No. 18-6905

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS THADEUS SZCZERBA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule required suppression of the evidence uncovered pursuant to the search warrant in this case, where the description of items to be seized did not appear in the warrant itself, but was contained in a supporting affidavit that the issuing judge signed and that accompanied the warrant during the search.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 897 F.3d 929. The report and recommendation of the magistrate judge (Pet. App. 21a-34a) and the order of the district court adopting that report and recommendation (Pet. App. 35a-39a) are not published in the Federal Supplement but are available at 2016 WL 11268699 and 2016 WL 8668285, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2018. A petition for rehearing was denied on August 31, 2018 (Pet. App. 52a). The petition for a writ of certiorari was filed on

November 29, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371; interstate transportation of an individual to engage in prostitution, in violation of 18 U.S.C. 2421(a) and 2; use of facilities in interstate commerce with intent to aid an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(3) and 2; and use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(1) and 2. Judgment 1-2. He was sentenced to 140 months of imprisonment, to be followed by a life term of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-20a.

1. In 2015, petitioner met B.M., then 22 years old, and B.M. moved into the apartment that petitioner shared with Keisha Edwards in Houston, Texas. Pet. App. 2a. Edwards worked as a prostitute under the alias "Stacey Monroe," and in June 2015, B.M. began performing sex acts for money as well, using the alias "Avery Monroe." Ibid. Petitioner and Edwards took photographs of B.M. and posted them with an advertisement on Backpage.com, a website known for advertising prostitution. Ibid. Petitioner gave B.M.

a phone and a script to use when customers called, and B.M. met customers at petitioner's apartment and elsewhere. Ibid. Petitioner and Edwards set the rates for B.M.'s services, requiring her to make $1000 a day, and B.M. gave petitioner the money she received from customers. Ibid. Petitioner provided B.M. with condoms, food, clothing, and personal-hygiene products, and he controlled when she slept and what she ate. Id. at 3a. He also publicly embarrassed and degraded B.M., who felt threatened by petitioner and worried that he would find her family, whose address petitioner carried on a card in his wallet. Ibid.

Between late June and mid-July 2015, petitioner traveled with B.M. and Edwards to Illinois, Wisconsin, and finally St. Louis, Missouri, where Edwards rented a room in a downtown hotel. Pet. App. 3a. In each city, petitioner and Edwards placed advertisements for "Avery Monroe" and "Stacey Monroe" on Backpage.com, and B.M. and Edwards had sex with customers who responded to the ads. Ibid. Upon their arrival in St. Louis, petitioner forced B.M. to place makeup sponges in her vagina to conceal her menstruation from customers. Ibid. After one of the sponges became lodged inside B.M., B.M. asked petitioner to take her to the hospital, but instead petitioner tried to remove the sponge himself with tweezers. Id. at 4a. According to B.M., "she was screaming in pain so loudly that the hotel staff received a complaint." D. Ct. Doc. 85-1 (Warrant Aff.), at 1 (Jan. 29, 2016).

When his own efforts to remove the sponge failed, petitioner took B.M. to the hospital for treatment. Pet. App. 4a.

Approximately two days later, on the night of July 15, 2015, B.M. fled from petitioner and Edwards during an altercation in the lobby of a customer's apartment building. Pet. App. 4a; see Warrant Aff. 1. B.M. ran until she found a dumpster and climbed inside. Pet. App. 4a. Once B.M. could no longer hear petitioner and Edwards calling for her, she called a friend, who connected her to 911. Ibid. The responding police officers found B.M. standing shoeless and scared near the dumpster, and they brought her to the hospital for medical care. Ibid.

At the hospital, a shaken B.M. met with Sergeant Patricia Nijkamp of the St. Louis Police Department and described her experiences with petitioner and Edwards. Pet. App. 4a-5a; Warrant Aff. 1. B.M. also gave Sergeant Nijkamp a black notebook that contained her script for taking calls from customers and listed customer names, dates, times, addresses, lengths of time, and amounts to be charged. Pet. App. 5a. B.M. told Sergeant Nijkamp the name of the hotel and the room number where petitioner and Edwards were staying and said that petitioner had driven to St. Louis in a gold Mercedes. Ibid. After confirming that the hotel had a room registered to Edwards and a gold Mercedes registered to Edwards in the parking lot, Sergeant Nijkamp went to the hotel room with other police officers, and the officers arrested

petitioner and Edwards. Ibid. After petitioner and Edwards refused to consent to a search of the hotel room, the officers secured the hotel room and Mercedes, and Sergeant Nijkamp left to seek a warrant to search both locations. Ibid.

