No. 18-6702

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON GALE COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

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

2. Whether the good-faith exception is categorically inapplicable when a warrant affidavit includes information that the affiant obtained in a manner later determined to have been unlawful, and the affiant also executed the search warrant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-7A) is not published in the Federal Reporter but is reprinted at 729 Fed. Appx. 250.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2018. A petition for rehearing was denied on June 25, 2018 (Pet. App. 8A). On August 7, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 12, 2018, and the petition was filed on November

9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. App. 130. The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 131-132. The court of appeals affirmed. Pet. App. 1A-7A.

1. On May 20, 2015, Lieutenant Tanner Davis of the Clover Police Department received a phone call from Kristin Shea. C.A. App. 14, 24-25. Shea, who was crying, said that she had been assaulted by petitioner, with whom she had a child. Id. at 25-26. She said that she was still at petitioner's home, and needed the police to come get her. Id. at 14, 26.

Before that phone call, Lieutenant Davis had received a tip that petitioner had obtained a firearm. C.A. App. 14, 27. Lieutenant Davis asked Shea whether that was true. Ibid. Shea stated that it was and that she had seen the firearm the previous night. She said that the last time she had seen the firearm, it was under petitioner's mattress. Id. at 27-28.

Police officers responded to petitioner's residence. C.A. App. 15, 26. Shea was sitting in front of the home with her child.

Id. at 15, 26-27. She "had obvious bruising." C.A. App. 15; see id. at 28. Officers approached the home and knocked on the door. Id. at 15, 29-30. After several minutes, petitioner "approached the door and spoke to the officers through a slightly ajar door," but then "closed the door and began to walk away." Id. at 15; see id. at 30-31. Officers followed petitioner inside. Id. at 15; see id. at 31. After seeing that petitioner was naked, they allowed him to dress. Id. at 15, 31-32. Officers spoke with petitioner. Id. at 15, 32-34. At one point during the interview, petitioner asked Lieutenant Davis for a cigarette, and gave him permission to enter petitioner's bedroom to obtain one. Id. at 36. While getting cigarettes from the bedroom, Lieutenant Davis saw a bullet on the floor beside the bed. Id. at 37.

After speaking with petitioner, officers placed him under arrest for criminal domestic violence. C.A. App. 15, 32-34. While placing petitioner under arrest, Lieutenant Davis told petitioner that he had received information that petitioner was in possession of a gun, knowing that he was not allowed to have one, and asked petitioner for consent to search the home. Id. at 34. Petitioner did not answer, and Lieutenant Davis said he would interpret the silence as declining to give consent. Id. at 35. But as petitioner was being escorted to the police car, he told officers that he would "just go in and get [the officers] the gun." Ibid. Officers

did not allow petitioner to reenter the home for that purpose. Id. at 35-36.

Lieutenant Davis immediately sought and obtained a warrant to search petitioner's house and to seize "[f]irearms, ammunition, or items consistent with the purchase, sale or possession of firearms" therein. C.A. App. 68; see id. at 36, 67-69. Lieutenant Davis's affidavit in support of the search warrant described Shea's call to him reporting the domestic violence, and identified Shea by name. Id. at 69. The affidavit explained that "Lt. Davis had received intelligence the previous week regarding [petitioner] purchasing a handgun," and that "Lt. Davis asked [Shea] if [petitioner] still had a handgun in the home and she stated that he did." Ibid. The affidavit also explained that officers had responded to the scene, spoken with petitioner at the door, followed him into the home, and questioned him there. Ibid. In addition, the affidavit explained that while retrieving a cigarette for petitioner at his request, Lieutenant Davis "observed a 9mm bullet laying on the floor." Ibid. The affidavit related that petitioner had declined to consent to a search for the gun, but that while officers were escorting petitioner to the car, petitioner had "stated 'just let me go get the gun for you.'" Ibid. The affidavit further related that petitioner was not permitted to possess a firearm because of prior convictions for

"burglary 2nd degree violent and criminal domestic violence of a high and aggravated nature in 2013." Ibid.

