No.

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON GALE COMBS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is unconstitutional to allow appellate courts to review information known to police, but unknown to the neutral and detached magistrate at the time the judge issues the warrant, to determine if probable cause for the warrant existed, as held by the Fourth Circuit in this case, and as previously held by the Seventh, Eighth and Eleventh Circuits, a position contrary to that held by the Sixth, Ninth and Tenth Circuits.

II. Whether the good faith exception outlined in *United States v. Leon*, 468 U.S. 897 (1984) extends to an officer who uses information that the officer illegally obtained to show probable cause in the search warrant affidavit and the same officer executes the resulting warrant.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brandon Gale Combs, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 16-4840, entered on April 10, 2018.

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on April 10, 2018, affirming the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Combs*, 729 Fed. Appx. 250 (4th Cir. 2018) and is attached as App. 1A-7A. On April 19, 2017, Combs filed a petition for rehearing and rehearing *en banc*, which was denied on June 25, 2018. App. 8A. The order of the district court denying Combs' motion to suppress evidence from the search was a text entry on the docket sheet. *United States v. Combs*, No. 0:15-00881-MGL, *Text Order Denying Motion to Suppress Search*, ECF No. 45 (D.S.C. July 26, 2016).

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on April 10, 2018. App. 1A-7A. Combs filed a petition for rehearing and rehearing *en banc* with the circuit court, which was denied on June 25, 2018. App. 8A. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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.

U.S.C.A. Const. Amend. IV (West 2018).

STATEMENT OF THE CASE

On December 15, 2015, Combs was charged with being a felon in possession of a firearm and ammunition under 18 U.S.C. §922(g)(1), §924(a)(2), and §924(e), to which he ultimately pled guilty. JA 2, ECF No. 2; JA 6, ECF Nos. 49-50.[1] The events leading to the conviction arose from police in Clover, South Carolina responding to a call from Combs' former girlfriend Kristen Shea, alleging he had assaulted her the previous evening. JA 25-26. When police arrived at Combs' house, they placed Shea and her daughter in the back seat of a police car. JA 26-27.

After putting Shea in the car, Lieutenant Davis and another officer went to Combs' front door and knocked at length, asking Combs to talk to them. JA 29-30 and JA, CD Ex. at 11:47:40 - 11:53:19 (time on video). Ultimately, Combs came to the door, opening it only a few inches. JA 30. Davis asked Combs if he could come in and talk to Combs, but Combs closed the door. JA 30-31. Davis testified that the door was only open a few inches and Combs closed the door, but that, after Combs closed the door, Davis saw him walk "back towards the back of the house." JA 30-31, lines 2-4.

The officer opened the door and followed Combs into the house, whereupon he saw Combs was nude. JA 31, JA 48-49. At that point, Davis testified that he knew Combs had only slightly opened the door because he did not have on clothes. *Id.*

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Combs*, No. 16-4840, *Joint Appendix* (ECF No. 16) (4th Cir. filed Feb. 16, 2017).

Davis also testified that he did not feel threatened and the officers did not have their guns drawn. JA 32-33.

Yet, Davis followed Combs into his bedroom and told him to put on pants and underwear. JA 31-32 and JA, CD Ex. at 11:53:27 -11:54:09. When Combs wanted to get a cigarette, Davis said he would retrieve it from the bedroom. JA 36-37 and JA, CD Ex. at 11:54:09-11:54:19. Davis testified that Combs gave him permission to get the cigarettes, but, in fact, the officers refused to let Combs get the cigarettes and Davis said he would do it. *Id.* While retrieving the cigarettes, Davis said he saw a bullet on the floor by the bed. JA 37.

The officers told Combs he was not being arrested, but was being detained, and handcuffed him. JA 49 and JA, CD Ex. at 11:55:46-11:56:00. Davis testified that Combs was not free to leave after he was handcuffed. JA 49.

Then, Davis started questioning Combs. Without giving Miranda warnings, Davis asked Combs if there was a gun in the house, and questioned him about Shea coming to his house and her injuries. JA 49-51 and JA, CD Ex. at 11:56:21 - 11:57:30. The district court granted the suppression motion as to Combs' statements because of the *Miranda* violation. JA 6, ECF No. 47.

