

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE EATON -- PETITIONER

vs.

STATE OF INDIANA -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment permit a warrant to issue for the search of a person's home and of his private papers on the basis of (a) his arrest as a suspect in a single drug transaction at a remote location; and (b) the uncorroborated opinion of a law enforcement officer premised on his asserted knowledge that drug traffickers commonly keep incriminating documentary evidence in their homes?

2. Does a person's suspected participation in a single drug transaction support a reasonable inference that he is a drug trafficker likely to keep documentary evidence of drug trafficking concealed in his home?

LIST OF PARTIES

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

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VS.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the Supreme Court of Indiana, which was highest state court to review the merits, appears at Appendix A to the Petition and is reported as *Eaton v. State*, 889 N.E.2d 297 (Ind. 2008). The opinion of the intermediate state appellate court appears at Appendix B to the Petition and is reported as *Eaton v. State*, 878 N.E.2d 481 (Ind.Ct.App. 2007). The trial court order denying the motion to suppress evidence is unreported and appears as Appendix C.

JURISDICTION

The date on which the Indiana Supreme Court decided the case was June 30, 2008. A timely petition for rehearing was denied on October 21, 2008. A copy of the order denying rehearing appears at Appendix A-9.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides:

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

STATEMENT OF THE CASE

This case raises important and recurring Fourth Amendment questions relating to the issuance of broadly worded residential search warrants premised upon uncorroborated opinions of law enforcement officers asserting their “knowledge” or “training and experience” in place of specific facts to support a finding of probable cause.

Procedural History

Upon evidence seized from his home pursuant to two search warrants issued by a state judge, Mr. Eaton was convicted after a jury trial of the Class A felony of Dealing in Cocaine and misdemeanor Possession of Marijuana. On October 18, 2006, he was sentenced to twenty-five (25) years imprisonment (with five (5) years suspended). Appendix D-2, D-3, D-5.

Petitioner’s motion to suppress the evidence was denied by the trial court. Appendix C. The Indiana Court of Appeals reversed the trial court holding that the motion to suppress evidence was improperly denied because the searches of Eaton’s home violated the Fourth Amendment. *Eaton v. State*, 878 N.E.2d 481 (Ind.Ct.App. 2007). That court concluded that a “good faith” exception was not available to the state. *Id.* at 487-88. The Supreme Court of

Indiana granted the state's motion for transfer, vacated the opinion of the Court of Appeals, and affirmed the trial court's judgment of conviction and sentence. That court held specifically that no Fourth Amendment violation had occurred. *Eaton v. State*, 889 N.E.2d 297, 300 (Ind. 2008), and deemed the "good faith" issue to be moot. *Id.* at 298 n.3. Petitioner filed a timely motion for rehearing which was denied on October 21, 2008. Appendix A-9.

Facts

The case turns on whether the search warrants issued upon the affidavits of an investigating police officer violated Eaton's rights secured by the Fourth Amendment. The "four corners" rule applies and a reviewing court may look only to the warrants themselves and supporting affidavits for the purpose of determining whether the probable cause and particularity requirements of the Fourth Amendment have been satisfied. *Whitely v. Warden*, 401 U.S. 560, 565 n.8 (1971).

The affidavit for the initial search of Mr. Eaton's home was submitted by Indiana State Police Officer Ron Shoemaker and is included at Appendix D-6 to D-9. The first twelve paragraphs describe a May 4, 2005, encounter between officers of the Indiana State Police and Edgar Gonzalez. State Trooper Wildauer stopped Gonzalez for speeding and "unsafe lane movement" on Interstate 70 near Indianapolis, Indiana. After issuing a warning ticket, the officer obtained from Gonzalez consent to search his car which yielded four (4) kilos of cocaine hidden in the passenger side air bag compartment.

This discovery motivated Gonzalez to cooperate with the police. He told them he was to meet some "black guys" in Richmond, Indiana. After substituting three of the four kilos with simulated cocaine, the material was replaced in the air bag compartment and a listening device was installed. Accompanied part way by Officer Shoemaker, Gonzalez continued his trip

during which he had a cell phone conversation with a male caller who directed him to a muffler “store” in Richmond. On reaching the area Shoemaker got out of the car but continued to maintain surveillance and to monitor Gonzalez’s movements. Gonzalez made a “wrong turn” and made a cell phone call. Shortly thereafter a male in a tan Chevrolet Blazer met him in a restaurant parking lot. This person later was identified as DeWayne (Wayne) Eaton known personally to the affiant “from prior drug investigations.”

Gonzalez followed the Blazer to a location where “[b]oth vehicles pulled inside (*sic*) Discount Muffler. . . .” Shoemaker observed a “male” direct Gonzalez to pull his car into one of the service bays, and observed “Wayne Eaton standing outside the business talking on a cell phone.” He reports next hearing “someone repairing the tire inside the business” and “shortly thereafter” Willie Eaton arrived in a blue vehicle. He spoke to Wayne Eaton and Gonzalez and then pulled his car into a service bay.