A magistrate issued the warrant. C.A. App. 39-40. Officers executed the warrant later that same day and recovered a nine-millimeter handgun from petitioner's house. Id. at 70.

2. A grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. App. 10. Petitioner filed a motion to suppress "any evidence that was seized from the search of" his house, "on the grounds that the search warrant was invalid, not supported by probable cause, and the execution of the warrant constituted a violation of the Fourth Amendment." Id. at 13. Petitioner also moved to suppress "any and all statements made by [petitioner] on May 20, 2015" -- the day of the search -- on the ground that "he was never advised of his Miranda warnings." Id. at 20.

The district court conducted a suppression hearing, at which Lieutenant Davis testified about the tip he had received regarding the gun, Shea's call, the investigation and arrest at petitioner's home, and his obtaining a warrant. C.A. App. 21-66. At the conclusion of the hearing, the court denied petitioner's suppression motion from the bench. The court explained that even if all of the evidence that petitioner challenged were excluded from the affidavit, Lieutenant Davis "still had the statement from

Miss Shea, and it also corroborated the anonymous tip." Id. at 61. Under those circumstances, the court found there was "no question that there was probable cause to get the search warrant." Id. at 64. The court later suppressed the statements that petitioner made in custody on the date of his arrest -- specifically, his statement that he would go get the gun in the house -- on the ground that petitioner had not been given Miranda warnings and Lieutenant Davis's inquiries had been reasonably likely to yield an incriminating response. Id. at 6.

Petitioner entered a conditional guilty plea, reserving his right to appeal on the ground that the district court should not have denied his suppression motion. C.A. App. at 73, 130. The court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 131-132.

3. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 1A-7A. As relevant here, petitioner argued on appeal that his suppression motion should have been granted. Id. at 2A. Petitioner argued that the initial tip that Lieutenant Davis had received regarding petitioner's possession of a gun "should have been treated as if it was from an anonymous source" and "stripped from the magistrate's consideration" on that basis. Id. at 3A. Petitioner also argued that his own "statement regarding the gun should be excluded from consideration because he

was not given Miranda warnings." Ibid. In addition, he argued that evidence officers observed while inside his house (the stray bullet) should have been excluded from consideration on the ground that officers' "entry into his house without a warrant was illegal." Ibid. Finally, petitioner argued that Shea's statement, by itself, was inadequate to support probable cause because "the officer did not provide any information about Shea's veracity or credibility." Ibid.

The court of appeals rejected petitioner's argument. Pet. App. 3A-7A. The court explained that, "[o]rdinarily, '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 4A (quoting United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004)). The court noted that reliance on a search warrant "is not considered reasonable" if, among other things, "the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless disregard of the truth," or if "'the warrant was based on an affidavit that was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Ibid. (quoting United States v. Hyppolite, 65 F.3d 1151, 1156 (4th Cir. 1995), cert. denied, 517 U.S. 1162 (1996)). The court explained that under its

precedent the good-faith analysis includes consideration of "information in the warrant affidavit and any 'uncontroverted facts known to officers but inadvertently not disclosed to the magistrate.'" Ibid. (quoting United States v. McKenzie-Gude, 671 F.3d 452, 459 (4th Cir. 2011)).

The court of appeals explained that it need not decide whether the search warrant established probable cause, because when "a defendant challenges both probable cause and the applicability of the good faith exception, we may proceed directly to the good faith analysis." Pet. App. 5A. Applying that analysis, the court first found "no evidence that Davis intentionally or recklessly omitted material information from the affidavit." Ibid. It observed that "Davis's testimony at the suppression hearing shows that the facts not included in the affidavit would have actually strengthened probable cause rather than defeating it." Ibid.; see id. at 6A-7A (describing facts).