Davis testified at the suppression hearing that, prior to Davis receiving the call from Shea, he received a call from "a concerned citizen" who "didn't want to give me their name" and who claimed Combs had a gun. JA 27. Davis later testified he received an "anonymous tip" that Combs had a gun. JA 46. However, Davis later contradicted his testimony, stating in response to defense counsel's question about

whether he knew who made the call: "Yes. I know who it is, but they asked me not to reveal their name." JA 46. Davis testified that, during the initial call with Shea, he asked if Combs had a gun. JA 27. Davis said Shea said Combs had a gun at the house. *Id.*

After entering Combs' home and questioning him, Davis talked to Shea about her claims, and ultimately asked her about the gun. JA, CD Ex. at 12:00:13-12:02:58 (listening to the VLP2 and In-Car Audio recordings). Shea responded that "I can't really say . . . I want to say it's under the bed", and said "I think he showed it to me last night, but . . .." JA, CD Ex. at 12:01:47-12:02:11. Davis asked if she had been under the influence and she said that she was intoxicated. JA, CD Ex. at 12:02:11-12:02:30. Shea told Davis that Combs did not show her the gun when he was mad or threaten her with it. JA, CD Ex. at 12:02:30-12:02:44.

Combs was arrested and taken to jail. JA 50 and JA, CD Ex. at 12:03:39-12:10:04. Davis told Combs he would read him his rights, but Davis admitted he never issued *Miranda* warnings. JA 50-51 and JA, CD Ex. at 12:04:03-12:10:04. While Combs was being taken to the police car, he told officers to let him retrieve the gun. JA 39. After Combs was arrested, Davis told him he suspected Combs had a gun for some time and asked for consent to search. JA, CD Ex. at 12:04:42-12:06:00. Combs never gave a definitive answer, so Davis said he would assume the answer was no. *Id.*

Davis submitted an affidavit for a search warrant. His affidavit indicated he was seeking "firearms, ammunition, or items consistent with the purchase, sale or

possession of firearms." JA 69. In support of the request, Davis indicated he "had received intelligence the previous week regarding Mr. Combs purchasing a handgun." JA 38, JA 69. Nothing in the affidavit provided any information whatsoever about the source of the information. *Id.* The affidavit further stated Davis asked the victim (Shea) if Combs "still had a handgun in the home" and she said he did. *Id.* After following Combs into his house, Davis said he saw a bullet on Combs' bedroom floor. *Id.* When Combs was being taken to the police car after his arrest, Davis indicated Combs said "just let me go get the gun for you." JA 39, JA 69. The affidavit also included many facts about the alleged domestic violence, which was unrelated to the stated purpose of the search warrant, which was limited to firearms. JA 69. Furthermore, Shea never suggested, and, in fact, adamantly denied, a gun was used in connection with her claims of assault. JA, CD Ex. at 12:02:30-12:02:44.

Based on this affidavit, a search warrant issued. Police found a gun and flare gun at Combs' home. JA 40, JA 70. The bullet allegedly seen by Davis was not logged on the warrant return. JA 52, JA 70.

Combs filed a motion to suppress evidence from the search warrant and a motion to suppress his statements elicited without *Miranda* warnings. JA 5, ECF Nos. 36, 38, JA 13, JA 20. The government filed an opposition to the motion to suppress, arguing that probable cause existed because police received confidential information that Combs had a gun, which was corroborated by Shea, that Davis saw a bullet in Combs' bedroom and that Combs offered to get the gun after his arrest. JA 14-18. The district court denied the motion to suppress fruits of the search, but

granted the suppression motion related to all statements Combs made the day of his arrest. JA 6, ECF Nos. 45, 47.

Combs then entered a conditional plea, reserving the right to appeal the denial of the motion to suppress the evidence discovered from the search warrant. JA 6, ECF Nos. 48-50, JA 73, JA 95. Combs appealed to the Fourth Circuit, who affirmed the decision in an unpublished opinion. App. 1A-7A.