2. On the afternoon of July 16, 2015, Sergeant Nijkamp applied to a state judge for a warrant to search the hotel room and the Mercedes. Pet. App. 5a; Warrant Aff. 1-2. In the affidavit in support of the warrant application, Sergeant Nijkamp described her interview with B.M. and recounted B.M.'s experiences with petitioner and Edwards. Pet. App. 7a; Warrant Aff. 1. The affidavit stated that B.M. had called 911 early that morning after "escap[ing] from two suspects that had been forcing her to prostitute herself." Ibid. The affidavit described Sergeant Nijkamp's interview with B.M., explaining that B.M. said that she met petitioner and Edwards five to six weeks earlier in Houston "and reluctantly began prostituting herself and giving all proceeds to [petitioner]." Warrant Aff. 1. The affidavit recounted petitioner's mistreatment of B.M., including the recent incident with the makeup sponge, and stated that petitioner "put [B.M.] in a constant state of fear for her safety by threatening to beat her, forcefully grabbing her face while yelling and berating her, [and] denying her freedom of movement." Ibid.; see Pet. App. 7a.

The affidavit identified the hotel name, address, and room number, as well as the Mercedes's license-plate number and vehicle-identification number. Pet. App. 7a; Warrant Aff. 1-2. The affidavit explained that B.M. had identified the hotel room as the location of some of her encounters with customers and that the police had located and "detained" petitioner and Edwards in that room. Warrant Aff. 1. The affidavit reported that B.M. had "stated that there are numerous items of potential evidence located in the hotel room and vehicle used such as: cell phones, lap top computers, large amounts of cash, condoms, and lubricant as well as the receipts and paperwork relating to the Crime of 'Trafficking for the Purpose of Sexual Exploitation.'" Id. at 1-2; see Pet. App. 7a.

Sergeant Nijkamp presented the affidavit to a state judge, and the judge signed the affidavit and issued a search warrant. Warrant Aff. 2; Pet. App. 7a. The warrant identified the hotel room and the Mercedes and stated that both were registered to Edwards. Warrant Aff. 2; see Pet. App. 7a. The warrant further stated that a sworn "complaint" and "supporting written affidavits" had been filed with the judge and that, from those documents, the judge had found "probable cause to believe that allegations of the complaint to be true and probable cause for the issuance of a search warrant therein." Warrant Aff. 3. The warrant "command[ed] you that you search the said person above

described * * * and if said above described property or any part thereof be found on the said person by you, that you seize the same and take same into your possession." Ibid. The warrant did not otherwise identify the items authorized to be seized during the search. Pet. App. 8a; see Warrant Aff. 1-2.

Sergeant Nijkamp "believed that the warrant authorized the search of the hotel room and of the Mercedes and the seizure of the evidence set forth in her affidavit." Pet. App. 8a. She "brought a copy of the warrant and the supporting affidavit with her when she went to conduct the searches," and she and her lieutenant supervised the officers who searched the hotel room and car. Ibid. During the searches, the officers found various incriminating items, including several boxes of condoms, sex toys, dental dams, makeup sponges, feminine hygiene products, medication prescribed to Avery M. (the name B.M. had given at the hospital when seeking treatment several days earlier), and several receipts. Id. at 5a; see id. at 4a, 8a.

3. A federal grand jury in the Eastern District of Missouri charged petitioner with conspiracy, in violation of 18 U.S.C. 371; conspiracy to engage in sex trafficking, in violation of 18 U.S.C. 1594(c); interstate transportation of an individual to engage in prostitution, in violation of 18 U.S.C. 2421 and 2; use of facilities in interstate commerce with intent to aid an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(3) and

2; enticement to travel in interstate commerce to engage in prostitution, in violation of 18 U.S.C. 2422(a) and 2; sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b)(1), and 2; and use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(1) and 2. D. Ct. Doc. 94, at 1-8 (Feb. 18, 2016).

Petitioner moved to suppress the evidence obtained during the searches of the hotel room and Mercedes. Pet. App. 21a. Following an evidentiary hearing, see ibid., a magistrate judge issued a report and recommendation setting forth findings of fact and conclusions of law, id. at 21a-34a. As relevant here, the magistrate judge found that Sergeant Nijkamp read the search warrant and "believed it authorized the police to search [the hotel room] and the gold Mercedes, and to seize from those places items that related to the current investigation of human sex trafficking." Id. at 25a. The magistrate judge also determined that Sergeant Nijamp's affidavit established probable cause to believe that evidence of sex trafficking would be found in the hotel room and the Mercedes. Id. at 29a. The magistrate judge found, however, that the warrant itself was defective because it "did not accurately describe the locations intended by the affidavit to be searched," "did not particularly describe the items

to be seized," and did not include language incorporating the affidavit. Ibid.; see id. at 29a-31a.

