No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The good-faith exception to the exclusionary rule allows the admission of illegally obtained evidence if "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable." *United States* v. *Leon*, 468 U.S. 897, 926 (1984). What information may be considered in determining whether the officer's reliance was reasonable "is a question that has split [the] circuits." *United States* v. *Knox*, 883 F.3d 1262, 1271 (10th Cir. 2018). The question presented is:

Whether a suppression court may consider (1) only information contained within the four corners of the warrant application, as the Ninth Circuit, Colorado, Maryland and South Carolina hold; (2) only that information plus any other information presented to the issuing magistrate at the time of the warrant application, as the Fifth, Sixth, Seventh, and Tenth Circuits hold; or (3) all information known by the officer at the time she applied for the warrant, even if she never disclosed it to the magistrate, as the Fourth, Eighth, and Eleventh Circuits and Arkansas, Kentucky, Louisiana, Nebraska, and Virginia hold—and further, even if, as the Fourth Circuit holds, the officer failed to disclose the information as a result of a departmental policy.

TABLE OF CONTENTS

Page(s)

Question Presented I
Table Of Authorities V
Opinions Below 1
Jurisdiction 1
Relevant Constitutional Provision 1
Introduction 2
Statement 2
- A. Legal Background 2
- B. Factual and Procedural Background 4

Reasons For Granting The Petition 9
I. The Decision Below Further Entrenches An Already Deep Split 9
- A. Three Circuits and Five State Supreme Courts Hold That All Information Known By The Officer When Applying For The Warrant May Be Considered 10
- B. Four Circuits Hold That Only Information Presented To The Issuing Magistrate May Be Considered 14
- C. One Circuit And Three State High Courts Hold That Only Information Presented Within The Four Corners Of The Affidavit And Warrant Application May Be Considered 16

TABLE OF CONTENTS

Page(s)

II. The Decision Below Violates The Fourth Amendment 20

A. The Fourth Circuit's Unwarranted Expansion Of The Good-Faith Exception Undermines The Core Protections Of The Fourth Amendment 20

1. The Fourth Circuit's Rule Permits An End Run Around The Magistrate 20

2. The Decision Below Weakens The Ex-Ante Check That Warrants Provide ... 22

B. The Fourth Circuit's Rule Wrongly Turns The Good-Faith Exception Into A Subjective Inquiry 24

C. *Herring* v. *United States* And *Davis* v. *United States* Also Require Exclusion In This Case 30

III. This Case Presents An Ideal Vehicle For Resolving A Recurring Question Of Undeniable Importance 32

Conclusion 34

Appendices:

Court of Appeals Opinion (Nov. 8, 2018) 1a

District Court Suppression Opinion (Dec. 15, 2016) 16a

TABLE OF CONTENTS

Page(s)

District Court Suppression Order (Dec. 15, 2016) 49a

Court of Appeals Denial of Petition for Rehearing En Banc (Dec. 7, 2018).......... 50a

District Court Judgment (Aug. 9, 2017)...... 51a

Transcript Excerpts From Suppression Hearing (Aug. 17, 2016).......................... 74a

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams v. *Commonwealth*, 657 S.E.2d 87 (Va. 2008) ... 12, 13

Aguilar v. *Texas*, 378 U.S. 108 (1964) ... 22

Anderson v. *Creighton*, 483 U.S. 635 (1987) ... 13

Arizona v. *Hicks*, 480 U.S. 321 (1987) ... 33

Ashcroft v. *al-Kidd*, 563 U.S. 731 (2011) ... 27

Beck v. *Ohio*, 379 U.S. 89 (1964) ... 23, 27

Bond v. *United States*, 529 U.S. 334 (2000) ... 26

Brigham City v. *Stuart*, 547 U.S. 398 (2006) ... 26

Davis v. *United States*, 564 U.S. 229 (2011) ... 30, 31

Florida v. *Jimeno*, 500 U.S. 248 (1991) ... 26

Graham v. *Connor*, 490 U.S. 386 (1989) ... 27

Greenstreet v. *State*, 898 A.2d 961 (Md. 2006) ... 16, 17, 19

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) ... 25

Herring v. *United States*, 555 U.S. 135 (2009) ... 3, 30, 31

Illinois v. *Gates*, 462 U.S. 213 (1983) ... 26

Johnson v. *United States*, 333 U.S. 10 (1948) ... 20

Katz v. *United States*, 389 U.S. 347 (1967) ... 20, 23

Kyllo v. *United States*, 533 U.S. 27 (2001) ... 33

Maryland v. *King*, 569 U.S. 435 (2013) ... 33

TABLE OF AUTHORITIES

Page(s)

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Moore v. *Commonwealth*, 159 S.W.3d 325
(Ky. 2005)..11, 19

Moya v. *State*, 981 S.W.2d 521 (Ark. 1998) 11, 12

People v. *Miller*, 75 P.3d 1108 (Colo. 2003) 16, 18, 19

People v. *Reed*, 56 P.3d 96 (Colo. 2002)..................18

Scott v. *United States*, 436 U.S. 128 (1978) 26

Silverman v. *United States*, 365 U.S. 505
(1961) 33

Sims v. *State*, 969 S.W.2d 657 (Ark. 1998) 11

State v. *Adolphe*, 441 S.E.2d 832
(S.C. Ct. App. 1994)..17

State v. *Edmonson*, 598 N.W.2d 450
(Neb. 1999)..12

State v. *Johnson*, 395 S.E.2d 167
(S.C. 1990).......................................16, 17, 18, 19

State v. *Varnado*, 675 So. 2d 268
(La. 1996) 11, 13, 19

Steagald v. *United States*, 451 U.S. 204 (1981).....21

United States v. *Bynum*, 293 F.3d 192
(4th Cir. 2002)..13

United States v. *Calandra*, 414 U.S. 338
(1974) 3, 23

United States v. *Chadwick*, 433 U.S. 1
(1977) 2, 20

TABLE OF AUTHORITIES

Page(s)

United States v. *Frazier*, 423 F.3d 526 (6th Cir. 2005)....14, 19

United States v. *Houston*, 665 F.3d 991 (8th Cir. 2012)....10

United States v. *Hove*, 848 F.2d 137 (9th Cir. 1988)....15

United States v. *Knox*, 883 F.3d 1262 (10th Cir. 2018)....9, 14, 15, 19

United States v. *Koerth*, 312 F.3d 862 (7th Cir. 2002)....14, 15

United States v. *Laughton*, 409 F.3d 744 (6th Cir. 2005)....15

United States v. *Lefkowitz*, 285 U.S. 452 (1932)....21

United States v. *Leon*, 468 U.S. 897 (1984)....*passim*

United States v. *Luong*, 470 F.3d 898 (9th Cir. 2006)....16, 17

United States v. *Maggitt*, 778 F.2d 1029 (5th Cir. 1985)....14, 15, 19

United States v. *Martin*, 833 F.2d 752 (8th Cir. 1987)....13

United States v. *Martin*, 297 F.3d 1308 (11th Cir. 2002)....11, 12

United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976)....23

TABLE OF AUTHORITIES

Page(s)

United States v. *McKenzie-Gude*, 671 F.3d 452 (4th Cir. 2011) .... *passim*

United States v. *Proell*, 485 F.3d 427 (8th Cir. 2007) 10

United States v. *Taxacher*, 902 F.2d 867 (11th Cir. 1990) 12

Whiteley v. *Warden*, 401 U.S. 560 (1971) 22

Whren v. *United States*, 517 U.S. 806 (1996) ... 25, 27

Wong Sun v. *United States*, 371 U.S. 471 (1963) 20

Constitutional and Statutory Provisions:

U.S. Const. amend. IV .... *passim*

28 U.S.C. § 1254(1) 1

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TABLE OF AUTHORITIES

Page(s)

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Model Penal Code § 2.02(c) (1985) 30

1 S.C. Jur. *Affidavits* § 29 (2019) 17

Derek V. Smith, *What Were They Thinking? Officers' Subjective Knowledge and the "Good Faith" Exception of Fourth Amendment Jurisprudence*—United States v. Laughton, 74 U. Cin. L. Rev. 1525 (2006) 24, 28

Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 Notre Dame L. Rev. 1085 (2007).................. 21

John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. Kan. L. Rev. 155 (2005) ... 9

TABLE OF AUTHORITIES

Page(s)

Richard Van Duizend et al., *The Search Warrant Process: Preconceptions, Perceptions, and Practices* (1985)....32

Webster's Third New International Dictionary (1971) 31

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 908 F.3d 68 (4th Cir. 2018). The district court's memorandum opinion denying petitioner's suppression motion (App., *infra*, 16a-48a) is unreported but may be found at 2016 WL 7324095 (W.D. Va. Dec. 15, 2016).

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2018. On November 21, 2018, petitioner filed a petition for rehearing en banc, which was denied on December 7, 2018. On February 26, 2019, the Chief Justice extended the time for filing a petition for a writ of certiorari until May 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

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

INTRODUCTION

This case asks whether the good-faith exception to the exclusionary rule allows the prosecution to use evidence obtained from an illegal search when a law enforcement officer testifies at a suppression hearing that at the time he obtained the deficient warrant he knew additional information—never disclosed to the magistrate—which would have furnished probable cause. Here the officer, following departmental policy, purposefully omitted key details from the warrant affidavit, including facts linking a seized cell phone to the alleged offenses and the dates the alleged offenses took place. Because he later testified to those facts at the suppression hearing, the Fourth Circuit held that the good-faith exception applied and admitted the illegally obtained evidence. The Fourth Circuit's holding further entrenches an already deep three-way split. This case can resolve it.

STATEMENT

A. Legal Background

"[A] search warrant 'provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.'" *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)). Reflecting the Revolution's fear of unchecked governmental authority, see, *e.g.*, Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 991-992

(2011), the Fourth Amendment's warrant requirement ensures that "neutral judicial officers," who "have no stake in the outcome of particular criminal prosecutions," provide an ex-ante check on potentially oppressive governmental searches. *Leon*, 468 U.S. at 917. This Court has thus "expressed a strong preference for warrants," *id.* at 914, which "[t]he [exclusionary] rule * * * 'safeguard[s] through its deterrent effect.'" *Id.* at 906 (quoting *United States* v. *Calandra*, 414 U.S. 414 U.S. 338, 348 (1974)).

Evidence obtained through an illegal search—which would ordinarily be suppressed—can nonetheless be admitted "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, 468 U.S. at 920. This Court recognized this good-faith exception in part because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates" in granting a subsequently invalidated warrant. *Id.* at 916; see also *Herring* v. *United States*, 555 U.S. 135, 144 (2009) (stating that the exclusionary rule is "trigger[ed]" when police conduct is "sufficiently deliberate" and "sufficiently culpable").

But this Court has also held that "it is clear" the good-faith exception does not apply when an officer has "no reasonable grounds for believing the warrant was properly issued." *Leon*, 468 U.S. at 922-923. "Suppression therefore remains an appropriate remedy" if an affidavit is "so lacking in indicia of probable cause as to render official belief in its

existence entirely unreasonable." *Id.* at 923 (internal citations and quotation marks omitted).

The Fourth Circuit and some other courts have developed an exception to this part of *Leon*'s holding. Even if an officer relied on a "warrant based on an affidavit so lacking in indicia of probable cause," *Leon*, 468 U.S. at 923 (internal citation and quotation marks omitted), they hold, a court may fill in the gaps and find objective good faith by looking "beyond the four corners of the affidavit" to consider "facts known to [the officer] but omitted from the affidavit presented to the magistrate." See App., *infra*, 9a. Other courts disagree. See pp. 13-19, *infra*.

B. Factual and Procedural Background

In 2014, Detective Charles Coleman of the Winchester, Virginia, City Police Department received an anonymous tip that petitioner LaMarcus Thomas had sexually abused a minor. App., *infra*, 4a. The minor's mother accused Thomas of sexually assaulting two of her sons and claimed that he had called her several times since the alleged assault to schedule further visits. *Ibid.* After observing interviews of the minor and his brother, Coleman used a telephone number the mother had provided to contact petitioner, who appeared for an interview and admitted to sexual contact. *Ibid.* Coleman then obtained two warrants for Thomas's arrest. App., *infra*, 4a. In arresting Thomas, he seized a cell phone. *Ibid.*

Coleman later applied for a warrant to search the cell phone. App., *infra*, 5a. In the affidavit, he swore that he had obtained two previous arrest warrants,

that Thomas had corroborated the allegations against him, and that based on Coleman's training, phones commonly contained "contact items" from victims (pictures, text messages, and voicemails). *Ibid.* The affidavit did not, however, mention that Thomas had telephoned the minors' mother after the alleged assault or specify when the offenses allegedly occurred. *Ibid.* A magistrate—who was unfamiliar with the prior arrest warrant application, C.A. J.A. 118–119—reviewed and granted the search warrant, pursuant to which sexually explicit images and videos of two minors were later found. App., *infra*, 6a. Petitioner was indicted on six counts of producing child pornography. *Ibid.*

Thomas moved to suppress the evidence obtained from the cell phone. App., *infra*, 6a. He argued that Coleman's affidavit failed to establish probable cause for two reasons: it failed to link the phone to the alleged offenses and it did not indicate when the offenses occurred, thereby making it impossible for the magistrate to determine whether any evidence was likely on the phone. *Ibid.*

At the suppression hearing, Coleman testified that "all the information" he "provided to the magistrate for the search warrant" was the "search warrant affidavit and the attached statement of probable cause." App., *infra*, 73a. In response to the court's questioning, Coleman stated that he omitted from his "affidavit for the search warrant" all information linking the assault allegations to the cell phone. See App., *infra*, 74a-76a. Further questioning made the point clear:

> THE COURT: Essentially, [petitioner] had a phone on him, but you didn't put anything in th[e cell phone search warrant] affidavit that indicates the phone had anything to do with the molestation, other than the fact he had it on him; right?
>
> THE WITNESS [Coleman]: Correct.

App., *infra*, 75a.

Earlier, he had given an explanation. Through "in-house training," App., *infra*, 73a, the police department had instructed him to include in warrant applications only the minimum amount of information he believed necessary to establish probable cause:

> Q. [by the Government]: Specifically with that in-house training, what have you been taught about drafting a search warrant?
>
> A. [by Coleman]: One of the things is, in our department, we are taught to put no more PC [probable cause] into the warrant than it takes to obtain the warrant.