The court of appeals then determined that, even assuming arguendo that the affidavit "was insufficient because it included information from the improper questioning of [petitioner] and did not provide any information regarding the informant," the good-faith exception applied. Pet. App. 6A. The court observed that "[t]he informant's statement regarding the gun was corroborated by Shea," and that "Shea's story was corroborated by her physical

appearance and [petitioner's] criminal background," and thus determined that "a reasonably well-trained law enforcement officer objectively would have believed the search to have been lawful." Id. at 6A-7A.

ARGUMENT

Petitioner contends (Pet. 8-14) that the court of appeals erred in determining that the good-faith exception to the exclusionary rule applied, in an analysis that included reference to a fact known to the warrant affiant but not included in the affidavit. The court was correct in its application of the good-faith exception. Although some disagreement exists in the courts of appeals regarding the relevance to good-faith analysis of facts outside the warrant affidavit, this case presents a poor vehicle for considering that disagreement, because the court below did not materially rely on facts outside the affidavit and because the affidavit alone would establish probable cause or good faith in the circuits whose methodology petitioner invokes. This Court has previously denied review of cases presenting similar issues, see Campbell v. United States, 138 S. Ct. 313 (2017) (No. 16-8855); Fiorito v. United States, 565 U.S. 1246 (2012) (No. 11-7217), and the same result is warranted here. Petitioner also contends (Pet. 15-22) that "[t]he 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," Pet. 15 (capitalization altered; emphasis omitted). That claim lacks merit, does not clearly implicate any ongoing disagreement in the circuits, and was neither pressed nor passed upon below. Further review is unwarranted.

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

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

Leon recognized a good-faith exception to the exclusionary rule in the context of search warrants. The Court explained that application of the exclusionary rule is "restricted to those areas where its remedial objectives are thought most efficaciously served." 468 U.S. at 908 (citation omitted). It observed that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a

subsequently invalidated search warrant cannot justify the substantial costs of exclusion." Id. at 922. The Court thus held that evidence should not be suppressed if officers acted in an objectively reasonable manner in relying on a search warrant, even if the warrant was later deemed deficient. Ibid.

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

b. Assuming arguendo (like the court of appeals) that the affidavit in this case did not establish probable cause to search petitioner's residence, the good-faith exception applied because officers reasonably relied on the magistrate-issued warrant, which

was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted). Lieutenant Davis's affidavit, which was attached to the warrant, explained that Shea had reported her presence at petitioner's home, petitioner's assault, and petitioner's possession of a gun, and that Shea was at petitioner's residence when Lieutenant Davis arrived. C.A. App. 69. The affidavit also stated that an anonymous source of "intelligence" stated that petitioner had purchased a handgun the previous week. Ibid. The affidavit further revealed that petitioner was at his house when Lieutenant Davis arrived, and that petitioner had a criminal history that included violent offenses that made it unlawful for him to possess a firearm. Ibid. In those circumstances -- even setting aside additional information in the affidavit that petitioner contends should not have been considered on the ground that it was unlawfully obtained -- it was not "entirely unreasonable" for an officer to believe, that the affidavit possessed the requisite "fair probability" required to justify a search of the residence for firearms. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place").

Petitioner argues (Pet. 8-14) that the court of appeals erred in stating that courts may take into account additional facts known to law enforcement, but not disclosed to a magistrate, in determining whether the good-faith exception applies. Petitioner is mistaken in suggesting that Leon bars consideration of information outside of the warrant affidavit in the good-faith analysis. Although Leon makes clear that an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant" must be "objectively reasonable," the Court in Leon held that "all of the circumstances * * * may be considered" when deciding whether objective reasonableness is established. 468 U.S. at 922-923 & n.23; accord Herring, 555 U.S. at 145 (explaining that the good-faith inquiry is based on "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances'" and that "[t]hese circumstances frequently include a particular officer's knowledge and experience") (quoting Leon, 468 U.S. at 922 n.23). Indeed, Leon itself listed a circumstance outside the four corners of the affidavit -- "whether the warrant application had previously been rejected by a different magistrate" -- as among the circumstances that courts might consider. 468 U.S. at 923 n.23. And in a companion case decided the same day as Leon, the Court again examined circumstances

outside the four corners of the warrant affidavit in concluding that the good-faith exception was applicable. Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984) (considering circumstances under which warrant application was presented).

