No. 19-5444

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Andrew Blake Moorehead — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

6th Circuit United States Appeals Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Blake Moorehead #27670-076
(Your Name)

PO Box 9000 Low
(Address)

Forrest City, AR 72336
(City, State, Zip Code)

No Phone Number
(Phone Number)

QUESTION(S) PRESENTED

1. When a warrant is void ab initio, does the Good-Faith exception to the exclusionary rule apply?

2. Does a Network Investigative Technique (NIT) warrant violate Federal Crim. P. 41(b) and 28 U.S.C. 636(a)?

3. Does a Network Investigative Technique (NIT) warrant violate an American citizen's Fourth Amendment right?

4. When a magistrate judge issues a warrant out of jurisdiction, does the Good-Faith exception to the exclusionary rule apply to a warrant that is void ab initio?

5. Was it objectively reasonable for the government to seek and rely upon a warrant to search computers nationwide under a rule that only permitted magistrate judges to authorize searches within their own districts?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 9, 2019.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 4

Unreasonable searches and seizures.

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.

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Comes now, Andrew Moorehead, Petitioner in the above styled and titled action and for his cause requests this Court to accept his Petition for Writ of Certiorari, and grant him his requested relief.

Petitioner's attorney, Diane Smothers, files a Direct Appeal motion (Case No. 18-5216), based on the unconstitutional NIT (Network Investigative Technique) warrant the Government used to obtain evidence in this case.

The Petitioner's argument claimed the NIT warrant was void ab initio, as it was used in contravention of Fed. Crim. P. 41(b) and 28 U.S.C. §636(a). This breach rose to the level of Fourth Amendment violation because the warrant was issued beyond the jurisdiction of the magistrate judge, rendering it void ab initio.

The Petitioner went on to claim that should the panel find itself bound by prior circuit precedent holding that the Good-Faith exception to the exclusionary rule can be applied to warrants that are void ab initio, the Petitioner avers that the district court erred in its analysis and application of the Good-Faith exception in his case. When weighing the benefits and deterrence against societal costs, the district court made an incorrect assumption that deterrence would no longer be necessary because Rule 41(b) has since been amended, and there will be no further NIT warrants. To date, however, at least 70 individuals have been prosecuted as a result of the NIT warrant, and the government collected enough information with the NIT warrant to prosecute thousands more. In fact, one court has documented that the FBI set a limit for itself of 8,000 new investigations due to its own staffing limitations.

Moreover, the district court improperly shifted the burden of persuasion to the Petitioner when making its analysis, stating that he offered no evidence that the FBI agents who presented the NIT warrant to the Virginia magistrate judge did so with the intent to evade Rule 41(b), or with reckless disregard for its limits of her authority or in any way with gross negligence. In this Circuit, the burden is upon the government to demonstrate good faith. The government offered no evidence that those involved in the case investigation acted in good faith.

However, the Petitioner did present to the district court the fact that the government was aware, at some of its highest levels, that there was a jurisdictional problem with seeking the NIT warrant under Rule 41(b), as it was drafted at the time. The government has already submitted information to certain members of the rules committee, who were working on possible changes to the rule for this very reason.

The Petitioner also submitted documents that demonstrated the attorney and agents involved in this investigation were using forms designed to seek the warrant under Rule 41(b), the usual jurisdiction of a magistrate within her own district, not outside her district. Any reasonably trained agent would have recognized this fact, much less the attorneys

involved. the warrant was quickly submitted to a magistrate judge within a two hour window in a district where there were nearly a dozen Article III district judges. Had a district judge issued the warrant, the same jurisdictional concerns would not arise. Yet, a district judge might question his authority to issue the warrant consistent with the Fourth Amendment.

The purpose of the exclusionary rule is not only to deter deliberate, reckless, or grossly negligent conduct, but in some circumstances, recurring or systematic negligence. The district court did not address systematic negligence in its order. Not only was the government's application for the NIT warrant reckless and grossly negligent, it was probative of systematic error and reckless disregard of constitutional requirements.