The Fourth Circuit held it could look at the information known to the police, but not to the magistrate, to determine if the officer's reliance on the warrant was objectively reasonable. App. 4A-5A (citing *United States v. McKenzie-Gude*, 671 F.3d 452 (4th Cir. 2011)). The Fourth Circuit's position is that it has consistently rejected that it is prohibited from looking outside the four corners of the warrant affidavit to determine if the officer's reliance on the warrant was objectively unreasonable. *Id.* This review, in the Fourth Circuit's view, allows appellate courts to consider facts known to the officer, but not presented to the magistrate, to determine whether the reliance was reasonable. App. 5A.

The Fourth Circuit then held the good faith exception applied to Combs' challenge to the search warrant. App. 6A. Assuming without deciding that the information provided to the magistrate to support probable cause was insufficient, the Fourth Circuit nonetheless held that the good faith exception applied. *Id.* In so holding, the Fourth Circuit did not address the important legal issue of whether an officer who violates the Constitution, and then uses the ill-gotten evidence to support an affidavit for a search warrant, is entitled to the good faith exception, a question

answered with a resounding no by several circuits. The positions taken are contrary to that in other circuits, and in *United States v. Leon*, 468 U.S. 897 (1984). These important constitutional issues should be settled by this Court.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to settle the circuit split about whether appellate courts can consider extraneous information known to police, but unknown to the magistrate judge issuing a warrant, to determine after-the-fact whether probable cause existed to support the warrant, making the officer's reliance objectively reasonable. This Court should decide the equally important issue of whether the good faith exception extends to police officers who engage in constitutional violations and then use the ill-gotten evidence to buttress probable cause for a search warrant. Review by this Court is necessary to settle the different holdings among the appellate courts, and to ensure the decisions of the appellate courts comport with this Court's precedent. S.Ct. Rule 10.

I. The Fourth Circuit's Position That Extraneous Information Known to the Police, But Not Presented to the Magistrate Judge Issuing the Warrant, Can Be Used to Establish Probable Cause for a Warrant, Eviscerates the Core Constitutional Right to a Warrant Issued by a Detached and Neutral Judicial Official

The Fourth Circuit held that it could look outside the four corners of the search warrant affidavit to "'uncontroverted facts known to the officers but inadvertently not presented to the magistrate'" to determine whether the officer reasonably relied on the warrant and whether probable cause existed. App. 4A-6A. (quoting *McKenzie-*

Gude, 671 F.3d at 459). Indeed, the Fourth Circuit has previously held, relying on *Leon*, that an affidavit omitting the nexus between the defendant and place to be searched did not defeat good faith, as the officers possessed the information about the facts omitted from the warrant affidavit, even though the magistrate did not. *McKenzie-Gude*, 671 F.3d at 458-60. The Fourth Circuit held that *Leon* did not preclude it from holding the officers held an "objective reasonableness when relying on uncontroverted facts known to them but inadvertently not presented to the magistrate." *Id.* at 460. The Fourth Circuit's ultimate holding, applied to *Combs*, is that evidence should not be suppressed when an officer possesses information showing probable cause, even though the magistrate is not privy to all the information supporting probable cause. *Id.* This position transfers the determination of probable cause to the police, rather than the magistrate judges.

McKenzie-Gude cited cases from the Seventh, Eighth and Eleventh Circuits for the proposition that the objective reasonableness of the officers can be determined from "uncontroverted facts known to . . . [police] but inadvertently not disclosed to the magistrate". *Id.* at 460 (citing *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992); and *United States v. Taxacher*, 902 F.2d 867, 871-73 (11th Cir. 1990)). The Eighth Circuit held "'[w]hen assessing the objective [reasonableness] of police officers executing a warrant, we "must look to the totality of the circumstances," including any information known to the officers but not presented to the issuing judge.'" *Marion*, 238 F.3d at 969 (quoting *United States v. Simpkins,* 914 F.2d 1054, 1057 (8th Cir.

1990)); *see also United States v. Conant*, 799 F.3d 1195, 1202 (8th Cir. 2015) (reaffirming that appellate courts can look at information known to the officer, but not disclosed to the magistrate, to determine whether to apply the *Leon* good faith exception).