The police heard sounds consistent with removal of material from Gonzalez’s car and heard him say “Show it to me” which they understood as a reference to the buy money. Police entered the shop and Wayne Eaton “was attempting to flee through the back door. . . .”

Officers located a black bag in the front passenger seat.¹ Inside the bag, officers observed a large sum of vacuum sealed cash [estimated to be from \$60,000 to \$100,000]. Officers also observed crack cocaine.²

. . . . Willie Eaton provided [his home] address to officials at the Wayne County Jail.

Affiant has been working narcotics investigations (*sic*) for approximately nine (9) years with the Indiana State Police. Affiant is currently assigned the Drug Enforcement Administration (*sic*). *Affiant knows that drug traffickers commonly keep records to maintain and promote the business of drug trafficking. Drug traffickers will commonly keep trafficking information in a variety of forms including: ledgers, computers, cell phones, pagers, phone bills, and wire transfer receipts. Affiant knows that drug traffickers often keep*

¹ There is no indication of the identity of the vehicle in which the black bag was found.

² There is no indication of where this substance was located, or if it was part of the material that had been taken from Gonzalez’s car, or if it was associated in any way with Willie Eaton.

U.S. currency within quick access and rarely place money in financial institutions for fear of detection. [Emphasis supplied]

Affiant is requesting a warrant to search the residen (*sic*) Willie Eaton at 813 North 8th Street,³ Richmond, to search therein for documents relating to drug trafficking, including:

- (1) ledgers;
- (2) records maintained in electronic form, including computer records, cell phone records, pager records;
- (3) receipts;
- (4) phone bills;
- (5) wire transfer receipts;
- (6) U.S. currency

The search warrant issued on the basis of this affidavit authorized seizure not only of the items listed above but of “*any and all property.*” [Emphasis supplied] Appendix D-10.

The return after the search lists as the items seized: “. . . twenty-eight pages of Sprint wireless telephone service records. Records [unspecified] addressed to Willie E. Eaton, #813 North 8th Street, Richmond, In., 47374.” Appendix D-11. The officers obtained a second search warrant based upon things discovered during the first search including “cocaine,⁴ digital scales, bags used to hold cocaine, U.S. currency and sawed-off shot gun and other long guns.” Also seized was an unspecified amount of marijuana. Appendix D-17. The second warrant also authorized the seizure of “any and all property.” The affidavit submitted in support of the application for the second warrant repeated all the allegations of the first affidavit and added the information acquired as a result of the first search. Appendix D-12 to D-16.

In addition to the two charges upon which Eaton was convicted, he was charged with conspiracy to deliver cocaine and being a violent felon in possession of a firearm. The latter charge was dismissed on motion of the prosecutor. The conspiracy charge was premised on the events involving Gonzalez and DeWayne Eaton at the muffler shop. At the close of the evidence

the trial court dismissed the conspiracy count on grounds of insufficient evidence. (Tr. 978). The evidence supporting Eaton's convictions was that seized from his home during the second search. (Tr. 688, 690, 788-89, 793, 797, 800-01, 835-36, 840). Significantly, Eaton's felony conviction does not rest upon evidence of actual dealing of cocaine, but upon his possession of more than three (3) grams with intent to deliver. Ind. Code §§ 35-48-4-1(a)(2)(c); 35-48-4-1(b)(1). The state's theory was that the relatively small amount of controlled substance (apparently less than one full ounce) that was found during the searches of his home, along with the scales, razor blades, baggies, guns and \$602.00 in currency, supported an inference that Willie Eaton intended to deal cocaine.

The Court of Appeals Decision

The Indiana Court of Appeals reversed Eaton's convictions holding that the evidence was seized from his home in violation of the Fourth Amendment and should not have been admitted. That court found the affidavit submitted in support of the first search warrant application deficient in that "it provided no reasonable basis to establish a fair probability either that Eaton was engaged in illicit activity or that a search of Eaton's residence would uncover such illicit activity." 878 N.E.2d at 487. The court held that the evidence recovered during the second search of Eaton's home was inadmissible because it was derived from the first illegal search. *Id.* at 488.

Elaborating on the defects of the affidavit the court noted that it (1) failed to specify Willie Eaton's location when the police entered the shop in relation to Wayne Eaton and Gonzalez; (2) did not supply information regarding the presence of other persons in the shop; (3)

³ The affidavit contains no indication of the distance between the muffler shop and Eaton's residence.

⁴ The weight of cocaine seized during the second search is not specified.

did not state whether the shop was open to the public for business; (4) did not mention the presence or absence of other vehicles in the shop to which Wayne Eaton or Gonzalez may have had access; (5) did not reveal the length or nature of Willie Eaton's interaction with Wayne Eaton and Gonzalez; (6) did not reveal whether Willie Eaton's vehicle was near the Gonzalez car inside the shop; (7) did not reveal whether any of the service bay doors were open or closed during the investigation. The court found that the affidavit offered "no clear reason to conclude that a search of [Willie] Eaton's residence would uncover evidence of criminal activity. Rather the Affidavit merely discloses the fact that [Willie] Eaton was at the shop at the same time as Gonzalez and Wayne." *Id.* at 486. Apart from coincidental presence, the court found that the affidavit provided no indication that he was connected either directly or circumstantially with a drug transaction. Hence, there was no basis for his arrest and no basis beyond speculation as to what he might have in his home. *Id.* at 487.