That approach accords with the principles that underlie the good-faith doctrine and the exclusionary rule more generally. This Court has explained that suppression is appropriate only "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." Davis, 564 U.S. at 238 (citation and internal quotation marks omitted). An officer's error does not rise to that level when, as here, he omits from a warrant affidavit facts known to him that "would actually have strengthened probable cause rather than defeating it." Pet. App. 5A. Such an omission cannot be deemed more "culpabl[e]" than the type of negligence for which this Court has indicated that suppression of evidence is not ordinarily appropriate. See Davis, 564 U.S. at 238. Moreover, officers already have considerable incentives to include facts supporting probable cause in their search warrant affidavits, because doing so increases the likelihood that the magistrate will issue a warrant. Those existing incentives suggest that any additional marginal benefit that a narrow construction of the good-faith doctrine might theoretically provide in deterring officers from omitting

inculpatory facts from warrant applications does not outweigh the high social costs of a suppression remedy. See Herring, 555 U.S. at 141.

c. "[A] majority of circuits" to consider the question have "taken into consideration facts outside the affidavit when determining whether the Leon good faith exception applies." United States v. Martin, 297 F.3d 1308, 1319 (11th Cir.), cert. denied, 537 U.S. 1076 (2002); see id. at 1320 (considering information known to officer but not included in affidavit in making good-faith determination); see also United States v. Farlee, 757 F.3d 810, 819 (8th Cir.) ("[W]hen assessing the officer's good faith reliance on a search warrant under the Leon good faith exception, we can look outside of the four corners of the affidavit and consider the totality of the circumstances, including what the officer knew but did not include in the affidavit."), cert. denied, 135 S. Ct. 504 (2014); United States v. McKenzie-Gude, 671 F.3d 452, 461 (4th Cir. 2011) (concluding that a court may consider "undisputed, relevant facts known to the officers prior to the search" but inadvertently not disclosed to the magistrate, as part of good-faith analysis); United States v. Taxacher, 902 F.2d 867, 871-873 (11th Cir. 1990) (relying on facts known to officer but not presented to magistrate in determining "whether the officer acted in objective good faith under all the circumstances"

(emphasis omitted)), cert. denied, 499 U.S. 919 (1991); see also United States v. Procopio, 88 F.3d 21, 28 (1st Cir. 1996) (applying Leon where "only omission [in an affidavit] was the failure to explain how the agent -- who had ample basis for the contention -- knew that" place to be searched belonged to subject of search), cert. denied, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997).

As petitioner notes (Pet. 10-11), some courts of appeals have, at least in some circumstances, disapproved of consideration of facts outside the four corners of the search warrant affidavit in the Leon analysis. United States v. Knox, 883 F.3d 1262, 1272-1273 (10th Cir.), cert. denied, 139 S. Ct. 197 (2018); United States v. Laughton, 409 F.3d 744, 751 (6th Cir. 2005); see United States v. Hove, 848 F.2d 137, 140 (9th Cir. 1988); United States v. Koerth, 312 F.3d 862, 869 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003); but see United States v. Dickerson, 975 F.2d 1245, 1250 (7th Cir. 1992) (concluding that the good-faith exception applied based on facts known to officers at the scene but not disclosed to the magistrate), cert. denied, 507 U.S. 932 (1993); United States v. Mendonsa, 989 F.2d 366, 369 (9th Cir. 1993) (determining that good-faith exception applied because detective "sought advice from county attorneys concerning the substantive completeness of the affidavit before he submitted it

to the magistrate" and "the attorney advised him that the affidavit seemed complete").