The Seventh Circuit likewise held that the good faith exception applied to a warrant where the officers at the scene were aware of facts not relayed to the magistrate judge that more than established probable cause. *Dickerson*, 975 F.2d at 1250. The Eleventh Circuit reaffirmed its holding that appellate courts "can look beyond the four corners of the affidavit and search warrant to determine whether . . . [police] reasonably relied upon the warrant." *United States v. Martin*, 297 F.3d 1308, 1318 (11th Cir. 2002). In so holding, the circuit court claimed that a majority of circuits look at information outside the affidavit to determine if the *Leon* good faith exception applied. *Id.* (citing cases from the First, Fourth, Sixth, Eighth, and Tenth Circuits).

However, the Sixth, Ninth, and Tenth Circuits have all held that review of the good faith exception is limited to the information in the affidavit and does not extend to information known to the police, but unknown to the magistrate issuing the warrant. *United States v. Knox*, 883 F.3d 1262 (10th Cir. 2018); *United States v. Frazier*, 423 F.3d 526 (6th Cir. 2005); *United States v. Hove*, 848 F.2d 137 (9th Cir. 1988). The Seventh Circuit seems to have revised its previous position that reviewing courts can look beyond what was provided to the magistrate judge. *United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002).

The Tenth Circuit recently issued an opinion detailing the circuit split on whether courts can look beyond the four corners of the affidavit to determine if the good faith exception should apply. *Knox*, 883 F.3d 1262. Turning to the language of *Leon*, the Tenth Circuit held not only that "a suppression court's assessment of an officer's good faith is confined to reviewing the four corners of the sworn affidavit and any other pertinent information actually shared with the issuing judge under oath prior to the issuance of the warrant", but also limited its own review of good faith to the affidavit. *Id.* at 1271-73. The court noted that the good faith exception in *Leon* was inapplicable when the "*affidavit* [was] so lacking in indicia of probable cause to render official belief in existence entirely unreasonable." *Id.* at 1272 (quoting *Leon*, 468 U.S. at 923) (internal quotations omitted) (emphasis in original). *Leon* also rejects reliance on officers' subjective beliefs when they are seizing evidence, instead focusing on "the officer's reliance on the magistrate's probable-cause determination and technical sufficiency of the warrant . . . ." *Id.* (quoting *Leon*, 468 U.S. at 922) (internal quotations omitted).

"*Leon* does not extend, however, to allow the consideration of facts known only to an officer and not presented to a magistrate." *Hove*, 848 F.2d at 140. The appellate courts' review is "limited to the information provided in the four-corners of the affidavit." *Frazier*, 423 F.3d at 531 (citing *Whitely v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565, n.8 (1971)); *Aguilar v. Texas*, 378 U.S. 108, 109 (1964) (abrogated on other grounds); and *United States v. Hatcher*, 473 F.2d 321, 324 (6th Cir. 1973)).

At least one judge in the Fourth Circuit agrees that a determination of good faith cannot be based on information unknown to the magistrate judge when determining probable cause to issue a warrant. What an officer knew, but failed to tell the magistrate, is irrelevant to the good faith exception because "*Leon* requires an officer to have an objectively reasonable belief that his affidavit gave *the magistrate* a substantial basis for finding probable cause." *United States v. Bynum*, 293 F.3d 192, 202 (4th Cir. 2002) (Michael, J., dissenting) (emphasis in original). "Whether this belief is reasonable can depend only on the facts presented to the magistrate." *Id.*

Probable cause and good faith are "based solely on the information presented during the warrant application process". *Koerth*, 312 F.3d at 871 (citing *Hove*, 848 F.2d at 140; *Bynum*, 293 F.3d at 212 (Michael, J., dissenting)). The Seventh Circuit held the district judge properly refused to consider evidence not presented to the magistrate judge issuing the warrant and presented for the first time at the suppression hearing. *Koerth*, 312 F.3d at 871.

