

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS L. SHORT, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari from

the Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I. WHEN AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT IS WHOLLY LACKING IN PROBABLE CAUSE SHOULD A REVIEWING COURT IGNORE THE FOURTH AMENDMENT ANALYSIS AND GO DIRECTLY TO A GOOD FAITH ANALYSIS PURSUANT TO UNITED STATES V. LEON.

i.

LIST OF PARTIES

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

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PETITION FOR A WRIT OF CERTIORARI

Marcus Short respectfully petitions for a writ of certiorari to the Nebraska Supreme Court in State v. Short No. S-19-415.

OPINION BELOW

The opinion of the Nebraska Supreme Court is reported at 310 Neb. 81, 964 N.W. 2d 272 (No. S-19-415) and is attached at (App. A).

STATEMENT OF JURISDICTION

The Nebraska Supreme court issued its opinion on September 17, 2021 (App. A). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

I.

The Fourth Amendment to the Constitution of the United States provides that “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.”

II.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that “... nor shall any State deprive any person of life, liberty, or property, without due process of law...”

STATEMENT OF THE CASE

The prosecution of this case arose out of a series of three shootings that occurred in Omaha Nebraska on August 5, 6, and 8, 2015. The shootings on August 6 and 8 resulted in the deaths of Deprecia Neelon and Garion Johnson respectively. The shooting on August 5, 2015, also targeted Garion Johnson but did not result in any serious physical injury. The shootings are related because the intended victim in all three shootings was Garion Johnson.

Marcus Short, the Petitioner herein, and Preston Pope were both charged with the homicides of Neelon and Johnson. They were tried separately. Short was acquitted of the Neelon homicide but was convicted of the Johnson homicide and related firearms charges. That said, it is necessary to relate the facts of all three shootings to obtain a full understanding of the issues to be decided in this matter.

A. August 5, 2015

Around 6 P.M. on August 5 2015, Garion Johnson was seated in his girlfriend's white Impala outside the residence of 2021 Pinkney St. in Omaha Nebraska. Johnson was conversing with his friend Marquis Miller when a single black male approached the vehicle and fired a handgun at Johnson. Johnson fled the scene on foot and was chased by the assailant. An eyewitness to the shooting identified Preston Pope as the shooter in this incident.

B. August 6, 2015

On the following day, August 6, 2015, Deprecia Neelon, a resident of 2021 Pinkney was shot and killed outside that residence. Someone had set the exterior of

that residence on fire and Neelon had exited the house to extinguish the fire. It was while she was outside the house that she was fired upon and chased by the shooter toward the back door of the residence. At that time, Mondell Robinson, another resident of 2021 Pinkney, witnessed the shooter run up to the back porch and fire multiple shots into Neelon while she was already down on the ground. Robinson described the shooter as a mixed race black- Native American male with a ponytail wearing a red shirt.

That same evening, police received an anonymous phone call informing them that a youth named “Shadow” was at 1816 Spencer St. talking with other youths about being involved in a shooting that just took place a few blocks away. Officers then went to the Spencer Street address, which is two blocks north of Pinkney St. The officers surrounded the house and Shadow Harlan was apprehended fleeing out the back door of 1816 Spencer St. When Harlan, a mixed race black-Native American male, was apprehended, he was wearing a tan fisherman’s hat, red shirt, and black shorts. His hair was in a ponytail. Harlan was questioned and released.

At trial, Mondell Robinson was shown a photo of Shadow Harlan taken by police on the night of the night of the shooting. Robinson indicated that he has seen Shadow Harlan in the neighborhood and he fits the description of the shooter but could not say for certain if he was the shooter. Mondell Robinson testified that the shirt worn by Shadow Harlan in the photo matches the shirt worn by the shooter. At trial, Mondell Robinson was able to observe Marcus Short and testified that Short was definitely not the shooter.

