised release.

On the second appeal, Mr. Bailey asserted that the search warrant from which the conviction resulted was obtained in violation of the Fourth Amendment to the Constitution ab initio whereas the issuing Magistrate lacked the jurisdictional authority to issue the search warrant and that the Leon exception did not apply because the warrant violated the sovereignty of the Creek Nation.

The second appeal was denied on June 24, 2024 by unpublished opinion. Although the issue raised by Mr. Bailey dealt with the jurisdictional validity

of the warrant ab initio, the Tenth Circuit's ruling applied the precedence established in United States v. Pemberton, 94 F.4th 1130, 1136-40 (10th Cir. 2024) and determined that the good faith exception to the exclusionary rule applied to the facts of the case under United States v. Leon, 468 U.S. 897, 906 (1984). See, Appendix A.

The issue of whether a warrant is invalid ab initio and therefore violated the jurisdictional sovereignty of the Creek Nation was not discussed by the reviewing panel.

## REASONS FOR GRANTING THE PETITION

Mr. Bailey respectfully submits that granting the instant Petition for Writ of Certiorari is warranted whereas the United States Court of Appeals for the Tenth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

Specifically, the appellate court ruling in this instance relies on the precedential interpretation in the Tenth Circuit of this Court's decision in McGirt v. Oklahoma, -U.S.-, 140 S.Ct. 2452, 207 L. Ed. 2d 985 (2020), which holds that officials in the State of Oklahoma lack jurisdiction to investigate and/or prosecute state crimes that occurred on the Cherokee/Creek Reservation. The Tenth Circuit precedence relied upon to allow evidence in a criminal trial gathered by state officials who lacked jurisdiction, United States v. Pemberton, 94 F.4th 1130 (10th Cir. 2024), avoids the jurisdictional issue altogether and employs instead the good faith exception to Fourth Amendment violations outlined in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L. Ed. 2d 677 (1984).

Mr. Bailey respectfully submits that the appellate court erred by applying the Leon good-faith exception to a warrant that was void ab initio.

In the district court, Mr. Bailey moved to suppress the evidence obtained as a result of the state-issued search warrant. As grounds, he argued that the warrant was void ab initio as the state magistrate judge did not have jurisdiction to issue a warrant for a search on Indian country for a crime believed to have been committed by Mr. Bailey. The district court denied the motion because it held that the Leon good-faith exception applied, and that the detective who executed the warrant acted in objectively reasonable reliance on it. The district court erred, however, when it concluded that the good-faith exception applied to warrants that are void ab initio.

A warrant issued in defiance of a court's statutory jurisdiction is not a valid warrant for Fourth Amendment purposes. See United States v. Baker, 894 F.2d 1334 (5th Cir. 1990). The rule should not be otherwise. It would be a "phantom warrant, ... disappearing whenever you look to the positive law and manifesting itself only before the Constitution." United States v. Krueger, 809 F.3d 1109, 1117-18 (10th Cir. 2015)(Gorsuch, J., concurring). Not surprisingly, the Supreme Court has rejected such a notion. It has "spoken of the need for a 'valid warrant' and indicated that for warrants to be valid they must emanate from 'magistrates empowered to issue' them." Krueger, 809 F.3d at 1124 (Gorsuch, J., concurring) (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)). A leading treatise makes the same point: the Fourth Amendment requires that a warrant be issued by a magistrate "lawfully vested" with the power to issue it. Wayne R. LaFare, 2 Search & Seizure: A Treatise on the Fourth Amendment § 4.2(f) (5th ed. Oct. 2016 update).

The Supreme Court has never addressed whether the good-faith exception applies to warrants issued without jurisdiction. Although this Court has often addressed the exception's applicability in cases involving warrants, in none of those cases was there any question that the judge who issued the warrant was empowered to do so. Instead, the cases involved warrants that, after issuance, were invalidated, quashed, or recalled. See Herring v. United States, 555 U.S. 135, 138 (2009); Arizona v. Evans, 514 U.S. 1, 4 (1995); Massachusetts v. Sheppard, 468 U.S. 981, 984 (1984); United States v. Leon, 468 U.S. 897, 900 (1984).

