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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government repeatedly concedes, as it must, that a deep conflict exists. See, *e.g.*, Br. in Opp. 8, 14 ("disagreement exists"); *id.* at 15 (similar); *id.* at 17 (similar). It disagrees only as to where two jurisdictions, the Fifth Circuit and Maryland, should be located on the three-way split, and would include a new jurisdiction, the First Circuit, under the split's first prong. See *id.* at 15, 16 n.2 (discussing case law). Even if the government were correct, however, the split would stand at something like 10-4-3 rather than 8-4-4—even more of a reason to grant cert.[1]

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[1] Although the government concedes that the Fifth Circuit rejects the four-corners position, see Br. in Opp. 16 n.2 (noting that Fifth Circuit held that an issuing judge's "questions and [the investigating officers'] answers" could support good faith concerning an invalid warrant), it believes the Fifth Circuit has not clearly staked out its position between the first two prongs of the conflict, *ibid*. That would still implicate the Fifth Circuit in the conflict, however, just at a different, more complex position.

The government believes Maryland likewise considers facts beyond the warrant application. Br. in Opp. 16 n.2. Again, even if that were true, it would merely move Maryland from the last, four-corners prong of the split to one of the other two. The government's reading does not weaken the split. It merely reconfigures it.

The government's inclusion of the First Circuit in the split is puzzling. The single case the government cites, see Br. in Opp. 15, *United States* v. *Procopio*, 88 F.3d 21 (1996), does not concern what information a suppression court can consider in determining good faith but rather "[w]hether * * * a defect in the application, [which] is hardly blatant," can, absent "any suggestion (or basis for a suggestion) of actual bad faith," warrant suppression, *id.* at 28. For purposes of describing the conflict,

The government argues against a grant for two reasons, neither of which—alone or together—warrants denying review of the important question presented. First, it claims that the lower courts correctly applied the good-faith exception. Br. in Opp. 8-14. Second, it argues that the case is an unsuitable vehicle for addressing the conflict. *Id.* at 14-20. Neither claim survives scrutiny.

I. Petitioner Is Right On The Merits

1. The government rests its merits argument largely on a single phrase plucked from a footnote in *Leon*: that in determining good faith, "*all of the circumstances* * * * may be considered." 468 U.S. 897, 922 n.23 (1984) (emphasis added). Unfortunately for the government, that single phrase cannot bear all the weight it must for the government's argument to succeed. For starters, as the examples in *Leon* itself and in its companion case, *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), show, "all of the circumstances [that] may be considered" exclude ones intrinsic to the probable cause determination itself that were never mentioned to the magistrate. Thus, in the part of the footnote the government elides, the Court specifically referenced only extrinsic evidence: "all of the circumstances—*including whether the warrant application had previously been rejected by a different magistrate*—may be considered." 468 U.S. at 922 n.23

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however, petitioner accepts the government's characterization. It only adds to the confusion among the circuits and state supreme courts.

(emphasis added). And in *Sheppard*, decided the same day, the Court discussed only extrinsic evidence relevant to the good-faith determination. It rested its decision on the fact that the officer had brought the warrant application's shortcomings to the magistrate's attention and been assured by him "that the necessary changes would be made," "then observed the judge make some changes," after "the judge concluded that the affidavit established probable cause." 468 U.S. at 989. "[W]e refuse to rule," this Court wrote, "that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Id*. at 989-990. In neither case did the Court consider evidence intrinsic to the probable cause determination itself that was never revealed to the magistrate.[2]

The government can point to no cases decided by this Court considering information intrinsic to probable cause but not revealed to the magistrate for good reason. The Court itself has held that "the [good-faith] inquiry under our precedents is whether 'a reasonably well-trained officer in petitioner's position would have known that *his affidavit*[, not all the information he knew,] failed to establish probable cause.'" *Messerschmidt*, 565 U.S. 535, 344 n.6 (2012)

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[2] *Messerschmidt* v. *Millender*, 565 U.S. 535 (2012), another of the government's primary authorities, holds the same. There this Court upheld the officers' reliance on the warrant solely on the basis of intrinsic information *actually submitted to the magistrate*, *id*. at 548-552, and extrinsic information "that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate," *id*. at 553.

(quoting *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986)) (emphasis added by *Messerschmidt*). If, as the Court held in *Messerschmidt*, the officer's "own evaluation [of the information contained in the affidavit] does not answer the question whether it would have been unreasonable for a[trained] officer to have reached a different conclusion from the facts in the affidavit," *ibid.*, the officer's knowledge of other facts never mentioned to anyone could not answer that question.

2. The government suggests that barring consideration of information known to the officer but never mentioned to the magistrate violates *Davis* v. *United States*, 564 U.S. 229 (2011), and *Herring* v. *United States*, 555 U.S. 135 (2009). Br. in Opp. 8-12. That misunderstands both cases. Broadly speaking, both *Davis* and *Herring* hold that when "suppression would do nothing to deter police misconduct [and] would come at a high cost to both the truth and the public safety" the exclusionary rule does not apply. *Davis*, 564 U.S. at 232. Thus, the "'deterrence rationale'" for the exclusionary rule "'loses much of its force'" when officers' "conduct involves only simple, 'isolated' negligence." *Id.* at 238 (brackets and citations omitted).