The court rejected the state's argument for a "good faith" exception pursuant to *United States v. Leon*, 468 U.S. 897, 923 (1984), because the multiple defects of the affidavit rendered it "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 878 N.E.2d at 487.

The Indiana Supreme Court Decision

Without addressing the multiple defects identified by the intermediate appellate court, the Indiana Supreme Court, noting the criteria established in *Illinois v Gates*, 462 U.S. 213 (1983), concluded summarily that Shoemaker's affidavit was sufficient to show that "defendant was involved in the receipt and unloading of a substantial quantity of drugs, and that incriminating records commonly maintained by persons engaged in drug trafficking were likely to be found at the defendant's residence." 889 N.E.2d at 300. The court found the good faith exception issue to be moot. 889 N.E.2d at 297 n.3.

In dissent Justice Rucker argued that the majority had adopted an extreme position on the question whether a person's suspected involvement in a single drug transaction, coupled with the uncorroborated opinion of the affiant, provided the requisite nexus for a search warrant for his home. Justice Rucker takes the majority to task for failing to explain why it rejected authorities from other jurisdictions that require greater indicia of drug trafficking and a probability of locating record evidence in a suspect's home. 889 N.E.2d at 303-04. He found the affidavit "absolutely devoid of any facts whatsoever demonstrating a nexus between Eaton's alleged drug activity [for which he doubts the existence of probable cause] - at a commercial establishment - and his home at a remote location." *Id.* 304. Justice Rucker expressed his agreement with the Indiana Court of Appeals adding:

Today's ruling invites the Government's search of a suspect's business, home, garage, tool shed, workshop, or any other property a suspect may use simply because a law enforcement officer believes, without more, that evidence of crime can be found there. In my view this is an anathema to the mandate of the Fourth Amendment to the United States Constitution. . . . There were no bases in this case, substantial or otherwise, for the magistrate to conclude that probable cause existed for the issuance of a search warrant. *Id.*

REASONS FOR GRANTING THE PETITION

I The Court Should Grant Certiorari to Resolve a Conflict Between the Federal Courts of Appeal and Among the State Appellate Courts With Respect to the Constitutional Limits Upon the Power of Judicial Officers to Issue Residential Search Warrants Premised Upon Uncorroborated Opinions of Police Authorities With Respect to Behavior Patterns of Certain Classes of Criminal Suspects

[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Boyd v. United States, 116 U.S. 616, 635 (1886).

A. This Case Squarely Presents a Conflict in Both State and Federal Courts

General searches abhorred by the framers of the Constitution of the United States have re-appeared as a by-product of the “war on drugs.” In place of the odious writ of assistance, highly intrusive home searches are conducted regularly under the guise of judicially authorized warrants that substitute generalizations based on police assertions of “knowledge”, “training and experience” or judicial “common sense” for the probable cause, nexus and particularity demands of the Fourth Amendment.

Some federal courts are coming close to (if not adopting) a *per se* rule that certain classes of criminal suspects are always likely to conceal evidence of their crimes in their homes no matter where their activities take place. *United States v. Williams*, 548 F.3d 311, 319-22 (4th Cir. 2008); *United States v. Williams*, 544 F.3d 683, 686-688 (6th Cir. 2008); *United States v. Whitner*, 219 F.3d 289, 297-298 (3d Cir. 2000); *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993). Along with Indiana, other state courts are reaching the same dangerous conclusions. See, e.g., *Eaton v. State*, *supra*; *State v. Godberson*, 493 N.W.2d 852, 855-56 (Iowa 1992);

People v. Nunez, 619 N.W.2d 550, 552 (Mich. App. 2000) (concurring justices noting conflict between federal circuits, *Id.* at 556 n.1); *State v. Ward*, 604 N.W.2d 517, 523 (Wis. 2000).

While recognizing the relevance of police training and experience, other federal courts have demanded corroboration in the form of case specific facts from which a reasonable inference of the involvement of a suspect's home may be derived. *E.g.*, *United States v. Barnes*, 492 F.3d 33, 37 (1st Cir. 2007); *United States v. Broussard*, 80 F.3d 1025, 1034-35 (5th Cir. 1996), *cert. denied sub nom, Merritt v. United States*, 519 U.S. 906 (1996); *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007), *cert. denied*, 127 S.Ct. 2966 (2007) (rejecting a *per se* approach); *United States v. Nolan*, 199 F.3d 1180, 1183-84 (10th Cir. 1999) (addressing a conflict with four other federal circuits: “unlike our sister circuits, we have never held that the mere observation of *repetitive* (emphasis supplied) illegal drug activity outside a suspect's residence by itself is sufficient to establish probable cause for a search of the suspect's residence”).

