

No. 18-6702

---

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

---

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

---

Kimberly Harvey Albro, Esquire  
Assistant Federal Public Defender  
1901 Assembly Street, Suite 200  
Columbia, South Carolina 29201  
Telephone No.: (803) 765-5088  
Email: Kimberly\_Albro@fd.org  
Counsel of Record for Petitioner

## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF AUTHORITIES .....   | ii |
| REPLY ARGUMENT.....  | 1  |
| I.    THIS COURT SHOULD SETTLE THE CIRCUIT SPLIT REGARDING<br>WHETHER LOWER COURTS CAN USE INFORMATION COMPLETELY<br>OUTSIDE THE KNOWLEDGE OF THE NEUTRAL, DETACHED<br>MAGISTRATES ISSUING WARRANTS TO DETERMINE IF PROBABLE<br>CAUSE EXISTED..... | 2  |
| II.   THIS COURT SHOULD CONSIDER THE IMPORTANT ISSUE OF<br>WHETHER AN OFFICER WHO ILLEGALLY OBTAINS EVIDENCE,<br>USES THE INFORMATION TO OBTAIN A SEARCH WARRANT AND<br>EXECUTES THAT WARRANT SHOULD BENEFIT FROM THE GOOD<br>FAITH EXCEPTION..... | 5  |
| CONCLUSION.....  | 11 |

## TABLE OF AUTHORITIES

### PAGE(S)

#### **Federal Cases**

|   |                |
|---|----------------|
| <i>Fla v. J.L.</i> ,<br>529 U.S. 266 (2000) .....   | 5              |
| <i>Illinois v. Gates</i> ,<br>462 U.S. 213 (1983) .....                                   | 4              |
| <i>Illinois v. Krull</i> ,<br>480 U.S. 340 (1987) .....                                   | 8              |
| <i>Massachusetts v. Sheppard</i> ,<br>468 U.S. 981 (1984) .....                           | 8              |
| <i>United States v. Camou</i> ,<br>773 F.3d 932, (9th Cir. 2014) .....                    | 9, 10          |
| <i>United States v. Combs</i> ,<br>No. 16-4840 (4 <sup>th</sup> Cir. Feb. 16, 2017) ..... | 6              |
| <i>United States v. Davis</i> ,<br>564 U.S. 229 (2011) .....                              | 6, 7, 8        |
| <i>United States v. Herring</i> ,<br>555 U.S. 135 (2009) .....                            | 6, 7, 8, 9, 10 |
| <i>United States v. Leon</i> ,<br>468 U.S. 897 (1984) .....                               | 1, 3, 8, 9     |
| <i>United States v. Shaw</i> ,<br>707 F.3d 666 (6th Cir. 2013) .....                      | 9, 10          |

#### **Statute and Rules**

|                                |   |
|--------------------------------|---|
| Supreme Court Rule 10(c) ..... | 9 |
|--------------------------------|---|

#### **Constitution**

|  |    |
|--|----|
| Fourth Amendment to the U. S. Constitution ..... | 11 |
|--|----|

## **REPLY ARGUMENT**

The government concedes that the courts of appeal disagree on whether facts outside the search warrant affidavit can be used for the good faith analysis. BIO at 9, 15-16. The government also agrees that the exclusionary rule is imposed “to deter police misconduct.” BIO at 10 (quoting *United States v. Leon*, 468 U.S. 897, 906, 916 (1984)). The government further agrees that suppression is “restricted to those areas where its remedial objectives are thought most efficaciously served.” *Id.* (quoting *Leon*, 468 U.S. at 908). Furthermore, the government concurs that police conduct must be objectively reasonable, not deliberate and culpable, to avoid the exclusionary rule. BIO at 22. These concessions are more than enough to warrant a grant of a writ of certiorari here.

As discussed below, this case presents a strong vehicle through which the Court should resolve the circuit split regarding the lower courts’ use of facts, unknown to the magistrate judge at the time the warrant was issued, to later establish probable cause. Relatedly, based on the history of the exclusionary rule and the circuit split created by this opinion, this Court should decide whether a police officer, who has both failed to give Miranda warnings, using the illegally gained statements in his warrant affidavit, and also entered a residence without a warrant or other justifiable exception, using evidence illegally obtained from the entry to support the warrant affidavit, can be afforded the protections of the good faith

exception. These issues are of great importance to the orderly and efficient operation of the criminal justice system.