Petitioner's case does not present a suitable vehicle for addressing any disagreement, however. Although the court of appeals cited its prior decision in McKenzie-Gude, supra, for the proposition that courts may consider facts beyond the affidavit in conducting the good-faith analysis, its analysis in petitioner's case did not go materially beyond the affidavit. The court determined that -- assuming the affidavit did not establish probable cause -- the good-faith exception applied based on the mutually corroborative statements of Shea and the anonymous informant, and on the corroboration of Shea's story "by her physical appearance and [petitioner's] criminal background." Pet. App. 6A-7A. Thus, all of the facts on which the court relied, aside from Shea's "physical appearance," were contained in the warrant affidavit. See C.A. App. 69.

In addition, the affidavit-based information on which the decision below chiefly relied -- statements of a named victim witness that were also corroborated by an unnamed informant -- would establish probable cause or good faith in any of the jurisdictions whose precedent petitioner invokes. Petitioner principally argues that the warrant did not establish probable cause because the affidavit did not set forth facts establishing

the reliability of Shea, the named victim-witness. Pet. App. 3A. But this Court has made clear that statements of such witnesses are "not to be viewed in the same light as the typical police informant." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.4(a), at 266 (2012); see Jaben v. United States, 381 U.S. 214, 224 (1965); see also Chambers v. Maroney, 399 U.S. 42, 46-47 (1970). Accordingly, "[t]he lower courts have rather consistently held that the proof-of-veracity rules which obtain in informant cases are not applicable with respect to other sources of information," such as victims, eyewitnesses, and citizen-informants (as distinct from those "from the criminal milieu" or paid informants). LaFave § 3.4(a), at 266; see id. at 266 n.8 (compiling many cases, including decisions from the Ninth, Tenth, and Seventh Circuits).

In any event, the warrant affidavit did set forth grounds to conclude that Shea's statements regarding petitioner's firearm were reliable, because, as the warrant affidavit explained, an informant had separately stated that petitioner purchased a gun the prior week. C.A. App. 69. Petitioner argued that the informant's statements should have been "stripped from the magistrate's consideration" because the affidavit "did not provide any information regarding the informant" to establish his reliability. Pet. App. 3A, 6A. But that is directly contrary to

this Court's leading probable-cause decision, which makes clear that even statements of anonymous informants are properly considered as part of the probable-cause analysis when additional investigation corroborates those statements. Illinois v. Gates, 462 U.S. 213, 227-228 (1983).

In light of those principles, nothing in the petition suggests that a warrant based on the mutually corroborating statements of a named victim-witness and an anonymous source would be insufficient for both probable cause and good faith under any circuit's case law. Cf. C.A. App. 61, 64 (district court finding "no question" as to probable cause based on "the statement from Miss Shea" which "corroborated the anonymous tip," even if other information in the affidavit were not considered). Petitioner identifies no decision from any court taking such a view. On the contrary, decisions in the courts on whose cases petitioner relies undercut his argument. See, e.g., United States v. Dismuke, 593 F.3d 582, 587-588 (7th Cir. 2010) (finding affidavit sufficient to support probable cause where informant told law enforcement "he personally observed [defendant] at his home in possession of three specific firearms" and could identify defendant, despite absence of "additional particularized facts about the informant's observations"), cert. denied, 564 U.S. 1018 (2011), abrogated on other grounds as recognized in United States v. Miller, 721 F.3d

435, 438-439 (7th Cir. 2013); United States v. Frazier, 423 F.3d 526, 536 (6th Cir. 2005) (applying good-faith exception where court concluded probable cause was lacking because the warrant affidavit was "based almost exclusively on the uncorroborated testimony of unproven confidential informants"); United States v. Bryan, No. 92-50723, 1994 WL 65073, at *2 (9th Cir.) (finding affidavit sufficient to support probable-cause finding where two "untested informants" "corroborated each other"), cert. denied, 512 U.S. 1245 (1994); United States v. Quezada-Enriquez, 567 F.3d 1228, 1233-1234 (10th Cir.) (applying good-faith exception where affidavit underlying warrant was based on "an uncorroborated tip from a reliable confidential informant" but did "not describe the basis of the informant's knowledge and police did not corroborate any details suggesting a gun would be found in the premises to be searched"), cert. denied, 558 U.S. 959 (2009).