These approaches are replicated in state courts. *E.g.*, *State v. Cannon*, 2007 WL 1849022, Del. Sup. Ct., New Castle County (2007) (an unreported but instructive opinion by Judge Ableman in text at fns. 29 – 51); *People v. Beck*, 713 N.E.2d 596, 599-601 (Ill. App. 1999); *Commonwealth v. O'Day*, 798 N.E.2d 275, 281 (Mass. 2003); *State v. Souto*, 578 N.W.2d 744, 748-750 (Minn. 1998); *State v. Johnson*, 578 N.W.2d 75, 80-83 (Neb.App.1998), *affirmed*, 589 N.W.2d 108 (Neb. 1999), *overruled on other grounds, State v. Davidson*, 618 N.W.2d 418 (Neb. 2000); *State v. Silvestri*, 618 A.2d 821, 824-825 (N.H. 1992) (rejecting a *per se* rule); *State v. Wilson*, 35 P.3d 1111, 1114-16 (Ore. 2001); *State v. Vukelich*, 2001 WL 1044617, pp. 10-11 (Tenn. Cr. App. 2001) (unreported), *cert. denied, Vukelich v. Tennessee*, 537 U.S. 884 (2002). The opinion and authorities discussed in *State v. Thein*, 977 P.2d 582, 585-590

(Wash. 1999) stand in stark contrast to the *per se* rule adopted without explanation or analysis by the Indiana Supreme Court: “Most courts . . . require that a nexus between the items to be seized and the place to be searched must be established by specific facts; an officer’s general conclusions are not enough [citations omitted].” 977 P.2d at 588.

Cases showing the conflict between jurisdictions are discussed in Justice Rucker’s dissent in the Indiana Supreme Court. *Eaton v. State*, 889 N.E.2d at 303.

B. The Questions Presented Are of Vital Importance Nationally

Home search warrants premised upon claims of police familiarity with the evidence-concealing behaviors of certain types of criminal suspects are not limited to drug cases. *United States v. Williams*, 544 F.3d 683 (6th Cir. 2008) (illegal firearms); *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004) (fraud); *United States v. Falso*, 544 F.3d 110, 113-14, 124 (2d Cir. 2008) (child pornography); *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990) (child pornography).

Dissenting in *Williams*, 544 F.3d at 694-696, Circuit Judge Karen Nelson Moore laments the evisceration of Fourth Amendment core values in the state and federal cases that have, like *Eaton* in Indiana and *Williams* in the Sixth Circuit, adopted rules that elevate police speculation above case specific information, and thereby elide and obliterate the nexus requirement of the Fourth Amendment.

In her *State v. Ward, supra*, dissent Wisconsin Chief Justice Shirley A. Abrahamson drew a direct analogy to this Court’s holding in *Richards v. Wisconsin*, 520 U.S 385 (1997), which condemned a generalization about drug dealers and firearms for the purpose of creating a *per se* rule for issuing “no knock” search warrants. She concluded that judicial acceptance of the generalization challenged by *Eaton* will lead inevitably to a conclusion that “every drug dealer

(big, medium or small) and further everyone engaged in criminal activity (drugs or otherwise), keeps evidence of the criminal activity at home. This ‘common sense’ reasoning swallows the Fourth Amendment requirement that applications for warrants must demonstrate reasonable grounds to believe that the item to be seized will be found in the place to be searched.” 604 N.W.2d at 533.

This Court has not addressed the issues presented by this Petition. Significant, however, is its recognition in *Richards* that creating “a criminal category” exception to the Fourth Amendment’s demand for specific facts renders “the Fourth Amendment’s reasonableness requirement meaningless.” 520 U.S. at 394. No less can be said for Indiana’s adoption of a *per se* rule for a broad but undefined category of “drug traffickers” that dispenses with the need for case specific probable cause to search for private papers in a home, and renders the warrant requirement meaningless.

Eaton’s case presents a ready vehicle by which to resolve the federal and state court conflicts on a critical point, to provide appropriate guidance to state and federal courts, and to prevent further erosion of the core values of the Fourth Amendment. Since its ruling in *Stone v. Powell*, 428 U.S. 465 (1976) (effectively removing Fourth Amendment challenges from federal habeas corpus jurisdiction), the Court is the only federal forum to which Willie Eaton and others can look for protection of their fundamental right to be free of unreasonable searches of their homes. A ruling will have significant impact nationwide not only upon persons suspected of crimes, but also upon innocent persons whose homes may be searched without probable cause. Given the demonstrated divisions among the state and federal courts, the criteria for a grant of a writ of certiorari specified in S.Ct. Rule 10(b) are satisfied. *Pennsylvania v. Dunlap*, 129 S.Ct. 448 (2008) (Chief Justice Roberts and Justice Kennedy dissenting from denial of certiorari).

II. Search Warrants for “Drug Traffickers” Homes Must Conform to Fourth Amendment Standards of Probable Cause and Particularity

A. Standard of Review

A finding of probable cause to search a home may be premised upon an affidavit of a police officer that supplies facts and circumstances that in their totality support an inference of “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The question is whether the magistrate who issued a search warrant on the strength of the affidavit had a substantial basis for authorizing a search. *Id.* at 238-39.