Ibid.

The district court denied petitioner's motion to suppress. App., *infra*, 48a. It agreed with Thomas that "the warrant at issue [wa]s facially invalid" for two reasons. App., *infra*, 17a. First, "while the affidavit contain[ed] facts supporting a finding of probable cause as to the aggravated sexual battery charge, no such facts exist[ed] as to * * * child pornography." *Ibid.* Second, "[b]ecause the affidavit provides no nexus whatsoever between Thomas' LG cell phone and the aggravated sexual battery offense

listed in the warrant, the magistrate had no facts sufficient to establish probable cause to search the LG phone." App., *infra*, 18a. But the court nevertheless admitted the illegally obtained evidence under *Leon*'s good-faith exception. *Ibid.*

Looking "outside the four corners of [the] deficient affidavit," App., *infra*, 31a, 39a (citing *United States* v. *McKenzie-Gude*, 671 F.3d 452, 459 (4th Cir. 2011)), the district court considered additional information Coleman testified he knew when he applied for the warrant but did not tell the magistrate, App., *infra*, 22a-26a. In particular, it found, "Coleman's knowledge that Thomas had phoned the victim's mother * * * supplied the missing link between the LG cell phone and the crime of aggravated sexual battery." App., *infra*, 39a. It further reasoned that Coleman's omission of the dates of the alleged assaults did not matter because he had "reason to believe that Thomas' phone calls to the victims' mother took place * * * just a few months" before the phone was seized. App., *infra*, 40a-41a. After the district court denied his suppression motion, Thomas accepted a plea bargain that allowed him to appeal that ruling. App., *infra*, 7a.

The Fourth Circuit affirmed. It saw "[t]he central question" as whether "we can look beyond the four corners of the affidavit in applying *Leon*, and consider as well facts known to Coleman but omitted from the affidavit presented to the magistrate." App., *infra*, 9a. "[W]e already have answered precisely that question in the affirmative," it stated, "holding * * * that '*Leon* presents no barrier' to considering 'uncontroverted

facts' known to an officer but 'inadvertently not presented to the magistrate' in assessing the officer's objective good faith." App., *infra*, 9a-10a (quoting *McKenzie-Gude*, 671 F.3d at 460).

Applying that rule to the facts, the court found that at the time of the warrant application Coleman (1) knew that one of the victims and his mother had reported that Thomas had used a phone to facilitate the abuse and (2) could infer that the cell phone seized at his arrest was the same one. App., *infra*, 12a. It similarly found that Coleman had knowledge placing the abuse "less than five months prior to the search, resolving any staleness issues." *Ibid.*

It then addressed Thomas's argument that the warrant affidavit could not be supplemented because "Coleman's omissions were not 'inadvertent' within the meaning" of Fourth Circuit precedent. App., *infra*, 12a. The omission, the court held, was not "the kind of deliberate or bad faith effort to mislead a magistrate that would render *Leon*'s good faith exception inapplicable." App., *infra*, 13a. "The police department's purported policy was not to file deficient affidavits," it explained, "it was to file affidavits that included enough, but no more than necessary, to establish probable cause." *Ibid.* If "Coleman[] fell short," he "was not acting pursuant to that policy [but] simpl[y] miscalculat[ing] * * * how much of what he knew he needed to include in his affidavit to show probable cause." App., *infra*, at 13a-14a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Further Entrenches An Already Deep Split

The courts of appeals and state high courts are openly and irreconcilably split over whether a suppression court may apply *Leon*'s good-faith exception to the exclusionary rule based on information an officer allegedly knew when making a warrant application, but that he failed to disclose to the issuing magistrate. A number of courts have directly recognized this conflict. See *United States* v. *Knox*, 883 F.3d 1262, 1271 (10th Cir. 2018) ("Beyond our own geographic boundaries, this is a question that has split our sister circuits."); *United States* v. *McKenzie-Gude*, 671 F.3d 452, 460 & n.3 (4th Cir. 2011) (acknowledging that although a "number of [the Fourth Circuit's] sister circuits" agree with its approach, other circuits have "held that *Leon* good faith reliance can be measured only by what is in an officer's affidavit.") (internal quotation marks and citation omitted).

So has the government itself. It has noted "that circuit courts differ on whether a district court should consider information outside the four corners of the affidavit," *e.g.*, Gov't C.A. Br. at 23-30, *United States* v. *Knox*, 883 F.3d 1262 (10th Cir. 2018) (No. 16-3324) (Apr. 26, 2017), and has discussed the split, *ibid.*

Fourth Amendment commentators have also acknowledged the split. See John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. Kan. L. Rev. 155,

180 (2005) ("[T]he courts that have addressed whether information not presented to the magistrate can be used to prove good faith have split."); Pamela L. Coleman, Note, *Beyond the Four Corners: Objective Good Faith Analysis or Subjective Erosion of Fourth Amendment Protections?*, 54 Mercer L. Rev. 1719, 1739 (2003) ("The 'totality of the circumstances' standard is being hailed by a majority of circuits as license for going beyond the four corners of the affidavit and warrant in determining objective good faith. Yet, the circuits are split regarding this issue."); see also Kenneth C. Halcom, Note, *Illegal Predicate Searches and the Good Faith Exception*, 2007 U. Ill. L. Rev. 467, 478 n.66 (2007) (noting these "disagreements"). "As an issue creating disparity among the circuits, inevitably the Supreme Court must intercede." Coleman, 54 Mercer L. Rev. at 1739.

A. Three Circuits And Five State Supreme Courts Hold That All Information Known By The Officer When Applying For The Warrant May Be Considered

The Fourth, Eighth, and Eleventh Circuits and the supreme courts of Arkansas, Kentucky, Louisiana, Nebraska, and Virginia hold that a court may consider all information known by the officer when applying for the warrant in determining whether the police officer acted in good faith. See, *e.g.*, *United States* v. *Houston*, 665 F.3d 991, 995 (8th Cir. 2012) ("When 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. *Proell*, 485 F.3d 427, 431 (8th Cir. 2007)); *McKenzie-Gude*, 671 F.3d at 460 ("[O]fficers * * * who swore out the affidavit and executed the search[] acted with the requisite objective reasonableness when relying on uncontroverted facts known to them but inadvertently not presented to the magistrate."); *United States* v. *Martin*, 297 F.3d 1308, 1318-1319 (11th Cir. 2002) (adopting an approach "based upon the totality of the circumstances," which includes "facts not presented to the issuing judge"); *Moya* v. *State*, 981 S.W.2d 521, 525-526 (Ark. 1998) (stating that "when assessing good faith, we can and must look to the totality of the circumstances, including what the affiant knew, but did not include in his affidavit" and including "information known to the executing officers that may or may not have been communicated to the issuing judge") (emphasis omitted) (quoting *Sims* v. *State*, 969 S.W.2d 657, 659-660 (Ark. 1998)); *Moore* v. *Commonwealth*, 159 S.W.3d 325, 328 (Ky. 2005) ("[W]e must look to the totality of the circumstances, including any information known to the officer but not presented to the issuing magistrate."); *State* v. *Varnado*, 675 So. 2d 268, 270 (La. 1996) (per curiam) (holding good-faith exception applicable to warrant application that "omi[tted]" officer's knowledge that "the targeted premises [w]as the defendant's residence" because "[t]he reasonableness inquiry under *Leon* is an objective one which turns on the totality of the circumstances surrounding the issuance of the warrant," which "include[s] the overall familiarity of the officer applying for the warrant with the investigation") (citation omitted); *State* v.

Edmonson, 598 N.W.2d 450, 460-462 (Neb. 1999) (holding good-faith exception applicable when officers obtained additional information before executing warrant that magistrate did not know when he issued it); *Adams* v. *Commonwealth*, 657 S.E.2d 87, 94 (Va. 2008) (concluding that "the totality of the circumstances should be considered when deciding the question of good faith," while rejecting an approach that "confine[s] the good-faith analysis to the facts set forth in the four corners of the search warrant affidavit (even if the analysis also considers additional information presented to the magistrate)").

These courts justify this conclusion differently. Some point to language in a footnote from *Leon* that a court should consider "all of the circumstances." See *United States* v. *Leon*, 468 U.S. 897, 922 n.23 (1984). The Fourth Circuit, for example, has "consistently rejected the notion that reviewing courts may not look outside the four corners of a deficient affidavit when determining, *in light of all the circumstances*, whether an officer's reliance on the issuing warrant was objectively reasonable." *McKenzie-Gude*, 671 F.3d at 459 (citation omitted; emphasis added). The Eleventh Circuit has similarly concluded that its "standard comports with the language used by the Court in *Leon,* that in determining 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization,' 'all of the circumstances . . . may be considered.'" *Martin*, 297 F.3d at 1318-1319 (quoting *United States* v. *Taxacher*, 902 F.2d 867, 871 (11th Cir. 1990)). The Arkansas, Louisiana, and Virginia supreme courts have also relied on this language. See *Moya*, 981

S.W.2d at 525; *Adams*, 657 S.E.2d at 92; *Varnado*, 675 So. 2d at 270.

Some courts reason that this approach is consistent with the purposes of the exclusionary rule and its good-faith exception. The Fourth Circuit, for example, notes that "[r]efusing to consider such information risks the anomalous result of suppressing evidence 'obtained pursuant to a warrant supported by the affidavit of an officer, who, in fact, possesses probable cause, but inadvertently omits some information from his affidavit.'" *McKenzie-Gude*, 671 F.3d at 460 (quoting *United States* v. *Bynum*, 293 F.3d 192, 199 (4th Cir. 2002)).

A few courts analogize to qualified immunity to justify their conclusion. The first Eighth Circuit case adopting this approach, for example, cited only *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987), a case involving the appropriate standard for qualified immunity analysis in a *Bivens* action. See *United States* v. *Martin*, 833 F.2d 752, 756 (8th Cir. 1987). The Eighth Circuit simply quoted this case—without explanation—for the proposition that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." *Ibid.* (quoting *Anderson*, 483 U.S. at 641).

B. Four Circuits Hold That Only Information Presented To The Issuing Magistrate May Be Considered

The Fifth, Sixth, Seventh, and Tenth Circuits confine the good-faith exception inquiry to the information presented in the warrant application process, whether in the affidavit or elsewhere in the proceeding. *United States* v. *Knox*, 883 F.3d 1262, 1272 (10th Cir. 2018) ("[G]ood 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."); *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*.") (emphasis added); *United States* v. *Koerth*, 312 F.3d 862, 871 (7th Cir. 2002) (holding that "the probable-cause determination is based solely on the information presented during the warrant application process" and courts should therefore decline "to consider documents that were not presented to" the warrant-issuing judge and were "cited * * * for the first time at the suppression hearing"); *United States* v. *Maggitt*, 778 F.2d 1029, 1036 (5th Cir. 1985) (holding where "investigating officers appeared before a judicial authority who carefully examined them about the portions of the affidavit that he apparently considered to be lacking," 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 at the warrant application proceeding").

These courts point to *Leon*'s instruction that the inquiry is objective to exclude information known to the officer but not presented to the issuing magistrate. See *Knox*, 883 F.3d at 1272 (noting that *Leon* "specified that [the issue is] manifest *objective* good-faith," holding that "the officer's reliance * * * must be *objectively* reasonable," and "eschew[ing] inquiries into the *subjective* beliefs of law enforcement officers") (second emphasis added); *United States* v. *Laughton*, 409 F.3d 744, 752 (6th Cir. 2005) (noting that considering information not presented to the issuing magistrate "would clearly perch a reviewing court at the edge of the proverbial slippery slope, with courts forced to determine not only how much affiants knew, but also when and from whom they learned it. It would also lead to the very kind of subjectivity that the Supreme Court has repeatedly and explicitly rejected."); *Koerth*, 312 F.3d at 871 ("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.") (quoting *United States* v. *Hove*, 848 F.2d 137, 140 (9th Cir. 1988)); *Maggitt*, 778 F.2d at 1036 ("It 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.") (emphasis added).

C. One Circuit And Three State High Courts Hold That Only Information Presented Within The Four Corners Of The Affidavit And Warrant Application May Be Considered

The Ninth Circuit and the high courts of Colorado Maryland, and South Carolina hold that a reviewing judge may not look beyond the affidavit to determine whether an executing officer had a reasonable basis for reliance on a defective warrant. *United States* v. *Luong*, 470 F.3d 898, 904 (9th Cir. 2006) (rejecting "the government's invitation to look to facts orally conveyed to the magistrate" because the circuit has "repeatedly held that all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath") (citation and internal quotation marks omitted); *People* v. *Miller*, 75 P.3d 1108, 1116 (Colo. 2003) (holding that in determining whether "police met the objective good faith standard," "we are restricted to the information contained within the four corners of the affidavit"); *Greenstreet* v. *State*, 898 A.2d 961, 978 (Md. 2006) ("To determine whether the officer held an objective reasonable belief that the search conducted was authorized, we review the warrant and its application."); *State* v. *Johnson*, 395 S.E.2d 167, 170 (S.C. 1990) ("We have already found that the affidavit alone does not include sufficient information to allow a magistrate to determine

probable cause. Therefore, the good faith exception may not be employed to validate this warrant.”).[1]

These courts generally justify this conclusion from *Leon*. In *United States* v. *Luong*, for example, the Ninth Circuit held that suppression courts must limit their consideration to the four corners of the affidavit because “*Leon* clearly and unequivocally states that when the affidavit itself is entirely lacking in indicia of probable cause, it cannot be said that the officer acted in good faith in relying on a warrant that issues.” 470 F.3d at 904.