Several days after the homicide police were able to contact Lew Lew, who lived in a house next door to 2021 Pinkney. Lew recalled being in his residence when he heard shots fired on August 6, 2015. He looked out his window and saw two people in the backyard of 2021 Pinkney firing handguns. One individual was wearing a red shirt and his hair was in a ponytail. Lew described this person as light skinned black and “mixed native” about 5’7-8” and bulky build. He described the second person as wearing a white tank top shirt and having the same skin tone and hairstyle as the other shooter. He observed both parties fleeing on foot. He recognized the person wearing the red shirt and firing the handgun as Shadow Harlan. He was acquainted with Harlan from the neighborhood.

Police canvassed the neighborhood in search of physical evidence and witnesses. Joseph Smith resided at 2111 Pinkney St. Sometime in midafternoon on August 6, 2015, Smith was sitting in his living room and looked out the window to see two men walking east in the alley behind his residence. One was wearing a bucket hat and the other had dreadlocks. Smith described the one in the hat as a light-skinned black male and a little taller than the second, who was a dark skinned black male. Fifteen minutes later he saw the same two men running west in the same alley. He observed them enter a blue minivan parked in the alley and drive off to the west.

It should be noted that on August 14, 2015, Preston Pope was apprehended while fleeing from police. He was observed exiting a blue minivan. He fled on foot and was captured by police. The blue minivan was registered to Pope’s mother.

While searching the alley behind Smith's residence, police located and collected a price tag for a pair of jersey gloves that was on the ground in the alley. Omaha police Crime lab technicians were able to lift a latent print from the price tag found in the alley. The print was submitted to the AFIS system, which is a database of prints collected by law enforcement agencies. A list of possible matches was developed and Laura Black, from the Omaha Police forensic unit identified the print as that of Marcus Short.

C. August 8, 2015

On the morning of August 8, 2015, Garion Johnson was shot and killed. Immediately prior to the shooting, Johnson was inside the residence of 5431 Fontenelle Blvd. with his girlfriend Mikayla Finley. At one point Johnson exited the residence to move Finley's car into the garage. While Johnson was still outside, Finley heard numerous loud noises that she ultimately determined to be gunshots. Finley looked out the window and observed her car, a white Impala, backing out of the driveway.

Finley saw a black male standing in her yard on the passenger side of the vehicle. She believed he was wearing a black hoodie and appeared to be shooting into the car although she did not see a gun. She did not recall seeing anyone else in the area. She described the person as aged sixteen to eighteen. Finley then called 911 and police arrived at her residence in a very short time.

After being briefly interviewed at the scene, Finley was brought to police headquarters to be interviewed. Short's photograph was included in the series of

photos displayed to Finley on August 8, 2015, and she made no identification of him as being the suspect. At trial Finley testified that Short was not the person in her yard at the time of the shooting.

Once at the scene, police observed that the white Impala occupied by Johnson had crashed into the garage of a residence located at 5439 Fontenelle Blvd. Upon approaching the vehicle, police observed Johnson laying in the front seat of the vehicle, bleeding from severe injuries. There was observable damage to the vehicle caused by gunfire. Johnson was transported to the hospital where he was later pronounced dead.

Omaha police spoke to a number of witnesses shortly after the shooting on August 8, 2015. On the morning of August 8, 2015, Sarah Alba was driving west on Fontenelle Blvd. when she observed two men standing outside of a white vehicle in the driveway of 5431 Fontenelle. The two men were standing on the driver's side of the vehicle and one of them had a gun in his hand. She decided to pull into a driveway several houses west of 5431 Fontenelle. She then heard a gunshot and saw the car drive in reverse into Fontenelle Blvd. She heard multiple more gunshots and observed the vehicle crash into a garage. The shooter ran south through some neighboring yards. She did not see the second person to be in possession of a gun, and never saw that person leave the driveway area of 5431 Fontenelle. The shooter was wearing a black hoodie. She could not describe any clothing of the second person.

