No.

In the

Supreme Court of the United States

CHRISTOPHER FITZGERALD

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "good faith" exception to the exclusionary rule apply to uphold a search of a residence, where there is *no* nexus between the residence and *any* alleged drug trafficking, but the affidavit contains evidence that the targeted individuals are involved in trafficking, thus negating the third *Leon* factor which supports exclusion of evidence obtained in a search where an officer drafts an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable?" *United States v. Leon*, 468 U.S. 897, 923 (1984).

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Petitioner Christopher Fitzgerald respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case. This case represents another instance where an individual's alleged status as a "drug trafficker" is used as the sole basis to seek a warrant to search that individual's residence. This widespread belief that drug dealers will conceal, harbor, store or maintain a residence which contains evidence of drug distribution is used to support warrants to conduct blanket, sweeping searches of residences which have no connection to any alleged trafficking or other wrongdoing.

Without this court's intervention, the courts of appeals will continue to erode the meaning and efficacy of *United States v. Leon*, 468 U.S. 897 (1984), and the necessity for probable cause to search a dwelling where there is no evidence that the dwelling itself played any role in ther allged wrongdoing of its occupants. This case squarely presents these important and recurring questions and is an ideal vehicle for resolving the issue. For these reasons, the petition should be granted.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals, Appendix, 1a- 13a, was unpublished and issued November 1, 2018, and is attached hereto.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Questions Presented implicates the Fourth Amendment to the United States Constitution:

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

STATEMENT OF THE CASE

A. Factual History of Suppression Issue Regarding Fitzgerald

The facts involved in the search warrant affidavit and warrant are not in dispute.

Christopher Fitzgerald, along with his half-sister Chiquita Anderson and his co-worker Rashard Smith, were all found guilty of violating federal drug laws based upon the testimony of Walter Walker III who was the alleged ringleader and seasoned narcotics trafficker. Fitzgerald and Walker had been friends in their youth, having re-connected as adults after Walker had served numerous prison terms for drug offenses in state and federal prisons. Fitzgerald and Smith were both employed with Federal Express, "FedEx," as route drivers who delivered packages on regular routes in the Northeast Ohio area. Christopher Fitzgerald had no criminal record.

Walker initially attracted the Ohio Gaming Commission's attention as Walker and an associate were spending and gambling large amounts of cash at the Jack Casino in Cleveland, Ohio. The pair would trade smaller monetary denominations into larger denominations at the casino.

Soon after the Gaming Commission notified Cleveland Police detectives and the Northern Ohio Law Enforcement Task Force, which specialized in narcotics-related investigations, an investigation was begun on Walker. Shortly thereafter, the detectives received information that an individual in Aurora, Ohio, a southeastern suburb in Portage County, Ohio, had attempted suicide, and the responding officers had discovered evidence of drug trafficking in the apartment where the attempt was made. The information also included the names Walter Walker and Christopher Fitzgerald, as persons involved in the Aurora incident, as the apartment had been rented by Fitzgerald, but was subleased to Walker. The investigation revealed that the individual who attempted suicide blamed Walter Walker for his desperation, as he was a driver who would make kilogram heroin runs to Chicago for Walker, but Walker had lost the last shipment and could not pay for the drugs. The Chicago supplier was blaming the driver for the missing drugs.

Almost one year later, the task force detectives were stil investigating the case, having received information from a source that Fitzgerald and his half-sister, Anderson, would assist Walker in receiving cocaine shipments from California to Northeast Ohio, using shipments sent via Federal Express. By January of 2015, a

Title III wiretap was used on the cellular telephone of Walker: a month later, a wirtap authorization was obtained for Fitzgerald's cell phone. The fruits of the wiretaps revealed coded conversations, and a specific conversation between Fitzgerald and Walker concerning a particular drop off of a package on Fitzgerald's delivery route.

By the time the detectives sought search warrants, the officers understood the general method of the drug distribution as including shipments via FedEx, which were delivered to businesses on the delivery routes of Fitzgerald and Rashard Smith, who also was a FedEx driver. Once at the location, Walker would take the delivery instead of delivering the package to the business to which the delivery was addressed.