The magistrate judge recommended, however, that the suppression motion be denied based on the good-faith exception to the exclusionary rule, finding that Sergeant Nijkamp and the other executing officers "reasonably relied on the search warrant as authority for their searches." Pet. App. 32a-33a. The magistrate judge determined that Sergeant Nijkamp "was most mindful of the Fourth Amendment warrant requirement" and "concealed no facts from the judge" in her affidavit. Id. at 32a. The magistrate judge also observed that "the search warrant clearly referenced Sgt. Nijkamp's affidavit, which described the places to be searched and the items to be seized." Id. at 33a. And the magistrate judge rejected petitioner's contention that items seized from the hotel room and car "were not within the Fourth Amendment scope of the items to be seized." Ibid.; see id. at 33a-34a.

The district court adopted the magistrate judge's recommendations, stating that it agreed with the magistrate judge's conclusions "in their entirety." Pet. App. 38a. The court found that Sergeant Nijkamp had a "good faith belief that the police were authorized to search the hotel room and the car" and "had probable cause to believe that a crime had been committed." Id. at 36a. The court thus denied petitioner's motion to suppress. Id. at 39a.

The case proceeded to trial, where the government presented testimony from B.M., Sergeant Nijkamp, and several other law-enforcement officers. Pet. App. 6a. The government also presented the evidence discovered in the hotel room and in the car, as well as the recording of B.M.'s 911 call, the Backpage.com advertisements for Stacey and Avery Monroe, and evidence of petitioner's bank transactions and social-media posts. Ibid. At the end of trial, the jury found petitioner guilty of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371; interstate transportation of an individual to engage in prostitution, in violation of 18 U.S.C. 2421(a) and 2; use of facilities in interstate commerce with intent to aid an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(3) and 2; and use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution, in violation of 18 U.S.C. 1952(a)(1) and 2. Pet. App. 1a-2a; Judgment 1-2. The district court sentenced petitioner to 140 months of imprisonment, to be followed by a life term of supervised release. Judgment 3-4.

4. The court of appeals affirmed. Pet. App. 1a-20a. As relevant here, it upheld the district court's denial of petitioner's motion to suppress. Id. at 7a-13a.

The court first determined that "the warrant's authorization to search 'said person' instead of 'said property' did not render

the warrant invalid." Pet. App. 9a. The court found that "[t]he omission of the word 'property' from the authorizing language appears to be a clerical error" in light of, among other things, "the warrant's meticulous identification of the hotel room and the Mercedes" and "the affidavit's similarly meticulous description and its request to search the hotel room and the Mercedes." Ibid. Under the circumstances, the court determined that "a reasonable officer executing the warrant likely would have read the warrant to authorize the search of" the hotel room and Mercedes. Ibid.

Although the court of appeals found that "[t]he warrant lacked particularity, because it did not list the items to be seized or incorporate Nijkamp's affidavit," the court determined that suppression was not warranted under the good-faith exception to the exclusionary rule. Pet. App. 9a; see id. at 10a-12a. The court explained that the exclusionary rule applies "only where it results in appreciable deterrence." Id. at 10a (brackets, citation, and internal quotation marks omitted). "[W]hen police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements," the court stated, "any marginal deterrence does not pay its way." Id. at 11a (quoting Herring v. United States, 555 U.S. 135, 141 (2009)) (internal quotation marks omitted).

In light of "the circumstances surrounding the issuance and execution of the search warrant in this case," the court of appeals

determined "that the warrant was not so obviously deficient that any reasonable officer would have known that it was constitutionally fatal." Pet. App. 12a. The court observed that, "[a]lthough the warrant itself did not describe the items to be seized, it specifically referred to Nijkamp's affidavit * * * , which clearly describes the locations to be searched * * * and the items to be seized." Ibid. (internal quotation marks omitted). The court further observed that "[t]he issuing judge signed the supporting affidavit, and Nijkamp testified that she brought both the affidavit and the warrant with her to supervise the search of the hotel room and the Mercedes," facts that differentiated this case from Groh v. Ramirez, 540 U.S. 551 (2004). Pet. App. 12a.