A case in which the court of appeals made virtually no use of facts outside the warrant affidavit, and which presents no serious basis for concluding another circuit would have ordered suppression, is not a suitable vehicle for addressing the relevance of facts outside the warrant affidavit in good-faith analysis. This Court's review of that question here is accordingly unwarranted.

2. Petitioner alternatively contends (Pet. 15-22) that "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," Pet. 15 (capitalization altered; emphasis omitted). Petitioner's case would not be a suitable vehicle for reviewing that contention, because it was neither pressed nor passed upon below. In any event, petitioner's argument lacks merit, and it is not clear that it implicates any ongoing disagreement in the circuits.

a. Petitioner is mistaken in contending (Pet. 15-22) that the good-faith exception is inapplicable in all cases in which a search-warrant affidavit incorporated information that is later determined to have been obtained unlawfully, if the affiant also subsequently executed the search warrant.

Petitioner suggests that the good-faith exception should be categorically unavailable in such cases because they involve "police officers' misconduct." Pet. 16 ("This Court has limited the exclusionary rule frequently when the mistakes or misconduct are not directly related to police officers' misconduct."). But while this Court has declined to apply the exclusionary rule in a number of cases involving errors by non-law-enforcement officers, this Court has also more broadly explained that the exclusionary

rule does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 919. Instead, to justify suppression, "police conduct must be sufficiently deliberate that exclusion cannot meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system from the exclusion of probative evidence." Herring, 555 U.S. at 144. "[E]vidence obtained from * * * a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919 (citation omitted).

This Court's recent decisions accordingly make clear that the good-faith doctrine is not limited to circumstances involving officers' reliance on determinations by third parties. Herring applied the good-faith doctrine when an arrest was a result of an error by "police employees" in "maintaining records in a warrant database." Davis, 564 U.S. at 239 (emphasis omitted). The Court concluded that the "'[i]solated,' 'nonrecurring' police negligence," ibid. (citation omitted), before it was not the type of "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" for which an

exclusionary sanction was appropriate, Herring, 555 U.S. at 144. And Davis concluded that suppression is inappropriate "when the police conduct a search in objectively reasonable reliance on binding judicial precedent," because such searches do not involve the type of culpable conduct that warrants an exclusionary sanction. 564 U.S. at 239; see id. at 249. Those decisions demonstrate that petitioner is incorrect that an exclusionary sanction is required whenever a warrant was obtained based on an affidavit containing information that resulted from conduct subsequently determined to have been unlawful, and the affiant executes the warrant, regardless of whether it was reasonable for officers to believe that the warrant had not been tainted by illegal conduct.

b. Petitioner's case does not implicate any current disagreement in the circuits. Several courts of appeals have applied the good-faith doctrine in cases where officers conducted searches pursuant to warrants that relied in part on information obtained through unlawful searches or seizures. See United States v. Cannon, 703 F.3d 407, 413 (8th Cir.), cert. denied, 569 U.S. 987 (2013); United States v. McClain, 444 F.3d 556, 559, 564-566 (6th Cir.), cert. denied, 549 U.S. 1030 (2006); United States v. Diehl, 276 F.3d 32, 41-45 (1st Cir.), cert. denied, 537 U.S. 834 (2002); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir.),

cert. denied, 474 U.S. 819 (1985), and 479 U.S. 818 (1986)). In finding the good-faith exception applicable, those courts have generally relied on a determination that the initial unlawful search or seizure had been "close enough to the line of validity" for officers to have reasonably believed the search to be lawful. McClain, 444 F.3d at 566 (citation omitted); see Cannon, 703 F.3d at 413.