The Affidavit recited pages of transcribed conversations captured via the Title III wiretaps on Walker's cell phone and the cell phone of Fitzgerald. None of the conversations involved any information which would lead the officers listening to believe that Fitzgerald was a drug dealer who was in the habit of stashing drugs at his residence. The officers may have been able to infer from the wiretap information and from the informant that Fitzgerald was assisting Walker through his position at FedEx as part of the delivery chain.

There was no indication that Fitzgerald was supplying dealers or users of drugs, or that Fitzgerald had drug source connections in California. Fitzgerald was not a supplier or a street dealer of narcotics, and none of the inferences gained from the wiretaps or the informants provided any support for such a finding. There was no witness testimony that Fitzgerald ever sold any narcotics, and there was no connection

to his residence. Fitzgerald never lived at the Aurora apartment where the attempted suicide took place: the apartment was rented for Walker. Contrary to the district court's findings that Detective Guzik's experience as recited in the boilerplate language provided a sufficient nexus to Appellant's residence, there was no reasonable inference of drug activity sufficient to justify the issuance of the warrant to search the Beachwood, Ohio home.

A summary of the 62-page Affidavit revealed that a scant six paragraphs were even remotely related to Fitzgerald's residence in Beachwood, Ohio: none provided an evidentiary nexus to his residence. Specifically, during the Affiant's recitation of his experience and training, Affiant summarizes his experience with drug traffickers. (Affidavit, at ¶¶2-6). Affiant stated that he had 15 years of experience investigating drug cases. (Affidavit, at ¶2). Based on this experience, Affiant asserted that he is familiar with the modus operandi of persons involved in the illegal distribution of drugs. (Affidavit, at ¶4). Accordingly, the Affiant stated that he was aware that "persons involved in the illegal distribution of controlled substances nearly always attempt to conceal their identities, the location at which drug transactions take place, and the flow of proceeds derived from their illicit drug transactions into 'clean' currency." (Affidavit, at ¶4). Affiant also stated that based on his training and 15 years of experience, he was aware of where drug traffickers often keep the evidence of their crimes. More specifically, Affiant stated that "traffickers must maintain on hand large amounts of U.S. Currency in order to finance their on-going narcotic business and often

keep this currency in their possession" (Affidavit, at ¶6(a)); that "drug traffickers maintain books, records, receipts, notes, ledgers, and similar items of their drug trafficking activity where the drug traffickers have ready access to them" (Affidavit, at ¶6(b)); that "persons involved in drug trafficking conceal in their residences ('stash houses'), large amounts of currency, financial instruments, precious metals and gems, jewelry, and other items of value and/or proceeds of drug transactions; and evidence of financial transactions relating to obtaining, transferring, secreting, or spending of large sums of money derived from engaging in narcotics trafficking activities" (Affidavit, at ¶6(e)); and that "when drug traffickers amass large amounts of proceeds from the sale of drugs, they attempt to legitimize these profits through money-laundering activities and that they often keep records of such activity (e.g. bank records, ledgers, business records, withdrawal and deposit slips, etc.) at their residences" (Affidavit, at ¶6(f)). None of these statements created a "fair probability that evidence would be located on the premises of the proposed search." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978).

The district court did not hold a hearing on the motion to suppress, which alleged that the informant had not been identified or proven reliable, and that there was no nexus between the residence of Fitzgerald and any alleged drug distribution. Citing the government's response in opposition, the district court determined that "drug dealers store drugs and proceeds where they live," and found that oft-used

justification and the affiant's experience, as sufficient nexus to uphold the warrant's probable cause finding.

B. The Decision Below

The Sixth Circuit Court of appeals affirmed the denial of the motion to suppress, the conviction, and the sentence imposed of 188 months for Fitzgerald. The Court of Appeals determined that the district court's finding of probable cause for the issuance of the warrant was not supported by the Affidavit, stating that "our precedent does not support the district court's conclusion that the affiant's 'experience that evidence of drug activity can often be found at the drug dealer's residence alone, is sufficient to establish a nexus to search the residence.'" Pet. App. 6a. The Court of Appeals found that the district ocurt relied upon cases which did not stand for the blanket assertion that evidence of drug dealing will be found where drug dealers live, stating that those cases referenced by the district court all had more evidence of a connection between the place to be searched and the illegality. Id.