The court of appeals also determined that "application of the exclusionary rule in this case would not result in appreciable deterrence of police misconduct." Pet. App. 12a. Although the court stated that Sergeant Nijkamp "acted negligently in drafting the warrant," because she "should have used appropriate authorizing language and ensured that the supporting affidavit was incorporated into the warrant," the court found that "[her] conduct certainly did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter." Id. at 12a-13a.

ARGUMENT

Petitioner renews his contention (Pet. 15-34) that the exclusionary rule mandated suppression of the evidence obtained pursuant to the search warrant in this case. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has previously denied a petition for a writ of certiorari raising similar contentions. See Rosa v. United States, 565 U.S. 1236 (2012) (No. 11-5141). It should follow the same course here.

1. The exclusionary rule is a "judicially created remedy" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). "The fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies." Herring v. United States, 555 U.S. 135, 140 (2009). To the contrary, this Court has "repeatedly held" that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," and the Court has therefore "limited the rule's operation to situations in which this purpose is 'thought most efficaciously serviced.'" Davis v. United States, 564 U.S. 229, 236-237 (2011) (citation omitted). Where "suppression fails to yield 'appreciable deterrence,'

exclusion is 'clearly . . . unwarranted.'" Id. at 237 (citation omitted); see Herring, 555 U.S. at 141.

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis, 564 U.S. at 237 (citation omitted). "The analysis must also account for the 'substantial social costs'" of the exclusionary rule. Ibid. (citation omitted). "Exclusion exacts a heavy toll" because "[i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Ibid. This Court's decisions "hold that society must swallow this bitter pill when necessary, but only as a 'last resort.'" Ibid. (citation omitted). Exclusion can be an appropriate remedy only when "the deterrence benefits of suppression * * * outweigh its heavy costs." Ibid.

Those principles are reflected in this Court's decision in United States v. Leon, supra, which held that evidence should not be suppressed if it was obtained "in objectively reasonable reliance" on a search warrant, even if that warrant is subsequently held invalid. 468 U.S. at 922. Under Leon, suppression of evidence seized pursuant to a warrant is not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless

disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role"; (3) the supporting affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) in "the circumstances of the particular case," the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers could not reasonably presume it to be valid." Id. at 923 (citation omitted). "[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." Id. at 919 (citation omitted).

2. The court of appeals correctly applied those principles in affirming the denial of the suppression motion in petitioner's case.

As the court of appeals explained, the officers' conduct in this case was objectively reasonable and not deliberate or sufficiently culpable to warrant suppression. Pet. App. 11a-13a. Although the search warrant itself failed to specify with particularity the items to be searched for and seized, the accompanying affidavit "clearly describe[d] * * * the items to be seized (cell phones, lap top computers, large amounts of cash, condoms, lubricants, and the receipts and paperwork relating to

the alleged crime)." Id. at 12a (citation omitted). Sergeant Nijkamp, who prepared and submitted the warrant affidavit and oversaw the resulting searches, "brought both the affidavit and the warrant with her to supervise the search of the hotel room and the Mercedes." Id. at 12a; see id. at 8a. In those circumstances, it was objectively reasonable for the officers to have taken the warrant and supporting affidavit together as specifying the bounds of their authority to search, because, among other things, the state judge reviewed the supporting affidavit and ultimately signed both the warrant and the affidavit. See id. at 7a, 12a. Thus, even if the warrant was itself legally deficient, the officers' conduct in relying on it was objectively reasonable, and the evidence they discovered in doing so should not be suppressed.

Petitioner does not appear to dispute that the warrant's flaw could have been cured by incorporating by reference the accompanying affidavit. See Pet. 13 (noting that the court of appeals "correctly explained that the 'particularity requirement can be satisfied by listing the items to be seized in the warrant itself or in an affidavit that is incorporated into the warrant'") (quoting Pet. App. 9a). The officers treated the warrant as doing so. Even if the warrant ultimately failed the Fourth Amendment's particularity requirement because it did not make that incorporation express, the central purpose of the particularity requirement was functionally satisfied. "[T]he requirement

ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Maryland v. Garrison, 480 U.S. 79, 84 (1987); see Andresen v. Maryland, 427 U.S. 463, 480 (1976); cf. United States v. Grubbs, 547 U.S. 90, 98-99 (2006) (rejecting other policy rationales for the particularity requirement). By signing the warrant affidavit, the state judge gave his written assurance that he had considered the scope of the search in relation to the probable cause and approved the specific request submitted to him. And the officers in this case limited the search to the items specified in the judge-signed warrant application and accompanying affidavit and, as such, complied with the scope of the authorization that the state judge plainly attempted to confer.*