In the morning hours of August 8, 2015, Amy Burk drove to visit her parents in the neighborhood of 41st and Camden St. in Omaha. Burk observed a vehicle parked on 41st St. near the intersection with Camden St. Burk described the vehicle as a Monte Carlo with white and blue dealership tags. Burk could not recall the color of the vehicle. After stopping at her parents' house, Burk left the area to run an errand. When she returned to the area twenty or thirty minutes later, the Monte Carlo was gone. She could not recall the time of day other than it was in the morning hours. She could not recall if the vehicle had in transit stickers.

William Bookout lived at 4017 Fort St. On the morning of August 8, 2015 he was at home letting his dogs out between eight and eight thirty A.M. He heard several gunshots and then a loud crash. Those noises were coming from Fontenelle Blvd., which is north of Fort St. He then observed two black males dressed all in black with black hoodies walking at a fast pace through a neighbor's yard in a southerly direction. Bookout lost sight of the individuals but shortly thereafter observed a white Monte Carlo drive north on 41st St. and turn west on Fort St. He was unable to determine how many occupants were in the car.

Delbert Scholting was employed as a cemetery caretaker at Golden Hill Cemetery at 41st and Brown St. in Omaha. On the morning of August 8, 2015, Scholting was parked at the gate of the cemetery between 9:30 and 10 A.M. He observed two kids running on 41st St. and get into a Monte Carlo. The car then drove off to the north. Scholting said the two were running in a southerly direction before getting into the Monte Carlo.

At about 1:30 P.M. on August 8, 2015, officer Adam Kruse was in his police vehicle and was alerted to the description of a possible suspect vehicle in the Johnson homicide described as a white Monte Carlo with blue and white paper plates. He subsequently contacted Sgt. Danette Culler, who was the sergeant in charge of the Johnson case, and informed her that he had possibly located the suspect vehicle at 4268 Binney St. The occupant of the residence, Mary Tolbert gave Kruse permission to search the house for any individuals inside. No one was inside the residence.

Numerous police officers were then sent to 4268 Binney St. After learning that Short was Tolbert's grandson, police asked if she could contact Short. Short was contacted by phone and homicide detective Candice Phillip requested that Short come to 4268 Binney St.

Once Short arrived at the scene he was immediately handcuffed and placed in the back seat of a police cruiser. Phillips walked away from the cruiser for a short period and when she returned, Short was still in the cruiser but was not in handcuffs. Phillips was told that a Lieutenant from the uniform patrol unit, who was on the scene, had the handcuffs removed. A disagreement ensued and Phillips had Short again placed in handcuffs and taken down to police headquarters. While at the scene, police seized two cell phones, a wallet, and a set of keys from Short's person.

D. Additional facts concerning the investigation

(a) The search of 4268 Binney St.

Omaha police obtained a search warrant for the residence of 4268 Binney St. and the Monte Carlo. The residential search began at 4:17 P.M. on August 8, 2015. Police finished the residential search at 6:17 P.M. Numerous items were seized from an upstairs bedroom of the residence including several handguns and some clothing.

(b) Additional fingerprint evidence

Police crime lab personnel were able to lift a latent palm print that was located on the barrel of a .357 revolver seized during the search of 4268 Binney St. The print was compared to the known prints of Shadow Harlan, Brandon Gee, and Marcus Short. All three were eliminated as the source of the fingerprint. The print was later identified as that of Preston Pope.

(c) Cell site location information

Special Agent Joseph Raschke of the FBI is a member of the Cellular Analysis Survey Team. In 2017, he was contacted by Omaha police, who requested his assistance to analyze some phone records of Marcus Short and Preston Pope in this case. Pope's records were obtained from Verizon for the number 402-830-8508 covering the time period of July 8, 2015, through August 10, 2015. Short's records were from Sprint with the phone number 702-619-1025 covering the time period from July 8, 2015 through August 8, 2015.