After holding that "the nexus requirement was not satisfied, and probable cause did not exist to issue the search warrant for Fitzgerald's residence," the Court of papeals determined that the evidence seized would not be excluded, under the Good Faith Exception to t the exclusionary rule, as announced in *United States v. Leon*, 468 U.S. 897 (1984). The Sixth Circuit panel recited the standards for finding that the officers acted in good faith as follows:

> The *Leon* good faith exception specifies that the affidavit must contain only a "minimally sufficient nexus between the illegal activity and the

> place to be searched...." That is a "less demanding showing than the 'substantial basis' threshold required to prove the existence of probable cause." [*United States v.*] *Frazier*, 423 F.3d 526, 536 (citing [*United States v.*] *Carpenter*, 360 F.3d 591, 595). An officer relying on a search warrant does not act in objectively reasonable good faith when: (1) the magistrate was misled by information in the affidavit that the affiant either knew was false or was reckless as to its falsity; (2) the magistrate wholly abandoned her judicial role; (3) the warrant was so lacking in indicia of probable cause that official belief in its existence is unreasonable; or (4) the officer's reliance on the warrant was otherwise not in good faith or objectively unreasonable, such as where the warrant is facially deficient. *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005) (citing *Leon*, 468 U.S. at 914–23, 104 S.Ct. 3405). The affidavit cannot be "bare bones" and merely "state[ ] suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. McPhearson*, 469 F.3d 518, 526 (citing *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996)). "The relevant question is whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. McCraven*, 401 F.3d 693, 698 (6th Cir. 2005) (citation and internal quotation marks omitted). Lack of good faith reliance on the affidavit may also exist "when evidence in the affidavit connecting the crime to the residence is 'so vague as to be conclusory or meaningless.' " *Frazier*, 423 F.3d at 536 (quoting *Carpenter*, 360 F.3d at 596). The standard of reasonableness is an objective one and "does not turn on the subjective good faith of individual officers." *Illinois v. Krull*, 480 U.S. 340, 355, 107 S.Ct. 1160 (1987) (citing *Leon*, 468 U.S. at 919 n.20, 104 S.Ct. 3405).

Pet.App.7a.

In its decision, the Sixth Circuit court established a new precedent in finding that the officers acted in good faith reliance on the warrant: the appeals court was impressed by the affidavit's 62 pages and its descriptions of the wiretaps and what it saw as a year-long investigation in to a "wide-ranging" drug conspiracy. Contrary to the appeals court's description of the contents of the affidavit, the alleged drug conspiracy as it related to Fitzgerald's residence was non-existent: the appeals court

cited the activitiy viewed between Walker and Anderson at her residence, but provided no information about any activity at Fitzgerald's residence, other than Fitzgerald's leaving for work, and returning at the end of the day. That the appeals court strained to justify finding the search warrant was saved by good faith, the court's determination that

> [T]he 62-page affidavit contains evidence of Fitzgerald's involvement in ongoing drug activity based on confidential informant reports and a year of wiretapped conversations and other surveillance of suspected co-conspirators. For example, the confidential informant claimed to speak regularly with Fitzgerald's half-sister, co-defendant Anderson, about the conspiracy and specifically described Fitzgerald's role as the FedEx deliverer. Magistrate judges authorized wiretaps on Fitzgerald's and Walker's cell phones and a tracker on Walker's vehicle. Experienced officers interpreted the suspects' cryptic phone and text conversations to refer to drug deliveries and payments. On days tapped phone calls led officers to believe Fitzgerald and Walker planned to meet, surveillance of Anderson's residence showed Walker arriving with Pelican cases.

Pet.App.7a.

Contrary to the above quotation, the 62-page affidavit contained no reference, informant testimony, surveillance, or any information regarding the "place to be searched," Fitzgerald's Beachwood, Ohio residence. Indeed, the appeals court contradicts itself by stating that on the one occasion after Walker and Fitzgerald's meeting while Fitzgerald was driving for FedEx on his delivery route, the officers surveillance captured Walker arriving at Anderson's home, not Fitzgerald's.