Probable cause to search exists only “where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. . . .” *Id.* at 696; *United States v. Grubbs*, 547 U. S. 90, 94 (2006). It follows logically that criminal activity at another place cannot by itself supply the necessary probable cause to search a person’s home for evidence, *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002), and that as a precondition for a search warrant authorities must establish a reasonable nexus between that activity and a suspect’s home or place of business. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978); *United States v. Ribeiro*, 397 F.3d 43, 50-53 (1st Cir. 2005).

B. The Decline of Specificity and the Rise of Opinion Based Search Warrant Affidavits

A finding of probable cause cannot be premised on unsupported allegations of a policeman. *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Grinton*, 154 F.3d 1245, 1257 (11th Cir. 1998), *cert. denied*, 526 U.S. 1032 (1999). However, a leading Fourth

Amendment commentator has traced a departure from the demand for *facts* to support a finding of the requisite nexus between alleged criminal activity and the places to be searched to a regular judicial practice of finding “this gap [to] be filled merely on the basis of the affiant-officer’s experience that drug dealers ordinarily keep their supply, records and monetary profits at home.” 2 Wayne R. LaFave, *Search and Seizure*, § 3.7(d), pp. 421-22 nn. 169, 170 (4th ed. 2004), and 2007-2008 Supp. pp. 43-44 (citing federal and state cases). The origin of the substitution of *ipse dixit* for specific facts is uncertain, but can be traced backward for at least thirty years. See, e.g., *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978): “[A] warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observation, but on the type of crime, nature of the items, and normal inferences where a criminal would likely hide contraband.” *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) (DEA agent’s ten year experience “had taught him that *major drug traffickers* [emphasis supplied] frequently maintain at their homes large amounts of cash, drugs, books, ledgers and other documents evidencing their criminal activities.”)

Despite the ubiquity of these claims (and the reported cases are a miniscule sample of the cases in which they are employed to secure home search warrants) research has revealed no empirical support for the broad assertions. The “training and experience” language inserted in search warrant affidavits often are little more than “boilerplate recitations designed to meet all law enforcement needs.” *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990) (search warrant purporting to describe pornography collecting practices of pedophiles). In these days of word processors and computers, the recurring and remarkably similar “training and experience” language in search warrant affidavits nationwide supports an inference that it is simply a “plug in” to fit “all law enforcement needs.” See cases cited at pp. 9-11, *supra*; *United States v.*

Harmon, 2006 WL 3913439 (E.D. Tenn. 2006) {particularly revealing affidavit seeking what can only be described as a warrant for a general search}. See also *United States v. Yates*, 132 F.Supp.2d 559, 562 (E.D. Mich. 2001); but see *United States v. Ribeiro, supra*, 397 F.3d at 51-52 (rejecting a “boilerplate” characterization, but in a case in which there was substantial support for an inference of defendant’s personal involvement in on-going illegal drug business).

While the affiant in this instance claimed knowledge that drug traffickers eschew banks and financial institutions as places to keep cash, others claim their training and experience indicates “that it is not uncommon for the records, etc. of such [drug] distribution to be maintained in bank safe deposit boxes.” *United States v. Schultz*, 14 F.3d 1093, 1097 (6th Cir.1994); or that they commonly use “mini-warehouse self-storage type facilities to stash large quantities of cocaine.” *United States v. Willis* 2007 WL 2413008 (N.D. Ga. 2007); or that traffickers keep their drugs and records in different or multiple locations. *United States v. McNeal*, 82 F. Supp.2d 945, 949 (S.D. Ind. 2000). The “training and experience” or, as in this case, “knowledge” can be molded to fit any place the police wish to search.

Special law enforcement expertise gained through experience may be helpful in probable cause analysis. *Ornelas v. United States*, 517 U.S. 690, 700 (1996); and see *Pennsylvania v. Dunlap*, 129 S.Ct. 448 (2008) (Chief Justice Roberts and Justice Kennedy dissenting from denial of certiorari). In those instances, however, a police officer was able to articulate case specific observations to which his expertise could be applied. Neither case involved the kinds of sweeping generalizations here at issue.

C. Uncorroborated Claims of Police Expertise Have Become a Basis for General Searches of Private Homes

In Willie Eaton’s case, the Indiana Supreme Court has pushed the issue beyond the constitutional boundary and has adopted a *per se* rule that allows residential search warrants to issue solely on (1) allegations that a person engaged in “drug trafficking” at a location remote from his home; and (2) the unsupported opinion of a police officer that some undefined class of “drug traffickers” commonly “keep evidence of their activities in their residences.” 889 N.E. 2d at 300. This ruling diminishes not only the core value of the privacy of one’s home protected against unreasonable government intrusion by the Fourth Amendment, *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *California v. Ciralto*, 476 U.S. 207, 212-213 (1986); *United States v. United States District Court*, 407 U.S. 297 (1972), but implicates the unsettled question whether exacting standards of probable cause should be applied when the target of a home search is a person’s “dearest property” in the form of his private papers. *Boyd v. United States*, 116 U.S. 616, 627-28 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)).