Specifically, Raschke was tasked with approximating the location of the target phones on August 5, 6, and 8 of 2015. This was accomplished by mapping the

phone activity of the target phones as illustrated by the location of the sector of the cell tower used by the cell phone. Raschke generated a report for the two phones locations on August 5, and 6, 2015 and a separate report for the same two phones locations on August 8, 2015

These records show that on August 5, 2018, there is no evidence that the cell phone attributed to Short was in the area of Neelon's residence of 2021 Pinkney between 5:30 and 7:30 P.M. Conversely, the records show that the cell phone attributed to Pope was indeed in the area of 2021 Pinkney St. between 5:30 and 7:30 P.M. on August 5, 2015.

Once again, on August 6, 2015, the records provide no evidence that the phone attributed to Short was in the area of 2021 Pinkney between the hours of 7:30 and 9:07 P.M. On the other hand, the phone attributed to Pope was once again in the vicinity of 2021 Pinkney during that same time frame.

The records for August 8, 2015 again fail to present any evidence that the phone attributed to Short was in the area of the scene of the Johnson homicide, 5431 Fontenelle Blvd on that date. It does show his cell phone in the area of 4268 Binney St. between 10:03 A.M. and 10:25 A.M. The phone appears to be moving away from that address by 10:25 A.M. The records also show that from 11:45 A.M. and 2:06 P.M., Short's phone is in an area northeast of that 4268 Binney, and by 2:20 P.M. is back in the area of his residence. Pope's phone is in the vicinity of 5431 Fontenelle between the hours of 8:20 A.M. and 9:34 A.M. on August 8, 2015. At 9:57 A.M. his phone is in the vicinity of 4268 Binney St.(E952).

(e) Search of the contents of Short's cell phones

The flip phone taken from Short's person, was determined to have the phone number 402-619-2962. The second phone taken from Short was an LG smart phone with the phone number 702-619-1025. Pursuant to a search warrant, police searched the content of both phones. Pursuant to search warrants, Detective Nicholas Herfordt examined the flip phone seized from Short's person. Because it was a simpler phone, Herfordt was only able to take photographs of screen shots from that phone. Several text messages between this phone and that of Pope were photographed and placed into evidence.

He also forensically examined the second phone taken from Short's person. This was a more advanced phone and Herfordt did not have the equipment to access the data on the phone. The phone was then sent to a private entity called Computer Crime Institute of Dixie State University. They were able to access the data on the phone. The significant information consisted primarily of several contacts between that phone and the phone attributed to Pope. It also had contact with "Shadow". The data also showed that Short's phone went to the KETV television station's website and viewed its reporting on the homicides of Neelon and Johnson.

The simple flip phone showed 3 text messages between Short's and Pope's phones on July 22, 2015 an unanswered text from Pope's phone to Short's phone on August 1, 2015 and several attempted phone contacts between the two on that date. There also were calls from Pope's phone to Short's phone at 12:06 P.M., 2:57 P.M.,

and 3:16 P.M. on August 8, 2015. Herefordt is unable to say if the calls were answered.

Herefordt was able to detect nineteen total contacts or attempted contacts between Pope's phone and Short's second phone. Contacts include incoming and outgoing phone calls regardless if there was an actual conversation, and incoming and outgoing text messages for the entire time period covered by the report. Only two contacts between Short's phone and "Shadow" were discovered in the report.

REASONS FOR GRANTNG THE WRIT

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR THE CONTENT OF SHORT'S TWO CELL PHONES IS TOTALLY LACKING IN PROBABLE CAUSE. THE TRIAL COURT, IN ITS ORDER OVERRULING SHORT'S MOTION TO SUPPRESS, DETERMINED THAT THE AFFIDAVIT CONTAINED SUFFICIENT PROBABLE CAUSE TO SUPPORT ISSUANCE OF THE WARRANT. HOWEVER, THE TRIAL COURT TOTALLY MISCHARACTERIZED THE INFORMATION CONTAINED IN THE AFFIDAVIT. THE TRIAL COURT ALSO DETERMINED THAT EVEN IF THE AFFIDAVIT DID NOT SUPPORT A FINDING OF PROBABLE CAUSE, THE GOOD FAITH EXCEPTION APPLIED. ON APPEAL THE NEBRASKA SUPREME COURT FAILED TO ADDRESS THE ISSUE OF PROBABLE CAUSE AND WENT DIRECTLY TO A FINDING THAT THE GOOD FAITH EXCEPTION APPLIED. THIS COURT HAS PREVIOUSLY INDICATED THAT THE FOURTH

