No. 18-1344

In the Supreme Court of the United States

LAMARCUS THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
VIJAY SHANKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Assuming that the affidavit in support of a search warrant in petitioner's case failed to establish probable cause, whether evidence obtained under the warrant was admissible in court under the good-faith exception to the exclusionary rule.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Va.):

United States v. *Thomas*, 5:16-cr-00001-MFU-JCH-1 (Aug. 9, 2017)

United States Court of Appeals (4th Cir.):

United States v. *Thomas*, No. 17-4523 (Nov. 8, 2018)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 18-1344

LAMARCUS THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 908 F.3d 68. The memorandum opinion of the district court (Pet. App. 16a-48a) is not published in the Federal Supplement but is available at 2016 WL 7324095.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2018. A petition for rehearing was denied on December 7, 2018 (Pet. App. 50a). On February 26, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 6, 2019, and the petition was filed on April 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Virginia, petitioner was convicted on two counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). He was sentenced to 360 months of imprisonment, to be followed by a life term of supervised release. Pet. App. 53a-55a. The court of appeals affirmed. *Id.* at 1a-15a.

1. In 2014, police officers in Winchester, Virginia, received an anonymous tip that petitioner had sexually abused a minor. Pet. App. 4a. Detective Charles Coleman began an investigation. He contacted the mother of the alleged victim, who told him that petitioner, "who knew her family through church and often acted as a caretaker for her children," had "sexually assault[ed] two of her minor sons." *Ibid.* She also said that after the assaults, petitioner "had reached out to her several times over the phone, hoping to schedule further visits with her children." *Ibid.*

Detective Coleman arranged and observed interviews of the two boys. Both boys stated that petitioner "had put his hand inside their pajamas and fondled their genitals during a sleepover at a hotel." Pet. App. 4a. One of the boys also discussed petitioner's "attempts to contact his mother through phone calls and text messages after the assault" to arrange further sleepovers. *Ibid.*

Petitioner agreed to an interview, which was videorecorded. Petitioner admitted during the interview that he had touched the boys' genitals. Pet. App. 4a-5a. Detective Coleman filed a criminal complaint seeking warrants for petitioner's arrest on charges of aggravated sexual abuse. *Id.* at 5a; Gov't C.A. Br. 3. The complaint and arrest warrants identified October 11, 2014, as the

estimated date of the assaults, and set out the ages of the victims. *Ibid.* A state magistrate judge issued the warrants. *Ibid.* Detective Coleman arrested petitioner and recovered a cell phone from petitioner's pocket during a search incident to arrest. *Ibid.*

After consulting with state prosecutors, Detective Coleman applied for a warrant to search the seized phone. Pet. App. 5a. Detective Coleman's affidavit in support of the warrant explained that he was "investigating a case w[h]ere two children were allegedly molested by" petitioner. C.A. App. 229. It explained that petitioner himself had corroborated the victims' allegations of abuse when interviewed by Detective Coleman. *Ibid.* The affidavit explained that Detective Coleman had arrested petitioner pursuant to two warrants for aggravated sexual battery, and that during petitioner's arrest, Detective Coleman had seized an "LG cell phone that [petitioner] advised was his personal cell phone." *Ibid.*

Detective Coleman explained in the affidavit that he "ha[d] received many hours of training to investigate child sexual abuse cases and ha[d] learned through training and experience that [it is] common for offenders to keep contact items from victims" such as "pictures of victims, text messages, phone calls," voicemail messages, and "child pornography." C.A. App. 229. He explained that the phone had been in police custody since petitioner's arrest and requested permission to search the phone. *Ibid.* The affidavit noted the date "on which the [arrest] warrants had issued and Coleman had made the arrest, but it did not include the date on which the offenses were alleged to have occurred." Pet. App. 5a; see C.A. App. 229. The affidavit did not discuss petitioner's "use of a phone to contact the [victims']

mother after the assaults." Pet. App. 6a; see C.A. App. 229.