But this is not such a case. Detective Coleman withheld the relevant information from the magistrate in following departmental policy, which left it to the detective, not the magistrate, to decide what information was relevant and what would supply probable cause. Barring such information from good-faith determinations would deter police departments from leaving such judgments to their officers rather than to the magistrate, where they belong. And even

if there had been no such departmental policy, Detective Coleman's taking upon himself—rather than leaving to a neutral, detached magistrate—to decide whether and how particular information bears on probable cause represents the "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *Davis*, 564 U.S. at 238, that the exclusionary rule was designed to prevent.

3. The government also argues that considering information known to the officer but never revealed to the magistrate in determining good faith does not "'sidestep th[e] central procedural safeguard' of the warrant requirement and 'make an end run around the magistrate'" because "[the good-faith] exception applies only if officers sought and obtained a warrant." Br. in Opp. 11 (quoting Pet. 20). But taking the government's reasoning to its logical conclusion shows how mistaken this argument is. If an officer obtained a warrant on the basis of a bare-bones affidavit containing *no* relevant information (even though he personally knew much), he would have effectively sidestepped any real determination by the magistrate. The judge would simply have no relevant information on which to make a proper determination. And in that case *Leon* itself would demand suppression. 468 U.S. at 915 ("[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'") (quoting *Illinois* v. *Gates*, 462 U.S. 213, 239 (1983)).

The government also argues that considering information known to the officer but never disclosed to the magistrate does not turn the good-faith

determination into a subjective inquiry. Br. in Opp. 11. As this case shows, however, it does require canvassing what was in the officer's head when he applied for the warrant—both factual information and conclusions drawn from it. As this Court held in *Messerschmidt*, *Leon* and its progeny bar consideration of such conclusions exactly because they rest on subjective belief: "Messerschmidt's belief about the nature of the crime, however, is not information he possessed but a conclusion he reached based on information known to him. We have 'eschew[ed] inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant.'" 565 U.S. at 551 n.6 (quoting *Leon*, 468 U.S. at 922, n.23).

II. This Case Provides An Ideal Vehicle In Which To Decide The Question Presented

1. The government argues that this case is an unsuitable vehicle "because the search here would meet the good-faith standard developed by the courts on whose decisions petitioner relies." Br. in Opp. 17. This expands a truncated argument the government includes in its merits section that "the good-faith exception would apply even assuming the inquiry were in fact restricted solely to information contained in the warrant affidavit." Br. in Opp. 13. Both claims mistake the law and, to avoid repetition, petitioner responds to them together.

In both versions of this argument, the government claims that three statements in the warrant affidavit supply good faith: (i) that the detective obtained petitioner's phone when he arrested him and petitioner acknowledged he owned the phone; (ii) that

petitioner corroborated both juveniles' statements against him; and (iii) that the detective's training and experience had taught him that offenders often keep pictures of victims and other evidence on their cell phones. See Br. in Opp. 13 (merits version); *id.* at 17-18 (vehicle version). As the government pitches the argument in its merits section, "[i]t stands to reason * * * that an admitted child molester might have evidence of his activities on the phone that he carried with him." *Id.* at 14. But, as the government must concede and the district court held, "the affidavit contain[ed] no facts supporting the conclusion that Thomas engage[d] in crimes involving child pornography, much less why the LG cell phone was likely to reveal evidence related to such crimes" and "while the affidavit [did] contain[] sufficient facts supporting the aggravated sexual battery charge, it contain[ed] no facts linking that crime to Thomas' LG cell phone." Pet. App. 27a-28a. And the Fourth Circuit "cast no doubt on the district court's decision in this regard." *Id.* at 8a n.1. There was simply nothing in the affidavit or mentioned to the magistrate connecting the phone to either the crime eventually charged or the original crime investigated.

The government attempts to jump this gap by arguing (i) that it is vanishingly small, see, *e.g.*, Br. in Opp. 17 (arguing that "the good-faith exception applies if the affidavit *in some fashion* 'link[s]' the defendant to the place to be searched") (citation omitted and emphasis added) (vehicle version), and (ii) that the detective's training and experience could bridge it, see Br. in Opp. 14 (the detective's "training and experience confirmed") (merits version); *id.* at 18

("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.") (vehicle version). Both parts of this reasoning fail.