The Maryland Court of Appeals and the Colorado Supreme Court rely on a different aspect of *Leon*: its objective focus. See *Greenstreet*, 898 A.2d at 978 & n.4 (confining the good-faith inquiry to the “warrant

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[1] South Carolina is one of a minority of states that allows warrant affidavits to be supplemented by sworn oral testimony at application. See John M. Burkoff, Search Warrant Law Deskbook § 6:7 & n.3 (2019) (citing *Johnson*). The South Carolina Supreme Court thus remanded in *Johnson* for determination of whether “the affidavit was in fact supplemented by sworn oral testimony before the magistrate.” *Johnson*, 395 S.E.2d at 170. But this determination goes to “the validity of the [underlying] warrant,” not the applicability of the good-faith exception, which, as quoted above, the court held “may not be employed to validate this warrant.” *Ibid.*; see also *State* v. *Adolphe*, 441 S.E.2d 832, 834 (S.C. Ct. App. 1994) (“[*Johnson*] declined to apply the good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.”); 1 S.C. Jur. Affidavits § 29 (2019) (“The [South Carolina c]ourts will not apply the good faith exception adopted in [*Leon*] if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.”) (citing *Adolphe*).

and its application" and specifically rejecting the State's invitation to peer beyond the affidavit's "four corners," because *Leon* "eschew[s]" such "subjective" inquiries) (quoting *United States* v. *Leon*, 468 U.S. 897, 924 (1984)); *Miller*, 75 P.3d at 1116-1117 ("[C]ourts must consider whether reliance on the warrant was objectively reasonable, based on the contents of the warrant, and cannot inquire into the police's subjective good faith.") (citing *People* v. *Reed*, 56 P.3d 96, 101 (Colo. 2002)).

The South Carolina Supreme Court relies on a different aspect of *Leon*. Quoting its language that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others," *Johnson*, 395 S.E.2d at 170, it held that "the good faith exception may not be employed to validate [a] warrant" when "the affidavit alone does not include sufficient information to allow a magistrate to determine probable cause," *ibid.*[2]

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[2] Citing *Johnson* and its progeny, the State of South Carolina has repeatedly petitioned this Court to rectify what it considers "the South Carolina appellate courts['] regular[ ] misapprehen[sion of] the appropriate constitutional standard for the applicability of the 'good faith' exception." See, *e.g.*, Cert. Reply, *South Carolina* v. *Miller*, No. 16-231, 2016 WL 7473966, at *5 (Dec. 21, 2016); Pet., *South Carolina* v. *Thompson*, No. 17-378, 2017 WL 4060171, at *14 n.2 (Sept. 9, 2017) ("[South Carolina] courts have historically struggled to correctly interpret [*Leon*]."). As the State itself has informed this Court, "South Carolina appellate courts have *never* applied * * * *Leon* in a published decision to preclude the exclusion of evidence discovered in a case involving a subsequently-invalidated search warrant at any point since the *Leon* decision was announced over three decades ago." *Ibid.*

* * * * *

The circuits and state high courts are intractably split over what information suppression courts may consider in applying *Leon*'s good-faith exception. Whether evidence is admissible under the exception depends on the jurisdiction involved. The conflict's particular geography, moreover, worsens the inconsistency and confusion. In many places, whether evidence is admissible under this rule depends wholly on whether the defendant is charged in state or federal court. Compare *Greenstreet*, 898 A.2d at 978 (Maryland's Four-Corners Rule), and *Johnson*, 395 S.E.2d at 170 (South Carolina's Four-Corners Rule), with App., *infra*, 10a-11a (Fourth Circuit's Totality Rule); compare *Miller*, 75 P.3d at 1116 (Colorado's Four-Corners Rule), with *Knox*, 883 F.3d at 1272 (Tenth Circuit's All-Information-Presented-to-Magistrate Rule); compare *Frazier*, 423 F.3d at 535-536 (Sixth Circuit's All-Information-Presented-to-Magistrate Rule), with *Moore*, 159 S.W.3d at 328 (Kentucky's Totality Rule); compare *Maggitt*, 778 F.2d at 1036 (Fifth Circuit's All-Information-Presented-to-Magistrate Rule), with *Varnado*, 675 So. 2d at 270 (Louisiana's Totality Rule). As petitioner's case illustrates, state criminal investigations frequently morph into federal charges, which in these jurisdictions would change a suppression motion's outcome and perhaps the case's ultimate result. This Court's review is warranted to provide horizontal and vertical uniformity across all jurisdictions.

II. The Decision Below Violates The Fourth Amendment

A. The Fourth Circuit's Unwarranted Expansion Of The Good-Faith Exception Undermines The Core Protections Of The Fourth Amendment

1. The Fourth Circuit's Rule Permits An End Run Around The Magistrate

This Court has consistently maintained that review by a neutral judicial officer is central to the Fourth Amendment's warrant requirement. See, *e.g.*, *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 *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963)); *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (holding that the Fourth Amendment's "protection consists in requiring that those inferences [regarding probable cause] be drawn by a neutral and detached magistrate"). In *Leon* itself, this Court emphasized that "the detached scrutiny of a neutral magistrate * * * is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)).

The Fourth Circuit's rule permits police officers to sidestep this central procedural safeguard. So long as an officer later testifies that at the time of the warrant

application he had information in his head that would have furnished probable cause he can effectively cure a deficient warrant. See App., *infra*, 9a-10a. The Fourth Circuit's rule thus does away with the requirement that the magistrate weigh all the information before a search. It instead allows the officer to do so.

Encouraging the officer to substitute his judgment for the magistrate's undermines the "informed and deliberate determinations of magistrates" that this Court has recognized are "preferred over the hurried action of officers and others who may happen to make arrests." *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). Not only are officers' judgments often hurried, they are often incorrect. As this Court has noted, the warrant requirement itself "implicitly acknowledges that an officer engaged in the often competitive enterprise of ferreting out crime may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and * * * privacy." *Steagald* v. *United States*, 451 U.S. 204, 212 (1981).[3]

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[3] Empirical research supports this Court's insight that magistrates make these determinations more deliberately and objectively than do officers. See, *e.g.*, Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 Akron L. Rev. 431, 454 (2014) (describing how officers "showed bias in terms of how they interpreted new information during an investigation and insensitivity to potentially exonerating information presented later in the investigation"); see also Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 Notre

Worse yet, the rule allows law enforcement officers to pick and choose what information to provide the magistrate, knowing that if they are later second-guessed they can testify at the suppression hearing to additional information they may have possessed. The rule thus removes an incentive for the officer to provide the magistrate with the full picture on which any truly objective judgment necessarily rests. Taken to its logical conclusion, moreover, the rule would find good faith when the officer searched without any warrant at all so long as he could later testify that at the time he executed the search he possessed private information that would furnish probable cause.

For all these reasons, this Court has held that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971) (quoting *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964)). "A contrary rule would," it noted, "render the warrant requirements of the Fourth Amendment meaningless." *Ibid.*

2. The Decision Below Weakens The Ex-Ante Check That Warrants Provide

The Fourth Circuit's decision undermines another central feature of the Fourth Amendment: that it

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Dame L. Rev. 1085, 1120 (2007); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. Rev. 847, 848 (2002).

provides a powerful check on government overreaching *before*, not *after*, a search occurs. As this Court has held, "[t]he purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong * * * is fully accomplished by the original search." *United States* v. *Calandra*, 414 U.S. 338, 354 (1974). A check afterwards cannot prevent an injury that has already occurred. At most, it can deter future misconduct.

Ex-post review suffers, moreover, from hindsight bias. As this Court has noted, "an after-the-event justification for [a] search[, is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Katz* v. *United States*, 389 U.S. 347, 358 (1967) (citing *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964)). One important "purpose [served by the warrant requirement] is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 565 (1976). Without a warrant, "the safeguards provided by an objective predetermination of probable cause" are traded for "the far less reliable procedure of an after-the-event justification for the arrest or search." *Beck*, 379 U.S. at 96. As Professor LaFave has recognized, "[i]t must be much harder for a judge to decide that an officer had something less than probable cause to believe cocaine was in the trunk of a defendant's car when the cocaine was in fact there." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on*

the Fourth Amendment § 4.1(a), at 563 (5th ed. 2012) (internal citation omitted).

The Fourth Circuit's rule also places law enforcement officers in a difficult position. Once a warrant has been challenged, they may be expected to defend it vigorously. But because no one, including the officer, can know with certainty exactly what was in the officer's head when the search warrant was issued, ex-post testimony can create a risk of distorted memory. An ex-post check provides "no assurance that the critical facts and details were in fact known prior to the issuance of the warrant," which creates "too great a potential for abuse." 2 LaFave § 4.3(a), at 640; see also Derek V. Smith, *What Were They Thinking? Officers' Subjective Knowledge and the "Good Faith" Exception of Fourth Amendment Jurisprudence*—United States v. Laughton, 74 U. Cin. L. Rev. 1525, 1546 (2006) (arguing that "preservation of the integrity of the judicial system * * * point[s] toward a good faith exception analysis centered on the information provided in the affidavit itself").

B. The Fourth Circuit's Rule Wrongly Turns The Good-Faith Exception Into A Subjective Inquiry

In *Leon*, this Court held that "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant" should not be suppressed. *Leon*, 468 U.S at 922. It "emphasize[d] that the standard of reasonableness we adopt is *an objective one*," rejecting arguments that "assume that the exception will turn on the subjective good faith of individual officers." *Id.* at 919 n.20 (emphasis added).

And objectivity girdles Fourth Amendment law more generally, since "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren* v. *United States*, 517 U.S. 806, 813 (1996).

An objective standard serves four important purposes. The first is administrability. "[O]bjective good faith" can be proven "without a substantial expenditure of judicial time," and so objective standards "should not be difficult to apply in practice." *Leon*, 468 U.S. at 924; see also *Missouri* v. *Seibert*, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) (acknowledging that "evidentiary difficulties have led us to reject an intent-based test in several criminal procedure contexts"). In qualified immunity cases, for example, this Court has recognized that "substantial costs attend the litigation of the subjective good faith of government officials," since "there often is no clear end to the relevant evidence" that could prove subjective intent. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816-817 (1982); see also *Leon*, 468 U.S. at 922 n.23 (stating that just as the Court "eliminated the subjective component" of qualified immunity analysis in *Harlow*, the Court "also eschew[s] inquiries into the subjective beliefs of law enforcement officers"). A subjective inquiry implicates potentially anything an officer knew; an objective standard, by contrast, limits a court's inquiry to the facts surrounding a particular situation, like an appearance before a magistrate.

Second, an objective good-faith standard "retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct

themselves in accord with the Fourth Amendment." *Leon*, 468 U.S. at 919 n.20 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in judgment)). Its objectivity encourages "police training programs" to "emphasize the need to operate within [the] limits" of the Fourth Amendment. *Ibid.* (citing Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412 (1977)).

Third, an objective standard gives police a clear rule to follow, because it "requires officers to have a *reasonable knowledge* of what the law prohibits." *Leon*, 468 U.S. at 919 n.20 (emphasis added; citation omitted). An objective standard enables officers to attend to their duties because "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott* v. *United States,* 436 U.S. 128, 138 (1978)). Objective tests therefore predominate in Fourth Amendment law generally. See, *e.g.*, *ibid.* (holding that an "officer's subjective motivation is irrelevant" when deciding whether an exigency existed) (citing *Bond* v. *United States*, 529 U.S. 334, 335, 338 n.2 (2000)); *Bond*, 529 U.S. at 335, 338 n.2 (holding that "the issue is not [the law enforcement officer's] state of mind, but the objective effect of his actions" in analyzing whether a search violated the Fourth Amendment); *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) (holding that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness")

(internal citations omitted); *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) (holding that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional").

Fourth, an objective standard promotes fair and uniform application of the law. Subjective inquiries may draw on an endless list of sources and make "the search and seizure protections of the Fourth Amendment * * * variable, and * * * turn upon * * * trivialities." *Whren*, 517 U.S. at 815 (internal citations omitted). This Court, in deciding whether a government official was entitled to immunity, stated that "[*e*]*fficient* and *evenhanded* application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 740 (2011) (emphases added). An objective standard consistently safeguards constitutional rights, unlike the shifting ground of subjective tests. This Court accordingly recognized that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck*, 379 U.S. at 97.

The decision below nonetheless invites subjective analysis by allowing courts far-removed from the conduct in question to squint into an officer's head in search of information never brought before the magistrate. The Fourth Circuit has tried to square its

policy with *Leon* by emphasizing that a court does not "abandon[] the objective inquiry required by *Leon* when it considers the uncontroverted *facts known* to the officer, which he has inadvertently failed to disclose to the magistrate." *United States* v. *McKenzie-Gude,* 671 F.3d 452, 460 (4th Cir. 2011); see App., *infra*, 10a-11a (explaining that the "'specific, uncontroverted facts known to the officer' * * * necessarily inform the objective reasonableness of an officer's determination regarding probable cause") (citation omitted). The restriction imposed by *Leon*, the Fourth Circuit stated, "simply precludes courts from inquiring into the subjective *beliefs* of law enforcement officers," but "does not require courts to disregard specific, uncontroverted facts known to the officers." *McKenzie-Gude,* 671 F.3d at 460 (internal quotation marks and citation omitted).

But there is no meaningful difference here between "subjective *beliefs*" and "facts known to the officer." *McKenzie-Gude*, 671 F.3d at 460. Both require an inquiry into what was in an officer's head. While facts could be uncontroverted, whether the officer knew a certain fact *at a certain time* may be controverted. Looking outside the warrant process ex-post is "a difficult and time-consuming fact-finding process" because it "forces courts to make evaluations of what information the officers had, how much information existed, and when it was known." Derek V. Smith, *What Were They Thinking? Officers' Subjective Knowledge and the "Good Faith" Exception of Fourth Amendment Jurisprudence*—United States v. Laughton, 74 U. Cin. L. Rev. 1525, 1541 (2006). This is even truer when a court venturing beyond the

warrant process wades into questions of what an officer actually thought at a specific time long past. Evidence tending to show that an officer knew "uncontroverted facts" when applying for a warrant will often be missing or imperfect. In these circumstances, the inquiry must draw on the same sources of evidence as would an inquiry into an officer's subjective understanding.

In short, determining whether an officer knew a fact, even if the fact itself is uncontroverted, will often require inquiry into the "minds of police officers," exactly what *Leon* barred. *Leon*, 468 U.S. at 922 n.23 (citation omitted). When an officer includes facts in the affidavit supporting the warrant application, it is certainly clear that those facts are "known to the officer[]." *McKenzie-Gude*, 671 F.3d at 460. But when the officer fails to include all known facts in the affidavit, suppression courts are much more likely to face subjective inquiries. For example, if one fact on one sheet of paper buried in one of several boxes of evidence is later found necessary to support probable cause, the suppression court will have to determine whether the officer knew that fact at the time he applied for the warrant. Even more problematically, if an officer claims he knew a necessary fact at the time of the warrant application, but there is no evidence that the fact was known by anyone at the time, the suppression court can look nowhere else other than the mind of the officer to determine whether there was probable cause.