Petitioner contends (Pet. 4-6, 21-22) that the court of appeals' decision is inconsistent with one passage in Leon and the Court's ruling in Groh v. Ramirez, 540 U.S. 551 (2004). Petitioner is incorrect. The Leon Court recognized that, "depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be

* Although petitioner briefly contends that Sergeant Nijkamp and the other executing officers "did not limit the scope of the searches in conformity with the unincorporated affidavit," Pet. 32, the magistrate judge found that "all of the seized items reasonably appear to be evidence of [petitioner]'s trafficking in sexual exploitation," Pet. App. 34a, and the district court adopted that finding, id. at 38a.

searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923. That observation is fully consistent with this case. Leon emphasized "the circumstances of the particular case," and, on particular facts, courts may conclude that a warrant's failure to particularize the things to be searched is not "so facially deficient" as to preclude objectively reasonable reliance by officers. Ibid. Such a circumstance exists where, as here, the associated affidavit specifying the things to be searched is signed by the judge and carefully followed by those conducting the search. That approach is consistent with Leon's recognition that "all of the circumstances" of the case must be considered when evaluating the objective reasonableness of law-enforcement conduct. Id. at 922 n.23; see Herring, 555 U.S. at 145-146 (noting that all of the circumstances are relevant to the good-faith inquiry).

Similarly, as the court of appeals recognized (Pet. App. 11a-12a), Groh does not preclude application of the good-faith exception here. The Court in Groh confronted a Bivens claim based on a "glaring deficiency" on the face of a warrant that other circumstances in the case failed to mitigate. Groh, 540 U.S. at 564. Instead of enumerating the items to be seized, the warrant in Groh simply included a description of the two-story house to be searched. Id. at 554. The Court concluded that it could not be assured "that the Magistrate actually found probable cause to

search for, and to seize, every item mentioned in the affidavit." Id. at 560; cf. id. at 558 (noting that the officer had only orally described the items to be seized). In this case, in contrast, the officer who oversaw the team of officers that executed the search warrant was the same officer who prepared the warrant application and affidavit, which specified the things to be searched for and seized. Pet. App. 7a-8a. The record makes clear that the state judge reviewed the warrant and the warrant affidavit and signed both documents. The judge's signature on the affidavit that "clearly describes * * * the items to be seized," Pet. App. 12a (citation omitted), differentiates this case from the circumstances in Groh, and makes it more like Massachusetts v. Sheppard, 468 U.S. 981 (1984), in which the magistrate's assurance that he would correct any mistakes in the warrant was a significant factor supporting application of the good-faith exception. See id. at 986 & n.3, 989-991.

3. Petitioner contends (Pet. 15-19, 22-30) that the decision below conflicts with the decisions of other courts of appeals. None of those decisions reflects a division of authority that might warrant this Court's review.

a. Petitioner first argues (Pet. 15-19) that the decision below conflicts with decisions of the Ninth and Tenth Circuits that, according to petitioner, establish that the good-faith exception does not apply when the government obtains evidence

pursuant to a search warrant that "contains no list of items to be seized and no words incorporating an attached affidavit in support." Pet. 15. But neither of the decisions on which petitioner relies addressed that circumstance.

In United States v. McGrew, 122 F.3d 847 (9th Cir. 1997), the search warrant "referred to an 'attached affidavit which is incorporated herein,'" id. at 849, and that affidavit, in turn, identified items that the executing officers were authorized to seize, see id. at 849 n.3. Because the affidavit did not accompany the warrant at the time of the search, however, the Ninth Circuit determined that the warrant lacked particularity and that the good-faith exception to the exclusionary rule was "not available in this instance." Id. at 850; see also id. at 850 n.5. The court did not address, and had no occasion to address, whether the good-faith exception would have applied if, as in petitioner's case, the judge who issued the warrant also signed the supporting affidavit, and the officer supervising the execution of the warrant "brought a copy of the warrant and the supporting affidavit with her when she went to conduct the searches." Pet. App. 8a; see McGrew, 122 F.3d at 850.

