No. 18-8202

IN THE SUPREME COURT OF THE UNITED STATES

WALTER RONALDO MARTINEZ ESCOBAR, 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

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 909 F.3d 228. The memorandum and order of the district court (Pet. App. 29a-35a) is not published in the Federal Supplement but is available at 2016 WL 3349224.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on November 26, 2018. The petitions for rehearing were denied on January 3, January 10, January 31, and February 21, 2019 (Pet. App. 28a). The petition for a writ of certiorari was filed

on February 25, 2019. 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 District of Minnesota, petitioner was convicted of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 260 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-26a.

1. Petitioner belonged to a multi-state methamphetamine organization led by Jesse Garcia. In 2015, DEA agents investigating Garcia placed GPS trackers on several vehicles that Garcia used. The trackers led the agents to a suspected stash house in rural Wisconsin. The agents installed a pole camera outside the stash house and determined that Garcia's supply came from that house. Pet. App. 3a-4a. The stash house was operated by Jose Rojas-Andrade, with the assistance of petitioner and Juan Carlos Garcia-Noyala. Id. at 4a; see D. Ct. Doc. 759 (Dec. 23, 2016); Presentence Investigation Report (PSR) ¶¶ 47-48. Petitioner's role included maintaining the "stash house, making deliveries of methamphetamine, collecting drug debts, and sending payments." PSR ¶ 47.

During July and August 2015, agents intercepted incriminating telephone calls between Garcia and his co-conspirators discussing

the arrival and distribution of methamphetamine. In an intercepted call on August 18, Garcia discussed picking up methamphetamine from petitioner and Rojas-Andrade. Garcia also contacted other co-conspirators to inform them of the imminent arrival of 50 pounds of methamphetamine. Pet. App. 4a-8a.

Phone calls intercepted on August 18 and August 19, 2015 indicated that Garcia would be driving to the stash house to retrieve the 50-pound shipment of methamphetamine. Pet. App. 8a-9a. Agents planned to intercept the shipment, and then to search the stash house, pursuant to a warrant, for additional drugs, paraphernalia, currency, records of the drug business, and other relevant documents. Id. at 39a-40a.

To execute that plan, on August 19, investigator Thomas Bauer sought an anticipatory search warrant for the stash house. Pet. App. 9a. Bauer's affidavit explained that agents had been investigating Garcia's drug trafficking organization since February 2015 and had determined that Garcia obtained 75-100 pounds of methamphetamine per month from a Mexican source. Id. at 39a; see id. at 38a-40a. The affidavit explained that the location that officers sought to search was a suspected stash house for Garcia's organization. Id. at 39a. It stated that in June 2015, an informant told investigators that Garcia's source of supply had recently obtained 200 pounds of methamphetamine, and that investigators had also learned that Rojas-Andrade and co-

conspirator might be protecting a large quantity of methamphetamine at the stash house address. It further stated that surveillance had determined that the co-conspirator had moved into the stash house in June 2015 and was there daily, while Rojas-Andrade frequently stopped by the house. Ibid.

The affidavit further explained that agents had conducted surveillance of the suspected stash house on August 17. It stated that on that date, agents had seen two individuals leave the stash house and drive to a Walmart, where they wired $1000 to a suspected co-conspirator in Indiana. It explained that agents had then seen the two men return to, and enter, the stash house. Pet. App. 39a-40a.

Finally, Bauer's affidavit explained that agents expected based on their investigation that Garcia would travel to a location in Wisconsin to pick up 50 pounds of methamphetamine on August 19 or 20 and that agents expected to perform a traffic stop on Garcia's vehicle when Garcia returned to Minnesota. Pet. App. 40a. Bauer sought authorization to perform a search of the stash house in the event that the traffic-stop search revealed methamphetamine in Garcia's possession. Ibid. A judge issued the anticipatory warrant. Id. at 9a.

On August 19, agents observed Garcia drive to the stash house and then depart the house. Agents conducted a traffic stop and recovered 50 pounds of methamphetamine from Garcia's vehicle. Pet.

App. 9a. Other agents stopped petitioner and another associate after they were observed leaving the area around the stash house. Ibid. Agents then executed the search warrant at the stash house and seized 29 pounds of methamphetamine from a dining room freezer, a firearm from petitioner's bedroom, and a firearm from another bedroom. Ibid.

2. Petitioner and ten others were charged with conspiring to distribute methamphetamine in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846. Pet. App. 10a. Petitioner moved to suppress the evidence seized from the stash house. Id. at 14a. He argued that the affidavit for the anticipatory search warrant had been inadequate. Specifically, he alleged that the warrant did not adequately establish probable cause for the warrant's triggering event -- the seizure of methamphetamine from Garcia's car in a traffic stop -- because the affidavit did not detail the information indicating that Garcia would pick up methamphetamine from the stash house on August 19 or 20. Ibid.; see id. at 40a.