C. *Herring* v. *United States* And *Davis* v. *United States* Also Require Exclusion In This Case

In *Herring* v. *United States*, this Court held that the exclusionary rule should apply whenever a law enforcement officer's conduct is both "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." 555 U.S. 135, 144 (2009). And in *Davis* v. *United States*, this Court made clear that "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." 564 U.S. 229, 238 (2011) (quoting *Herring*, 555 U.S. at 144). In this case, Officer Coleman's own conduct was intentional. He deliberately followed a departmental policy he was taught during in-house police department training. See App., *infra*, 12a-13a, 73a. This policy, which requires that officers include only the very minimum amount of information necessary to establish probable cause, is reckless. By purposefully omitting relevant information from a warrant affidavit, Coleman "consciously disregard[ed] a substantial and unjustifiable risk" that a deficient warrant would be issued. Model Penal Code § 2.02(c) (1985). This is especially true when other means, like sealing the warrant application, would have achieved any goal of protecting privacy.

This situation is far different from those in *Herring* and *Davis*, where this Court held suppression unwarranted. In *Herring*, the officer could not have

known that the arrest warrant he was relying on—from a different police department—was not active. 555 U.S. at 137-138. The error was someone else's in a different jurisdiction and although it was "negligent," it was not "reckless or deliberate," which this Court noted was a "fact * * * crucial to our holding that th[e] error [wa]s not enough by itself to require" suppression. *Id.* at 140 (citations omitted). Later summarizing its holding, this Court indicated that Thomas's case should come out differently: "[W]e conclude that when police mistakes are the result of negligence * * * rather than systemic error or *reckless disregard of constitutional requirements*," suppression is inappropriate. *Id.* at 147 (emphasis added; citation omitted).

In *Davis*, the officer did not know and could not have been expected to know that his search of an automobile, which was clearly constitutional under existing circuit precedent, would later be declared unconstitutional by this Court. 564 U.S. at 239-240. "The officers who conducted the search," this Court held, "did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence." *Id.* at 240. In such a situation, "all that exclusion would deter * * * is conscientious police work." *Id.* at 241.

The Fourth Circuit attempted to escape *Herring* and *Davis*'s implications by misrepresenting Coleman's purposefully following a reckless policy as mere "inadverten[ce]." App., *infra*, 13a. "[A]ny error," it stated, "appears to have 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." App., *infra*, 13a-14a. The Fourth Circuit's description of his action as "inadvertent," however, errs on the law. Miscalculating what amount of information amounts to probable cause reflects an intentional, if incorrect, judgment, not a failure to "turn[] the mind to a matter." *Inadvertent*, Webster's Third New International Dictionary 1140 (1971). Stretching good faith to those purposefully following a reckless policy would allow the exception to swallow the rule.

III. This Case Presents An Ideal Vehicle For Resolving A Recurring Question Of Undeniable Importance

The question presented by this case can arise frequently—whenever an officer tries to rehabilitate a warrant later found unsupported by probable cause. Untold numbers of search warrants issue in jurisdictions across the nation each year. According to one representative study conducted by the National Center for State Courts, suppression hearings occurred in 39 percent of cases involving the execution of a search warrant. Richard Van Duizend, et al., *The Search Warrant Process: Preconceptions, Perceptions, and Practices* 42-44 (1985). Given the regularity with which suppression hearings arise, the good faith exception often comes into play and knowing what information can support probable cause is crucial. This case thus presents the Court with an opportunity to provide guidance to lower court judges on a question they often encounter. It also presents a separate but related issue that should be considered at the same

time: whether purposefully following a departmental policy *not* to include all relevant information in the warrant affidavit defeats good faith.

This case presents an ideal vehicle for deciding both issues. There are no jurisdictional disputes and the issues concern pure questions of law. Both issues were fully briefed below and decided by the court of appeals.

* * * * *

The Fourth Amendment aims foremost to safeguard citizens, not criminals. "[T]here is nothing new," this Court has noted, "in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, 480 U.S. 321, 329 (1987). "'At the very core' of the Fourth Amendment 'stands the right of a man to * * * be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). Whether a reviewing judge may consider knowledge undisclosed to the original magistrate bears deeply on the privacy of those "for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." *Maryland* v. *King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting). This Court should resolve the conflict among the courts of appeals and state high courts. The issue is fully developed, squarely presented, and free from any threshold questions in this case. It warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2019

APPENDICES

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17-4523

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAMARCUS THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Virginia at Harrisonburg, Michael F. Urbanski, Chief District Judge (5:16-cr-00001-MFU-JCH-1)

Argued: September 28, 2018
Decided: November 8, 2018

Before WILKINSON and HARRIS, Circuit Judges, and William L. OSTEEN, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Wilkinson and Judge Osteen joined.

ARGUED: Andrea Lantz Harris, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellant. Nancy Spodick Healey, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee. ON BRIEF: Larry W. Shelton, Federal Public Defender, Christine Madeleine Lee, Assistant Federal Defender for Appellate Litigation, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia, for Appellant. Leslie Williams Fisher, Child Exploitation & Obscenity Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Rick A. Mountcastle, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

PAMELA HARRIS, Circuit Judge:

Detective Charles Coleman arrested LaMarcus Thomas on charges of aggravated sexual battery, and seized a cell phone from Thomas during a search incident to the arrest. After Coleman obtained a warrant to search the phone, authorities discovered sexually explicit images and videos involving children.

Charged with producing child pornography, Thomas moved to suppress that evidence, arguing that the affidavit submitted with Coleman's warrant application was insufficient to establish probable cause for the search. The district court agreed that the affidavit was deficient, but nevertheless denied Thomas's motion to suppress under the good faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984). While the affidavit alone did not establish probable cause, the district court reasoned, additional information known to Coleman was enough to give rise to an objectively reasonable belief that there was probable cause for the search.

We agree with the district court that the evidence obtained from Thomas's phone is admissible under *Leon*. Our precedents make clear 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. And under all the circumstances presented here, Coleman had a reasonable basis to believe there existed probable cause to search Thomas's phone.

Accordingly, we affirm the judgment of the district court.

I.

A.

In 2014, the police department in Winchester, Virginia received an anonymous tip that LaMarcus Thomas had sexually abused a minor. Detective Charles Coleman was assigned to investigate the allegations.

Coleman began his investigation by contacting the alleged victim's mother. During her conversation with Coleman, the mother accused Thomas—who knew her family through church and often acted as a caretaker for her children—of sexually assaulting two of her minor sons. The mother also claimed that since the alleged assault, Thomas had reached out to her several times over the phone, hoping to schedule further visits with her children.

Coleman arranged for the two boys to be interviewed, and observed the interviews from a separate room. Both boys stated that Thomas had put his hand inside their pajamas and fondled their genitals during a sleepover at a hotel. One of the boys also described Thomas's attempts to contact his mother through phone calls and text messages after the assault, in an effort to arrange further sleepovers.

Using a telephone number provided by the boys' mother, Coleman contacted Thomas and asked him to appear for an interview at the Winchester police station. Thomas agreed, and during his video-recorded interview with Coleman, he admitted to touching the

boys' genitals.

Coleman filed a criminal complaint against Thomas, describing his investigation of the alleged assaults and requesting two warrants for Thomas's arrest. The complaint included the ages of the victims and identified October 11, 2014, as the estimated date of the assaults. Coleman arrived at that date by reviewing records from the hotel the boys identified as the site of their abuse, which indicated that Thomas had stayed there on September 16, 2014, and again on October 11, accompanied by two children.

On January 5, 2015, a magistrate issued two warrants for Thomas's arrest on charges of aggravated sexual battery of a minor. Coleman arrested Thomas on the same day, and during a search incident to the arrest, seized a cell phone from Thomas's pocket.

After consulting with state prosecutors, Coleman requested a warrant to search the phone and submitted an accompanying affidavit. The affidavit explained that Coleman had obtained two arrest warrants for Thomas on charges of aggravated sexual battery, based on an investigation in which Thomas had corroborated the allegations against him. It noted the date — January 5, 2015 — on which the 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. With respect to the phone, specifically, Coleman averred that based on his training and experience, it is common for offenders like Thomas to keep "contact items" from victims—pictures, text messages, voicemails, and the like—on their cell phones. J.A. 208. The affidavit did not

reference Thomas's use of a phone to contact the boys' mother after the assaults.

A magistrate issued a search warrant for the phone on the same day, January 13, 2015. After conducting a forensic analysis of the phone, state authorities discovered explicit images and videos of Thomas with two minors. Thomas eventually confessed to sexually abusing the minors and memorializing the abuse on his cell phone.

B.

On January 13, 2016, a federal grand jury in the Western District of Virginia charged Thomas with six counts of producing child pornography, in violation of 18 U.S.C. §§ 2251(a), (e) (2012). Thomas moved to suppress the evidence derived from the search of his cell phone, arguing that for two reasons, Coleman's affidavit fell short of establishing probable cause for the search. First, according to Thomas, the affidavit did not sufficiently link the phone to the alleged offenses, and thus did not establish probable cause that evidence would be found in the place to be searched. And second, Thomas argued, there was a problem with timing and staleness: Even if there were some reason to think evidence would have been found on his phone at around the time of the alleged offenses, the affidavit gave no indication of when those offenses occurred, making it impossible for a magistrate to assess the likelihood that evidence would *remain* on the phone at the time of the search.

Following a hearing at which Coleman testified, the district court denied Thomas's motion to suppress.

The court agreed with Thomas that the search warrant was unsupported by probable cause, finding that "while the affidavit contains sufficient facts supporting the aggravated sexual battery charge, it contains no facts linking that crime to" the subsequent search of Thomas's cell phone. J.A. 251. Nevertheless, the court held that the evidence found on Thomas's phone was admissible under *United States v. Leon*, 468 U.S. 897 (1984), because Coleman had an "objectively reasonable belief" that there was probable cause to execute the search. J.A. 244. Relying on *United States v. McKenzie-Gude*, 671 F.3d 452, 459, 460 (4th Cir. 2011), the court reasoned that any gaps in Coleman's affidavit could be filled by looking "outside the four corners" of the affidavit, J.A. 260, and considering "uncontroverted facts known to [Coleman] but inadvertently not presented to the magistrate," J.A. 244. Here, the court continued, Coleman was aware that Thomas had phoned the victims' mother to set up a new encounter with her sons, "suppl[ying] the missing link between the [ ] cell phone and the crime of aggravated sexual battery." J.A. 260–61. Similarly, any staleness concern was addressed by Coleman's knowledge that the assaults occurred — and the phone calls in question were made—around October of 2014, just a few months before the search was authorized in January of 2015.

Thomas pled guilty to two counts of producing child pornography, reserving his right to appeal the district court's denial of his motion to suppress. The district court sentenced Thomas to 360 months of imprisonment, followed by a lifetime of supervised release, and Thomas timely appealed.

II.

Thomas's sole challenge on appeal is to the district court's denial of his motion to suppress. In considering the district court's suppression decision, we review legal determinations de novo and the court's underlying factual findings for clear error. *United States v. Guijon-Ortiz*, 660 F.3d 757, 762 (4th Cir. 2011). For the reasons that follow, we agree with the district court that the evidence discovered on Thomas's phone was admissible under *Leon*'s good faith exception to the exclusionary rule.[1]

The exclusionary rule ordinarily provides that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Kimble*, 855 F.3d 604, 610 (4th Cir. 2017) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). In *Leon*, however, the Supreme Court recognized a good faith exception to that rule, under which evidence obtained by an officer who acts in objectively reasonable reliance on a search warrant will not be suppressed, even if the warrant is later deemed invalid. 468 U.S. at 922. Typically, an officer's

[1] In light of this holding, we need not consider whether the affidavit was deficient in establishing probable cause. We intend to cast no doubt on the district court's decision in this regard. Rather, by proceeding directly to the question of admissibility under *Leon*, we simply adopt the same analytical approach we have taken in similar cases in the past. *See, e.g., United States v. Bynum*, 293 F.3d 192, 194-95 (4th Cir. 2002); *cf. Leon*, 468 U.S. at 925 (stating that a reviewing court may proceed directly to the good faith inquiry without first deciding whether a warrant was supported by probable case).

reliance on a magistrate's decision to issue a warrant will be deemed objectively reasonable. *Id.* But as *Leon* makes clear, when a supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," then an officer cannot be found to have reasonably relied on the resulting warrant, and suppression remains the appropriate remedy. *Id.* at 923 (internal quotation marks omitted).

Thomas argues that this case falls squarely within that limit on *Leon*. According to Thomas, the affidavit submitted by Coleman in support of his search warrant application was so "lacking in indicia of probable cause" that Coleman could not reasonably have relied on the warrant in searching Thomas's phone. The government's primary response is that even if Coleman's affidavit was obviously deficient in establishing probable cause — a point the government does not concede — Coleman reasonably believed in the existence of probable cause based on his own knowledge of the investigation. And that is enough, the government argues, to establish that Coleman executed the search warrant with the objective good faith required by *Leon*.

Like the district court, we agree with the government. The central question in this case is whether, as the government urges, we can look beyond the four corners of the affidavit in applying *Leon*, and consider as well facts known to Coleman but omitted from the affidavit presented to the magistrate. And as the district court recognized, we already have answered precisely that question in the affirmative,

holding in *McKenzie-Gude* that "*Leon* presents no barrier" to considering "uncontroverted facts" known to an officer but "inadvertently not presented to the magistrate" in assessing the officer's objective good faith. 671 F.3d at 460.

In *McKenzie-Gude*, officers executed a residential search warrant that led to the seizure of weapons from a defendant's bedroom. *Id.* at 457. The affidavit supporting the warrant application included most, but not all, of the facts necessary to show probable cause that evidence would be found in the place to be searched: It established that the defendant likely possessed illegal weapons and that he likely possessed them in his home, and it included the address to be searched — but it failed to state that the defendant lived at, or had any connection to, the listed address. *See id.* at 457–58. Despite that obvious deficiency, we applied the good faith exception under *Leon*. *Id.* at 461. While the affidavit itself lacked any nexus between the place to be searched and the defendant, we reasoned, that gap could be filled by an uncontroverted fact known to the searching officers — specifically, that the defendant lived at the address identified in the affidavit. *Id.* at 458–60.