A warrant issued by a judge without jurisdiction presents a very different question. That is to say that when a court makes an error while properly exercising jurisdiction, its order is simply voidable, meaning that it carries legal effect unless and until a party takes the necessary steps to invalidate it. Benton v. Maryland, 395 U.S. 784, 797 (1969). But when a court defies its jurisdiction and acts beyond the lawful bounds of its authority, its order is simply void. Id.

This distinction is "not a mere nicety of legal metaphysics." U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988). It "rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power." Id. A judge acting without jurisdiction is "not acting as a court"; he is "a pretender to, not a wielder of, judicial power." United

States v. Mine Workers of America, 330 U.S. 258, 310 (1947) (Frankfurter, J., concurring in the judgment).

Thus, "[a]ll proceedings of a court beyond its jurisdiction are void." Ex parte Watkins, 28 U.S. 193, 197 (1830). They have no legal effect whatsoever; it is as if they never happened. This concept plays out across all areas of the law. For example, parties normally must obey any court order on pain of contempt "until it is modified or reversed, even if they have proper grounds to object." GTE Sylvania, Inc v. Consumer Union of U.S., Inc., 445 U.S. 375, 386 (1980). But an order issued without jurisdiction "may be violated with impunity" because it is "a nullity." In re Novak, 932 F.2d 1397, 1401 (11th Cir. 1991) (citing In re Green, 369 U.S. 689 (1962)). Likewise, a court generally must enforce a foreign court's judgment, treating it as "conclusive on the merits" without inquiry into whether error occurred. Underwriters Nat. Assur. Co. v. N.C. Life and Acc. Health Ins. Guaranty Ass'n, 455 U.S. 691, 704 (1982). But this rule gives way when the foreign court lacked jurisdiction, because in that case its judgment is simply void. Id. The same is true for warrants issued without jurisdiction: they are "absolutely void." Young v. Hesse, 30 F.2d 986, 987 (D.C. Cir. 1929).

For this reason, the good-faith exception does not apply in the case of a warrant issued by a judge without jurisdiction. Although the good-faith exception sometimes applies to warrantless searches, it does not apply to all of them. Instead, it applies only in situations where the officers acted in reliance on "a neutral third party." United States v. Clarkson, 551 F.3d 1196,



1203 (10th Cir. 2009); See also, Leon, 468 U.S. at 922 (noting that the exception requires "objectively reasonable reliance"). Thus, the exception has been applied where officers relied on a law passed by a legislature, Illinois v. Krull, 480 U.S. 340, 342 (1987), on a decision handed down by courts, Davis v. United States, 564 U.S. 229, 232 (2011), or on a warrant issued by a judge, Evans, 514 U.S. at 4. In these cases, it usually turns out that the officers' reliance was mistaken. In Krull, the statute was later determined to be unconstitutional. 480 U.S. at 344. In Davis, the precedent on which the officers relied was overturned. 564 U.S. 235-36. And in Evans, it turned out the warrant had been quashed. 514 U.S. at 4.

But in each case, there was no question that the third party lawfully exercised its power in taking whatever action the officers relied on. That action may have been invalidated or declared unlawful at some later point in time, but it occurred through the lawful exercise of official authority and thus came into actual existence under the law. That is not the case with a warrant issued without jurisdiction. A warrant like that is void ab initio. In the eyes of the law, it never existed. It is words on a piece of paper, but it is not - and never was - a warrant in any legal sense of the word.

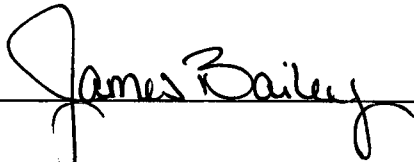
The district court therefore erred when it concluded that the good-faith exception applied. The warrant pursuant to which the search was conducted was no warrant at all. Because it was void at the outset, it never existed under the law. It is as if the issuance of the warrant never happened, so "there simply was no judicial approval" for the search, and nothing on which the

officers could rely. United States v. Levin, 186 F. Supp. 3d 26, 36 (D. Mass. 2016). The good-faith exception therefore does not apply.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

\_\_\_\_\_

Date: Sept. 17, 2024