

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAMARCUS DESHUNN THOMAS,
Petitioner

v.

UNITED STATES OF AMERICA

***APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE
A PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT***

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit: Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, LaMarcus DeShunn Thomas respectfully requests a 60-day extension of time, to and including Monday, May 6, 2019, in which to file a petition for a writ of certiorari in this Court. The Court of Appeals for the Fourth Circuit entered judgment on November 8, 2018. (A copy of the Fourth Circuit's opinion is attached as Exhibit 1. See *United States v. Thomas*, 908 F.3d 68 (4th Cir. 2018).) That Court denied a timely petition for en banc rehearing on December 7, 2018. (A copy of the Fourth Circuit's order denying rehearing en banc is attached as

Exhibit 2.) Mr. Thomas's time to file a petition for certiorari in this Court will currently expire on March 7, 2019. This application is being filed more than 10 days before that date.

The Fourth Amendment of the United States Constitution prevents unreasonable searches and seizures and requires, in most instances, that a law enforcement officer obtain a warrant from a neutral, detached magistrate prior to the search or arrest. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[T]he Constitution requires ‘that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police.’”) (quoting *Sun v. United States*, 371 U.S. 471, 481-482 (1963)). This Court has allowed for a good faith exception to the Fourth Amendment's exclusionary rule when an officer reasonably relies on a warrant that is issued by a magistrate but subsequently invalidated. See *United States v. Leon*, 468 U.S. 897, 922 (1984). This Court made clear in *Leon*, however, that the good faith exception does not apply when the warrant is based on an affidavit “so lacking in indicia of probable cause” that it would be objectively unreasonable for an officer to rely on it. *Id.* at 924.

This case presents a substantial and recurring question on which the federal courts of appeals and state high courts are deeply divided: whether an officer can rely in good faith on a deficient warrant by later claiming that, at the time the warrant was granted, he had knowledge of additional information establishing probable cause that he never disclosed to the magistrate. See *United States v. Knox*, 883 F.3d 1262,

1271 (10th Cir.), *cert. denied*, 139 S. Ct. 197 (2018) (noting that this question “has split our sister circuits”).

The Fourth, Eighth, and Eleventh Circuits, hold that an officer can save a facially invalid warrant in this manner. See, *e.g.*, Ex. 1 at 3 (holding “that in assessing an officer’s objective good faith in executing a search warrant, we may consider facts known to the officer, but inadvertently omitted from a warrant affidavit”); *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (holding that “[w]hen assessing the objective [reasonableness] of police officers executing a warrant, we ‘must look to the totality of the circumstances,’ including any information known to the officers but not presented to the issuing judge.”) (quoting *United States v. Simpkins*, 914 F.2d 1054, 1057 (8th Cir.1990)); *United States v. Martin*, 297 F.3d 1308, 1318 (11th Cir. 2002) (holding that a court “can look beyond the four corners of the affidavit and search warrant[, including information not presented to the magistrate,] to determine whether [the executing officer] reasonably relied upon the warrant”).

The Sixth, Seventh, Ninth, and Tenth Circuits, however, hold the opposite. They will not allow an officer to rescue a deficient warrant by later testifying to additional facts that he never disclosed to the magistrate. See, *e.g.*, *United States v. Frazier*, 423 F.3d 526, 535-536 (6th Cir. 2005) (“[W]e hold that a court reviewing an officer’s good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing

magistrate.”); *United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002) (“[B]ecause the probable-cause determination is based solely on the information presented during the warrant application process, * * * the district judge properly refused to consider documents that were not presented to [the] warrant-issuing [judge] and were cited by the Government for the first time at the suppression hearing in federal court.”); *United States v. Luong*, 470 F.3d 898, 904-905 (9th Cir. 2006) (holding that good faith must be based on information “within the four corners of a written affidavit given under oath [lest] the good faith exception * * * swallow the Fourth Amendment rule.”); *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) (“The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer’s later testimony on his subjective intentions or knowledge.”); *Knox*, 883 F.3d at 1272 (10th Cir.) (“hold[ing] that a suppression court’s assessment of an officer’s good faith is confined to reviewing the four corners of the sworn affidavit and any other pertinent information actually shared with the issuing judge under oath prior to the issuance of the warrant, as well as information relating to the warrant application process.”).

Petitioner has just engaged the University of Virginia School of Law’s Supreme Court Litigation Clinic to file *pro bono* a petition for certiorari. The clinic is working diligently, but respectfully submits that the additional time requested is necessary to prepare Mr. Thomas’s petition. Substantial work remains to master the full record

of the case, to complete research on the authorities supporting this Court's review, and to prepare the petition and appendix for filing. Among other things, this case will require detailed inquiries into the text and history of the Fourth Amendment, this Court's precedents on the *Leon* good faith exception, as well as lower courts' differing interpretations of those authorities. Additional time is also required to allow Mr. Thomas (who is currently incarcerated) and his counsel below sufficient opportunity to review and comment on the draft petition.

In addition to this case, the clinic is busy with other matters. It just filed the merits-stage opening brief and the joint appendix for *Quarles v. United States.*, No. 17-778, which will be argued on April 24, 2019, and in a few weeks will start drafting the reply brief. The clinic is also drafting a cert-stage reply in *Fattah v. United States*, No. 16-1265, and preparing petitions for certiorari in two other cases.

Yesterday, following instructions received from the Solicitor General's Office, Petitioner emailed it a draft of this application, asking if it would consent to the application or wished to oppose it. So far, Petitioner has received no response.

Wherefore, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari up to and including May 6, 2019.

Respectfully submitted,

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF
LAW SUPREME COURT LITIGATION
CLINIC
580 Massie Road
Charlottesville, VA 22903-1738
(434) 924-3127
dortiz@law.virginia.edu

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