"The *Leon* test for good faith reliance is clearly an objective one and it is based solely on the facts presented to the magistrate." *Hove*, 848 F.2d at 140 (citing *Leon*, 468 U.S. at 923). "An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge." *Id.* "Reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause." *Id.* (quoting *Leon*, 468 U.S. at 915) (internal quotation marks and other citations omitted). Allowing the

deficiency in a warrant and affidavit to be cured by later testimony from the police who sought the warrant would "unduly erode the protections of the fourth amendment." *Id.*

Combs is contrary to the fundamental rights guaranteed by the Fourth Amendment:

> 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.

U.S. Const., Amend. IV. The Fourth Amendment does not allow those "officer[s] engaged in the often competitive enterprise of ferreting out crime" to substitute their judgment for that of a detached and neutral magistrate judge. *Johnson v. United States*, 333 U.S. 10, 14 (1948). The critical underlying protection of the warrant requirement is not to deprive law enforcement of their reasonable inferences, but to allow "those inferences [to] to be drawn by a detached and neutral magistrate." *Id.* at 13-14. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.* at 14. "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be 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)

(abrogated on other grounds). This Court has reaffirmed this core holding, observing that the role of the neutral and detached magistrate "go[es] to the foundations of the Fourth Amendment." *Aguilar*, 378 U.S. at 110-11 (abrogated on other grounds).

The position taken in *Combs* sanctions what the Fourth Amendment and this Court's precedent forbid. The fundamental purpose of the Fourth Amendment is to allow neutral and detached magistrates to determine probable cause. It is unconstitutional to look for probable cause after the warrant has been executed, as this robs the magistrate of his role to make a "disinterested determination to issue a search warrant" and allows searches to occur at "the discretion of police officers." *Johnson*, 333 U. S. at 14. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Id.*

The view of the Sixth, Ninth, and Tenth Circuits comports with this Court's precedent. The better position is that review of the existence of probable cause and whether the good faith exception applies is limited to what the magistrate judge actually knew at the time the warrant issued.

Combs respectfully requests that this Court review the decision of the Fourth Circuit to resolve the conflict among the circuits, and to clarify the meaning of *Leon*'s good faith exception.

II. The Good Faith Exception Is Not Intended to Apply to Police Officers Whose Affidavits Include Evidence Illegally Obtained By the Officer Swearing the Affidavit and Subsequently Executing the Warrant

Contrary to the holding of the Fourth Circuit, the good faith exception does not apply when the officer knew the evidence used to support the affidavit was obtained illegally. Here, the very officer who illegally entered Combs' home after Combs' unequivocally shut the door in the officer's face, swore the affidavit seeking a search warrant, citing evidence he obtained after illegally entering Combs' home. JA 30-31, JA 48-49, and JA 69. As Davis admitted, Combs' statement was obtained without the officer administering *Miranda* warnings. JA 50-51. Yet, Davis used Combs' illegally obtained statements to support his warrant affidavit. JA 69.

The Fourth Circuit ignored these constitutional violations and relied on facts unknown to the issuing magistrate to hold probable cause existed. A key issue relates to the illegally obtained information that was presented to the magistrate. The good faith exception cannot apply to an officer who uses illegally obtained evidence to obtain a search warrant under these circumstances. The Fourth Circuit concluded, without deciding, that the affidavit for the search warrant was insufficient and focused on the good faith exception. App. 6A-7A. The panel concluded "a reasonably well-trained law enforcement officer objectively would have believed the search to have been lawful." App. 7A.

The opinion fails to explain how the officer, who entered Combs' home illegally and admittedly questioned Combs without *Miranda* warnings, acted in good faith. Davis presented evidence obtained from these constitutional violations in a sworn

affidavit to the magistrate, thereby obtaining a warrant to search Combs' home. This police misconduct is exactly the type of behavior the exclusionary rule was designed to deter and prevent. *See Leon*, 468 U.S. at 911 (the "flagrancy of police misconduct" is important when excluding evidence). Instead of excluding the evidence to deter police misconduct, the Fourth Circuit rewarded Davis' constitutional violations.