A state magistrate judge issued a warrant for a search of petitioner's phone. Pet. App. 6a. State authorities searched the phone pursuant to the warrant and discovered explicit images and videos of petitioner with two minors. *Ibid.*; Gov't C.A. Br. 4-5. Petitioner later "confessed to sexually abusing the minors and memorializing the abuse on his cell phone." Pet. App. 6a.

2. A federal grand jury in the Western District of Virginia returned an indictment charging petitioner with six counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). C.A. App. 9-12.

Petitioner moved to suppress the evidence from his cell phone, arguing that the warrant affidavit did not establish probable cause for the phone search. The district court denied the motion after an evidentiary hearing at which Detective Coleman testified. Pet. App. 16a-48a. The court agreed with petitioner that Detective Coleman's affidavit had been deficient on the ground that it "contain[ed] 'sufficient facts supporting the aggravated sexual battery charge'" but failed to adequately connect that offense to "the subsequent search of [petitioner's] cell phone." *Id.* at 7a (quoting C.A. App. 251); see *id.* at 17a-18a, 27a-28a. But the court found that the good-faith exception to the exclusionary rule developed in *United States* v. *Leon*, 468 U.S. 897 (1984), applied on the facts of this case.

The district court explained that, under *Leon*, officers are ordinarily entitled to rely on a warrant issued by a magistrate even when a court later determines that magistrate erred in finding probable cause, subject to certain exceptions, including when an officer's belief in

the existence of probable cause would be "entirely unreasonable." Pet. App. 39a. The court observed that *Leon*'s inquiry into whether "a reasonably well trained officer would have known that the search was illegal" depends on an analysis of "all of the circumstances." *Ibid.* (quoting *Leon*, 468 U.S. at 922 n.23). Accordingly, the court explained, a court assessing the applicability of the good-faith exception may consider facts known to the officer but "outside the four corners of a deficient affidavit." *Ibid.* (quoting *United States* v. *McKenzie-Gude*, 671 F.3d 452, 459 (4th Cir. 2011)).

The district court determined that "Detective Coleman's reliance on the search warrant" in this case "was objectively reasonable and subject to the *Leon* good faith exception." Pet. App. 42a. It emphasized that Detective Coleman was aware of the uncontroverted evidence that petitioner had used a phone to call "the victims' mother just a few months earlier," "in furtherance of his criminal conduct," although those facts were not set out in the affidavit. *Id.* at 18a-19a. The court found that the good-faith exception applied because "the experienced officer[] in this case * * * acted with the requisite objective reasonableness when relying on uncontroverted facts known to [him] but inadvertently not presented to the magistrate." *Id.* at 19a (quoting *McKenzie-Gude*, 671 F.3d at 460) (brackets in original).

Petitioner pleaded guilty to two counts of producing child pornography, reserving his right to appeal the denial of his suppression motion. The district court sentenced petitioner to 360 months of imprisonment, to be followed by a lifetime term of supervised release. Pet. App. 53a-55a.

3. The court of appeals affirmed. Pet. App. 1a-15a. The court explained that it did not need to decide

whether Coleman's affidavit established probable cause, because the good-faith exception would apply even if the affidavit were deficient. *Id.* at 8a & n.1.

The court of appeals observed that it had already determined that *Leon* permits a court to "look beyond the four corners of the affidavit" in determining whether an officer's belief in the existence of probable cause was objectively reasonable. Pet. App. 9a. Under *Leon*, the court explained, the key inquiry is "whether a reasonably well trained officer would have known that [a] search was illegal in light of *all of the circumstances*." *Id.* at 10a (citation and internal quotation marks omitted). The court explained that "'specific, uncontroverted facts known to the officer[]'" but outside the warrant affidavit "necessarily inform the objective reasonableness of an officer's determination regarding probable cause, even if they are omitted inadvertently from a warrant application." *Id.* at 11a (citation omitted; brackets in original). "[W]hen an officer's belief in the existence of probable cause is objectively reasonable," the court observed, "he or she has no reason to second guess the magistrate's decision to issue a warrant, and acts in good faith when executing the search." *Ibid.*

The court of appeals added that a contrary approach would lead to the anomalous result that evidence would be suppressed in cases in which magistrates had issued search warrants and officers had probable cause to support the search. Pet. App. 11a. Further, the court explained, "[w]hen a warrant is invalidated only because an officer mistakenly omitted information necessary to establish probable cause, application of the exclusionary rule can have little, if any, deterrent effect." *Ibid.* The court observed that suppression in those circumstances would be contrary to the principle, set out in

Herring v. *United States*, 555 U.S. 135, 147-148 (2009), that "[w]hen police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence * * * does not pay its way." *Ibid.* (citation omitted).