The Court has not addressed a “private papers” search since *Andresen v. Maryland*, 427 U.S. 463 (1976), and then only in the context of business records in a business office. *Andresen* recognizes that:

General warrants, of course, are prohibited by the Fourth Amendment. “(T)he problem (posed by the general warrant) is not the intrusion *Per se* but of a general, exploratory, rummaging in a person’s belongings. . . . (The Fourth Amendment addresses the problem) by requiring ‘particular description’ of the things to be seized.” [citation omitted]. This requirement “makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” [citations omitted]. *Id.* at 480.

The opinion goes on to note:

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person’s papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are in fact among those papers authorized to be seized. . . .

[R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy. Id. at 482 n.11 [emphasis supplied].

The first warrant for the search of Willie Eaton's residence specified for seizure "documents relating to drug trafficking, including: "(1) ledgers; (2) records maintained in electronic form, including computer records, cell phone records, pager records; (3) receipts; (4) phone bills. (5) wire transfer receipts; (6) U.S. currency. and (*sic*) to there search for and seize *any and all property.*" Appendix D-10 [emphasis supplied]. When executing a warrant the police were allowed to examine any area in which the authorized items might be secreted. *Horton v. California*, 496 U.S. 128 (1990). Because of the potentially small size of some of the items listed in the warrant, the police were permitted to look into every drawer, file cabinet, closet, container, computer and "nook and cranny" of the Eaton home. Since the police could not be sure that they had located any or all of the specified items until every drawer, file cabinet, closet, container, computer and "nook and cranny" had been opened and its contents carefully examined, the warrant, contrary to the caution expressed in *Andresen, supra*, imposed no limitation upon their conduct. The addendum that the police were thereby authorized "to search for and seize any and all property" leaves no doubt that this was a general search proscribed by the Fourth Amendment.

This point is not asserted as a separate issue, but is directly related to Eaton's claim that probable cause for the intrusive search of his home was non-existent.

[T]he requirement of particularity is closely tied to the requirement of probable cause. . . The less precise the description of things to be seized, the more likely it will be that either or both [of the probabilities as to criminal activity and location] has not been established. For example, a general description "records, mail, correspondence, and communications" is immediately suspect as being based upon nothing more than conjecture that such items related to the crime under investigation actually exist.

2 Wayne R. LaFare, *Search and Seizure*, § 4.6(a), pp. 606-07 (4th ed. 2004); *United States v. Denton*, 487 F.Supp.2d 1180, 1183-84 (D. Or. 2007); *United States v. Bridges*, 344 F.3d 1010, 1017-18 (9th Cir. 2003) (“not limited to” language too broad); *Levenduski v. State*, 876 N.E.2d 798 (Ind.Ct.App. 2007) (catch all language permitting seizure of “any other item or contraband which are (*sic*) evidence of crime” created a general warrant.).

III The Court Should Clarify the Meaning of “Drug Trafficker” for Purposes of Assessing the Validity of Generalizations About Where Evidence Is Kept

The kinds of search warrants at issue are based on two dependent syllogisms. The major premise of the first is that a “drug trafficker” is a person who displays certain characteristics and behaviors common to the class. The major premise of the second is that a person who has been identified as a drug trafficker commonly keeps record evidence of that activity in his home. In Willie Eaton’s case the Indiana Supreme Court omitted the essential first step by failing to examine whether he could be subsumed within the ‘drug trafficker’ category simply because of his physical proximity to the single transaction in which Wayne Eaton and Gonzalez were involved

In the cases cited in this Petition at pp. 9-11, *supra*, other federal and state courts have required proof of some combination of (1) on-going activity indicating that the person is conducting an illegal business; (2) personal involvement in multiple transactions; (3) lengthy criminal history of drug dealing; or (4) a factual basis upon which to infer that a suspect is a “big time” or “major player” in the drug business. This “common thread” is noted in 2 LaFave, *supra*, p. 422 n.169. These, too, are the types of persons who may be more likely to keep large amounts of cash or financial and other records of their activity in their homes. Those who may assist them only in the transportation or handling of drugs are highly unlikely to be record keepers or cash stashes. *United States v. Weber*, 923 F.2d 1138, 1345-46 (9th Cir. 1990) (before there can be probable cause to search a person’s home premised upon the “known” proclivities of a certain criminal class there must first be a showing that the search target is a member of that class).

Some state courts have resisted attempts to add to police folklore yet another “criminal

category” generalization that users or possessors of drugs will keep drugs “at their residence so they always have a source to satisfy their addiction.” *People v. Pressy*, 126 Cal. Rptr.2d 162, 167 (Cal.App.2002); *State v. Thien, supra*, 977 P.2d at 585; *State v. Johnson*, 589 N.W.2d 108 (Neb. 1999), *overruled on other grounds*, *State v. Davidson*, 618 N.W.2d 418 (Neb. 2000). This holds true for persons like Willie Eaton who, according to the affiant’s allegations, *at most* was present and *maybe* in some unspecified way assisting Wayne Eaton inside the muffler shop. The Indiana Supreme Court took an illogical leap from those meager “facts” to (1) the conclusion that Willie Eaton was a “drug trafficker;” to (2) unquestioned acceptance of the uncorroborated “knowledge” of the affiant; to (3) a conclusion that Willie Eaton was probably a drug trafficking record keeper; and to (4) a conclusion that he would probably keep those records in his home.