The Petitioner's case is far from the sole instance in which the government sought and obtained an NIT warrant despite knowing of the suspect territorial limitations of Rule 41(b). For these reasons, the district court's balancing analysis was incorrect.

REASONS FOR GRANTING THE PETITION

ISSUE I: THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY TO WARRANTS THAT ARE VOID AB INITIO.

Standard of Review

In evaluating the denial of a motion to suppress evidence, the district court's factual findings are reviewed for clear error and its conclusions of law de novo. UNITED STATES v. JACKSON, 682 F.3d 448, 452 (6th Cir. 2012). "A factual finding will only be clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." UNITED STATES v. ADAMS, 583 F.3d 457, 463 (6th Cir. 2009). The evidence is reviewed "in the light most likely to support the district court's decision." UNITED STATES v. HIGGINS, 557 F.3d 381, 389 (6th Cir. 2009).

Argument

Though the district court ultimately determined that it did not have to decide whether the Network Investigative Technique (NIT) warrant ran afoul of Rule 41(b) or 28 U.S.C. §636, it is important to the analysis to first establish whether the warrant was void ab initio or not. If the Court finds that the warrant did not violate Rule 41(b), then there would be no basis to grant the suppression motion and the district court's ruling could simply be affirmed. If it did violate Rule 41(b), then it must be determined whether the breach rose to a Fourth Amendment violation because it was issued by a magistrate judge beyond her jurisdiction, rendering it void ab initio. If the Court finds no such Fourth Amendment violation, there would again be no basis to grant the suppression motion. If a Fourth Amendment violation did occur, however, it is then that the question of whether the good-faith exception to the exclusionary rule applies when a warrant is is void ab initio. The Petitioner avers the warrant ran afoul of Rule 41(b) and §636, rendering it void ab initio, that the violation was of a constitutional magnitude, and that the exclusionary rule does not apply to warrants that are void ab initio.

A. THE NIT WARRANT VIOLATED RILE 41(B) AND 28 U.S.C. §636.

The district court found persuasive certain reasoning that posited the NIT was a functional equivalent of a tracking device, such that Fed. R. Crim. P. 41(b)(4) would authorize the magistrate judge to issue the warrant. At least two circuit courts have now rejected the reasoning the district court found persuasive in this case, finding that the Virginia magistrate

judge violated Rule 41(b) by issuing the NIT warrant. See UNITED STATES v. WEREDENE, No. 16-3588, 2018 U.S. App. LEXIS

4089 (3rd Cir. Feb 21 2018); UNITED STATES v. HORTON, 863 F.3d 1041 (8th Cir. 2017). The Petitioner urges this court to instruct the Sixth Circuit to follow these sister circuits. As the Sixth Circuit has stated, "While analogous decisions from our sister circuits are not binding, we have repeated recognized their authority." See ASS'N OF CLEVELAND FIRE FIGHTERS v. CITY OF CLEVELAND, 502 F.3d 545, 553 n.6 (6th Cir. 2007).

It is helpful to begin with a summary of the jurisdiction of federal magistrate judges, as it existed at the time the NIT warrant was issued in this case. The Federal Magistrates Act, 28 U.S.C. § 636(a), authorizes federal magistrate judges to exercise the "powers and duties conferred...by the Rules of Criminal Procedure" in three geographic areas: "[1] within the district in which the sessions are held by the court that appointed the magistrate judge, [2] at other places where the court may function, and [3] elsewhere as authorized by law." 28 U.S.C. § 636(a); see also UNITED STATES v. KRUEGER, 809 F.3d 1109, 1118 (10th Cir. 2015) (Gorsuch, J., concurring). Accordingly, § 636(a) creates "jurisdictional limitations on the power or magistrate judges" because it "expressly and independently limits where those powers will be effective." KRUEGER, 809 F.3d at 1119 (Gorsuch, J., concurring); see also UNITED STATES v. HAZLEWOOD, 526 F.3d 862, 864 (5th Cir. 2008) ("In the Federal Magistrates Act, 28 U.S.C. § 636, Congress conferred jurisdiction to federal magistrate judge[s]"); N.L.R.B. v. A-PLUS ROOFING, INC. 39 F.3d 1410, 1415 (9th Cir. 1994) ("Federal magistrates are creatures of [§ 636(a)], and so is their jurisdiction."); GOV'T OF VIRGIN ISLANDS v. WILLIAMS, 892 F.2d 305, 309 (3rd Cir. 1989) ("The jurisdiction of federal magistrates is defined by the Federal Magistrates Act.").