The court of appeals noted that petitioner's "principal argument in response" to the district court's analysis was that "Coleman's omissions were not 'inadvertent'" because "Coleman intentionally omitted crucial facts from his affidavit pursuant to a police department policy, which Coleman described at the suppression hearing as one of limiting newspaper publicity by 'put[ting] no more [probable cause] into the warrant [affidavit] than it takes to obtain the warrant.'" Pet. App. 12a-13a (citation omitted; brackets in original). But the court found that "Coleman's error in this case—assuming there was one—was inadvertent" because it did not "result from the kind of deliberate or bad faith effort to mislead a magistrate that would render *Leon*'s good faith exception inapplicable." *Id.* at 13a. To the extent that Detective Coleman omitted facts from the affidavit that were necessary to establish probable cause, the court explained, that omission was not pursuant to any departmental policy, but instead "resulted from a simple miscalculation by Coleman as to how much of what he knew he needed to include in his affidavit to show probable cause." *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 9-33) that the court of appeals erred in determining that the good-faith exception applied after considering facts known to Detective Coleman but not disclosed to the magistrate. The court was correct in its application of the good-faith exception and in its consideration of facts outside the four corners of

the search warrant affidavit. Although some disagreement exists regarding the relevance of such facts to good-faith analysis, this case presents a poor vehicle for considering that disagreement, because the affidavit alone would establish good faith in the circuits whose methodology petitioner invokes. Moreover, petitioner's case would be an especially unsuitable vehicle because petitioner's argument that application of the exclusionary rule is appropriate rests largely on the warrant application policy of a specific police department, which was not at issue or addressed in prior decisions concerning the relevance of facts outside warrant affidavits in good-faith analysis. This Court has repeatedly and recently denied review of the question presented. See *Escobar* v. *United States*, No. 18-8202, 2019 WL 1004491 (May 28, 2019); *Combs* v. *United States*, 139 S. Ct. 1600 (2019) (No. 18-6702); *Campbell* v. *United States*, 138 S. Ct. 313 (2017) (No. 16-8855); *Fiorito* v. *United States*, 565 U.S. 1246 (2012) (No. 11-7217). The same result is warranted here.

1. The court of appeals correctly determined that the good-faith exception to the exclusionary rule applies in petitioner's case.

a. The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). This Court has explained that in order to justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. *Herring* v. *United States*, 555 U.S. 135, 144 (2009); see *Davis* v. *United States*, 564 U.S. 229, 236-239 (2011).

Leon recognized a good-faith exception to the exclusionary rule in the context of search warrants. The Court explained that application of the exclusionary rule is "restricted to those areas where its remedial objectives are thought most efficaciously served." 468 U.S. at 908 (citation omitted). It observed that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922. The Court thus held that evidence should not be suppressed if officers acted in an objectively reasonable manner in relying on a search warrant, even if the warrant was later deemed deficient. *Ibid.*

This Court noted that in some cases an officer's reliance would not be objectively reasonable because the officer lacked "reasonable grounds for believing that the warrant was properly issued," such as when a warrant was "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citation omitted). The Court has explained, however, "that the threshold for establishing" such a deficiency "is a high one, and it should be." *Messerschmidt* v. *Millender*, 565 U.S. 535, 547 (2012). And *Leon* emphasized that whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" is to be decided based on "all of the circumstances." 468 U.S. at 922 n.23.