A magistrate judge prepared a report recommending that the suppression motion be denied. Pet. C.A. Addendum 16-36. The magistrate judge summarized evidence about the stash house and the drug conspiracy in the affidavit and concluded that the affidavit established probable cause that evidence of drug trafficking would be located at the stash house. Id. at 35.

The district court adopted the magistrate's report and recommendation and denied the suppression motion. Pet. App. 29a-35a. The court rejected petitioner's argument that the warrant affidavit was deficient because it failed to "connect all of the dots of the alleged drug conspiracy" by "set[ting] forth all of the telephone conversations in the several days leading up to August 19, 2015, which would have set the stage for a search of the [stash] house." Id. at 33a. The court explained that "the affidavit outlined many other aspects of the suspected drug ring, giving the issuing judge more than sufficient probable cause to order a search of the [stash] house." Ibid. The court also determined that, in any event, the good-faith exception to the exclusionary rule would apply if probable cause were lacking. Id. at 33a-34a. The court explained that "the officers executing the warrant knew all of the information that [petitioner] contends should have been presented to the issuing judge." Id. at 34a. Further, the court concluded, "[t]his [was] not a situation * * * in which the warrant was facially deficient" or could be properly described as "'so lacking in probable cause as to render official belief in its existence entirely unreasonable.'" Ibid. (citation omitted).

A jury found petitioner guilty at trial. Pet. App. 3a. The district court sentenced petitioner to 260 months of imprisonment. Judgment 2.

The court of appeals affirmed. Pet. App. 1a-26a. As relevant here, the court rejected petitioner's challenge to the warrant-based search of the stash house. Without deciding whether the warrant affidavit established probable cause, the court wrote:

> Even if there was no probable cause, * * * the good-faith exception applies because under the totality of the circumstances, officers' reliance on the warrant was objectively reasonable. See United States v. Proell, 485 F.3d 427, 431 (8th Cir. 2007) ("When assessing the objective reasonableness of police officers executing a warrant, we must look to the totality of the circumstances, including any information known to the officers but not presented to the issuing judge.")

Pet. App. 14a.

ARGUMENT

Petitioner contends (Pet. 3-9) that the court of appeals erred in determining that, assuming arguendo that the warrant affidavit in this case failed to establish probable cause, the good-faith exception to the exclusionary rule applied. Petitioner argues that the good-faith determination rested on earlier decisions that held that facts outside the four corners of the warrant affidavit may be considered in the good-faith analysis, and he further argues that those earlier decisions are incorrect. Pet. 4-6. The petition should be denied. Contrary to petitioner's arguments, an analysis

of good faith properly takes account of the totality of the circumstances, including facts known to the affiant but not included in the warrant affidavit. In any event, this case would be an unsuitable vehicle for considering any disagreement in the court of appeals on that point. It is not clear that the court of appeals relied on facts outside the warrant affidavit in determining that the good-faith exception applied, and the affidavit itself would have been sufficient to establish good faith in the circuits whose methodology petitioner invokes. This Court has previously denied review of the question presented in similar circumstances, see Combs v. United States, No. 18-6702 (cert. denied Apr. 22, 2019); Campbell v. United States, 138 S. Ct. 313 (2017) (No. 16-8855); Fiorito v. United States, 565 U.S. 1246 (2012) (No. 11-7217), and the same result is warranted here.

1. a. Contrary to petitioner's arguments, a court determining whether the good-faith exception to the exclusionary rule applies may properly consider the totality of the circumstances, including facts known to law enforcement officers but not included in the warrant affidavit. The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). This Court has explained that in order to justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it,

and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. Herring v. United States, 555 U.S. 135, 144 (2009); see Davis v. United States, 564 U.S. 229, 236-239 (2011).

Leon recognized a good-faith exception to the exclusionary rule in the context of search warrants. The Court explained that application of the exclusionary rule is "restricted to those areas where its remedial objectives are thought most efficaciously served." 468 U.S. at 908 (citation omitted). It observed that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." Id. at 922. The Court thus held that evidence should not be suppressed if officers acted in an objectively reasonable manner in relying on a search warrant, even if the warrant was later deemed deficient. Ibid. The Court noted that in some cases an officer's reliance would not be objectively reasonable because the officer lacked "reasonable grounds for believing that the warrant was properly issued," such as when a warrant was "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Id. at 923 (citation omitted). The Court has explained, however, "that the threshold for establishing" such a deficiency "is a high one, and it should be." Messerschmidt v.

Millender, 565 U.S. 535, 547 (2012). And it has emphasized that whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" is to be decided based on "all of the circumstances." Leon, 468 U.S. at 922 n.23.

