No. _____

In the Supreme Court of the United States

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WALTER RONALDO MARTINEZ ESCOBAR,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Eighth Circuit caselaw the Panel applied in Escobar's case holding that the *United States v. Leon* good-faith exception applies even when the officers executing the warrant rely on information outside the warrant conflict with *Leon*, where that caselaw erroneously relied on a ruling this Court made in a warrantless-search case, and does the Eighth Circuit caselaw also create a Circuit split with the Sixth and Ninth Circuits, which hold to the contrary?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Walter Escobar, petitions for a Writ of *Certiorari* to review the judgment in his case, as affirmed by the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The published Court of Appeals' opinion (Appendix "App." 1a) in Escobar's case is *United States v. Escobar*, 909 F.3d 228 (8th Cir. 2018), filed November 26, 2018. The District Court did not publish an opinion.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment, attached at App. 27a, on November 27, 2018, a day after it filed its opinion.

Petitioner on December 10, 2018 timely petitioned the Eighth Circuit for re-hearing to the Panel, which that Court denied in an order entered January 10, 2019. App. 28a.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) to review a circuit court's decision via a writ of *certiorari*.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> 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 things to be seized.

STATUTORY PROVISION INVOLVED

Not applicable.

STATEMENT OF THE CASE

I. Proceedings Below

This case arises from a judgment and sentence of the United States District Court for the District of Minnesota, the Honorable Paul A. Magnuson, presiding. The Government invoked jurisdiction in the District Court by indictment under 18 U.S.C. 3231. Jurisdiction in the Eighth Circuit Court of Appeals was proper under 18 U.S.C. 1291.

Prior to trial, Petitioner Escobar moved to suppress the drug and other evidence seized from the Prescott, Wisconsin house where he was living, citing the warrant's failure to state anticipatory probable cause, and the inapplicability of the *Leon* good-faith exception. The District Court denied that motion. Memorandum and Order, District Court Docket (DCD) 531, at App. 33a-35a.

A jury convicted Escobar at a trial held guilty held July 11-15, 2016, on an indictment charging him with conspiracy to distribute methamphetamine under 21 U.S.C. 841. The District Court sentenced Escobar on December 29, 2016 to 260 months confinement, imposed a 5-year supervised release term, and ordered a $100 special assessment.

The relevant offense-and-issue related facts are in the Eighth Circuit's opinion in Escobar's case, at App. 3a-10a.

REASONS FOR GRANTING THE WRIT

The District Court's ruling

In the District Court, the Government asserted the good-faith exception, which the District Court addressed. District Court Memorandum and Order, DCD 531, at App. 33a-34a. The Court said the reasonableness of the officers' reliance on the warrant depends on "the totality of the circumstances, including any information known to the officers but not presented to the issuing judge," citing *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007).

The Court added that here "the officers executing the warrant knew all the information that Escobar contends should have been presented to the judge." Order, *id*., at App. 34a.

The Eighth Circuit's ruling

The Eighth Circuit Panel that decided Escobar's appeal did not directly address his argument that the drug, firearm and derivative testimonial-evidence obtained from the search of the Prescott house under the anticipatory warrant should have been suppressed owing to the search warrant not making the showing required by *Grubbs v. United States*, 547 U.S. 90 (2006).

That showing requires that when the court issued the warrant, the supporting affidavit made it probable that Garcia would travel to the Prescott house to deliver methamphetamine within the two-day timeframe specified in the affidavit. *U.S. v. Escobar*, *id*., at App.,14a; Search warrant, at App. 39a.

The Panel instead decided that even if anticipatory probable cause had not been established owing to the affiant not including statements captured by a wiretap that indicated when Garcia would travel with the drugs to the Prescott house (the anticipatory condition), the good-faith exception applied because under the totality of the circumstances the officers were objectively reasonable in relying on the warrant, citing *Proell*, *id*., at 431. Panel opinion, at App., 14a.[1]

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[1] The Panel decision describes the triggering condition in its broadest terms, stating that in addition to a basis to believe Garcia would travel to the Prescott house on August 19 or 20, 2015, the condition includes officers stopping Garcia after leaving the Prescott house and finding drugs. This is correct, but Escobar has focused on the absence of any basis in the warrant-affidavit to make the first part

Proell in turn cites *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) for the proposition, not found in *United States v. Leon*, 468 U.S. 897 (1984), that "the totality of the circumstances, includ[es] any information known to the officers but not presented to the issuing judge." *Proell, id*.