**I. THIS COURT SHOULD SETTLE THE CIRCUIT SPLIT REGARDING WHETHER LOWER COURTS CAN USE INFORMATION COMPLETELY OUTSIDE THE KNOWLEDGE OF THE NEUTRAL, DETACHED MAGISTRATES ISSUING WARRANTS TO DETERMINE IF PROBABLE CAUSE EXISTED**

The government opposes Combs' petition, in part, because it claims that the Fourth Circuit did not materially rely on facts outside the search warrant affidavit for its holding that courts are entitled to rely on information not presented to the magistrate judge when determining if the officer's reliance on the warrant was reasonable. BIO at 9. The government also urges the Court to reject Combs' petition since it has done so in two other cases. BIO at 9. However, because the circuits are split on this very important constitutional issue, and the issue has been repeatedly raised, this Court should grant Combs' petition to resolve this matter once and for all.

The government incorrectly concludes that the Fourth Circuit only relied on the facts outside the warrant application related to Shea's appearance. BIO at 17. The Court of Appeals actually recited several factors from the police officer's testimony at the suppression hearing to overcome the relevant factor that the officer did not intentionally or recklessly omit information when obtaining the warrant, and to support the good faith exception. App. 5A-6A. The Fourth Circuit relied on information completely unrelated to the search warrant's purpose, which was to

search for guns, including prior investigations involving Shea and Combs, bruising on Shea's face and Davis' "contact with Combs previously on 'several different occasions.'" *Id.* Furthermore, the Court relied on Davis' testimony from the suppression hearing, that explained what was merely recited as "intelligence" in the warrant affidavit, such as the source was a "concerned citizen" who was a "close personal friend' of Combs", none of which was shared with the issuing magistrate judge. App. 6A. The Court also relied on Davis' testimony that Combs provided false information to police about the alleged domestic violence, which Davis refuted by talking to Combs' roommate, a fact also not disclosed to the magistrate. *Id.*

Therefore, contrary to the government's assertion, Combs' case falls squarely into the area on which the circuits are split: whether courts can consider extraneous information unknown to the magistrate judge who issued the warrant when the courts are determining after-the-fact whether the warrant was supported by probable cause or is subject to the good faith exception.

The government further argues that, as far back as *Leon*, 468 U.S. 897, this Court has authorized courts to look at all the circumstances to determine if police actions were objectively reasonable. BIO at 13-14. This position alone warrants review of this decision, as several courts of appeal do not agree. Pet. At 10-12; BIO at 15-17. Given the number of cases in which this issue has arisen, this Court should settle the matter to provide guidance to the lower courts.

Finally, the government's posture is that probable cause existed even without the illegally-obtained evidence because Shea verified "as the warrant application explained, an informant had separately stated that petitioner purchased a gun the prior week." BIO at 18. However, that is a misstatement of what Davis actually asserted in his affidavit. Davis never indicated that an informant provided the information. Davis affirmed that he "received intelligence the previous week regarding Mr. Combs purchasing a handgun." JA 69. Davis never indicated what or who constituted "intelligence". He never said if a person or camera surveillance or wiretaps provided the "intelligence". Davis did not tell the magistrate if the "intelligence" was first-, second-, or third-hand information. Most importantly, Davis' statement in the affidavit read that he received intelligence the previous week, and gave no indication when Combs allegedly purchased or possessed a gun, which could have been well before the date of the affidavit.

The government cites *Illinois v. Gates*, 462 U.S. 213, 227-28 (1983) to support that Shea's verification satisfies the probable cause standard. BIO at 18-19. *Gates* holds that a totality of the circumstances analysis, including the veracity, basis of knowledge and reliability of the anonymous tipster, applies. *Id.* at 233-35. However, so little was provided in the warrant affidavit that it was not even sufficient to count as an anonymous tip that could be verified. Even if Davis' testimony could be considered by the appellate court, all Davis said was that he "received information about a gun" and twice said the tip was anonymous. JA 27, 45-46. Davis then

changed his testimony to indicate he knew who the person was, but the district court did not make him testify as to the tipster's identity. JA 46-47. For all the magistrate judge was aware, the "intelligence" alleged in the warrant affidavit could have come from a completely unknown source or from Shea herself. Davis never identified when Combs allegedly had the gun. Davis did not recall documenting the tip in a file. JA 47.