Petitioner is mistaken in suggesting (Pet. 6-7) that Leon bars consideration of information outside of the four corners of the warrant affidavit in the good-faith analysis. Although Leon makes clear that an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant" must be "objectively reasonable," the Court in Leon held that "all of the circumstances * * * may be considered" when deciding whether objective reasonableness is established. 468 U.S. at 922-923 & n.23; accord Herring, 555 U.S. at 145 (explaining that the good-faith inquiry is based on "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances'" and that "[t]hese circumstances frequently include a particular officer's knowledge and experience") (quoting Leon, 468 U.S. at 922 n.23). Indeed, Leon itself listed a circumstance outside the four corners of the affidavit -- "whether the warrant application had previously been rejected by a different magistrate" -- as among the circumstances that courts might consider. 468 U.S. at 923 n.23. And in a companion case decided the same day as Leon, the Court

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

That approach accords with the principles that underlie the good-faith doctrine and the exclusionary rule more generally. This Court has explained that suppression is appropriate "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." Davis, 564 U.S. at 238 (citation and internal quotation marks omitted). Agents do not engage in any "deliberate, reckless, or grossly negligent" conduct when they omit incriminating facts that would have only helped them gain the magistrate's approval. Instead, at most, agents in that circumstance commit the type of negligent omission for which this Court has indicated that suppression of evidence is not ordinarily appropriate. Ibid. Moreover, officers already have considerable incentives to include facts supporting probable cause in their search warrant affidavits, because doing so increases the likelihood that the magistrate will issue a warrant. Those existing incentives suggest that any additional marginal benefit that a narrow construction of the good-faith doctrine might theoretically provide in deterring officers from omitting inculpatory facts from warrant applications does not outweigh the

high social costs of a suppression remedy. See Herring, 555 U.S. at 141.

b. In this case, suppression was unwarranted because the warrant affidavit established probable cause or, at a minimum, was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted).

The affidavit explained that officers had determined through their investigation that Jesse Garcia was operating a large-scale methamphetamine trafficking organization that received between 75 pounds and 100 pounds of methamphetamine per month. Pet. App. 39a. It set out information from a confidential source regarding Garcia's drug-trafficking operation and it detailed seizures of drugs and currency connected to the conspiracy. Id. at 39a-40a. Further, the affidavit explained that agents believed the location to be searched was being used as a stash house, explained that surveillance established that one member of the conspiracy was at the address "nearly daily," and noted that Rojas-Andrade "frequently stop[ped]" by the address. Id. at 39a. In addition, it stated that just two days before the warrant was obtained, two individuals who had been repeatedly observed at the stash-house address were observed traveling from the stash house to a Walmart, wiring $1000 to a suspected co-conspirator, and then traveling back to the stash-house address. Id. at 39a-40a.

As the district court found, the facts in the affidavit "g[ave] the issuing judge more than sufficient probable cause to order a search of the [stash] house" without regard to whether the affidavit also adequately alleged the basis for the statement that the traffic stop and methamphetamine seizure on August 19 would occur. Pet. App. 33a; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"); see generally Messerschmidt, 565 U.S. at 553.* At minimum, given the facts in the affidavit, "[t]his [was] not a situation * * * in which the warrant was facially deficient" or would be properly described as "'so lacking in probable cause as to render official belief in its existence entirely unreasonable.'" Pet. App. 34a (citation omitted); see id. at 14a. That is reinforced by officers' knowledge of intercepted communications that substantiated the affidavit's statement that officers expected Garcia to pick up 50 pounds of methamphetamine on August 19 or August 20. See id. at 7a-8a (describing calls).

2. "[A] majority of circuits" to consider the question have "taken into consideration facts outside the affidavit when

* In Messerschmidt, the Court held that police officers who executed a warrant-authorized search of a residence were entitled to qualified immunity from damages under 42 U.S.C. 1983. See 565 U.S. at 539. In so holding, the Court explained that the Leon good-faith standard is the "same standard" as the "clearly established" standard in the Section 1983 context. Id. at 546 n.1 (citations omitted).

determining whether the Leon good faith exception applies." United States v. Martin, 297 F.3d 1308, 1319 (11th Cir.), cert. denied, 537 U.S. 1076 (2002); see id. at 1320 (considering information known to officer but not included in affidavit in making good-faith determination); see also United States v. Farlee, 757 F.3d 810, 819 (8th Cir.) ("[W]hen assessing the officer's good faith reliance on a search warrant under the Leon good faith exception, we can look outside of the four corners of the affidavit and consider the totality of the circumstances, including what the officer knew but did not include in the affidavit."), cert. denied, 135 S. Ct. 504 (2014); United States v. McKenzie-Gude, 671 F.3d 452, 461 (4th Cir. 2011) (concluding that a court may consider "undisputed, relevant facts known to the officers prior to the search" but inadvertently not disclosed to the magistrate, as part of good-faith analysis); United States v. Taxacher, 902 F.2d 867, 871-873 (11th Cir. 1990) (relying on facts known to officer but not presented to magistrate in determining "whether the officer acted in objective good faith under all the circumstances") (emphasis omitted), cert. denied, 499 U.S. 919 (1991); see also United States v. Procopio, 88 F.3d 21, 28 (1st Cir.) (applying Leon where "only omission [in an affidavit] was the failure to explain how the agent -- who had ample basis for the contention -- knew that" place to be searched belonged to subject of search), cert. denied, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997).