"[T]he exclusionary rule was historically designed as a means of deterring police misconduct . . . ." *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (citing *Leon*, 468 U.S. at 916 and *Illinois v. Krull*, 480 U.S. 340, 350 (1987)). "[E]xclusion is appropriate only if the remedial objectives are thought most efficaciously served . . . ." *Id.* At 13-14 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)). This Court has limited the exclusionary rule frequently when the mistakes or misconduct are not directly related to police officers' misconduct. *See Evans*, 514 U.S. at 15 (exclusion of evidence from mistakes by court employees would not deter court employees or "be expected to alter the behavior of the arresting officer".); *Krull*, 480 U.S. 340 (exclusionary rule not imposed when officer reasonably relied on statute authorizing warrantless administrative search, even though the statute was ultimately found to violate the Fourth Amendment); and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (exclusion not appropriate when officer relied on a form warrant for drug offenses, rather than the offense at issue, when the issuing judge told him any necessary corrections would be made. Since any error was attributable to the judge, exclusion would not serve the purposes of the rule, which is deterring police misconduct). "The exclusionary rule was adopted to deter unlawful searches by police, not to punish the

errors of magistrates and judges." *Illinois v. Gates*, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment).

Leon thoroughly explained the balance between invalid warrants and the sanction of exclusion when it fashioned the good faith exception. The purpose of exclusion is "deterring official misconduct", rather than remedying rights that have already been violated. *Leon*, 468 U.S. at 900, 906. Exclusion should be limited particularly when "law enforcement officers have acted in *objective* good faith or their transgressions have been *minor*". *Id.* at 908 (emphasis added). "An assessment of the flagrancy of the police misconduct is an important step in the calculus." *Id.* at 911 (citing *Dunaway v. New York*, 442 U.S. 200, 218 (1979) and *Brown v. Illinois*, 442 U.S. 590, 603-04 (1975)).

In line with *Leon*, the Second, Ninth, and Tenth Circuits have explicitly held that the *Leon* good faith exception does not apply when the officer who violated the defendant's constitutional rights uses the illegally obtained information to later obtain a warrant. *United States v. Cos*, 498 F.3d 1115 (10th Cir. 2007); *United States v. Reilly*, 76 F.3d 1271 (2nd Cir. 1996); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987). The Eleventh Circuit also recognized that the "exclusionary rule is meant to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would not support a finding of probable cause." *Martin*, 297 F.3d at 1320.

When an officer violates the defendant's Fourth Amendment rights, the violation "precludes any reliance on the good faith exception." *Vasey*, 834 F.2d at

789. The *Leon* exception applies when "the officer presented lawfully obtained evidence to a neutral magistrate." *Id.* The *Leon* exception does not apply when, like in Combs' case, the officer "conducted an illegal warrantless search and presented tainted evidence obtained in this search to a magistrate in an effort to obtain a search warrant." *Id.* "The *Leon* court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department." *Id.* (citing *Leon*, 468 U.S. at 918). The magistrate's evaluation of the warrant affidavit containing illegally obtained evidence does not cleanse the taint because the magistrate is not in a position "to evaluate the legality of the search" which generated the evidence included in the affidavit. *Id.*

The Second Circuit held that the *Leon* good faith exception does not apply when the affidavit to obtain a search warrant contains evidence gleaned from an illegal search. *Reilly*, 76 F.3d at 1280. "Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble." *Id.* "For the good faith exception to apply, the police must reasonably believe that the warrant was based on a valid application of the law to the known facts." *Id.* The good faith exception "does not protect searches by officers who fail to provide all potentially adverse information to the issuing judge". *Id.* Reckless falsity of the affidavit "may be inferred when omitted information was 'clearly critical' to assessing the legality of a search." *Id.* (citations omitted). Good faith does not apply when officers fail to tell the magistrate judge about potentially adverse information. *Id.* In sum, the Second Circuit held:

> But it is one thing to admit evidence innocently obtained by officers who rely on warrants later found invalid due to a magistrate's error. It is an entirely different matter when the officers are themselves ultimately responsible for the defects in the warrant. And that is precisely the case here, since the data presented to the issuing judge did not allow him to decide whether the evidence of wrongdoing was itself obtained illegally and in bad faith by the officers seeking the warrant.

Id. at 1281.