As we explained in *McKenzie-Gude*, that result is entirely consistent with *Leon*'s "objective inquiry" into officer good faith. *Id.* at 460. The key, "objectively ascertainable question" under *Leon* is "'whether a reasonably well trained officer would have known that the search was illegal' in light of '*all of the circumstances*.'" *Id.* at 459 (quoting *Leon*, 468 U.S. at 922 n.23, 104 S.Ct. 3405). Among those circumstances

are "specific, uncontroverted facts known to the officer[ ]," *id.* at 460, which necessarily inform the objective reasonableness of an officer's determination regarding probable cause, even if they are omitted inadvertently from a warrant application. And when an officer's belief in the existence of probable cause is objectively reasonable, 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. *Id.* at 459, 461; *see also Leon*, 468 U.S. at 920–21, 104 S.Ct. 3405.

Moreover, we reasoned, any other outcome would produce "anomalous result[s]." *McKenzie-Gude*, 671 F.3d at 460. Evidence might be suppressed even when "obtained pursuant to a warrant supported by the affidavit of an officer, who, in fact, possesses probable cause." *Id.* (quoting *Bynum*, 293 F.3d at 199). And that cost to the criminal justice system would come without offsetting benefits: When 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. "[W]hen police mistakes are the result of negligence ... rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence [through application of the exclusionary rule] does not pay its way." *Id.* at 461 (quoting *Herring v. United States*, 555 U.S. 135, 147–48 (2009)).

The district court correctly applied *McKenzie-Gude* to the present case, considered both the affidavit and the facts known to Detective Coleman, and concluded

that Coleman reasonably relied on the warrant to search Thomas's phone. Although the affidavit did not contain particularized facts establishing a nexus between the place to be searched — Thomas's phone — and the alleged sexual abuse, the court reasoned, Coleman knew that both the victims' mother and one of the victims had reported that Thomas used a phone in furtherance of his criminal conduct, calling the mother to attempt to arrange further interactions with her sons. And Coleman "reasonably could infer," the court continued, that the cell phone seized during Thomas's arrest was the same phone Thomas had used to contact the boys' mother. J.A. 244. Similarly, though Coleman's affidavit lacked any information about when the offenses and phone calls occurred, Coleman knew that Thomas had visited a hotel with his victims and tried to contact their mother less than five months prior to the search, resolving any staleness issues that otherwise might arise.

Thomas's principal argument in response to this straightforward analysis is that Coleman's omissions were not "inadvertent" within the meaning of *McKenzie-Gude*, in that there is no evidence that Coleman believed (albeit incorrectly) that he had included the relevant facts in his affidavit.[2] Instead,

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[2] Thomas also argues briefly that unlike the fact omitted from the affidavit in *McKenzie-Gude* – the defendant's address – the information known to Coleman and considered by the district court was not "uncontroverted." But as Thomas concedes, it is indeed uncontroverted that at the time Coleman sought a search warrant and then executed the search, he knew "Thomas had called the victims' mother by phone and left her voicemail or text messages." Appellant's Br. At 23. Similarly, Thomas does not

Thomas argues, 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." J.A. 74. And because the court's decision in *McKenzie-Gude* was conditioned on inadvertence, Thomas concludes, we should not go beyond the four corners of the affidavit here.

We disagree. Coleman's error in this case — assuming there was one — was inadvertent in precisely the same sense as the error in *McKenzie-Gude*: In neither case did the error result from the kind of deliberate or bad faith effort to mislead a magistrate that would render *Leon*'s good faith exception inapplicable. *Cf. Leon*, 468 U.S. at 914 & n.12, 923 ("knowing or reckless falsity" in a search warrant affidavit may preclude reliance on *Leon*). The police department's purported policy was not to file deficient affidavits; it was to file affidavits that included enough, but no more than necessary, to establish probable cause.

To the extent Coleman's affidavit fell short, Coleman was not acting pursuant to that policy, and there is no other reason to think he was acting

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contest that Coleman knew, within a reasonably narrow window, the dates on which the abuse and subsequent calls occurred. This uncontroverted information, along with the information included in Coleman's affidavit, is enough to show an objectively reasonable belief in the existence of probable cause to search the phone seized when Thomas was arrested.

deliberately.[3] Rather, any error appears to have 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. That is not the kind of deliberate misconduct that the exclusionary rule was intended to deter. *See Herring*, 555 U.S. at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

In short, the district court properly considered facts known to Detective Coleman, but inadvertently omitted from his supporting affidavit, when it applied *Leon* in this case. Because Coleman "harbored an objectively reasonable belief in the existence of probable cause," *Leon*, 468 U.S. at 926, 104 S.Ct. 3405, under that standard, the district court correctly denied Thomas' motion to suppress under *Leon*.

III.

In short, the district court properly considered facts known to Detective Coleman, but inadvertently

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[3] Indeed, it would be the rare circumstance in which an officer would have any incentive to deliberately withhold from a search warrant affidavit information known to him that he believes necessary to establish probable cause. Should an officer do so, the most likely outcome would be the denial of a search warrant, leaving the officer empty-handed; the best-case scenario would be the granting of a search warrant that could not withstand the almost inevitable Fourth Amendment challenge. This is not a case, in other words, in which we need be concerned that police officers will have some systemic incentive to avoid the "detached scrutiny of a neutral magistrate." *Leon*, 468 U.S. at 913-14.

omitted from his supporting affidavit, when it applied *Leon* in this case. Because Coleman "harbored an objectively reasonable belief in the existence of probable cause," *Leon*, 468 U.S. at 926, 104 S.Ct. 3405, under that standard, the district court correctly denied Thomas's motion to suppress under *Leon*.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

UNITED STATES,	)	
	)	**Civil Action No.**
v.	)	**5:16-cr-001**
	)	
LAMARCUS THOMAS,	)	**By: Michael F.**
	)	**Urbanski**
Defendant.	)	**United States**
	)	**District Judge**

MEMORANDUM OPINION

Defendant Lamarcus Thomas ("Thomas") moves to suppress evidence obtained from the search of an LG cell phone found on his person at the time of his arrest. ECF No. 28. The court held an evidentiary hearing on August 17, 2016, during which the court heard the testimony of Detective Charles Coleman ("Detective Coleman"), an officer with the Winchester, Virginia Police Department (the "WPD"), who swore and submitted an Affidavit for Search Warrant ("affidavit"); ECF No. 39-1, in support of the search warrant at issue.

As a result of the images and videos found on Thomas' LG cell phone and interviews conducted thereafter, the United States charged Thomas as the sole defendant in an indictment alleging six counts of using a minor to engage in sexually

explicit conduct for the purpose of creating child pornography. ECF No. 1. Thomas argues that the affidavit submitted by Detective Coleman to the state magistrate to obtain a search warrant for Thomas' LG cell phone contained insufficient facts, rendering the warrant invalid. The government counters that the LG cell phone warrant is facially valid as to each of the offenses listed in the warrant-aggravated sexual battery, production of child pornography, and possession of child pornography-and that Detective Coleman possessed a good faith belief as to the warrant's validity, satisfying the good faith exception articulated in <u>United States v. Leon</u>, 468 U.S. 897; 923 (1984). Alternatively, the government argues that even if Detective Coleman's affidavit was too thin to support probable cause as to the crimes of possession and production of child pornography, it was plainly sufficient as to the aggravated sexual battery charge, rendering suppression inappropriate under <u>Leon</u>. Finally, the government argues that the evidence of child pornography was in plain view during the search for evidence of aggravated sexual battery.

The court finds that the warrant at issue is facially invalid as the supporting affidavit is deficient in two respects. First, while the affidavit contains facts supporting a finding of probable cause as to the aggravated sexual battery charge, no such facts exist as to the possession or production of child pornography charges. Under controlling Fourth Circuit precedent, evidence of sexual assault, standing alone, is insufficient to justify a

search warrant for child pornography. United States v. Doyle, 650 F.3d 460, 472 (4th Cit. 2011).

Second, even as to the adequately supported charge of aggravated sexual battery, the affidavit contains insufficient facts linking it to Thomas' LG cell phone. The only reference to the LG cell phone in Detective Coleman's affidavit is the fact that it was found on Thomas' person at the time of his arrest on January 5, 2015. Because the affidavit provides no nexus whatsoever between Thomas' LG cell phone and the aggravated sexual battery offense listed in the warrant, the magistrate had no facts sufficient to establish probable cause to search the LG cell phone.

Nevertheless, the court concludes that the Leon good faith exception applies in this case. At the time he submitted the affidavit, Detective Coleman knew that the LG cell phone played a role in the aggravated sexual battery offense listed in his affidavit. During his investigation, Detective Coleman learned from the victims' mother that Thomas had called her several times in an attempt to set up another rendezvous with her children and left her multiple voicemail messages. Although Detective Coleman's affidavit itself provides no link between the use of the LG cell phone and the crime, it is Uncontroverted that Detective Coleman knew that Thomas used a phone in furtherance of his criminal conduct. Detective Coleman reasonably could infer that the LG cell phone seized at Thomas' arrest was

the phone that Thomas used to call the victims' mother just a few months earlier. Thus, it is clear that Detective Coleman "'harbored an objectively reasonable belief in the existence' of this factual predicate," United States v. McKenzie-Gude, 671 F.3d 452, 458-59 (4th Cir. 2011) (quoting Leon, 468 U.S. at 926), linking Thomas' phone to the aggravated sexual battery. It cannot be said here that Detective Coleman relied 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. As was the case in McKenzie-Gude, "Leon presents no barrier to holding that the experienced officer[] in this case, who swore out the affidavit and executed the search, acted with the requisite objective reasonableness when relying on uncontroverted facts known to [him] but inadvertently not presented to the magistrate." McKenzie-Gude, 671 F.3d at 460.

Accordingly, the court will **DENY** Thomas' motion to suppress, ECF No. 28.

I.[1]

A.

On January 13, 2015, Detective Coleman submitted an affidavit for a search warrant of an LG

[1] The facts recounted below consist primarily of those described by Detective Coleman during his testimony at the suppression hearing.

cell phone seized during Thomas' arrest.[2] The warrant indicated the search related to the following offenses: (1) possession of child pornography, (2) production of child pornography, and (3) aggravated sexual battery. In describing the "place, person, or thing to be searched," the warrant application stated, "A cell phone black/silver in color, with 'LG' printed in silver on the front, 'LG' printed in dark gray on the back, in a purple and black case belonging to LaMarcus Thomas. Phone is in possession of the Winchester Police Department." In the portion of the affidavit describing the "things or persons to be searched," the warrant application stated:

> Any and all incoming and outgoing calls, gps locations, photos, text messages, voicemails, media, websites, instant messages, address books, media card, Sim card, contacts, contact numbers, social media websites to include but not limited to Facebook, Twitter, MySpace, Snap Chat, Vine, etc., media cloud, any stored electronic data that may be stored inside a smart phone that would be related to this crime and/or crime scene.

In the narrative portion of the affidavit, Detective Co1eman submitted the following:

> 01-05 15 Det. Coleman obtained two arrest warrants on LaMarcus Thomas for aggravated

[2] Copies of the warrant and affidavit are found at ECF Nos. 28-1 and 39-1.

> sexual battery. Det. Coleman located and arrested Thomas in the 500 block of North Loudon Street on the same date. During the arrest Det. Coleman removed a LG cell phone that Thomas advised was his personal cell phone. Det. Coleman is investigating a case were two children were allegedly molested by LaMarcus Thomas. During an interview with Det. Coleman LaMarcus Thomas corroborated both juvenile's statements against him. Det. Coleman has received many hours of training to investigate child sexual abuse cases and has learned through training and experience that it is common for offenders to keep contact items from victims such as follows; pictures of victims, text messages, phone calls, Voice mails and/or child pornography on their cell phone/storing devices. Det. Coleman had reason to believe Thomas may also have these types of items on his cell phone/media cloud. Det. Coleman is requesting a search warrant for the cell phone taken from Thomas's person at the time of arrest. Det. Coleman and the Winchester Police Department have maintained possession of this cell in the evidence room per WPD general orders since the time of arrest. /s/ Det. Coleman.

On January 13, 2015, the state magistrate issued the search warrant for the LG phone seized from Thomas during his arrest (hereinafter the "LG warrant"). Detective Coleman did not examine the

LG cell phone himself, but turned it over to the Virginia State Police crime lab for forensic analysis. The Virginia State Police provided a report indicating that images and videos of child pornography were found on the SD memory card taken from the LG cell phone. Detective Coleman was unable to specify the procedure employed by the Virginia State Police to search the LG cell phone other than to state that while the investigators were unable to access the password protected phone itself, they were able to remove and search the LG cell phone's SD card. After the forensic report issued; agents of the Federal Bureau of Investigation ("FBI") interviewed Thomas on April 10, 2015, and the federal indictment issued on January 13; 2016.

B.

Detective Coleman has had a long career as a police officer and significant experience investigating cases of child battery and sex crimes with the WPD. Detective Coleman has taken multiple classes discussing child neglect, child abuse, and child sexual assault. Detective Coleman testified that he understands that persons who engage in sexual crimes related to children often engage in crimes involving child pornography. Detective Coleman explained that child molesters frequently keep images containing child pornography on electronic devices such as computers, cell phones, and other forms of media storage.

Detective Coleman has received substantial training in drafting search warrants, both at the

police academy and through the WPD. Detective Coleman testified that it is WPD policy to provide no more probable cause information than necessary to obtain a warrant because of media access to warrants.

Detective Coleman explained that he became involved in the investigation of Thomas in November 2014 after the WPD received an anonymous tip that Thomas had abused a child (hereinafter referred to as "MV4"). After learning of the alleged abuse, Detective Coleman contacted MV4's mother. The mother advised Detective Coleman that MV4 and a sibling (hereinafter referred to as "MV3") had spent the night with Thomas. Thereafter, Thomas repeatedly called her to arrange additional sleepovers.