As petitioner notes (Pet. 8), some courts of appeals have, at least in some circumstances, disapproved of consideration of facts outside the four corners of the search warrant affidavit in the Leon analysis. United States v. Knox, 883 F.3d 1262, 1272-1273 (10th Cir.), cert. denied, 139 S. Ct. 197 (2018); United States v. Laughton, 409 F.3d 744, 751 (6th Cir. 2005); see United States v. Hove, 848 F.2d 137, 140 (9th Cir. 1988); United States v. Koerth, 312 F.3d 862, 869 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003); but see United States v. Dickerson, 975 F.2d 1245, 1250 (7th Cir. 1992) (concluding that the good-faith exception applied based on facts known to officers at the scene but not disclosed to the magistrate), cert. denied, 507 U.S. 932 (1993); United States v. Mendonsa, 989 F.2d 366, 369 (9th Cir. 1993) (determining that good-faith exception applied because detective "sought advice from county attorneys concerning the substantive completeness of the affidavit before he submitted it to the magistrate" and "the attorney advised him that the affidavit seemed complete").

Petitioner's case does not present a suitable vehicle for addressing any disagreement, however. First, although the court of appeals cited its prior decision in United States v. Proell, 485 F.3d 427, 430 (2007), for the proposition that the good-faith exception applies when "under the totality of the circumstances, officers' reliance on [a] warrant was objectively reasonable," and noted that "'information known to the officers but not presented

to the issuing judge'" may be considered, Pet. App. 14a (citation omitted), it is not clear that the court's good-faith determination rested on facts outside the affidavit. The district court had found that the affidavit itself was not "facially deficient" or "'so lacking in probable cause as to render official belief in its existence entirely unreasonable.'" Id. at 34a (citation omitted). And in the absence of a more detailed discussion of reasons why the court of appeals agreed that the officers' reliance on the warrant was objectively reasonable, see id. at 14a, it is not clear that the court of appeals' determination rested on facts outside the affidavit.

Second, the officers' reliance on the warrant here would meet the good-faith standard developed by the courts on whose decisions petitioner relies. See Pet. 8 (citing Laughton, 409 F.3d at 751; Hove, 848 F.2d at 140). In Laughton, the Sixth Circuit explained that the good-faith exception applies when there is "some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be searched." 409 F.3d at 749; see also id. at 750 (good faith exception applied where the affidavit contained "some connection, regardless of how remote it may have been, between the criminal activity at issue and the place to be searched") (emphasis omitted). Similarly, in the Ninth Circuit it suffices if the affidavit in some fashion "link[s]" the defendant to the place to be searched, even if the affidavit is

not "'the model of thoroughness.'" United States v. Crews, 502 F.3d 1130, 1137 (2007) (citation omitted).

The affidavits at issue in Laughton and Hove fell short of these courts' good-faith standards, but the affidavit in this case would not. The affidavit in Laughton "failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit," and "also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there," 409 F.3d at 747, while the affidavit in Hove "offer[ed] no hint as to why the police wanted to search this residence," did not "link this location to the defendant," and did "not offer an explanation of why the police believed they may find incriminating evidence there." 848 F.2d at 139-140.

By contrast, the affidavit in this case contained far more than a "modicum" of evidence linking the Wisconsin stash house to methamphetamine trafficking. See Pet. App. 39a-40a. It explained that Garcia ran a large-scale methamphetamine operation, detailed seizures associated with the drug conspiracy, and explained that agents believed that Rojas-Andrade and others likely were protecting a large quantity of methamphetamine at the stash house. Ibid. It also set out evidence linking the stash house to the conspiracy, including the fact that one conspirator was there on a daily basis, that Rojas-Andrade was frequently there, and that

individuals had just been surveilled leaving the house, wiring money to a suspected co-conspirator, and then returning to the house. Ibid. Any deficiency in the probable cause concerning officers' understanding that Garcia would take some of the methamphetamine out of the stash house would not suggest that the affidavit failed to show probable cause that the stash house contained evidence of drug trafficking. A case in which it is not clear whether the good-faith determination rested on facts outside the warrant affidavit, and in which no serious basis exists for concluding another circuit would have ordered suppression, is not a suitable vehicle for addressing the relevance of facts outside the warrant affidavit in good-faith analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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