The court of appeals asserted that there was no evidence in the record to contradict its holding that the officers relied on the warrant in good faith of its veracity. Indeed, such proof of good faith belief will likely not be developed in the

record without a hearing on the motion to suppress, which would give a defendant an opportunity to challenge the officer's basis and breadth of knowledge concerning the affidavit and its contents. Here, the district court found no need to hold a hearing, finding that there was probable cause in the affidavit and no need to resort to good faith to resuscitate a warrant issued without probable cause.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's unpublished decision in *United States v. Fitzgerald,* reflects a clear break with established Supreme Court precedent. This case squarely presents the important and recurring question of whether a finding that an officer acted in good faith reliance on a signed warrant is supported where there is no connection in the affidavit or warrant regarding the place to be searched and its connection to the alleged illegality. This case is an ideal vehicle for which this Court may answer this question, as the Court of Appeals clearly found no probable cause and no connection to the private residence, and nonetheless determined that the officer acted in good faith belief of the warrant's validity, thus negating *Leon's* third exception to the good faith analysis. In addition, lower courts are faced with this issue repeatedly, and as the opinions in those courts reflect, the analysis announced in Leon has has not been followed, and the exceptions to a good faith finding and the analysis therein have been reduced to meaningless exercises, in violation of defendants' Fourth Amendment rights.

1. *The Question Presented and its Effect has Eliminated the Need for Probable Cause in a Warrant or Affidavit based upon Application of Good Faith Exception*

Petitioner states that in the years since Leon, law enforcement has learned that it is not necessary to include evidence which will provide the reviewing magistrate with a basis for finding probable cause for two reasons: first, most jurisdictions in the United States have some magistrates who will sign a warrant affidavit without holding the presenting officer to any meaningful evidentiary standard, and officers seeking warrants with questionable facts know how to forum shop a weak affidavit. Secondly, even in situations where the officer is not forum shopping, affidavits lacking in probable cause have routinely stood up to challenge based upon the officer's good faith in exercising a warrant signed by a neutral magistrate.

The devolution of the exclusionary rule on the back of *Leon's* good faith exception has reduced the exclusionary rule to being a "non-starter." In Petitioner's case, and in myriad other cases, law enforcement "experience" and "knowledge" has replaced facts, and evidence gained through meaningful investigation in affidavits, leading to warrants signed which lean on history and experience rather than particularity and evidence. Petitioner states that this Court should take the opportunity to review its decision in Leon, based upon the 35 years of case law since its inception, to determine whether the law enforcement officer's good-faith exception has supplanted the Fourth Amendment's probable cause requirement as the necessary evidentiary basis for search warrants. It is Petitioner's belief that the Sixth Circuit's opinion has signaled that there indeed is no longer a probable cause "requirement."

A. The Exception Swallows the Rule: Good Faith trumps Exclusionary Rule even where No Probable Cause Exists

Justice Blackmun, in his concurrence in *Leon* stated the following:

> What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

United States v. Leon, 468 U.S. at 928 (J. Blackmun, concurring). Thirty-five years after the decision in *Leon* and its companion case *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), petitioner submits that the time for reconsideration of the affect that the good faith exception has had on the drafting of affidavits and the issuance of warrants is at hand.

The widespread practice of using "good faith" as a cure for a facially defective affidavit and warrant as evidenced in this case, reflects the use of law enforcement assumptions elevated to evidentiary status. For example, in the Sixth Circuit, decisions from the circuit reflect regular use of the adage that drug dealers will harbor evidence of their drug trafficking in their homes, as a substitute for actual evidence of the use of a residence in a drug trafficking scheme.

We have acknowledged that "[i]n the case of drug dealers, evidence is

> likely to be found where the dealers live." *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998) (citing *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991)). However, we also maintain that "a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant's home." *United States v. Berry*, 565 F.3d 332, 339 (6th Cir. 2009) (citing *Frazier*, 423 F.3d at 533).

Pet.App.5a.