Similarly, the Tenth Circuit refused to apply the good faith exception to a warrant issued based on officers' illegal entry into a home, when the information procured from the illegal entry was the basis for the subsequent search warrant. *Cos*, 498 F.3d 1115. The good faith exception was inapplicable when "the officers' initial entry into Mr. Cos's apartment was based neither on a facially valid warrant nor on a mistake made by someone other than the officers." *Id.* at 1132. The "good faith exception ordinarily remains inapplicable" to Fourth Amendment violations caused by officers' mistakes, rather than by mistakes of a third party. *Id.* at 1132, n.3.

In fact, the Tenth Circuit declined to extend the good faith exception to a warrantless search of a truck, where the officer mistakenly believed he was authorized to stop the truck pursuant to a valid state regulatory scheme. *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006). The court held the stop violated the Fourth Amendment and the good faith exception did not apply, concluding: "*Leon*'s good-faith exception applies only narrowly, and ordinarily only where the officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *Id.* at 1249. The circuit court construed this Court's holdings to mean that the good faith exception applies only "where someone other than a police

officer has made the mistaken determination that resulted in the Fourth Amendment violation." *Id.*

Even some members of the Fourth Circuit have recognized that the good faith exception is limited. The dissent noted that this Court applies the good faith exception when "the actor primarily responsible for the Fourth Amendment violation is not a law enforcement officer." *United States v. Davis*, 690 F.3d 226, 278 (4th Cir. 2012) (Davis, J., dissenting) (citing *Leon*, 468 U.S. 897; *Krull*, 480 U.S. 340; *Evans*, 514 U.S. 1; and *Davis v. United States*, 564 U.S. 229 (2011)). The dissent further noted: "the exclusionary rule is the 'usual remedy' where evidence of identity is derived from unlawful searches and seizures". *Id.* at 280 (citing *United States v. Oscar-Torres*, 507 F.3d 224, 227 (4th Cir. 2007)). "[S]uppression of evidence obtained during illegal police conduct provides the usual remedy for Fourth Amendment violations", as well as for evidence indirectly obtained through the violation. *Oscar-Torres*, 507 F.3d at 227 (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). Suppression of evidence is appropriate when there is "exploitation of the initial police illegality." *Id.* at 230 (internal quotations and citation omitted).

The Fourth Circuit held, contrary to *Leon*, that the good faith exception applied to a police officer who committed two separate constitutional violations against Combs and then used the illegally obtained information in an affidavit to a magistrate judge to obtain a search warrant for Combs' home. The Fourth Circuit itself does not reconcile the illegal entry into Combs' home and subsequent custodial questioning without *Miranda*, and the principle that the good faith exception applies when an

officer acts in objective good faith and when the transgressions are only minor. *Leon*, 468 U.S. at 908.

Yet, the Fourth Circuit concluded that "a reasonably well-trained law enforcement officer objectively would have believed the search to have been lawful." App. 7A. It is difficult to fathom how any trained officer could believe that evidence obtained from illegal entry into someone's home and in violation of *Miranda* could be used to obtain a search warrant. JA 49-50. This is clearly not a circumstance that warrants application of *Leon*'s good faith exception to the exclusionary rule. It is inexplicable that an officer who committed two constitutional violations, using the resulting evidence to his benefit, would be afforded the good faith exception. What happened to Combs is the very situation envisioned by *Leon* that justifies suppression, a position several other circuits have taken.

The Fourth Circuit's divergence from the clear directive of *Leon* has caused a circuit split. Based on *Combs*, defendants in the Fourth Circuit will now be subjected to unconstitutional police practices, from which the police can benefit under the good faith exception. Because this issue has great constitutional implications, this Court should grant Combs' petition.

This case provides an ideal vehicle to resolve these important constitutional issues. Combs was the only defendant in this case. The constitutional violations are not debatable, as the officer himself admitted the *Miranda* violation and no justification was offered for the illegal entry into Combs' residence. The issues were

clearly briefed, and the Fourth Circuit's position directly set forth in its opinion. The conflicting circuit opinions provide a direct contrast to the Fourth Circuit's holdings.

CONCLUSION

For the foregoing reasons, Combs respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted.

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