Section § 636(a) thus defines the geographic scope of a magistrate judge's powers, while the Federal Rule of Criminal Procedure 41(b) , among others, defines what those powers are. 28 U.S.C. § 636(a)(1); see also KRUEGER, 809 F.3d at 1119 (Gorsuch, J., concurring). Rule 41(b) provides that a magistrate judge may "issue a warrant to search for and seize a person or property located within their own district." Fed. R. Crim. P. 41 (b)(1). At the time that the NIT warrant was issued, the Rule also authorized four exceptions to this territorial restriction: (1) for property that might be moved outside the district before the warrant is executed, Fed. R. Crim. P. 41(b)(2); (2) for terrorism investigations, Fed. R. Crim. P. 41(b)(3); (3) to install a tracking device within the magistrate judge's district that may track the movement of property outside that district, Fed. R. Crim. P 41(b)(4); and (4) to search and seize property located outside any district but within the jurisdiction of the United States, Fed. R. Crim. P. 41(b)(5). Significantly, "none of these [Rule 41(b)] exceptions expressly allow a magistrate judge in one jurisdiction to authorize the search of a computer in a different jurisdiction." HORTON, 863 F.3d at 1047.

Yet, the district court here found persuasive reasoning that would authorize the use of the NIT as a "tracking device," which is "an electronic or mechanical device which permits tracking of movement of a person or object." (See ORDER

DENYING MOT. SUPPRESS, R. 55, PID# 896-97 (quoting 18 U.S.C. § 3117(b); citing Fed. R. Crim. P. 41(a)(2)(E)).) the court equated movement of an object with the movement of information on the internet. Id. at PID# 897 The district court then found that NIT comported with Rule 41(b)(4)'s exception authorizing magistrate judges to order use of tracking devices both inside and outside of their own districts. Id.

According to the WEREDENE court, warrants issued under Rule 41(b)(4) are specialized documents that are denominated "Tracking Warrant" and require the Government to submit a specialized "Application for a Tracking Warrant." Id. (citing Administrative Office of U.S. Courts, Criminal Forms AO 102 (2009) & AO 104 (2016)). As is the case here, the FBI did not submit an application for a tracking warrant, but applied for and received a standard search warrant. ID. the term "tracking device" is absent from the NIT warrant application and supporting affidavit. Id.; (see also MOT. SUPPRESS, EXH. 3, R. 45-3, PID# 420-458.)

The Third Circuit also found that the analogy could not withstand scrutiny because the explicit purpose of the warrant was not to track movement, as required under Rule 41(b)(4), but to "obtain information" from "activating computers." WEREDENE, 2018 U.S. App. LEXIS 4089, at *15 (quoting language from the warrant application). The WEREDENE panel observed that the NIT was designed to search, not track, the user's computer for the IP address and other identifying information, and to transmit that data back to a government controlled server. Id. Hence, reasoned the WEREDENE panel, although the seized information assisted the FBI in identifying a user, it provided no information as to the computer's or user's precise and contemporary location, as a tracking device would.