Only one other state seems to have authorized home search warrants to issue upon this kind of speculation. In *People v. Nunez*, 619 N.W.2d 550 (Mich.App. 2000), the defendant was arrested in 1997 on a federal indictment for a cocaine dealing conspiracy alleged to have occurred in 1995. A search of his car incident to that arrest revealed “a small white chunk of material that field tested positive for cocaine.” On this (and his false denial that he was living in a certain apartment) the state court, citing a prior ruling based on a claim of police “training and experience,” upheld a warrant for the search of the apartment because “[t]he presence of some cocaine in defendant’s vehicle . . . supported a reasonable inference that [he] was still trafficking in cocaine.” *Id.* at 552 n.1.

The Court, for purposes of clarifying the probable cause requirement of the Fourth Amendment, should grant certiorari and articulate for state and federal judges the criteria necessary to support a reasonable inference that a person is a “drug trafficker.” The Court also may find this case a useful vehicle through which to determine whether a *per se* “drug trafficker”

home search rule is as offensive to Fourth Amendment values as was the generalization with respect to possession of firearms in *Richards v. Wisconsin, supra*.

IV The Indiana Supreme Court's Interpretation of the Warrant Clause of the Fourth Amendment Is Seriously Flawed

A. There Was No Basis for a Finding of Probable Cause to Search Willie Eaton's Home

Restated from the opinion of the Indiana Supreme Court, its rule is: If an affidavit submitted in support of an application for a search warrant alleges that a person is involved [in some undisclosed manner at a location remote from his home] in [a single instance of] the receipt and unloading of a substantial quantity of illegal drugs, he is a drug trafficker and therefore [based upon an unsupported and uncorroborated claim of knowledge by a policeman] is likely to have in his residence incriminating records and documents of the kind commonly maintained by drug traffickers; therefore, the probable cause and particularity elements of the Warrant Clause of the Fourth Amendment to the Constitution of the United States are not violated by a general search of the person's home pursuant to a search warrant that is issued solely on the basis of those allegations.

This, on its face, reflects a profound misunderstanding and distortion of the core values that the Fourth Amendment is meant to preserve and protect. Multiple defects in the affidavit offered in support of the first warrant for the search of Eaton's home are described in the opinion of the Indiana Court of Appeals (878 N.E.2d at 487) and in Justice Rucker's dissent in the Indiana Supreme Court (889 N.E.2d at 303-04).

Applying the "four corners" rule of *Whitely v. Warden, supra*, there are additional flaws in the affidavit that the Indiana Supreme Court should have acknowledged. The only basis upon

which to infer that Eaton kept documentary evidence of drug trafficking in his home is Officer Ron Shoemaker's assertion of what he "knows" -- based on his nine years "working on narcotics invest[ig]ations" and his current assignment to the Drug Enforcement Administration. Missing is the usual claim of "training and experience" to support his assertion. Just *how* does he "know" these things? The magistrate had no indication of what he actually did during those nine years or if he participated in any searches in which the kinds of materials sought from Eaton's home had been recovered. How many searches? What percentage of the searches yielded the kinds of materials that "drug traffickers" are alleged "commonly" to maintain? How many searches failed to reveal such material? In short, what empirical evidence supports Shoemaker's claim of knowledge? Was this language crafted originally for this warrant application or was it "cut and pasted" from another document? In how many instances has the affiant and his colleagues used identical language in their applications for search warrants?⁵ In short, Shoemaker's affidavit contains no more reliable information than the "bare bones" affidavit condemned by this Court in *Aguilar v. Texas, supra*. His foundationless claim of knowledge "may have added fat to the affidavit, but certainly no muscle." *United States v. Weber, supra*, 923 F.2d at 1346.

Absent inexplicably from the affidavit is any information that would have been expected to be supplied by the "inside man" (Edgar Gonzalez) concerning Willie Eaton's role (if any) in the transaction. Who produced the black bag containing the buy money and from where did it come? Was the bag checked for fingerprints? The police theory of Willie Eaton's arrest is that he was the "bagman" who delivered the cash -- and that was based only on his arrival in a blue car at some point after Wayne Eaton and Gonzalez had reached the location. Shoemaker gives

⁵ Similar language appears in an affidavit considered in *Membres v. State*, 889 N.E.2d 265, 276 (Ind. 2008).

an impression that the cell phone call made by Wayne outside the muffler shop was to Willie Eaton, but the affidavit says nothing about the number Wayne was calling which easily could have been determined by examining his cell phone call log.