AMENDMENT QUESTION SHOULD, IN MOST CASES, BE ADDRESSED BY REVIEWING COURTS BEFORE ADDRESSING THE ISSUE OF GOOD FAITH. IT IS IMPERATIVE THAT SEARCH WARRANTS BASED ON AFFIDAVITS THAT FALL WOEFULLY SHORT OF ESTABLISHING PROBABLE CAUSE DO NOT BECOME THE NORM FOR DETERMINING A MAGISTRATES INDEPENDENCE AND A LAW ENFORCEMENT OFFICER'S BASIS FOR OBJECTIVE GOOD FAITH.

Prior to trial, Short filed motions to suppress the information seized from a search of the content of his cell phones. He also filed motions to suppress the call detail records and cell site location information obtained from Short's cell phone provider. The motions concerning the information obtained from the cell provider are not the subject of this Petition. They are pertinent to this Court's decision only because the Nebraska Supreme Court singularly addressed the two affidavits and warrants in their analysis of the Fourth Amendment issues in this case. The affidavit and search warrant for the contents of Short's cell phones were presented to the magistrate and approved on August 11, 2015 and are attached hereto and marked Appendix B.

The affidavit and search warrant for the call detail records and cell site location information were presented to the magistrate and approved on December 5, 2018. Short asserted that the search warrant lacked probable cause to believe that information on these shootings would be contained in the content of the cell phones.

The trial court overruled Short's motions stating that the warrants were supported by sufficient probable cause and that even if flawed, the evidence should not be suppressed because the officers relied in good faith on the validity of the warrants. The trial court's Order is attached hereto as Appendix D.

The Nebraska Supreme court affirmed Short's convictions. When addressing the suppression question, the Nebraska Supreme Court never addressed the underlying Fourth Amendment inquiry and, instead went directly to a finding that even if the affidavits and warrants were insufficient, the "good faith" exception applied.

THE SEARCH OF THE CONTENT OF THE CELL PHONES

Short filed a motion to suppress (App. C) the evidence obtained as a result of a search of the contents of his cell phones. The evidence was obtained pursuant to a search warrant. The search warrant, affidavit in support of the search warrant, and the return and inventory are found in (App. B). In its order denying Short's motion to suppress, (App. D) the court found that the "affidavit presented to the issuing court is an affidavit that is detailed and specific." The trial court stated the affidavit included information that:

"... Witnesses observed two black males flee the scene of the Garion Johnson shooting in a white Chevy Monte Carlo vehicle with paper plates. A white Chevy Monte Carlo vehicle with paper plates and registered to Mr. Short was discovered the same day parked at 4268 Binney Street, Omaha, Douglas County, Nebraska. A search warrant

was executed at 4268 Binney Street, Omaha, Douglas County, Nebraska because it was believed Mr. Short resided at the home. The affidavit provides the necessary details to establish probable cause to believe that evidence of a crime would be found in the cell phone data requested in the affidavit. The affidavit contains sufficient detail to establish probable cause that Mr. Short was connected to the then ongoing Garion Johnson homicide investigation. It additionally contains information that more than one individual may have been involved in the Garion Johnson shooting. It also establishes through the affiant's experience, why the types of records requested are likely to produce valuable evidence in a murder investigation". (App. D p.8-9).

However, a review of the actual affidavit belies much of the trial court's assertions concerning its contents. Nowhere in the affidavit is there any mention of witnesses seeing two black males flee the scene of the shooting. Nowhere in the affidavit does it say witnesses saw two suspects flee the scene in a white Monte Carlo.