Before this Court's decisions in Herring and Davis, several courts suppressed evidence in decisions that treated the good-faith doctrine as having no application where law enforcement obtains a warrant based on information obtained during a predicate unreasonable search or seizure. See United States v. Mowatt, 513 F.3d 395, 405 (4th Cir. 2008), abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011); United States v. Herrera, 444 F.3d 1238, 1248-1255 (10th Cir. 2006); United States v. McGough, 412 F.3d 1232, 1239-1240 (11th Cir. 2005); United States v. Wanless, 882 F.2d 1459, 1466-1467 (9th Cir. 1989); United States v. Vasey, 834 F.2d 782, 789-790 (9th Cir. 1987); State v. DeWitt, 910 P.2d 9, 12-15 (Ariz. 1996) (en banc); People v. Machupa, 872 P.2d 114, 119-125 (Cal. 1994); State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994); State v. Johnson, 716 P.2d 1288, 1301 (Idaho 1986). Those decisions generally reasoned that the good-faith doctrine applied only where "a neutral third party," rather than

a police officer, makes "the mistake resulting in the Fourth Amendment violation." Herrera, 444 F.3d at 1251; see Mowatt, 513 F.3d at 405; McGough, 412 F.3d at 1239-1240; Vasey, 834 F.2d at 789; Machupa, 872 P.2d at 119, 122; Johnson, 716 P.2d at 1301.*

Following Herring and Davis, however, it is not clear that any disagreement persists. Herring rejected the principle -- generally central to the decisions rejecting good faith above -- that good faith applies only to errors by neutral third parties, rather than by police officers. See 555 U.S. at 147-148. Similarly, Davis undercuts the reasoning of those decisions by explaining that "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence," the drastic sanction of exclusion is inappropriate -- without imposing any additional requirement that officers have relied on

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* Several additional cases cited in the petition (Pet. 17) are inapposite. United States v. Cos, 498 F.3d 1115 (10th Cir. 2007), did not address whether good faith can apply to a warrant-based search when the warrant affidavit incorporated information determined to have been unlawfully obtained. Instead, it rejected an attempt to invoke Leon in the context of a warrantless search. Id. at 1131-1133. United States v. Reilly, 76 F.3d 1271 (2d Cir. 1996), likewise did not categorically reject the application of good faith when a warrant affidavit includes reference to illegally obtained evidence. Instead, the court stated that the good-faith exception applies only when officers "reasonably believe that the warrant was based on a valid application of the law to the known facts," and determined that this condition was not satisfied on the facts before it. Id. at 1280-1283.

the judgment of a neutral third party. 564 U.S. at 238 (citations omitted). Petitioner identifies no decision since Herring and Davis to have suppressed evidence on the theory that the good-faith doctrine is categorically inapplicable to the fruits of warrants based in part on erroneous police searches. It is thus far from clear that any other court of appeals would have reached a different result in this case.

c. In any event, petitioner's case would be an unsuitable vehicle for review of this question because it was neither pressed nor passed upon below. In the court of appeals, petitioner stated that the court should determine whether the good-faith exception applied using a four-part test derived from Leon, under which "'evidence will be excluded based on an invalid warrant if: (1) the affidavit contained information that the affiant knew was false or was stated in reckless disregard for the truth, (2) the magistrate judge abandoned his detached and neutral role, (3) police relied on a warrant 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' or (4) the warrant is so 'facially deficient' that an officer could not reasonably believe it is valid." Pet. C.A. Br. 46 (citation omitted); see id. at 46-48. Accordingly, the court of appeals determined whether good faith applied under that test. Pet. App. 4A (setting out same test); id. at 4A-7A. It did

not address the distinct argument that the good-faith exception is categorically unavailable if the warrant affidavit included evidence obtained by the affiant that is later determined to have been obtained illegally, when the affiant also executes the search warrant.

This Court's usual practice is to "refrain from addressing issues not raised in the [c]ourt of [a]ppeals." EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam); see United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted). Adherence to the usual practice is particularly appropriate here because -- since the question was neither pressed nor passed upon below -- the lower courts did not address antecedent issues such as whether the warrant established probable cause even when the challenged evidence was excluded (rendering the evidence obtained admissible irrespective of the good-faith exception), and whether the challenged evidence resulted from conduct that officers could reasonably have believed to be permissible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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