Petitioner is mistaken in suggesting (Pet. 24-29) that *Leon* bars consideration of information outside of the four corners of the warrant affidavit in the good-faith analysis. In making clear that an "officer's reliance on the magistrate's probable-cause determination and on

the technical sufficiency of the warrant" must be "objectively reasonable," the Court in *Leon* held that "all of the circumstances * * * may be considered" when deciding whether objective reasonableness is established. 468 U.S. at 922-923 & n.23; accord *Herring*, 555 U.S. at 145 (explaining that the good-faith inquiry is based on "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances'" and that "[t]hese circumstances frequently include a particular officer's knowledge and experience") (quoting *Leon*, 468 U.S. at 922 n.23). Indeed, *Leon* itself listed a circumstance outside the four corners of the affidavit—"whether the warrant application had previously been rejected by a different magistrate"—as among the circumstances that courts might consider. 468 U.S. at 923 n.23. And in a companion case decided the same day as *Leon*, the Court again examined circumstances outside the four corners of the warrant affidavit in concluding that the good-faith exception was applicable. *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989 (1984) (considering circumstances under which warrant application was presented).

That approach accords with the principles that underlie the good-faith doctrine and the exclusionary rule more generally. This Court has explained that suppression is appropriate "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *Davis*, 564 U.S. at 238 (citation and internal quotation marks omitted). Agents do not engage in any "deliberate, reckless, or grossly negligent" conduct when they omit incriminating facts that would have only helped them gain the magistrate's approval. Instead, at most, agents in that circumstance commit the type of negligent omission for which this

Court has indicated that suppression is not ordinarily appropriate. *Ibid.* Moreover, officers already have considerable incentives to include the facts needed to establish probable cause in their search warrant affidavits, because doing so increases the likelihood that the magistrate will issue a warrant. Those existing incentives suggest that any marginal benefit that a narrow construction of the good-faith doctrine might theoretically provide in deterring officers from omitting inculpatory facts from warrant applications does not outweigh the high societal costs of a suppression remedy. See *Herring*, 555 U.S. at 141.

Contrary to petitioner's suggestion, the court of appeals has not permitted officers to "sidestep th[e] central procedural safeguard" of the warrant requirement and make "an end run around the magistrate," Pet. 20 (capitalization altered). The *Leon* good-faith exception does not permit officers to evade magistrates' review, because it applies only if officers sought and obtained a warrant. And petitioner is simply mistaken in suggesting that consideration of "'all of the circumstances,'" Pet. App. 10a (quoting *United States* v. *McKenzie-Gude*, 671 F.3d 452, 459 (4th Cir. 2011))—including the facts known to the officers but not included in the warrant affidavit—"turn[s] the good-faith exception into a subjective inquiry," Pet. 24 (capitalization altered). Objective inquiries eschew analysis of "'the subjective intent' motivating the relevant officials," *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 736 (2011) (quoting *Whren* v. *United States*, 517 U.S. 806, 814 (1996)), but routinely examine all of the facts known to officers in assessing the reasonableness of the officers' actions. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) ("[A] warrantless arrest by a law officer is reasonable under the

Fourth Amendment where there is probable cause," which "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968) (stating that the "objective standard" for an investigative stop is whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate").

Finally, petitioner falls short in seeking to reconcile his argument with this Court's decisions in *Herring* and *Davis*. See Pet. 30-32. Those decisions make clear that "[t]he basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue," and that the "'deterrence rationale'" for the exclusionary rule "'loses much of its force'" when officers' "conduct involves only simple, 'isolated' negligence," *Davis*, 564 U.S. at 238 (brackets and citations omitted). Petitioner suggests (Pet. 30-32) that insofar as Detective Coleman's affidavit omitted facts needed for probable cause, the omission reflects reckless or deliberate conduct because of a police department policy on omitting unnecessary facts from warrant affidavits. But as the court of appeals explained, the department's policy was to omit only facts that were not needed for probable cause. Pet. App. 13a. Accordingly, if petitioner is correct that the warrant affidavit was deficient (a question the court of appeals did not decide), Detective Coleman's failure to include additional necessary facts was not "pursuant to [departmental] policy," but rather an apparent negligent error in assessing the evidence in the case. *Id.* at 13a-14a.

b. Petitioner does not dispute that if facts known to Detective Coleman can be considered as part of the good-faith analysis, the lower courts correctly applied the good-faith exception to the exclusionary rule. And the good-faith exception would apply even assuming the inquiry were in fact restricted solely to information contained in the warrant affidavit.