The affidavit merely states that the suspect vehicle is a white Monte Carlo. The affidavit contains no context as to why the vehicle was the "suspect vehicle". Nowhere in the affidavit is there any mention of police executing a search warrant at 4268 Binney Street. Nowhere in the affidavit does it state that the Monte Carlo was observed at 4268 Binney Street on the same day as the homicide. Neither does

it state that Short was taken into police custody on the same day as the homicide. The affidavit merely states that when he was taken into police custody he had the two cell phones in his possession. The remainder of the affidavit simply contains boilerplate language as to why electronic devices and/or cell phones may contain valuable information.

On appeal, the Nebraska Supreme Court consolidated its analysis of the two search warrants challenged by Short; one concerning the search of the contents of the cell phone, and the other concerning the obtaining of call detail records and cell site location information. That court's opinion recites a menagerie of Westlaw type headnote statements concerning previous fourth amendment decisions pertaining to probable cause, but utterly fails to address the specifics of the affidavit and search warrant at issue relating to the search of the content of the cell phones. A cursory review of the affidavit indicates why the court chose to literally ignore that affidavit in its analysis and proceed directly to a "good faith" analysis. *State v. Short* 310 Neb. 81, 134, 964 N.W. 2d 272, 313 (2021)

Contrary to the trial court's written opinion, and the opinion of the Nebraska Supreme Court, the affidavit in this case is a bare bones affidavit, which contains only a fraction of the "facts" recited by the trial court in its order denying the motion to suppress. Moreover, it includes conclusory statements by the affiant, which are not backed up with factual information to support the conclusions. The affidavit on its face is so wholly lacking in substance that it cannot be said to meet the totality

of the circumstances test of *Illinois v. Gates* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

The approval of the search warrant in this case is a clear example of the magistrate merely ratifying the conclusions of the police and rubber stamped their request for a search warrant.

In its Order, the trial court determined that the affidavit contained sufficient evidence to establish probable cause to justify a search of the contents of Short's phone. Then the court took a further step declaring that even if the warrant was issued without probable cause, the evidence should not be excluded because the officers acted in good faith. The Nebraska Supreme Court totally punted on addressing the question on the sufficiency of the affidavit and went straight to a good faith analysis.

The "good faith" exception to the exclusionary rule stems from this Court's decision in *United States v. Leon* 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed. 2d 677 (1984). Among the reasons stated by this Court in *Leon* for not applying "good faith" is if the" magistrate has abandoned his detached and neutral role" and acted as a rubber stamp for the police.

Of significant import to the present case, this Court stated in *Leon* that "If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue. Indeed, it frequently will be difficult to determine whether the officers acted

reasonably without resolving the Fourth Amendment Issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that the magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation."

Leon 468 U.S. 897, 925, 104 S. Ct. 3405, 3421-3422.

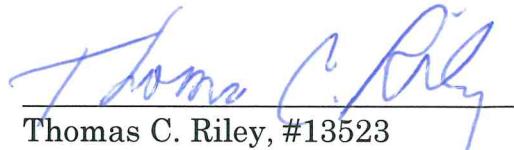
The circumstances of this case offer this Court an opportunity to set out guidelines as to when a reviewing court must decide the Fourth Amendment question before addressing good faith. In addition, this case offers the opportunity for this Court to at least put the brakes on reviewing courts, like the Nebraska Supreme Court, that have utilized the "good faith" exception far beyond its intended purpose.

The affidavit in this case is so lacking in evidence to support probable cause that no neutral and detached magistrate could possibly approve a warrant and no reasonably objective officer could possibly believe that this warrant was based on probable cause. Indeed if this affidavit becomes the acceptable baseline for "good faith" analyses in Nebraska and other likeminded jurisdictions, no affidavit, however lacking in evidence to support probable cause, would ever result in suppression of evidence.

CONCLUSION

For each and all of the aforementioned reasons, the Petitioner respectfully requests the Court grant this Writ of Certiorari as it is imperative for purposes of preservation of the Fourth Amendment.

RESPECTFULLY SUBMITTED:



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Douglas County Public Defender
Attorney for Petitioner