The circumstances of this case are akin to *Fla. v. J.L.*, 529 U.S. 266, 270 (2000), where the intelligence lacked any indicia of reliability, particularly as the tip was presented to the magistrate judge. "[T]here are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop'", but *Combs* is not one of them. *J.L.*, 529 U.S. at 270. The government is incorrect that probable cause for the warrant existed notwithstanding the tainted evidence.

This case provides a perfect opportunity for this Court to settle the circuit split on whether extraneous information unknown to the issuing magistrate judge can be used by reviewing courts to determine probable cause.

**II. THIS COURT SHOULD CONSIDER THE IMPORTANT ISSUE OF WHETHER AN OFFICER WHO ILLEGALLY OBTAINS EVIDENCE, USES THE INFORMATION TO OBTAIN A SEARCH WARRANT AND EXECUTES THAT WARRANT SHOULD BENEFIT FROM THE GOOD FAITH EXCEPTION**

The government offers several unpersuasive reasons why this Court should



deny Combs' petition. First, the government incorrectly claims that Combs case is "an unsuitable vehicle for review" because the issue "was neither pressed nor passed below". BIO at 21, 26-27. Second, it asserts there is no current circuit split on the issue, particularly in light of this Court's opinions in *United States v. Herring*, 555 U.S. 135 (2009) and *United States v. Davis*, 564 U.S. 229 (2011). BIO at 23-26.

Contrary to the government's assertion, Combs thoroughly argued, and the Fourth Circuit addressed, whether the good faith exception would apply to an officer who flagrantly violated Combs' constitutional rights, using the resulting evidence to obtain a search warrant. Combs summarized the issue in his opening brief:

Davis was involved in this case from beginning to end. He entered Combs' house without a warrant and gathered evidence later used to establish probable cause for the warrant. Davis illegally entered Combs's house without a warrant of any kind, arrested Combs, and questioned Combs without administering Miranda warnings. Davis also used this ill-gotten statement to establish probable cause. Davis completed the affidavit that omitted information about either source of information. Davis then went to the magistrate, obtained a search warrant and executed that search warrant at Combs' house. These are not circumstances where the good faith exception applies.

*United States v. Combs*, No. 16-4840, Appellant's Brief at pp. 46-48 (4<sup>th</sup> Cir. Feb. 16, 2017). The main portion of the Fourth Circuit's opinion addressed the good faith exception as the reason for affirming Combs' conviction and the denial of the motion to suppress. The issue was clearly answered by the Fourth Circuit, as it held that Davis was entitled to the benefit of the good faith exception. App. 3A-6A. Therefore, Combs' case is an ideal vehicle for this Court to review this important constitutional question.

Next, the government attempts to downplay the diverging opinions in the circuits by citing to this Court’s ten-year old *Herring*, 555 U.S. 135 and eight-year old *Davis*, 564 U.S. 229 cases, indicating that these cases have somehow change the landscape of whether police misconduct triggers the exclusionary rule. However, neither *Davis* nor *Herring* addressed the type of culpable misconduct that occurred in this case. In *Davis*, this Court held that the exclusionary rule did not apply to “[e]vidence obtained during a search conducted in reasonable reliance on binding precedent”. *Davis*, 564 U.S. at 241.

The *Davis* holding is not implicated here, as the officer admittedly failed to give Combs *Miranda* warnings – a decades-old requirement known to law enforcement – and questioned Combs while Combs was under arrest, using the illegally obtained statements to support probable cause in a search warrant. JA 50-51. Also in violation of the Fourth Amendment, the police officer, in his own words, admitted he opened the door to Combs’ house after Combs declined to speak with the officer, entered the house, placed Combs under arrest, questioned Combs, and found evidence in Combs’ bedroom, also used to support probable cause in the search warrant application. JA 69. The officer did not have an arrest or search warrant and no exception to the warrant requirement was offered for the intrusion. JA 31. Combs’ Fourth Amendment rights were clearly violated “deliberately, recklessly or with gross negligence”, *Davis*, 564 U.S. at 240, signifying the deterrent effect is worth the cost

of exclusion given “the flagrancy of the police misconduct”. *Leon*, 468 U.S. at 911 (1984).