Detective Coleman arranged for the Child Advocacy Center to interview MV3 and MV4 regarding their interactions with Thomas. Detective Coleman observed the interviews from another room. Detective Coleman testified that the victims stated that they had been sexually assaulted by Thomas during an overnight visit at a hotel. The interviews also revealed that Thomas communicated with the victims' mother by phone calls, often leaving voicemail messages.

Upon contacting the hotel, Detective Coleman learned that Thomas stayed there on September 16, 2014 and October 11, 2014. The government introduced hotel receipts for those nights bearing Thomas' signature. ECF No. 39-6, at 2-3. In

particular, the hotel records confirmed that the October 11, 2014 receipt indicated "1 + 2," meaning one adult and two children. id. at 3.

After he confirmed that Thomas rented rooms at the hotel, Detective Coleman contacted Thomas via the phone number given to him by the victims' mother and arranged to interview Thomas at the WPD. ECF No. 35, at 2. On December 18, 2014, Detective Coleman interviewed Thomas. During that interview, Thomas admitted sexually assaulting both victims. Id. at 2-3.

On January 5, 2015, at the instruction of state prosecutors, Detective Coleman obtained two arrest warrants against Thomas for aggravated sexual battery. ECF No. 35, at 3; ECF No. 39-2. Though the arrest warrant application reflects an offense date of October 11, 2014-the date the hotel receipt indicated Thomas rented a hotel room accompanied by two children-Detective Coleman testified that he later learned that different children had accompanied Thomas to the hotel on October 11, 2014. Detective Coleman later discovered that MV3 and MV4 accompanied Thomas to the hotel on September 16, 2014, the date on which the hotel records indicated Thomas rented a room, but made no mention of the fact that he was accompanied by children.

On January 5, 2015, Detective Coleman arrested Thomas. While arresting Thomas, Detective Coleman found the LG cell phone located in Thomas' pocket. On January 6, 2015, Detective Coleman obtained and

executed search warrants for two of Thomas' recent residences. Detective Coleman testified that he seized a laptop, a tablet, and an additional cell phone at one residence. Detective Coleman testified that this phone was an older model, found in a bag with miscellaneous items. After executing the residential search warrants, Detective Coleman consulted with an Assistant Commonwealth's Attorney about obtaining a search warrant for the LG cell phone seizure during Thomas' arrest. On January 13, 2015, Detective Coleman submitted the affidavit to search the LG cell phone.

During his testimony at the suppression hearing, Detective Coleman acknowledged that the affidavit in support of the LG warrant did not contain the date of the alleged offense or the ages of the victims, but stated that this information was contained in the earlier arrest warrants which he referenced in the LG cell phone warrant affidavit. Likewise, Detective Coleman confirmed that the only information in the affidavit about the LG cell phone was that the phone was recovered from Thomas' person at the time of his arrest.

Detective Coleman also acknowledged that at the time he submitted the affidavit, he had no information that Thomas had used his LG cell phone to take pictures or videos of the minor victims. The reference in his affidavit to having "reason to believe Thomas may have these types of items on his cell phone/ media cloud" resulted from his training and experience in

investigating child sex crimes, rather than anything specific about Thomas.

After receiving authorization to search the LG cell phone, Detective Coleman sent it to the Virginia State Police for examination. As noted above, Detective Coleman testified that the Virginia State Police's forensic examination of the SD card contained in the LG cell phone revealed pornographic images of children other than MV3 and MV4. Detective Coleman testified that the images of the children on the SD card were produced by Thomas on October 11, 2014.

II.

"The Fourth Amendment generally requires police to secure a warrant before conducting a search." United States v. Banks, 482 F.3d 733, 738 (4th Cir. 2007)(quoting Maryland v. Dyson, 527 U.S. 465, 466 (1999). Warrants must be supported by probable cause, which "exists 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' in the place to be searched." United States v. Richardson, 607 F.3d 357, 369 (4th Cir. 2010)(quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). Evidence seized pursuant to an invalid warrant is subject to suppression under the exclusionary rule, absent operation of the good faith exception described in Leon. See United States v. Andrews, 577 F.3d 231, 235 (4th Cir. 2009). Thomas challenges both the facial validity of the search

warrant and the applicability of the good faith exception.

A.

Probable cause exists where there is 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 magistrate's findings are entitled to "great deference," United States v. Blackwood, 913 F.2d 139, 142 (4th Cir. 1990), and the court limits its inquiry to whether the warrant contained a "substantial basis for determining the existence of probable case." Gates, 462 U.S. at 239.

The affidavit submitted by Detective Coleman includes the following relevant facts: (1) on January 5, 2015, Detective Coleman arrested Thomas pursuant to arrest warrants for aggravated sexual battery; (2) during the course of the arrest, Detective Coleman seized an LG cell phone that Thomas indicated was his personal cell phone; (3) prior to the arrest, Detective Coleman was investigating whether Thomas had sexually assaulted two children and Thomas had corroborated statements made by the alleged victims; and (4) that Detective Coleman received training indicating that offenders in child sexual abuse cases tend to keep evidence of various sexual offenses on their cell phones.

For two reasons, these few facts fail to support a finding of probable cause. First, there are no facts supporting a finding of probable cause as to the child pornography offenses. The affidavit contains no facts supporting the conclusion that Thomas engage in

crimes involving child pornography, much less why the LG cell phone was likely to reveal evidence related to such crimes. Second, while the affidavit contains sufficient facts supporting the aggravated sexual battery charge, it contains no facts linking that crime to Thomas' LG cell phone. In particular, the affidavit does not share with the magistrate Detective Coleman's knowledge gleaned from his investigation that Thomas used a telephone to perpetrate the aggravated sexual battery offenses. Rather than articulating any nexus between the LG cell phone and the crimes at issue, the affidavit explains generally that it is common for sex offenders to have incriminating evidence on heir cell phones. Of course, Detective Coleman knew facts linking Thomas' use of a phone to the aggravated sexual battery offenses – namely, Thomas' communications with the victims' mother – but he neglected to put them in the affidavit.

The fact of the affidavit simply provided the magistrate with no information linking the LG cell phone and the crimes listed in the warrant. Thus, there was no "substantial basis for determining the existence of probable cause." Gates, 462 U.S. at 239. Accordingly, the court finds the LG warrant facially invalid.

B.

"Under the good faith exception to the warrant requirement, evidence obtained from an invalidated search warrant will be suppressed only if 'the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable

belief in the existence of probable cause.'" United States v. Lalor, 996 F.2d 1578, 1583 (4th Cir. 1993)(quoting Leon, 468 U.S. at 926). The good faith exception is rooted in the underlying purpose of the exclusionary rule, which is to deter police misconduct. Andrews, 577 F.3d at 235-36; see also United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) ("[A] court should not suppress the fruits of a search conducted under the authority of a warrant… unless 'a reasonably well trained officer would have know that the search was illegal despite the magistrate's authority.'"). As the Fourth Circuit has recognized, the deterrence objective of the exclusion rule "is not achieved through the suppression of evidence obtained by an officer acting with objective good faith within the scope of a search warrant issued by a magistrate." Andrews, 577 F.3d at 235 (quoting United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004), and Leon, 468 U.S. at 920) (internal quotation marks omitted). "[I]t is the magistrate's responsibility to determine whether probable cause exists, and officers cannot be expected to second-guess that determination in close cases." United States v. Mowatt, 513 F.3d 395, 404 (4th Cir. 2008), abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011). Accordingly, "under Leon's good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if the officer's reliance on the warrant was "objectively reasonable." Perez, 393 F.3d at 461 (citing Leon, 468 U.S. at 922).

In most cases, "a warrant issued by a magistrate… suffices to establish that a law enforcement officer has

acted in good faith in conducting the search." Id. at 461. However, courts recognize four circumstances in which an officer's reliance on a warrant is not "objectively reasonable":

- First, where the magistrate or judge is issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;
- Second, where the magistrate acted as a rubber stamp for the officers and so wholly abandoned his detached and neutral judicial role;
- Third, where a supporting affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
- Fourth, where a warrant [is] so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.

United States v. Williams, 548 F.3d 311, 317-18 (4th Cir. 2008) (internal citations, quotation marks, and brackets omitted). "In any of these four circumstances… the Leon good faith exception does not apply." Perez, 393 F.3d at 461.

In his motion to suppress, Thomas focuses on the third circumstance, arguing that the Leon good-faith exception ought not apply because Detective Coleman's affidavit is bare bones and devoid of indicia that could give rise to probable cause. See United

States v. Wellman, 663 F.3d 224, 229 (4th Cir. 2011) (explaining that the argument that a search warrant contains grossly insufficient information invokes the third circumstance in which Leon is inapplicable).

Under the third Leon exception, a warrant affidavit must be so lacking in "indicia of probable cause" that no reasonable officer could believe probable cause existed to justify a search. This standard demands even less from the government than the "substantial basis threshold" required to prove that probable cause existed in the first place. Bynum, 293 F.3d at195; see also Williams, 548 F.3d at 318 n.6 (distinguishing the "substantial basis" and "indicia of probable cause" standards). Moreover, the good faith analysis is objective, and must be "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." Herring v. United States, 555 U.S. 135, 145 (2009) (internal citation and quotation marks omitted). To determine "objective reasonableness," a court looks to the information included in the warrant affidavit and any "uncontroverted facts known to the officers but inadvertently not disclosed to the magistrate." McKenzie-Gude, 671 F.3d at 459; United States v. Brown, 481 F.App'x 853,855 (4th Cir. 2012) ("We may consider information conveyed to the magistrate but not contained in the affidavit as well as uncontroverted facts known to the officer but inadvertently not presented to the magistrate.")

The outcome in this case hinges on the interplay of the Fourth Circuit's opinions in McKenzie-Gude and Doyle. McKenzie-Gude instructs courts undertaking a Leon analysis to "look outside the four corners of a deficient affidavit" and to consider "uncontroverted facts known to the officers but inadvertently not disclosed to the magistrate." 671 F.3d at 459-60. In McKenzie-Gude, a residential search led to the seizure of a number of guns and explosive devices from the defendant's bedroom. The affidavit included information showing the defendant had engage in criminal activity, but failed to provide any information linking the defendant to the residence that officers searched. Id. at 456-58. However, the affiants knew that McKenzie-Gude lived at the residence. Id. Police reports and a letter submitted by the defendant's co-resident confirmed the affiants' knowledge as to the defendant's home. Id. In addressing the question whether a court may consider information known to the officers, but inadvertently excluded from the affidavit, the Fourth Circuit stated:

> Leon instructs that the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." 468 U.S. at 22 n.23 [ ] (emphasis added): accord Herring [ ], 555 U.S. 135, 145 [ ]; United States v. DeQuasie, 373 F.3d 509, 520 (4th Cir. 2004). For this reason, we have consistently rejected the notion that reviewing courts may not look outside the four corners of a deficient affidavit

> when determining, in light of all the circumstances, whether an officer's reliance on the issuing warrant was objectively reasonable. See, e.g., [ ] Perez, 393 F.3d [at] 462, United States v. Legg, 18 F.3d 240, 243-44 (4th Cir. 1994).
>
> …
>
> Refusing to consider such information risks the anomalous result of suppressing evidence "obtained pursuant to a warrant supported by the affidavit of an officer, who, in fact, possesses probable cause, but inadvertently omits some information from his affidavit." Bynum, 293 F.3d at 109.

Id. at 459-60. McKenzie-Gude explains that a court undertaking a Leon analysis is precluded from "inquiring into the subjective beliefs of law enforcement officers," but is allowed to consider the "uncontroverted facts known to the officers." Id. at 460. The Fourth Circuit concluded that the officers acted with the "requisite objective reasonableness" in that case, despite their inadvertent failure to present uncontroverted facts to the magistrate. Id. at 460.

In Doyle, the Fourth Circuit ordered the suppression of evidence resulting from a search warrant issued without proper factual foundation. 650 F.3d at 476. The Fourth Circuit described the warrant application in Doyle as follows:

> Authorization was sought to search Doyle's house for "any and all materials, books,

> magazines, picture, or videos that are of sexual nature involving any minor child" as well as "any communication system that could be used to facilitate a sexual offense against a child. (computer)." In the section stating the "material facts constituting probable cause that the search should be made," the affidavit stated: "three minor children have come forward and stated that Doyle has sexually assaulted them at the Doyle residence. One victims [sic] disclosed to an Uncle that Doyle had shown the victim pictures of nude children." The affidavit indicated that the affiant learned this information through an informant whose credibility was determined from "detailed Victim statements of the assault and of the Doyle residence, where victims describe the assailants [sic] bedroom and vehicle he drives and description of the home. Which has all been verified by Sheriff's Dept."

Id. at 464. The opinion focused on two major deficiencies in the affidavit, both of which rendered the officer's reliance on the warrant unreasonable. The Fourth Circuit first addressed the issue of probable cause as to support the existence of a crime, noting the "remarkably scant evidence in the affidavit… to support a belief that Doyle in fact possessed child pornography." Id. at 472. While the affidavit in Doyle was submitted to authorize a search for evidence of the crime of possession of child pornography, the facts contained in the affidavit did not rise to the level of probable cause that a child pornography offense has

been committed. The closest it came was the statement that one of the victims "disclosed" to an Uncle that Doyle had shown the victim pictures of nude children." Id. at 472. The Fourth Circuit found this to be insufficient.

> Without anything more than a description of the photographs as depicting "nude children," there were arguably insufficient indicia of probable case to justify reasonable reliance on a warrant authorizing a search for child pornography. Insofar as possessing nude pictures of children is not per se illegal, reasonable officers should at least obtain a description of the photographs before relying on them to justify entry into a residence.

Id. at 473-74. In short, while the affidavit in Doyle would have been sufficient to support a warrant concerning sexual assault, the Fourth Circuit held that it was insufficient to establish probable cause to search for evidence as to the separate crime of possession of child pornography. It is worth emphasizing that the search warrant in Doyle, unlike the warrant in the present case, only sought evidence related to the offense of possession of child pornography.