The WEREDENE panel also found it significant that Rule 41(b)(4) requires that a tracker be "installed within the district it was ordered." Id. at *16 (quoting Fed. R. Crim. P. 41(b)(4))). the defendant's computer, like Mr. Moorehead's computer, was not physically located in the Eastern District of Virginia, so in the panel's view, it was difficult to imagine a scenario where the NIT was "installed" on the computer. Likewise, Mr. Moorehead's computer was physically located in the Western District of Tennessee, so the same ruling has to apply here as well.

B. THE NIT WARRANT VIOLATED THE FOURTH AMENDMENT

Another issue that the district court assumed without deciding was that the violation of Rule 41(b) was constitutional and not merely procedural. (Order Denying Mot. Suppress, R. 55, PID#899.)

The Fourth Amendment provides "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..." U.S. Const. IV. The fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." CAMARA v. MUN. CT., 387 U.S. 523, 528 (1967), see SKINNER v. RY. LABOR EXECS.' ASS'N, 489 U.S. 602, 613-14 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction.") the Fourth Amendment embraces the protections against unreasonable searches and seizures that existed at common law at the time of its adoption, and the Amendment must be read as "providing at a minimum" those same protections today. KRUEGER, 809 F.3d at 1123 (Gorsuch, G. concurring) (quoting UNITED STATES v. JONES, 132 S. Ct. 945, 953 (2012)). Looking to the common law at the time of the framing it becomes obvious that a warrant issued for a search or seizure beyond the territorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all, as ultra vires and void ab initio. Id. the principle animating the common law at the time of the Fourth Amendment's framing was clear, a warrant may travel only so far as the power of its issuing official, and that principle is applicable here. Id. at 1124.

These principles underlie the Circuit's holding that, "when a warrant is signed by someone who lacks the legal authority to issue warrants, the warrant is void ab initio" and any search under a void warrant violates the Fourth Amendment. UNITED STATES v. MASTER, 614 F.3d 236, 241 (6th Cir. 2010). In MASTER, the Court found that a state judge in one Tennessee county did not have the jurisdictional authority to authorize a warrant for property in a different county. this simply did not comply with the Fourth Amendment under Federal law. See 614 F.3d at 239.

In this case, the magistrate judge not only exceeded the territorial scope of Rule 41(b), but, as a result of that violation, she also exceeded the jurisdiction that § 636(a) imposes on magistrate judges. Under 28 U.S.C. § 636(a), the magistrate judge was only authorized to to exercise the powers of Rule 41(b) under three circumstances: (1) "within the district" that appointed her, i.e.., the Eastern District of Virginia; (2) "at other places where the Eastern District of Virginia may function"; and (3) "elsewhere as authorized by law." 28 U,S.C. § 636(a). Tennessee obviously does not fall within the

confines of the Eastern District of Virginia or its places of function, and Mr. Moorehead had already shown that Rule 41(b) did not authorize the NIT warrant. the NIT warrant was therefore void ab initio because it violated § 636(a)'s jurisdictional limitations and was not authorized by any positive law. See MASTER, 614 F.3d at 239 (6th Cir. 2010); see also HORTON, 863 F.3d at 1049 ("The NIT warrant was void ab initio..."). Consequently, the breach was a Fourth Amendment violation because the NIT warrant was issued by a magistrate judge beyond her jurisdiction. this warrants suppression.

Before concluding this subsection it is also noted that the district court relied upon the case of UNITED STATES v. FRANKLIN, 284 F. App'x 266 (6th Cir. 2008), for the proposition that the void ab initio rule does not apply in cases where the issuing judge otherwise has "the authority to grant warrants." (Order Denying Mot. Suppress, R. 55, PID# 900). In FRANKLIN, like MASTER, a judge sitting in one Tennessee county issued a warrant for another Tennessee county. See 284 F. App'x at 268. The judge "claimed" to have jurisdiction under Tennessee's "interchange rules." Id. The FRANKLIN panel found the warrant valid simply because the magistrate otherwise had authority to issue under the Fourth Amendment because he was neutral and dethatched. Id. at 271. The point that was missed by the majority was eloquently stated by the lone dissenting judge in FRANKLIN: "implicit in the Fourth Amendment's requirement that a search warrant must be issued by a dethatched and neutral magistrate is the requirement that the issuing officer must act within the scope of the authority delegated to him. Id. at 273 (Clay, J. dissenting). Indeed, this aspect of FRANKLIN was distinguished, if implicitly overruled in MASTER. The MASTER panel noted that it was at least debatable in FRANKLIN whether the issuing judge had authority to issue the warrant. MASTER, 614 F.3d at 239 n.2. the MASTER panel declined to follow the FRANKLIN panel's reasoning when it determined that a warrant signed by someone who lacks the legal authority necessary to issue search warrants is void ab initio. Id. at PID# 239.

C. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY WHEN A WARRANT IS VOID AB INITIO DUE TO THE MAGISTRATE JUDGE'S LACK OF JURISDICTION.

Because Mr. Moorehead has established that Rule 41(b) was violated, and that the violation was constitutional rendering the warrant void ab intio, the issue of whether the good faith exception to the exclusionary rule should operate to allow use of evidence obtained by the government in violation of Mr. Moorehead's Fourth Amendment rights can finally be addressed. Mr. Moorehead's position is that the exclusionary rule is inapplicable to warrants that are determined void ab initio.

The exclusionary rule is a prudential doctrine created by the Supreme Court to compel respect for the constitutional guaranty to the American people to be secure against unreasonable searches and seizures. DAVIS v. UNITED STATES, 564

U.S. 229, 236 (2011). the district court was correct that the rule does not necessarily apply each time a Fourth Amendment violation occurs. See HERRING v. UNITED STATES, 555 U.S. 135, 140 (2009). Rather, the exclusionary rule aims to deter government violations of the Fourth Amendment. See KRUEGER, 809 F.3d at 1125 (Gorsuch, J., concurring) ("Even when an unreasonable search does exist, the Supreme Court has explained, we must be persuaded that 'applicable deterrence' of police misconduct can be had before choosing suppression as the right remedy for a Fourth Amendment violation." (quoting HERRING, 555 U.S. at 141)).

The good faith should not be expanded to encompass warrants issued by a judge who had no jurisdiction. This argument is consistent with both Supreme Court precedent and the longstanding principle that any action taken by a court without jurisdiction is null and void at the outset.

A warrant issued by a judge without jurisdiction presents a very different question. When a court makes an error while properly exercising jurisdiction, its order is simply voidable, meaning that it carries legal effect unless and until a party takes the necessary steps to invalidate it. BENTON v. MARYLAND, 395 U.S. 784, 797 (1969). When a court defies its jurisdiction and acts beyond the lawful bounds of its authority, however, its order is simply void. Id.

This distinction is "not merely a nicety of legal metaphysics." US CATHOLIC CONFERENCE v. ABORTION RIGHTS MOBILIZATION, INC., 487 U.S. 72, 77 (1988). It "rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exists to protect citizens from the very wrong asserted here, the excessive use of judicial power." Id. A judge acting without jurisdiction is "not acting as a court"; he is "a pretender to, not a wielder of, judicial power." UNITED STATES v. MINE WORKERS OF AMERICA, 330 U.S. 258, 310 (1947) (Frankfurter, J.,

concurring in the judgment). Hence, "all proceedings of a court beyond its jurisdiction are void." EX PARTE WATKINS, 28 U.S. 193, 197 (1830). They have no legal effect whatsoever; it is as if they never happened. For such reasons, the good faith exception does not apply in the case of a warrant issued by a judge without jurisdiction.

ISSUE II: IT WAS NOT OBJECTIVELY REASONABLE FOR THE GOVERNMENT TO SEEK AND RELY UPON A WARRANT TO SEARCH COMPUTERS NATIONWIDE UNDER A RULE THAT ONLY PERMITTED MAGISTRATE JUDGES TO AUTHORIZE SEARCHES WITHIN THEIR OWN DISTRICTS

Standard of Review

The standard of review is the same for Issue II as it was for Issue I. Mr. Moorehead therefore incorporates by reference as though set forth herein the standard of review for Issue I.