Detective Coleman's affidavit explained that he had obtained petitioner's cell phone during the arrest of petitioner for the molestation of two children, and that petitioner had acknowledged the phone to be his. C.A. App. 208. The affidavit further explained that Detective Coleman had interviewed petitioner and that petitioner had "corroborated both juvenile's statements against him." *Ibid.* Detective Coleman then stated that he "ha[d] received many hours of training to investigate child sex abuse cases, and ha[d] learned through training and experience that it is common for offenders to keep contact items from victims such as * * * pictures of victims, text messages, phone calls, Voice mails and/or child pornography on their cell phones." *Ibid.* Accordingly, Detective Coleman stated that he "had reason to believe" petitioner had such material on his cell phone. *Ibid.*

In light of these passages—even setting aside information outside the affidavit that petitioner contends should not have been considered—it was not "entirely unreasonable" for an officer to believe that the affidavit established the requisite "fair probability" to justify a search of the phone for evidence of sexual abuse or child pornography. See *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983) (probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"); see generally *Messerschmidt*,

565 U.S. at 553.[1] It stands to reason—and Detective Coleman's training and experience confirmed—that an admitted child molester might have evidence of his activities on the phone that he carried with him.

2. Although some disagreement exists in the courts of appeals concerning whether a court may consider facts outside of search warrant affidavits under *Leon*, this case is not a suitable vehicle for considering that disagreement because the affidavit in this case would establish probable cause or good faith in the circuits on whose decisions petitioner relies.

"[A] majority of circuits" to consider the question have "taken into consideration facts outside the affidavit when determining whether the *Leon* good faith exception applies." *United States* v. *Martin*, 297 F.3d 1308, 1319 (11th Cir.), cert. denied, 537 U.S. 1076 (2002); see *id.* at 1320 (considering information known to officer but not included in affidavit in making good-faith determination); see also *United States* v. *Farlee*, 757 F.3d 810, 819 (8th Cir.) ("[W]hen assessing the officer's good faith reliance on a search warrant under the *Leon* good faith exception, we can look outside of the four corners of the affidavit and consider the totality of the circumstances, including what the officer knew but did not include in the affidavit."), cert. denied, 135 S. Ct. 504 (2014); *McKenzie-Gude*, 671 F.3d at 461 (explaining that a court may consider "undisputed, relevant facts

---

[1] In *Messerschmidt*, the Court held that police officers who executed a warrant-authorized search of a residence were entitled to qualified immunity from damages under 42 U.S.C. 1983. See 565 U.S. at 539. In so holding, the Court explained that the *Leon* good-faith standard is the "same standard" as the "clearly established" standard in the Section 1983 context. *Id.* at 546 & n.1 (citations omitted).

known to the officers prior to the search" but inadvertently not disclosed to the magistrate, as part of good-faith analysis); *United States* v. *Taxacher*, 902 F.2d 867, 871 (11th Cir. 1990) (relying on facts known to officer but not presented to magistrate in determining "whether the officer acted in objective good faith under all the circumstances") (emphasis omitted), cert. denied, 499 U.S. 919 (1991); see also *United States* v. *Procopio*, 88 F.3d 21, 28 (1st Cir.) (applying *Leon* where "only omission [in an affidavit] was the failure to explain how the agent—who had ample basis for the contention—knew that" place to be searched belonged to subject of search), cert. denied, 519 U.S. 1046 (1996) and 519 U.S. 1138 (1997). Several state courts have also adopted that approach. See *Moya* v. *State*, 981 S.W.2d 521, 525-526 (Ark. 1998); *Moore* v. *Commonwealth*, 159 S.W.3d 325, 328 (Ky. 2005); *State* v. *Varnado*, 675 So. 2d 268, 270 (La. 1996) (per curiam); *State* v. *Edmonson*, 598 N.W.2d 450, 460-462 (Neb. 1999); *Adams* v. *Commonwealth*, 657 S.E.2d 87, 94 (Va. 2008).