Proell thus conflicts with *Leon*, which establishes the circumstances in which the good-faith exception applies, the first of which is that the police relied in objectively-reasonable fashion on what the search warrant contains, not on information they did not put in the warrant and assessed by the issuing judge. 468 U.S. at 922 n. 23 (". . . we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant.").

The conflict here with *Leon* becomes even more apparent when one traces back from *Proell* and *Marion* to find the Eighth Circuit case that first says that information known to officers — but not included in the warrant-affidavit, and not presented to the issuing judge — can later be relied on to assess the reasonableness of the officers' reliance on the defective warrant: *United States v. Martin*, 833 F.2d

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of the triggering condition probable, specifically, the absence of any information in the affidavit to make it probable that Garcia would even travel to Prescott on the days cited. This is because the affidavit not demonstrating a probability that the first part of the triggering condition would occur makes irrelevant the triggering condition's latter parts.

752, 756 (8th Cir. 1987), *cert. denied*, 494 U.S. 1070 (1990), which in turn cites *Anderson v. Creighton*, 483 U.S. 635 (1987).

Anderson, however, is a civil, qualified-immunity case, involving an FBI agent who searched a home without a warrant. At issue was whether a reasonable officer in the agent's position could have believed the warrantless search to be lawful, in light of clearly established law, and the information the agent possessed. 483 U.S. at 641. In the context of a warrantless search, the objective reasonableness of an officer's decision to search often requires consideration of the information the searching-official possessed. *Id*., at 641.

But that is not true of the *Leon* good-faith exception, because it rests on 1) the premises that an officer must be allowed to rely on a judge's finding of probable cause, so that the police are not penalized for the judge's error, and 2) the inapplicability of the exclusionary rule's deterrence rationale when it is the judge who errs. 468 U.S. 918-21.

Accordingly, because in *Anderson* the facts known to the officer conducting the warrantless search did properly bear on the reasonableness of his view of that search's legality, *Proell*, which relies on this Court's decision in *Anderson*, has no relevance to determining whether in Escobar's case the officers in good faith relied on the issuing judge's finding of probable cause for the anticipatory warrant.

In Escobar's case, to support the requested anticipatory warrant, Agent Bauer alleged only the remote, past drug-related activities of Jesse Garcia, along with what was allegedly occurring at the Prescott house, neither of which made it probable that the triggering event — Garcia on Aug. 19 or 20 would travel to the Prescott house to obtain methamphetamine — would occur. See search warrant, at App., 39a-40a; *Grubbs*, 547 U.S. at 96-97. Bauer did not include in the warrant-affidavit information, gleaned from a recent wiretap involving Garcia, showing when Garcia would likely travel to the Prescott house.

In these circumstances the good-faith exception has no application, because the two earlier-stated premises that *Leon* cites as underlying the exception have no applicability here.

The officers executing the warrant did not rely on the issuing judge's finding of probable cause, as based on facts stated in the warrant-affidavit, but on information they did not include in the warrant-application, effectively making their own probable-cause finding.

And the exclusionary rule's deterrence rationale fully applies in Escobar's case because it was not the judge who erred, but the officers, because they relied on non-warrant facts to make their own, erroneous assessment that they had anticipatory probable-cause.

Certiorari should therefore be granted to overrule the erroneous 8th Circuit decisions in *Proell* and its predecessor cases, which apply this Court's inapplicable *Anderson v. Creighton* decision to allow good faith to be found based on information known to the officer executing the warrant, but not provided to the judge who issued the warrant.

Conflict with precedent of other Circuits

Before the Eighth Circuit panel, the Government in its brief acknowledged that two other Circuits have caselaw holding that, for purposes of deciding whether an objectively reasonable officer would in good-faith have relied on a defective warrant, the good-faith exception does not permit consideration of information known to the officer but not included in the warrant-affidavit: *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir. 2005) and *United States v. Hove,* 848 F.2d 127, 140 (9th Cir. 1988).

The Eighth Circuit's decision in Escobar's case applying Eighth Circuit precedent that the good-faith exception applies even when officers rely on non-warrant facts to make their own probable-cause determination thus puts it in conflict with authoritative decisions of the Sixth and Ninth Circuit United States Courts of Appeal, which creates a split among the Circuits, which this Court should resolve.

CONCLUSION

Escobar requests that this Court grant the Writ to decide the question presented, and in so doing resolve the Circuit split.

Dated this 25th day of February, 2019.

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