Likewise, *Herring*, 555 U.S. 135 does not change the reasons this Court should grant Combs’ petition. *Herring* involved “isolated negligence attenuated from the arrest” caused by a bookkeeping error that the employee from another police department, rather than the arresting officer’s police department, made. *Id.* at 137. This is again not the type of culpability directly attributed to the police officer, who then used the illegally obtained evidence for a search warrant, the situation that occurred in *Combs*. As recognized in *Herring*, suppression “turns on the culpability of police and the potential of exclusion to deter wrongful police conduct.” *Id.*

The common theme in all of exclusionary rule jurisprudence is that the good faith exception applies when the reliance on the evidence, warrant or other challenged item is objectively reasonable. *See, e.g., Davis*, 564 U.S. at (police relied on existing law); *Herring*, 555 U.S. 135 (police relied on incorrect information provided by another police department’s employee); *Illinois v. Krull*, 480 U.S. 340, 350 (1987) (officer reasonably relied on statute ultimately found to violate the Fourth Amendment); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (police relied on form warrant that the issuing judge said would be corrected, so any error was made by the judge, not police); *Leon*, 468 U.S. 897 (police, who were not dishonest or reckless, relied on a warrant issued by a detached, neutral magistrate). *Davis* and *Herring* do not change the pre-existing circuit split about evidence obtained from violating an

individual's constitutional rights being used to obtain a warrant. Even absent a circuit split, this issue is extraordinarily important to constitutional jurisprudence, so the issue should be settled by this Court. S.Ct. Rule 10(c).

Nonetheless, several circuits have distinguished *Herring* when the circumstances involved the direct actions of the law enforcement official. *United States v. Camou*, 773 F.3d 932 (9<sup>th</sup> Cir. 2014); *United States v. Shaw*, 707 F.3d 666 (6<sup>th</sup> Cir. 2013). The Ninth Circuit held that the good faith exception did not apply when officers searched a phone more than an hour after the phone's owner was arrested. *Camou*, 773 F.3d at 944-45. The Court distinguished *Herring* by recognizing that *Camou*, unlike *Herring*, involved the direct actions of the police, not "isolated negligence attenuated from the arrest." *Id.* The Court held that no reasonably well-trained officer in the same position would have thought the search was legal, since the law at the time was that searches incident to arrest must be contemporaneous with the arrest. *Id.* In fact, the Court observed: "The Supreme Court has never applied the good faith exception to excuse an officer who was negligent himself, and whose negligence directly led to the violation of the defendant's constitutional rights." *Id.* at 945. The Court indicated the only way *Leon* and *Herring* could be reconciled "is to conclude that the officer who executed the unconstitutional search or seizure cannot have been the negligent actor". *Id.* at 945, n.3. In other words, under *Herring*, the good faith exception applies "when an officer reasonably relies on incorrect information that was the result of *another* individual's 'isolated'

and ‘attenuated’ negligence”. *Id.* (emphasis in original). This conclusion comports with Combs’ position about the violation of his constitutional rights, and shows the divergent opinions between the Ninth and Fourth Circuits.

Under circumstances similar to those in Combs’ case, officers, armed with an arrest warrant for a woman, could not locate the correct house number, but narrowed the choices to two. *Shaw*, 707 F.3d at 667. Upon knocking on the door of one house (the incorrect house), a woman answered the door, but promptly shut the door upon seeing police. *Id.* Police continued to knock for seven to eight minutes until the woman opened the door again, told the woman they had a warrant for her location, did a protective sweep after the woman acquiesced to the police’s entry, and discovered cocaine. *Id.* The Sixth Circuit reversed the district court’s denial of the suppression motion. The Court held that none of the numerous reasons provided by the government, including that the woman shut the door in their faces, was sufficient justification for police to enter the house. *Id.* at 668. The government urged the Court to apply *Herring*, and not invoke the exclusionary rule. *Id.* at 670. The Sixth Circuit ultimately concluded these circumstances were exactly the kind to which the exclusionary rule should apply, notwithstanding *Herring*: “so long as there is an exclusionary rule, it seems safe to say that it will apply to officers who enter and remain in a house based on false pretenses”. *Id.* Direct police misconduct is different from attenuated isolated negligence present in *Herring*. *Id.*

This Court should address this issue because it raises an issue of great importance in Fourth Amendment jurisprudence.

**CONCLUSION**

For the foregoing reasons and those outlined in the petition, this Court should grant certiorari.

Respectfully submitted.

s/KIMBERLY HARVEY ALBRO  
Kimberly Harvey Albro, Esquire  
Assistant Federal Public Defender  
1901 Assembly Street, Suite 200  
Columbia, South Carolina 29201  
Telephone No.: (803) 765-5088

March 29, 2019