Shoemaker's affidavit did not reach a level of "reasonable probability" given competing inferences that Wayne had stashed the bag with the money at the muffler shop before going to meet Gonzalez, or that the bag had been transported in Wayne's car. Shoemaker's affidavit alleges that both Gonzalez and Wayne "pulled insi[d]e Discount Muffler" and that he "observed DeWayne Eaton exit the tan Blazer." The language is ambiguous and can be understood as an observation of both cars being driven into the service area of the shop or, initially, into an outside parking area. There is nothing *on the face* of the affidavit that would have permitted the magistrate to conclude that the police surveillance of these activities excluded Wayne Eaton's tan Blazer as the source of the black bag and the buy money. *Whitely v. Warden, supra*, precluded the police from "backing and filling" on that issue in subsequent hearings on Eaton's motion to suppress evidence.

Third, there is nothing in Shoemaker's affidavit that would have permitted the magistrate to infer a prior relationship between DeWayne Eaton and Willie Eaton beyond a coincidence of a not uncommon surname. There is no indication of race that could permit the magistrate to infer that Willie Eaton may have been one of the "black guys" Gonzalez said he was to meet. Finally, there is nothing in the affidavit to indicate that Willie Eaton was anything but a legitimate customer of the muffler shop who had the misfortune of being there at the wrong time.

The Indiana Supreme Court concluded incorrectly that the searches of Eaton's home were conducted lawfully under provisions of the Fourth Amendment, and that the evidence obtained thereby was properly admitted at his trial.

B. The Second Search Warrant Was Based on Evidence Derived Illegally During the First Search of Eaton's Home

The Indiana Court of Appeals concluded correctly that all the evidence supporting Eaton's convictions was discovered as a direct result of the first illegal search of Willie Eaton's residence. 878 N.E.2d at 487. The second search warrant was premised entirely on tainted evidence and there were neither independent sources of the evidence nor any circumstances of attenuation. According to the derivative evidence doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963), all of the evidence obtained by the state as a result of the two searches of Eaton's home should have been suppressed.

V The "Good Faith" Issue Is Not Before This Court

Any attempt by the Respondent to urge upon this Court an application of the "good faith" exception recognized in *United States v. Leon*, *supra*, should be rejected for several reasons.

First, the Indiana Supreme Court did not reach the issue because of its failure to recognize the multiple defects in Officer Shoemaker's affidavit; second, the Indiana Court of Appeals was correct in concluding that *Leon* was inapplicable because its myriad defects rendered it "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 878 N.E.2d at 487; third, the affidavit was approved and signed by a county prosecutor who, as a legal expert, should have been aware of its failure to meet constitutional standards of probable cause (an issue not addressed in *Leon*).

Finally, and most importantly, the Indiana Supreme Court has yet to address whether *Leon's* good faith standards are incompatible with Article 1, Section 11 of the Indiana Constitution, and with a state statute that was enacted *before* this Court's decision in *Leon* which prescribes criteria that are more exacting than what *Leon* would allow under the Fourth

Amendment. Andrew C. Krull, *Turning Back the Clock: Why the 'Good Faith Exception Was Not and Should Not Be Recognized in Indiana*, Res Gestae, October 2007, pp. 29-37 (a publication of the Indiana State Bar Association). The article traces the history of Indiana Supreme Court rulings that assert only “judicial integrity” as the basis for the state’s rule that excludes illegally seized evidence as opposed to *Leon*’s deterrence rationale.

Recent comments by the Indiana Chief Justice Randall T. Shepard suggest that when the issue is directly put to the state court, it may join the sixteen other states that either in whole or in part reject the “good faith” exception of *Leon* on the basis of state law. *Id.* at 29, 35-36 n.16. *See also Membres v. State*, 889 N.E.2d 265, 277-78 (Ind. 2008) (Justice Frank Sullivan dissenting and acknowledging that Indiana constitutional history is inconsistent with *Leon*’s sole focus on police deterrence).

The Indiana Supreme Court has not interpreted Indiana Code § 35-37-4-5 which provides a basis for avoiding exclusion of evidence obtained by police in good faith, but only if pursuant to “(1) (A) a search warrant that was *properly issued upon a determination of probable cause . . . that is free from obvious defects other than nondeliberate errors made in its preparation. . . .*” [Emphasis supplied]

The statute demands more than the “indicia of probable cause” tolerated by *Leon* and requires a “proper” determination of probable cause. In other words, the statute permits a good faith exception only if the defects in the affidavit or warrant involve matters other than constitutionally adequate probable cause.

In light of the unsettled state law, if the Court grants certiorari and agrees with Willie Eaton that the evidence supporting his convictions was the product of Fourth Amendment violations, the matter should be remanded to the state courts without consideration of the “good

faith” exception by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: January 12, 2009

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE EATON – PETITIONER

VS.

STATE OF INDIANA – RESPONDENT

PROOF OF SERVICE

I, F.Thomas Schornhorst, do declare that on this date, January 12, 2009, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, by depositing to the party an envelope containing the above-documents in the United States mail properly addressed and with first-class postage prepaid.

The name and address of the party is: Attorney General of Indiana, Fifth Floor, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana, 46204.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2009.

F. Thomas Schornhorst
Counsel of Record for
Petitioner Willie Eaton