A second concern addressed by the court in Doyle stemmed from the absence of any suggestion in the affidavit as to when Doyle may have possessed the alleged child pornography. The court recognized that though "substantial amounts of time can elapse before probable cause to search for child pornography

becomes 'stale,'" the affidavit's complete absence of information as to when the alleged child pornography may have been possessed rendered it "completely devoid of indicia that the probable cause was not stale." Id. at 475. The Doyle court concluded that '[h]ere, nothing indicated when and if child pornography existed in Doyle's home. We conclude that an objectively reasonable officer would not rely on a warrant application so devoid of necessary information." Id. at 476.[3]

This case is far closer to the circumstances in McKenzie-Gude than those present in Doyle. First, unlike in Doyle, the search warrant in this case sought evidence related to the crime of aggravated sexual battery, along with the child pornography offenses. Here, the affidavit contained ample evidence of probable cause as to the aggravated sexual battery charge. Not only did the affidavit refer back to the recently obtained arrest warrants for these offenses, it

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[3] The Doyle court was less concerned with the lack of any information tying the place to be searched, Doyle's house, to the child pornography charge. There was no indication from the victim's uncle as to where the nude pictures were allegedly shown. The court cited its earlier decision in United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988), for the proposition that "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." The court determined that "in light of Anderson, we cannot conclude that the district court erred in concluding that, if Doyle actually possessed child pornography, it was reasonable to assume that Doyle kept it at his house." Doyle, 650 F.3d at 472.

stated that Thomas, in a post-arrest interview, "corroborated both juvenile's statements against him." ECF No. 39-1, at 6. Thus, the threshold failure of the affidavit in Doyle, the lack of evidence to support a finding of probable cause as to the only crime referenced in the warrant – possession of child pornography – is not present here. While the affidavit in Doyle failed to establish probable cause that any crime had been committed, the affidavit in this case plainly is sufficient as to the crime of aggravated sexual assault.[4]

While Detective Coleman's affidavit is sufficient to support a finding of probable cause as to the aggravated sexual battery charge, it makes no

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[4] It is true that Detective Coleman's search warrant affidavit also listed the crimes of possession and production of child pornography. As to these two crimes, Detective Coleman's affidavit presents even less factual basis than was present in Doyle. As to the possession and production of child pornography charges, Doyle teaches that Detective Coleman could not have reasonably concluded that the warrant contained probable cause. At the suppression hearing, Detective Coleman made clear that his suspicion that Thomas possessed or had produced child pornography was based on the general notion that those who engage in sexual assault of minors are likely to also produce or possess child pornography. The affidavit contains no facts suggesting that Thomas produced or possessed child pornography. Detective Coleman also gave no indication that he knew any facts not included in the affidavit that would have bolstered a finding of probable cause that Thomas produced or possessed child pornography. Regardless of the child pornography offenses, Detective Coleman's affidavit establishes probable cause as to the listed crime of aggravated sexual battery.

mention of Thomas' LG cell phone, other than to say that it was removed from him at the time of his arrest. In other words, the affidavit provides no link between Thomas' LG cell phone and the aggravated sexual battery charge. The next question, therefore, is whether the holding in McKenzie-Gude provides a legal basis sufficient to cover this omission.

McKenzie-Gude allows courts to consider information outside the four corners of the affidavit where the affiant inadvertently omits information from an affidavit. 671 F.3d at 459-60. At the suppression hearing, Detective Coleman made clear that he knew at the time he applied for the search warrant that Thomas communicated with the victims' mother by phone calls to arrange another meeting with the victims. To be sure, Detective Coleman's subjective belief as to whether the affidavit contained probable cause is irrelevant. Leon, 468 U.S. at 922 n.23; United States v. Hodson, 543 F.3d 286, 292-93 (6th Cir. 2008) (explaining that the Leon analysis is conducted independently of the specific beliefs of the officer, but with the "faceless, nameless, reasonably well-trained officer in the field"). Rather, the inquiry is objective and focuses on the facts a "reasonably well-trained officer would have known" in considering the legality of the warrant. McKenzie-Gude, 671 F.3d at 459 (citing Leon, 468 U.S. at 92 n.23).

In Leon, the Supreme Court held that a court should not suppress the fruits of a search conducted pursuant to a "subsequently invalidated" warrant unless "a reasonably well-trained officer would have

known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n.23. Thomas argues that the warrant was invalid because it failed to link him and his alleged criminal activity to the LG cell phone to be searched. Leon requires the court to assess whether Detective Coleman "harbored an objectively reasonable belief in the existence" of this factual predicate. Id. at 926.

Leon states that officers cannot be found to have acted with "objective reasonableness" and suppression remains the appropriate remedy when they rely on "an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Id. at 923. The government contends that Detective Coleman acted with objective reasonableness in relying on the affidavit and "additional evidence" known to him. The government maintains that this "additional evidence" – the fact that Thomas telephoned the victims' mother to set up another encounter – conclusively establishes the objectively reasonable belief in the sufficiency of the warrant.

The court agrees. Leon instructs that the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal" in light of "all of the circumstances." Id. at 922 n.23; accord Herring v. United States, 555 U.S. 135, 145 (2009). For this reason, a reviewing court may "look outside the four corners of a deficient affidavit when determining, in light of all the circumstances,

whether an officer's reliance on the issuing warrant was objectively reasonable." McKenzie-Gude, 671 F.3d at 459. Because Detective Coleman's knowledge that Thomas had phoned the victims' mother to set up a new encounter supplied the missing link between the LG cell phone and the crime of aggravated sexual battery, his reliance on the issuing warrant was objectively reasonable.

Thomas argues that the search warrant must failed because it does not list the age of the minor victims or the dates of the alleged sexual assaults, again citing Doyle. But the issue of staleness that concerned the Doyle court is not present her. In Doyle, the uncle first reported the sodomy of his step-nephew to the police in August 2003. The victim children were interviewed later that month, and a state search warrant was issued and executed in January, 2004. The indictment was not forthcoming for more than three years, issued as it was on March 6, 2007. The Doyle court was justifiably concerned that there were no facts stated in the warrant as to when Doyle possessed the nude pictures of children, noting that "[a] valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at the time." Doyle, 650 F.3d at 474 (emphasis added) (quoting United States v. McCall, 740 F.2d 1331, 1335-36 (4th Cir.184)). The Doyle court concluded "that even if the affidavit established probable cause, it was completely devoid of indicia that the probable cause was not stale." Id. at 475. The complete lack of information as to when the events supposedly creating probable cause

to search took place caused the Doyle court to conclude that the officers could not have reasonably relied on the resulting search warrant.

But this case is different. While Detective Coleman did not list the dates of the alleged sexual assaults in his affidavit, his offense dates were noted on the arrest warrants issued by another magistrate in Winchester eight days earlier. More importantly, at the time he applied for the LG cell phone search warrant, Detective Coleman had an objective reason to believe that Thomas' phone calls to the victims' mother took place some time around October 2014. Detective Coleman knew this because his investigation revealed that Thomas visited the hotel with two minors on October 11, 2014, the date he used as the date of offense in the arrest warrants.[5] Unlike in Doyle, where no officer had any idea when Doyle may have possessed the alleged nude photographs, Detective Coleman knew within a reasonably narrow window when the aggravated sexual battery took place and the phone calls were made. It was reasonable for Detective Coleman to infer that the phone seized from Thomas at his arrest on January 5, 2015 had been used by him just a few months earlier to call the victims' mother. See Anderson, 851 F.2d at 729 ("[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the

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[5] It is of no moment that Detective Coleman ultimately determined that Thomas sexually assaulted MV3 and MV4 a month earlier, on September 16, 2014, and that the October 11, 2014 hotel stay was with two other children. Either way, Doyle's staleness concerns are not present her.

item and the normal inferences of where one would likely keep such evidence."). As such, the staleness concern of the Doyle court is simply not present here.

III.

Having determined that Detective Coleman's reliance on the search warrant was objectively reasonable and subject to the Leon good faith exception, the next question concerns whether the review of the SD card by the Virginia State Police was authorized by the warrant. Based on the evidence adduced and the Fourth Circuit's opinion in United States v. Williams, 592 F.3d 511 (4th Cir.2010), the search of the LG cell phone's SD memory card was proper.

In Williams, the Fairfax County Police required a search warrant for Williams' home during their investigation of threatening emails sent to the Fairfax Baptist Temple. Id. at 515. During the course of the search of Williams' home, the FBI seized computer and electronic media and later search their contents, finding child pornography. Id. at 515-16. Williams sought suppression of the child pornography, arguing that the warrant, authorizing a search for evidence relating to other crimes involving threats of bodily harm and harassment by computer, could not reach evidence of child pornography.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized." At its core, the Fourth Amendment protects against general warrants that authorize "exploratory rummaging in a person's belongings… by requiring a particular description of the things to be seized." Andresen v. Maryland, 427 U.S. 463, 480 (1976). The particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves nothing to the discretion of the officer executing the warrant.

When a search is conducted pursuant to a warrant, it "is limited in scope by the terms of the warrant's authorization." United States v. Phillips, 588 F.3d 218, 223 (4th Cir. 2009). But the terms of the warrant are not to be interpreted in a "hypertechnical" manner. United States v. Robinson, 275 F.3d 371, 380 (4th Cir. 2001). Rather, they should be read with a "commonsense and realistic" approach, to avoid turning a search warrant into a "constitutional strait jacket." Phillips, 588 F.3d at 223 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965), and United States v. Dornhorfer, 859 F.2d 1195, 1198 (4th Cir. 1988)). Here, the warrant authorized the search of the LG cell phone for phone calls, gps locations, photos, text messages, voicemails, and other evidence related to the crime of aggravated sexual battery. Obviously, a search of the LG cell phone for evidence supporting the mother's and victims' claims of phone communication is within the express scope of the warrant's authorization. The same is true for gps

locations, data, and photos that may corroborate the aggravated sexual battery charges.

The fact that evidence of additional crimes – possession and production of child pornography – was located while searching the LG cell phone pursuant to the warrant's authorization does not render the warrant overbroad or otherwise invalidate it. "Courts have never held that a search is overbroad merely because it results in additional criminal charges." Phillips, 588 F.3d at 224.

> Thus, the fact that possession of child pornography is itself a crime does not render the seizure outside the scope of an investigation into the computer harassment crime. Whether seized evidence falls within the scope of a warrant's authorization must be assessed solely in light of the relation between the evidence and the terms of the warrant's authorization.

Williams, 592 F.3d at 520-21. The GL warrant authorized the police to look for data related to the crime of aggravated sexual battery. Plainly, the images of child pornography located on the LG cell phone's SC card "were sufficiently relevant to the crimes designated in the warrant to justify their seizure under the warrant." Id. at 521. As the LG warrant, by means of the Leon good faith exception, authorized the search of the LG cell phone, the child pornographic images seized fell within its terms and are not properly the subject of suppression under the exclusionary rule.

Even if it could be argued that the LG warrant did not authorize the seizure of the child pornography images and videos found on the SD memory card, the court alternatively concludes that the seizure of these images and videos falls within the plain view exception to the warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

> Under this exception, police may seize evidence in plain view during a lawful search if (1) the seizing officer is lawfully present at the place from which the evidence can be plainly viewed; (2) the seizing officer has a lawful right of access to the object itself; and (3) the object's incriminating character is immediately apparent.

Williams, 592 F.3d at 521 (internal quotation and punctuation omitted) (quoting United States v. Legg, 18 F.3d 240, 242 (4th Cir. 1994)).

In this case, the warrant authorized a search of Thomas' LG cell phone for evidence relating to aggravated sexual battery. As such, "[t]o conduct that search, the warrant impliedly authorized officers to open each file on the [LG cell phone's SD card] and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization – i.e., whether it related to the designated Virginia crime." Williams, 592 F.3d at 521-22. Further,

> once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the

> criteria for applying the plain-view exception are readily satisfied. First, an officer who has legal possession of the computer and electronic media and a legal right to conduct a search of it is "lawfully present at the place from which the evidence can be viewed," thus satisfying the first element of the plain-view exception. Second, the officer, who is authorized to search the computer and electronic media for evidence of a crime and who is therefore legally authorized to open and view all its files, at least cursorily, to determine whether anyone falls within the terms of the warrant, has "a lawful right of access" to all files, albeit only momentarily. And third, when the officer then comes upon child pornography, it becomes "immediately apparent" that its possession by the computer's owner is illegal and incriminating. And so, in this case, any child pornography viewed on the computer or electronic media may be seized under the plain-view exception.

Id. at 522 (internal citations omitted). As the Affidavit of Allison Boos, Digital Investigative Analyst, High Technology Investigative Unit, Child Exploitation and Obscenity Section, Criminal Division, United State Department of Justice, makes clear, there is no practical difference between an officer searching computer files and digital files located on an SD

memory card. ECF No. 41.1.[6] Thus, although Detective Coleman's affidavit was insufficient to justify a search of the LG cell phone for evidence of the possession and production of child pornography offenses, the Virginia State Police crime lab had lawful authority under Leon to search Thomas' LG cell phone and its SD memory card for evidence related to the crime of aggravated sexual battery. In doing so, the crime lab was lawfully authorized to access, albeit only momentarily, all of the files on the SD card. As in Williams, once child pornography images are viewed, their illegal nature becomes immediately apparent. As such, their seizure was lawful under the plain view exception.

IV.

Application of the exclusionary rule to suppress the evidence found on Thomas' LG cell phone is not called for in this case. Detective Coleman applied for a search warrant to examine the phone's contents, having ample information that Thomas had committed aggravated sexual battery crimes and used a phone to perpetrate those crimes. Although his search warrant affidavit could have provided more information linking Thomas' crimes to evidence located on his phone, it is clear that Detective Coleman acted reasonably and with objective good faith. There is no suggestion of police misconduct in this case, and

[6] The court exercises its discretion to admit the Boos affidavit for the limited purpose of providing background on the nature and organization of digital data stored on SD cards, as to which the court cannot discern any factual dispute.

Detective Coleman's good faith reliance on the LG warrant was objectively reasonable and grounded in the facts of his investigation. For these reasons, Thomas' motion to suppress, ECF No. 28, will be **DENIED**.

An appropriate order will be entered.

Entered: 12/15/2016

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

UNITED STATES,	)
	) Civil Action No. 5:16-cr-001
v.	)
	) By: Michael F. Urbanski
LAMARCUS THOMAS,	) United States District Judge

Defendant.