Indeed, the Ninth Circuit based its good-faith holding in McGrew on the premise that longstanding circuit precedent required that officers executing a search warrant "either serve the affidavit with the warrant or list with particularity its relevant

directives on the warrant itself." 122 F.3d at 850 n.5. The Ninth Circuit has since recognized, however, that this Court's decision in Grubbs overruled that court of appeals' prior precedent requiring that incorporated affidavits be provided to the persons whose property is subject to the search. See United States v. SDI Future Health, Inc., 568 F.3d 684, 701 (2009). The Ninth Circuit thus might conclude that McGrew's good-faith holding does not survive Grubbs.

The Tenth Circuit's decision in United States v. Williamson, 1 F.3d 1134 (1993), is similarly inapposite. In Williamson, the court of appeals determined that the good-faith exception did not apply because "no reasonable officer" could have concluded that the search warrant in that case was valid. Id. at 1136. But the circumstances in Williamson bear little resemblance to petitioner's case. In Williamson, federal agents obtained a warrant to enter and search "'the premises located at Star Route Box 302, Tijeras, New Mexico,'" which was "a rural mailbox" at the end of a dirt road leading to the defendant's residence. Id. at 1135-1136. The executing officers relied on that warrant to search the defendant's business at a different address several miles away, ibid., and the court of appeals declined to consider whether the contents of the supporting affidavit and warrant application cured the defects in the warrant because it found "no evidence" that either document was "attached to the search warrant at the time of

execution." Id. at 1136 n.1. The Tenth Circuit's analysis in Williamson thus sheds little light on whether that court might determine that the good-faith exception applies in circumstances like those here.

Indeed, a more recent decision indicates that the Tenth Circuit likely would apply the good-faith exception to such facts. In United States v. Russian, 848 F.3d 1239 (10th Cir. 2017), the Tenth Circuit determined that a search warrant was invalid because "it failed to describe with particularity the place to be searched (the two Samsung phones) and the things to be seized (the cell phone data)." Id. at 1244. Nevertheless, the court found that the good-faith exception applied in light of "several factors" indicating that the reliance on the warrant by the officer who executed it "was objectively reasonable." Id. at 1246. First, the executing officer himself "prepared the warrant application and supporting affidavit," in which he "carefully identified each Samsung cell phone by color and model number and specified which types of data he had probable cause to believe would be found thereon." Ibid. Second, the judge who signed the search warrant also "signed [the] warrant application and affidavit." Id. at 1247. Third, the executing officer "confined his search to the evidence specified in the warrant application and affidavit." Ibid. Finally, "excluding the challenged evidence would not serve the underlying purpose of the exclusionary rule" because the

executing officer "made every effort to comply with the law." Ibid. (quotation marks omitted). Because the same four factors are present in petitioner's case, see Pet. App. 12a-13a, 32a, the Tenth Circuit would likely agree with the court of appeals' decision here.

b. Petitioner acknowledges (Pet. 24-29) that the decision below is consistent with United States v. Rosa, 626 F.3d 56 (2d Cir. 2010), and United States v. Wright, 777 F.3d 635 (3d Cir.), cert. denied, 136 S. Ct. 37 (2015), but he contends (Pet. 22-24) that those cases disagree with the Sixth Circuit's decision in United States v. Lazar, 604 F.3d 230 (6th Cir. 2010), cert. denied, 562 U.S. 1140 (2011). Lazar does not establish that the Sixth Circuit would require suppression in petitioner's case.

In Lazar, a magistrate judge issued warrants to search the medical records of certain patients identified in a list that was presented to the judge but not included in the warrants or the supporting affidavits, which the warrants incorporated. 604 F.3d at 233-234. Although the warrants did not "formal[ly] incorporat[e] by reference" that list, the court of appeals held that the list was "effectively incorporated into the search warrants" because the affidavits referred to "'the below listed patients'" and "'the following patients.'" Id. at 236. The officers who conducted the search, however, seized "records of patients whose names did not appear on a patient list presented to

the issuing Magistrate Judge." Id. at 238. The Sixth Circuit ordered suppression of "only patient files seized beyond the scope of such list." Ibid. Lazar is thus a case in which a magistrate judge placed limits on the search that the officers exceeded by seizing records beyond the warrant's authorization. Nothing in Lazar precludes reliance on the good-faith exception when officers conduct a search within the limits of what they understand to have been authorized by a judge who signed both the warrant and the supporting affidavit enumerating specific items to be seized. Indeed, Lazar's recognition that an express incorporation by reference is not always necessary lends support to the court of appeals' determination here that the officers were objectively reasonable in reading the warrant and judge-signed affidavit together.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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