As petitioner notes (Pet. 14-18), some courts of appeals and state courts have, at least in some circumstances, disapproved of consideration of facts outside the four corners of the search warrant affidavit in the *Leon* analysis. See *United States* v. *Knox*, 883 F.3d 1262, 1272-1273 (10th Cir.), cert. denied, 139 S. Ct. 197 (2018); *United States* v. *Laughton*, 409 F.3d 744, 751 (6th Cir. 2005); *United States* v. *Koerth*, 312 F.3d 862, 869 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003); *United States* v. *Hove*, 848 F.2d 137, 140 (9th Cir. 1988); see also *People* v. *Miller*, 75 P.3d 1108, 1116 (Colo. 2003) (en banc), cert. denied, 541 U.S. 1082 (2004); *State* v. *Johnson*, 395 S.E.2d 167, 169-170 (S.C. 1990); but see *United States* v. *Dickerson*, 975 F.2d 1245, 1250 (7th

Cir. 1992) (concluding that the good-faith exception applied based on facts known to officers at the scene but not disclosed to the magistrate), cert. denied, 507 U.S. 932 (1993); *United States* v. *Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) (determining that good-faith exception applied because detective "sought advice from county attorneys concerning the substantive completeness of the affidavit before he submitted it to the magistrate" and "the attorney advised him that the affidavit seemed complete").[2]

---

[2] Decisions of the Fifth Circuit and Court of Appeals of Maryland on which petitioner relies do not address the question presented. In *United States* v. *Maggitt*, 778 F.2d 1029 (1985), cert. denied, 476 U.S. 1184 (1986), the Fifth Circuit concluded that the good-faith exception applied when "investigating officers appeared before a judicial authority who carefully examined them about the portions of [an] affidavit that he apparently considered to be lacking," reasoning that "[i]t was objectively reasonable for the officers to believe that whatever flaws may have existed in the warrant were cured by the city judge's questions and their answers." *Id.* at 1036. The court did not address whether it was permissible to consider facts known to officers but not disclosed to the magistrate as part of the good-faith analysis. In *Greenstreet* v. *State*, 898 A.2d 961 (2006), the Court of Appeals of Maryland stated that "[t]o determine whether [an] officer h[ad] an objective reasonable belief that the search conducted was authorized," it "review[s] the warrant and its application," but did not discuss whether other facts could also be considered. *Id.* at 978. The court has stated in other decisions that a judge should "consider all of the circumstances of the case" in assessing good faith, *Patterson* v. *State*, 930 A.2d 348, 365 (Md. 2007) (citation omitted), cert. denied, 552 U.S. 1270 (2008), including evidence outside the warrant affidavit, *Agurs* v. *State*, 998 A.2d 868, 874 n.8 (Md. 2010) (stating that when good faith was in dispute, "nothing precluded the state from requesting an evidentiary hearing to attempt to present other circumstances for the trial court to consider in determining whether a reasonably well-trained officer would have

Petitioner's case does not present a suitable vehicle for addressing that disagreement, however, because the search here would meet the good-faith standard developed by the courts on whose decisions petitioner relies. The Ninth Circuit, for example, has explained that the good-faith exception applies if the affidavit in some fashion "link[s]" the defendant to the place to be searched, even if the affidavit is not "'the model of thoroughness.'" *United States* v. *Crews*, 502 F.3d 1130, 1137 (2007) (citation omitted). The Seventh Circuit has stated that "[a] search warrant may issue even in the absence of direct evidence linking criminal objects to a particular site taking into account the totality of the circumstances," *United States* v. *Garey*, 329 F.3d 573, 578 (2003) (citation and internal quotation marks omitted), and that "[a]n issuing court is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense," *United States* v. *Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991) (citation and internal quotation marks omitted). And the Sixth Circuit has explained that the good-faith exception applies when there is "some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be searched." *Laughton*, 409 F.3d at 749; see also *id.* at 750 (good-faith exception applied where the affidavit contained "*some* connection, regardless of how remote it may have been, between the criminal activity at issue and the place to be searched").