Even within the Sixth Circuit, the panel opinions are inconsistent and provide no guidance as to what particular evidence, other than law enforcement speculation as to the habits of "drug dealers," is necessary to satisfy the Fourth Amendment's particularity requirement. In Petitioner's case, the district court relied upon the drug dealer's residence assumption to validate a warrant that was devoid of proof of probable cause that the residence would contain evidence of illegality. While corrected by the Sixth Circuit, the crux of the problem identified in the Question Presented became apparent in its holding that good faith saved the evidence from exclusion, finding a sufficient nexus under a good faith analysis which was absent under the analysis required under the Fourth Amendment and the exclusionary rule.

In *Leon*, Justice White stated the following:

> We conclude 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. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S] earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," *Illinois v. Gates*, 462 U.S., at 267, 103 S.Ct., at 2347 (WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." *United States v. Ross*, 456 U.S. 798, 823, n. 32, 102 S.Ct. 2157, 2172, n.

> 32, 72 L.Ed.2d 572 (1982). Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–819, 102 S.Ct. 2727, 2737–2739, 73 L.Ed.2d 396 (1982),23 and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Leon, 468 U.S. at 492-493. Petitioner submits that this Court should determine whether there are any meaningful exceptions to an officer's good faith belief in the validity of a warrant, or whether there are no circumstances in which an officer will present an affidavit which is susceptible to a Fouth Amendment challenge. This is so in light of the fact that a magistrate's signature on a warrant predicts the outcome, as it did in this case: even a warrant which provides no probable cause that evidence of drug trafficking will be located at a person's residence will contain "sufficient nexus" for find that an officer acted in good faith.

B. Several Circuit Courts Have Similarly Eroded the Exclusionary Rule using the Good Faith Exception

The uncertainty as to the vitality of the exclusionary rule as it pertains to warrants and affidavits which fail to contain suficient cause to search a particular place is not isolated in the Sixth Circuit: each circuit examined displayed the continued erosion of the exclusionary rule under the good faith warrant-saving rubric. Thus in *United States v. Williams*, 548 F.3d 311 (4th Cir.2008), the panel reversed the district

court's suppression of evidence obtained from a residence identified as one where alleged "drug traffickers" lived. In reversing the suppression decision, the Fourth Circuit, citing *Leon*, stated the following:

> Simply put, the district court's view is directly at odds with our precedent. We have consistently determined that there was probable cause to support search warrants—and not merely sufficient indicia of probable cause to justify application of the *Leon* good faith exception—in similar circumstances. That is, we have upheld warrants to search suspects' residences and even temporary abodes on the basis of (1) evidence of the suspects' involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes. See *United States v. Grossman*, 400 F.3d 212, 217–18 (4th Cir.2005); *United States v. Servance*, 394 F.3d 222, 230 (4th Cir.), vacated on other grounds, 544 U.S. 1047, 125 S.Ct. 2308, 161 L.Ed.2d 1086 (2005); *United States v. Williams*, 974 F.2d 480, 481–82 (4th Cir.1992); *United States v. Suarez*, 906 F.2d 977, 984–85 (4th Cir.1990). . . .
>
> As part of such a common sense determination, we observed in *Grossman*, "it is reasonable to suspect that a drug dealer stores drugs in a home to which he owns a key." *Id.* at 218; see also *Servance*, 394 F.3d at 230 (recognizing "that the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence" (internal quotation marks omitted)).

Williams, 548 F.3d at 319.

In *United States v. Corral-Corral*, 899 F.3d 927 (10th Cir.1990), the circuit panel held that an affidavit that failed to present any probable cause was able to be preserved through application of the good faith rationale. In *Corral-Corral*, the court determined that an ofifcer could rely on a magistrate's decision to issue the warrant, even in instances where the affidavit is facially insufficient: "we believe the state judge's probable cause finding is not only a relevant factor, but a significant one as

well, in the good-faith equation." *Id.* at 938. See also, *United States v. Robinson*, 336 F.3d 1293 (11th Cir.2003)(Under good faith exception t exclusionary rule, suppression only necessary where officers are dishonest or reckless and unable to seriously believe in the existence of probable cause).

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States v. Christopher Fitzgerald et al.

Sixth Circuit Court of Appeals Case No.17-3699

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