Argument

Should the court determine that MASTER controls and the good faith exception to the exclusionary rule applies to warrants that are void ab initio, Mr. Moorehead avers that the district court erred in its analysis and application of the good faith exception in his case. the district court held that suppression was not warranted because the benefit of deterrence would not outweigh the costs. (Order denying Mot. Suppress. R., 55, PID# 898-99.) the district court relied upon MASTER and HERRING for its analysis.

MASTER followed the HERRING decision, which was a 5-4 decision finding that police conduct must be "sufficiently deliberate" and "sufficiently culpable" to trigger the exclusionary rule. HERRING, 555 U.S. at 144. In the context of that case it was held that the good faith inquiry was limited to whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances. Id. at 145. the court considered the actions of all of the officers involved and found negligence as opposed to deliberate or reckless conduct, which was emphasized as crucial to the holding in the case. Id. at 140. To the extent HERRING established a balancing test to guide future courts, the one applied by the district court did not comport with the test.

The district court's main reason for finding there was no need to deter law enforcement from seeking similar warrants was because Rule 41(b) had been updated to allow for such warrants. (See Order Denying Mot. Suppress, R., 55 PID# 899.) this ignores the fact that the government has already prosecuted more than 70 other similar cases across the country. See WORKMAN v. UNITED STATES, No. 17-7042, Petition for Certiorari, at pp. 11-12 n.3 (filed Dec 5, 2017)(collecting cases). And, by all indications, the NIT procured information which the government could use to develop hundreds, if not thousands

more. In fact, one court has documented that the investigation so far has led to over 1,000 prosecutions worldwide, while here in the United States, the FBI set a limit for itself of 8,000 new investigations due to agency staffing limitations. See HALL, 2017 U.S. Dist. LEXIS 213465, at *9. Hence, an assumption that this issue need not be decided because Rule 41(b) was amended is incorrect.

The district court's reasoning further stated that Mr. Moorehead had cited no evidence that the FBI agents who presented the NIT warrant to the magistrate judge in the Eastern District of Virginia did so with any intent to evade Rule 41 (b), or with reckless disregard for the limits of the magistrate's authority or in any way with gross negligence. this finding is flawed.

While Mr. Moorehead disputed that he failed to submit any evidence of attempts to evade Rule 41(b), and this is addressed further below, the first error is that the district court improperly placed the burden upon Mr. Moorehead to demonstrate that the Leon good faith exception would not apply. The Sixth Circuit has never actually addressed who has the burden in a published case, but in an unpublished case the Sixth Circuit has held that the burden of demonstrating Leon good faith rests with the government.

In this case, the government offered no evidence on the issue of good faith. Yet it is clear from the filings that law enforcement officers demonstrated, at a minimum, a reckless disregard for proper procedure. At the time the government applied for the NIT warrant in February 2015, several courts had ruled that a violation of Rule 41(b)'s territorial limitations could lead to suppression of evidence. The D.C. Circuit's decision in UNITED STATES v. GLOVER, 736 F.3d 509 (D.C. Cir. 2013), which suppressed a wiretap issued in one district and executed in another as a violation of Rule 41(b), was decided in 2013. See GLOVER, 736 F.3d at 514-15. Thus, in February 2015 the government was on notice that courts disapproved of the government violating the jurisdictional limitations of Rule 41.

Perhaps more pertinent here, the district court's analysis ignores the fact that the NIT warrant was unmistakably sought under Rule 41(b)(1), not 41(b)(4), which only allows within-district searches. Rule 41(b) simply states that magistrate judges can authorize a search for property "located within the district." As has been discussed, the captions of both the application and the warrant described the "property to be searched" as computers that access "Website A." And just below the caption, both documents stated that the "property to be searched" was "located in the Eastern District of Virginia," the district in which the warrant was sought. Mr. Moorehead lived in the Western District of Tennessee, well beyond the jurisdiction of the magistrate judge in the Eastern District of Virginia. The documents therefore mirror the language of Rule 41(b)(1), and are not suggestive of any other subsection of the rule. Any "reasonably well trained" agent would have known and recognized that fact. HERRING, 55 U.S. at 145.