The affidavits in *Laughton* and *Hove*—cases on which petitioner relies—fell short of these courts' good-

---

known that the search was illegal"); *Agurs*, 998 A.2d at 874 n.8 (noting *Leon*'s consideration of "whether the warrant application had previously been rejected by a different magistrate").

faith standards, but the affidavit in this case did not. The affidavit in *Laughton* "failed to make *any* connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit" and "also failed to indicate *any* connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there," 409 F.3d at 747 (emphases added), while the affidavit in *Hove* "offer[ed] no hint as to why the police wanted to search this residence," did not "link this location to the defendant," and did "not offer an explanation of why the police believed they may find incriminating evidence there," 848 F.2d at 139-140. Detective Coleman's affidavit, in contrast, connected the cell phone to be searched to petitioner, described evidence (including petitioner's own statements) of petitioner's sexual abuse of minors, and explained that Coleman knew through training and experience that sexual-abuse offenders commonly keep pictures, text messages, phone calls, voice mails, and child pornography on their phones, before concluding that Coleman had reason to believe that petitioner had such items on his phone. C.A. App. 208.

Affidavits relying on an officer's training and experience to establish a nexus between a suspect's criminal activity and a place to be searched have been found sufficient for purposes of the good-faith exception to the exclusionary rule in courts whose good-faith precedents petitioner invokes. For instance, the Sixth Circuit found good faith when officers searched a suspected drug dealer's safety deposit box under a warrant, and "the only connection [the affiant] made" between the box and illegal activity was that "[b]ased on his training and experience, he believed . . . that it is not uncommon

for the records, etc. of * * * drug distribution to be maintained in bank safe deposit boxes." *United States* v. *Schultz*, 14 F.3d 1093, 1098 (1994) (brackets omitted). The Tenth Circuit likewise applied the good-faith doctrine to a warrant affidavit that established the nexus between a suspect's criminal activity and the place to be searched by "assert[ing], based on the detective's training and experience, that a high-level drug trafficker like [the defendant] probably kept incriminating records at his primary residence." *United States* v. *Ingram*, 720 Fed. Appx. 461, 468 (2017). And the Ninth Circuit has applied the good-faith doctrine to a warrant-based search of the home, assuming *arguendo* that an affidavit did not establish probable cause, when the affidavit set out evidence of a suspect's criminal activity "and stated that, based on [the affiant's] fifteen years of training and experience, he believed that 'persons who obtain fraudulent documents' tend to hide such documents in their residences." *United States* v. *Ahmad*, 118 Fed. Appx. 183, 185 (2004), cert. denied, 545 U.S. 1116 (2005). Since the good-faith exception would apply in petitioner's case even under his preferred approach to good-faith analysis, in light of the facts set out in Coleman's affidavit, petitioner's case is not a suitable vehicle for considering whether information outside the warrant affidavit may be considered in good-faith analysis.

3. Petitioner's case would be an especially unsuitable vehicle for considering the scope of the good-faith exception because petitioner's principal attempt to reconcile suppression in this case with this Court's recent good-faith decisions rests on what appears to be an unusual departmental policy. See Pet. 30-32 (addressing *Herring* and *Davis*); see also Pet. App. 12a-13a (noting petitioner's reliance on departmental-policy theory).

Petitioner identifies no decision other than the one below that addressed the question presented in the context of a departmental policy counseling officers to omit from their affidavits facts not necessary to establish probable cause. A case in which a petitioner's argument for suppression relies heavily on a policy of a type not considered in other cases is not a good vehicle for consideration of the broader question whether a court conducting good-faith analysis may look to all the circumstances, including facts outside the warrant affidavit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
VIJAY SHANKER
Attorney

JULY 2019