ORDER

For the reasons set forth in the accompanying memorandum opinion entered this day, Defendant Lamarcus Thomas' motion to suppress evidence obtained during and as a result of his LG cell phone, ECF No. 28, is DENIED.

It is **SO ORDERED**.

Entered: 12/15/2016

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District
Judge

FILED: December 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4523
(5:16-cr-00001-MFU-JCH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAMARCUS THOMAS,

Defendant-Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,

v.

LAMARCUS THOMAS

Case Number: DVAW516CR000001-001

USM Number: 21321-084

Andrea Harris, AFPD
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) two and six

☐ pleaded nolo contendere to count(s) ____________ __________________ which was accepted by the court.

☐was found guilty on count(s) ___________________ ____________ after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C./§2251(a)	Sexual Exploitation of a Minor	July 2014	2
18 U.S.C./§2251(a)	Sexual Exploitation of a Minor	10/11/2014	6

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ______________________________

☒ Count(s) 1,3, 4 & 5 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any changes of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 4, 2017
Date of Imposition of Judgment

/s/ Michael F. Urbanski
Signature of Judge

Michael F. Urbanski
United States District Judge
Name and Title of Judge

8/9/2017
Date

Judgment-Page 2 of 8

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imposed for a term of: 360 months as to Count 2 and Count 6, all to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant receive the appropriate sex offender treatment and/or mental health treatment. That the defendant be housed at Petersburg, VA.

☒ That the defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ________________ ☐ a.m. ☐ p.m. on ______

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ____________ on ______________

☐ a.m. ☐ p.m. on __________________________

☐ as notified by the United States Marshal

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ______________________
to ________________________________ a _________
_______________________, with a certified copy of this judgment.

____
United States Marshall

By ____________________
Deputy United States Marshall

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Life on Count 2 and Count 6, all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. ☐ You must make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution. *(check if applicable)*
3. You must not unlawfully possess a controlled substance.
4. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

    ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. §16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony,

you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these

conditions, see *Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.*

Defendant's Signature_______________Date_______

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of mental health treatment, as approved by the probation officer, until such time as the defendant has satisfied all requirements of the program.

The defendant shall participate in a program of drug testing and treatment for substance abuse, as approved by the probation officer, until such time as the defendant has satisfied all requirements of the program.

The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms or illegal controlled substances.

The defendant shall comply with the supervised sex offender conditions as ordered by the court.

1. The defendant shall register with all local and state sex offender registration agencies in any jurisdiction where the defendant resides, is employed,

carries a vocation, is a student, or is otherwise required to register by SORNA.

2. The defendant shall have no direct or indirect contact at any time, for any reason, with any victim identified in the presentence report or any victim's family.

3. The defendant shall not possess, view, or otherwise use any materials depicting or describing "child pornography" as defined in 18 U.S.C. § 2256, nor shall the defendant knowingly enter, or knowingly remain in, any location where such materials can be accessed, obtained, or viewed, including pictures, photographs, books, writings, drawings, videos, or video games.

4. The defendant shall submit to an evaluation by a qualified mental health professional, approved by the probation officer, who is experienced in the treatment of sexual offenders. The defendant shall take all medications reasonably related to his or her condition, complete all treatment recommendations, and abide by all rules, requirements, and conditions imposed by the treatment provider until discharged from treatment by the provider.

5. The defendant shall submit to risk assessments and other specific tests to monitor defendant's compliance. In conjunction with sex offender treatment, defendant shall submit to polygraph, plethysmograph, or other testing useful for treatment of sex offenders.

6. The defendant shall submit to a search of his or her person, property, residence, vehicle, papers, computer, electronic communication devices, or data storage devices or media at any time by the probation officer

with reasonable suspicion concerning unlawful conduct or a violation of a condition of release. The defendant should warn any other residents or occupants that their premises or vehicles in which the defendant may be located could be subject to search pursuant to this condition.

7. The defendant shall not linger within 100 feet of any parks, school property, playgrounds, arcades, amusement parks, daycare centers, swimming pools, community recreation fields, zoos, youth centers, carnivals, circuses, or other places that are primarily use or can reasonably be expected to be used by minors, without prior permission of the probation officer.

8. The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer or electronic device or cellular telephone that can be linked to any computer networks, bulletin boards, the Internet, or other exchange formats involving computers which have the capacity to contact minors or gather information about a minor, unless approved approved by the probation officer for lawful purposes such as defendant's gainful employment, use by an immediate family member living in defendant's household, or other legitimate activities. In addition, defendant shall not access or use any computer that utilizes any "cleaning" or "wiping" software programs.

9. The defendant shall not associate or have verbal, written, telephonic, electronic communications or knowingly socialize through the Internet with any minor, except: 1) in the present of the parent or legal guardian of said minor; 2) on the condition that the

defendant notifies the parent or legal guardian of the defendant's sex offender condition(s); and 3) with prior approval from the probation officer. This provision does not encompass minors working as waiters, cashiers, ticket vendors, and similar service positions with whom the defendant must deal in order to obtain ordinary and usual commercial services.

10. The defendant shall not purchase, posses, or use any camera or video recording devices without approval of the probation officer.

11. The defendant shall notify employers, family members, and other with whom the defendant has regular contact of the defendant's sex offender conditions and that the defendant is under the supervision of the probation officer.

12. The defendant shall not be employed in any position or participate as a volunteer in any activity that involves contact with minors without prior approval of the probation officer. The defendant may not engage in an activity that involves being in a position of trust or authority over any minor.

13. The defendant shall participate in the Computer and Internet Monitoring Program and abide by all conditions therein as directed by the probation officer. Participation in this program is contingent upon all program criteria being met.

14. The defendant shall contact the probation officer within 72 hours of establishing an ongoing romantic relationship with another individual having custody of a minor child and provide the probation officer with information about the other party. The defendant

shall also inform the other party of his or her prior criminal history concerning sex offenses.

15. The defendant shall not be in the company of or have contact with children under the age if 18, including the defendant's own children, without prior permission of the probation officer. Contact includes but is not limited to letters, communication devices, audio or visual devices, and communication through a third party. The defendant shall immediately report any such contact to the probation officer.

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

ADDITIONAL SUPERVISED RELEASE TERMS

16. The defendant shall not have any contact, other than incidental contact in a public forum such as ordering a restaurant or grocery shopping, with any minor that is under the age of 18 without prior permission of the probation officer. Any approved contact shall be supervised by an adult at all times. The contact addressed in this condition included but is not limited to direct or indirect, personal, telephonic, written, and through a third party. If the defendant has any contact with any such minor not otherwise addressed in this condition, the defendant is required to immediately leave the situation and notify the probation officer.
17. (objection sustained. condition deleted)
18. (objection sustained. condition deleted)
19. The defendant shall identify for the probation officer and authorize the probation officer to access (including providing user identification and password) all social networking sites used by defendant. Defendant shall not utilize by any means an electronic device, including a cellular phone, computer, or other device, to access a social networking website or other Internet website, blog, forum, chat room or other environment, to contact a minor, view images of minors or gather information about a minor.

20. The defendant shall submit to unannounced examination by the probation officer of the defendant's computer equipment and electronic devices, which may include the retrieval and copying of all data from the equipment or devices, to ensure compliance with the conditions of supervision. If the probation officer has reasonable suspicion that the defendant has violated the terms and conditions of supervision, the defendant shall consent to the seizure of such equipment and devices for the purpose of conducting a more thorough investigation.

21. The defendant shall permit the probation officer to conduct periodic, unannounced examinations of any computer equipment the defendant uses or possesses, which includes all hardware and software related to online use. This computer equipment includes but is not limited to any internal or external peripherals, internet-capable devices, and data storage media. These examinations may include retrieval and copying of data related to online use and viewing of pictures and movies which may be potential violations of the terms of supervision. The relevant computer equipment may be removed by the probation officer for more thorough examination. The probation officer may use and install any hardware or software system that is needed to monitor the defendant's computer use.

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**JVTA Assessment**[1]
TOTALS	$200.00	$

	Fine	**Restitution**
TOTALS	$500.00	$

☒ The determination of restitution is deferred until 90 days. An *Amended Judgment in a Criminal Case* (AO 245C0 will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below.

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	-------	-------	--------

☐ Restitution amount ordered pursuant to plea agreement $________________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(G).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Defendant: LaMarcus Thomas
Case Number: DVAW516CR000001-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $200.00 immediately, balance payable

☐ no later than ____________, or
☒ in accordance ☐ C, ☐ D, ☐E, ☒ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐F, or ☐ G below); or

C ☐ Payment in equal ______________ (e.g., weekly, monthly, quarterly) installments of $___________ over a period of _____________ (e.g. months or years), to commence ____________________ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in ____________________ (e.g., weekly, monthly, quarterly) installments of $___________ over a period of _____________ (e.g. months or years), to commence ____________________ (e.g., 30

or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____________ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ During the term of imprisonment, payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $20 or 25% of the defendant's income, whichever is greater, to commence 60 days (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $25.00 during the term of the supervised release, to commence 60 days (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C. §3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of

any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, 210 Franklin Rd., Suite 540, Roanoke, Virginia 24011, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Oral Order entered forfeiting the items listed in the indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including costs of prosecution and court costs.

Transcript Excerpts From Suppression Hearing

[9]

Q. Have you received any training, whether formal or informal, about how to draft a search warrant as a Winchester police officer?

A. Yes. You receive it at basic academy. Once again, some of those investigation classes include that. There’s also a lot of in-house training on that as well.

Q. Specifically with that in-house training, what have you been taught about drafting a search warrant?

A. One of the things is, in our department, we are taught to put no more PC into the warrant than it takes to obtain the warrant.

* * *

[64]

Q. [BY MR. WILSON] Detective Coleman, the information you provided to the magistrate for the search warrant for the LG phone consists of the information in Government's Exhibit 4, which is the search warrant affidavit and the attached statement of probable cause. A. Yes, sir.

Q. Is that all the information you provided the magistrate?

A. Yes, sir.

* * *

BY MS. FISHER:

Q. Just a few additional questions, Detective Coleman.

Now, when you interviewed the mother of Minor Victims 3 and 4, she did indicate that she had received phone communication from the defendant; is that correct?

[65]

A. Correct.

Q. And this was after the abuse occurred; is that correct?

A. Yes, ma'am.

Q. And also, when you observed the CAC interviews of the Minor Victims 3 and 4, did either of them say anything about phone communications their mother had received from the defendant?

A. M3 indicated calls and text messages after the abuse, trying to get M3 and M4 to return back for a sleepover, for a keyboard.

Q. Now, about the cell phone that was –

The court: You didn't put either of those, though, in your affidavit for the search warrant.

The witness: I did not.

The court: You didn't put any reference in that affidavit that the mother had indicated she had phone communication; correct?

The witness: That's correct.

The court: You also didn't indicate in there that M3, Minor Victim 3, had indicated there were calls and text messages after the abuse. That's not in there either.

The witness: No, sir.

The court: In fact, are there any facts in this affidavit connecting the LG phone to be searched with the investigation you were conducting about the molestation of

[66]

MV3 and M4?

The witness: I did indicate in there that the arrests were made for the molestation and that he had the cell phone on his person and was investigating where two children were allegedly molested, and the phone had been removed from Mr. Thomas, and he had corroborated their statements.

The court: Essentially, he had a phone on him, but you didn't put anything in this affidavit that indicates the phone had anything to do with the molestation, other than the fact he had it on him; right?

The witness: Correct.

The court: Look down in your statement. It says: "Detective Coleman had reason to believe Thomas may have had – may also have these types of items on his cell phone/media cloud."

Is that just something that you got off another warrant application that you just put in there, or

did you have some specific information in mind?

The witness: I didn't have anything specific. It was just a lot of our training, and one of the last ones I went to talked about the iClouds and how it can be up in space and not technically on the phone.

The court: You were just thinking it might be – it might be in the cloud.

[67]

The witness: Yes, sir.

The court: So you didn't have anything specific to this investigation that led you to believe there might be some items in the cloud.

The witness: Correct.

The court: Go ahead.

BY MS. FISHER:

Q. Now, you didn't put in your affidavit for the search warrant that Minor Victim 3 and 4's mother received phone communications from the defendant, but that is in your narrative police report; right?

A. Correct.

Q. And the CAC interview where Minor Victim 3 indicates his mother received text messages and phone calls from the defendant was recorded; is that correct?

A. Yes.

Ms. Healey: That has been made available to

defense counsel.

BY MS. FISHER:

Q. And the phone in question, this LG smartphone was removed from LaMarcus Thomas's person incident to arrest; is that correct?

A. Correct.

Q. And that's also indicated in your narrative report; correct?

* * *

[69]

BY MS. FISHER:

Q. In your report regarding January 5th, the arrest of the defendant, you indicated that phone was found on his person; correct?

A. Yes.

The court: Did you get any indication as to – I'm sorry. Let me start over.

Let me direction your attention back to your testimony concerning the interview with the mother of the minor victims where she said she received phone calls. Okay?

With regard to that, did she indicate whether or not those phone calls came from a particular number? In other words, did she know whether it came from a cell phone versus a landline? Did she say anything about that?

The witness: She referred to it as LaMarcus's

phone.

The court: Did she say whether they had come from the hotel?

The witness: No. She referred as LaMarcus's phone.

The court: Did she say that she spoke to LaMarcus or that he had just left messages?

[70]

The witness: I don't recall which method she used, but I know when M3 was interviewed, he said both calls and texts, on the DVD.

The court: Do you know whether you have notes of the interview with mom?

The witness: I don't recall right now.

The court: I was wondering whether the notes of your interview with mom might indicate whether she gave any more specificity with regard to the phone that she said was used. Do you have anything you could help me with, with regard to that?

The witness: I know that number – I got LaMarcus's phone number from the mother. That's how I contacted him. So when I called the number that she gave me, that's the number that he answered. That's where I got the cell phone number from.

The court: Do we know whether that number that she gave you is the number for the LG phone that

you took out of his pocket? Do you know?

The witness: I'm not going to guess at that. I'm not sure right now without reviewing notes.

The court: So you don't know whether the number for the phone that came out of his pocket was the same number she gave you; correct?

The witness: Correct.

[71]

The court: You certainly didn't give that information to the magistrate.

The witness: No.