First, simply "link[ing] the defendant to the place to be searched" "*in some fashion*" will not do. Even the three cases the government relies on, see Br. in Opp. 17 (discussing case law), require much more than that. *United States* v. *Crews*, for example, lists two paragraphs' worth of information, all contained in the affidavit, that linked the defendants to the place to be searched. See 502 F.3d 1130, 1137 (9th Cir. 2007) (including details concerning defendants' prior convictions; that when one defendant was arrested he was driving the other's car, which was registered to the place to be searched; that the gun discovered during one defendant's arrest had been discarded during chase from car registered to other defendant; and that one defendant had been observed driving away from a parking space reserved to the apartment searched and walking back and forth from the apartment searched to a car parked in its reserved space). *United States* v. *Garey* similarly lists one paragraph of information linking the instrumentality of the crime to the place to be searched, 329 F.3d 573, 578 (7th Cir. 2003) (including details like "two Molotov cocktails," "Big Bear brand, 40[-]ounce beer bottles," and "an AK-47 assault[-]type rifle"), and another paragraph of information linking the scene of the crime to the place to be searched, *ibid*. (including details like "[defendant], whom witnesses had

observed smelling of gasoline while fleeing the scene of an arson fire and gunshots, claimed to have been living at [the place to be searched] with an individual who coerced him at gunpoint to throw two Molotov cocktails at the crime scene"). *United States* v. *Lamon*, 930 F.2d 1183 (7th Cir. 1991), the government's final case, is similar. It spends over two pages of the federal reporter detailing information linking the defendant and crime to the places to be searched. See *id*. at 1188-1190 (discussing linking details).

Second, an officer's "training and experience," although relevant, can stretch only so far. Consider *United States* v. *Schultz*, 14 F.3d 1093 (6th Cir. 1994), the single published case the government cites for the proposition that a detective's training and experience can substitute for actual information. In the government's reading, "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 'based 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.'" Br. in Opp. 18-19 (quoting *Schultz*, 14 F.3d at 1098) (government's elisions). But subsequent Sixth Circuit cases, including one which the government itself discusses, see *id*. at 17-18 (discussing *United States* v. *Laughton*, 409 F.3d 744 (2005), expressly reject such a rosy interpretation. In *Laughton*, for example, the Sixth Circuit noted that the *Schultz* court had relied on an affidavit supporting probable cause in at least six different ways, see 409 F.3d at 749-750 (listing

supporting facts), and noted that even that level of support may have "stretch[ed] the limits of good faith," *id*. at 750. Another Sixth Circuit case noted that "the affidavit in *Schultz* was *full of facts* and lacking in only one discrete area." *United States* v. *Gaston*, 16 Fed. Appx. 375, 382 (2001) (emphasis added). Talismanic invocation of an officer's "training and experience" cannot accomplish the great work the government needs it to do.[3]

2. In a short, concluding paragraph, the government argues that the case is an "unsuitable vehicle" because it "rests on what appears to be an unusual departmental policy": that officers include in an affidavit only the minimum they believe necessary to establish probable cause. Br. in Opp. 19. That policy, though, actually makes the case an even better vehicle. It certainly does not affect the ease with

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[3] The only additional authorities, both unpublished, that the government cites for the power of an officer's "training and experience" to establish good faith, see Br. in Opp. 19, also contain many more supporting facts than the affidavit in this case. In *United States* v. *Ingram*, the Tenth Circuit described the affidavit as

> provid[ing] ample evidence that [the defendant] dealt drugs, including the three informants' statements, the police's surveillance [of defendant], and [the defendant's] history of drug activity and arrests. When combined with the assertion, 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, this evidence warranted good-faith reliance from the officers who executed the search.

720 Fed. Appx. 461, 468 (2017). And the affidavit in *United States* v. *Ahmad*, 118 Fed. Appx. 183, 185 (9th Cir. 2004), provided even more relevant factual detail.

which the Court can reach the basic conflict. The Court could simply decide that information known to the officer but never revealed to the magistrate cannot be considered. The policy would become potentially relevant only if the Court decides that information not given to the magistrate can generally be considered. In that case, the policy's presence in the case would allow the Court to reach and decide, if it wants, a closely related issue that has already arisen and would foreseeably arise more often. It is, however, a severable issue and, if the Court prefers, it can always rewrite the question presented to exclude it.[4]

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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[4] The government's argument that this Court should deny cert because it has "recently denied review of the question presented" in four other cases, Br. in Opp. 8, is unpersuasive. Two of those cases presented a different question: whether the good-faith determination is limited to consideration of facts *within the four corners of the warrant application*. See Pet. at i, *Martinez Escobar* v. *United States*, 139 S. Ct. 2639 (2019) (18-8202); Pet. at i, *Fiorito* v. *United States*, 565 U.S. 1246 (2012) (No. 11-7217). The other two did present the same question but painted the conflict as involving only a two-way split concerning at most seven jurisdictions. See Pet. at 9-11, *Combs* v. *United States*, 139 S. Ct. 1600 (2019) (18–6702) (describing split); Pet. at 7, *Campbell* v. *United States*, 138 S. Ct. 313 (2017) (16-8855) (same). And, the government argued in all four cases that vehicle problems weighed strongly against a grant.

Respectfully submitted.

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