The government moved Website A's server from North Carolina to Virginia. the government did not have a warrant to

remove the server from North Carolina to Virginia. One court has explained that, when the FBI transferred the operation from North Carolina to Virginia, Website A was taken offline for a couple of hours. HALL, 2017 U.S. Dist. LEXIS 213465, at *8. Before putting Website A back online, the FBI presented the NIT warrant to the magistrate in the Eastern District of Virginia. Id. The magistrate judge was aware that the warrant would allow the capture of information and lead to subsequent prosecutions of individuals outside the district. Id. Hence, there can be no credible arguments that officers "reasonably" believed that none of Website A's members were located outside of Virginia. Yet, it is evident from the plain language of Rule 41(b) that no interpretation would allow the search of potentially thousands of computers located outside the authorizing district.

And, as presented by Mr. Moorehead below, the government was clearly aware in any event that the NIT warrant was not authorized when it made its application in February 2015. By then, a memorandum addressed to the Committee on Rules of Practice and Procedure, dated May 5, 2014, introduced a proposed amendment to Rule 41(b) that would authorize the use of the NIT warrant. See Report of the Advisory Committee on Criminal Rules, May 29-30, 2014, at 482-486. Specifically, the then-proposed Rule 41(b)(6) would authorize a court "to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically located within or outside of the district." Id. at 485. the memorandum stated that the reason for the proposal was that the territorial venue provisions created "special difficulties" for the government when investigating crimes involving electronic information. Id. at 483.

Perhaps most telling, the memorandum introducing the proposal stated that the change "had its own origins in a letter from Acting Assistant Attorney General Mythili Raman." Id. at 483. the memorandum also stated the Department of Justice provided the committee with several examples of affidavits seeking a warrant to conduct such a search, and that one judge had recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of a computer was not known. Id. at 484. (citing In re Warrant to Search a Target Computer at a Premises Unknown, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (wherein the judge suggested that there might well be a good reason to update the territorial limitations of Rule 41(b) in light of advancing computer search technology)). It is thus not feasible that the government was unaware that such searches were not authorized under Rule 41(b). the fact that the proposal required an entirely new subsection to Rule 41(b), rather than clarification to an existing subsection, also determines that there was no reasonable interpretation of any of the provisions in Rule 41(b) that would have permitted such a search in 2015.

In MASTER, the Sixth Circuit provided guidance on Leon in the precise context of warrants void ab initio. There, the police executed a search warrant signed by a magistrate who had neither "authority" nor "jurisdiction" to issue the warrant. See MASTER, 614 F.3d at 239. The Sixth Circuit remanded to the district court to consider the potential application of Leon's

good faith exception under these circumstances. See Id., at 243.

The facts of this case are far more analogous to SCOTT than MASTER. As an initial matter, Mr. Moorehead had nothing to do with the fact that the NIT warrant was void at its inception. the government sought the NIT Warrant in secrecy and on its own terms; hence, any responsibility for the matter was the government's alone. But of MASTER, 614 F.3d at 243 (suggesting that the Leon analysis weighed in government's favor because the defendant himself caused the confusion resulting in a void warrant.)

Moreover, the "officers" in this case included special agents and attorneys at multiple levels within the FBI and DOJ Criminal Division. The government seized Website A in 2015. Rather than shutting down the site, the United States decided to keep it open and running for two weeks - in effect, distributing thousands of child pornography images worldwide. This database strategy (See LEVIN, 186 F. Supp. 3d at 37 n.12) required the highest levels of approval and authority. At a minimum, the Website A investigation involved FBI Special Agents, Assistant United States Attorneys, A United States Attorney, and at least one DOJ Criminal Division Deputy Assistant Attorney General. (See, e.g., Mot. Suppress, Exh. 2 R. 45 -2, PID# 326, 328-30, 373, 381, 385, 415, 419.) The investigation and the NIT warrant are therefore attributable to multiple agents and attorneys rather than any single "officer." See Leon, 468 U.S. at 923 n.24 (requiring an expansive understanding of "officer" under the good faith analysis.)

This presents a significant hurdle for the government because as discussed, the DOJ objectively knew that the NIT warrant was either void or on suspect footing at best. As early as 2013, when the judge in the Southern District of Texas issued his opinion regarding Rule 41(b)'s territorial limitations and suggesting the rule might need to be amended, the DOJ recognized that Rule 41(b) did not directly address the special circumstances that arise when officers execute search warrants, via remote access, over modern communication networks such as the internet. hence, the DOJ and FBI objectively knew that the NIT warrant was void or suspect at best but the government persisted in executing the warrant. To make matters worse, the government apparently made "minimal attempt" to ascertain the appropriate judges with actual authority to approve the NIT warrant. Cf, MASTER, 614 F.3d at 242 n.3 (observing that the Sixth Circuit in SCOTT found an absence of good faith because "in that case, the officers made at best minimal attempts to find available, active magistrates before presenting the warrant to the retired judge").

In February 2015, the Eastern District of Virginia had nearly a dozen Article III district judges in active service. See generally www.vaed.uscourts.gov. Any one of the district judges could have lawfully issued the NIT warrant. See LEVIN, 186 F. Supp. 3d at 43 ("With respect to district judges, neither Rule 41(b) nor Section 636(a) of the Federal Magistrates Act restricts their inherent authority to issue warrants consistent with the Fourth Amendment.") But there is no evidence that the FBI and DOJ meaningfully examined the interplay between Rule 41(b) and Website A to present the NIT warrant to an available district judge. In fact, the agents quickly sought the warrant while Website A was offline for a couple of hours while being moved from North Carolina to Virginia.

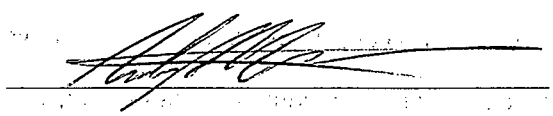
The United States always reiterates the nature of "reprehensible charges" as every reason to break the law and violate U.S. citizens' constitutional rights. The lower courts are notorious for allowing this to continue, and this is not the first time these issues have been presented to the Supreme Court of the United States. The American citizens look to the Supreme Court to advocate and overturn these gross violations that are just as criminal as the charges before them. Let us not forget, according to the law of this highest of Courts, a convicted felon is not a second class citizen and deserves not to be treated as such.

Regardless of the nature of these charges the Supreme Court has ruled many times over that statutes constructed through "morals" are unconstitutional. No doubt, this Court has stated its disdain towards these particular charges, which in effect is a "moral judgment call", considering that persons who are convicted of murder, homicide, assault, and battery receive less time in prison than those convicted of "possession of illegal images". People being convicted of being in possession of "illegal images" are being treated and viewed worse by the lower courts as well as this Court, than people who have taken another person's life, or assaulted them so badly that they are physically unable to recover. To prove this, this Court has granted relief for murderers and others who have perpetrated crimes in the same vain as murder, but have yet to grant relief to anyone convicted of 28 U.S.C. § 2252(a)(2) or § 2252(a)(4)(8). Mr. Moorehead does not wish to anger this Honorable Court, but only wants to state the obvious and the truth and to petition this Court to seriously review the statutes for serious constitutional violations.

CONCLUSION

It is for all of these very reasons that Petitioner, Andrew Blake Moorehead, respectfully requests this Court to accept his Petition for Writ of Certiorari and grant him his relief, to overturn his conviction, and vacate his sentence.

Respectfully submitted,



Date: May 17, 2019