No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREL LEON JORDAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a district court reviewing a motion to suppress evidence obtained pursuant to a defective search warrant may consider evidence outside the four corners of the warrant affidavit in determining whether the executing officers' reliance on the warrant was objectively unreasonable, such that the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), applies?

II. Whether the district court erred by denying Mr. Leon's motion to compel production of evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972)?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Jerel Leon Jordan.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 22 May 2019, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming the denial of Mr. Jordan's motion to suppress evidence and, following a bench trial, convictions of (1) possession with the intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B); (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1), 924. The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"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." U.S. Const. amend. IV.

STATEMENT OF THE CASE

Investigation and arrest of Jerel Jordan

In the fall of 2016, the narcotics unit of the Elizabeth City, North Carolina, Police Department began investigating Jerel Jordan after hearing from multiple confidential informants and other people arrested for drug offenses that Mr. Jordan was selling crack cocaine. J.A. 20-21. The police, including unit supervisor Ryan Boyce, an ATF task force officer, conducted surveillance of Mr. Jordan and his residence at 99 Red Cedar Run in Elizabeth City. J.A. 20-22; *see* J.A. 12. Boyce and other officers believed that Mr. Jordan was a mid-level dealer of crack cocaine, receiving a supply and then distributing it to several smaller dealers in Elizabeth City. J.A. 21-22.

After confirming Mr. Jordan's address, officers performed a trash pull in the early morning hours of 28 December 2016. J.A. 22. In trash obtained from 99 Red Cedar Run, officers found cellophane wrapping that field-tested positive for the presence of cocaine. J.A. 22-23. Officers also found a small cellophane bag with what appeared to be "crumbs" of cocaine; the small bag also field-tested positive for cocaine. J.A. 23.

Based on the results of the trash pull and the preceding investigation, Tim Bateman, a narcotics agent with the Elizabeth City Police Department, applied for and obtained a search warrant for the 99 Red Cedar Run residence. J.A. 90. Bateman appeared before magistrate Donna L. Holland. *See* J.A. 90. An affidavit from Bateman was attached to the search warrant. J.A. 83-84.

At the top of the affidavit, Bateman wrote "In the matter of: 204 C Roanoke Ave." *See* J.A. 83.[1] In his affidavit, Bateman stated that through "surveillance, interviews, debriefs, confidential sources and history," he knew Mr. Jordan to be a "major source of cocaine." J.A. 83. Bateman wrote that he had interviewed confidential sources and had found them to be truthful and reliable. J.A. 83. He also wrote that the informants' statements had been corroborated through more than fifty hours of surveillance of Mr. Jordan, and that officers had seen Mr. Jordan using his residence at 99 Red Cedar Run to store and sell cocaine. J.A. 83. Bateman recited that he and other officers had observed suspected hand-to-hand drug transactions. J.A. 83. He also stated that he and other officers had made several drug arrests "over the past several months," and that suspects had admitted to purchasing cocaine from Mr. Jordan. J.A. 83. Bateman wrote that Mr. Jordan had an arrest record including a cocaine-related offense. J.A. 83-84. Finally, Bateman described the trash pull, stating that agents had found a small amount of crack cocaine, and several vacuum bags that field-tested positive for cocaine. J.A. 84. Bateman wrote that officers had collected mail from the trash addressed to Mr. Jordan at 99 Red Cedar Run. J.A. 84.

Nothing in the affidavit indicated when officers had conducted surveillance of Mr. Jordan, when they had seen what they suspected were hand-to-hand drug

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[1] Bateman later crossed out "204C Roanoke Ave" and wrote, by hand, "99 Red Cedar Run," Mr. Jordan's address. J.A. 211-13. Bateman could not recall whether he made the correction before or after the magistrate issued the search warrant. J.A. 213.

transactions, or when they conducted the trash pull. J.A. 83-84; *see* J.A. 33-34. Although Bateman wrote that suspects arrested "over the past several months" had talked about Mr. Jordan's drug activity, he did not say whether the suspects told police when they had purchased drugs from Mr. Jordan. J.A. 83; *see* J.A. 33-34.

According to the signed search warrant application, it was supported by Bateman's attached affidavit. J.A. 81. Immediately beneath the signatures of the magistrate and Bateman, there was a section to record whether any additional information had been submitted in support of probable cause:

> ☐ In addition to the affidavit included above, this application is supported by additional affidavits, attached, made by _____
> _____
>
> ☐ In addition to the affidavit included above, this application is supported by sworn testimony, given by _____
> _____
>
> This testimony has been (*check appropriate box*) ☐ reduced to writing ☐ tape recorded and I have filed each with the clerk.

J.A. 81. This section of the search warrant application was left blank, indicating that Bateman's affidavit was the only information supporting the magistrate's probable cause determination. *See* J.A. 81.

Officers executed the search warrant on the afternoon of December 28. J.A. 23. Boyce, dressed in an ATF vest, approached Mr. Jordan and advised him of the warrant. J.A. 24, 36. Mr. Jordan immediately asked, "Am I going federal?" J.A. 13. Mr. Jordan was compliant during the search. J.A. 24. Mr. Jordan told Boyce there was no one else in the house, and that there was a handgun in a dresser

drawer in the bedroom. J.A. 24.

Agents searching 99 Red Cedar Run found a .45 caliber Ruger P90 semi-automatic pistol and a total of 397 grams of cocaine in the residence, including some compressed powder, or possibly crack cocaine. J.A. 13, 24-26.[2] Officers also found more than $2,000 in cash, digital scales, two Dixie cups that appeared to have been used for mixing and cutting cocaine, and a money-counting machine. J.A. 26-27.

Federal charges and pretrial proceedings

On 30 December 2016, two days after the execution of the search warrant, Mr. Jordan was charged by criminal complaint with one count of possession with the intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(a), one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c), and one count of possession of a firearm having been previously convicted of a felony in violation of 18 U.S.C. §§ 922(g), 924. J.A. 11. Boyce gave an affidavit in support of the criminal complaint. J.A. 12-15. In the affidavit, Boyce recounted his unit's findings from the search of Mr. Jordan's home. J.A. 12-13.

At Mr. Jordan's probable cause and detention hearings on 6 January 2017, Boyce admitted that nothing in the search warrant affidavit showed the dates on

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[2] Boyce's testimony about the amount of cocaine recovered was inconsistent. In his affidavit, Boyce stated that officers found 381 grams of crack cocaine and 22 grams of powder cocaine. J.A. 13. During the probable cause hearing, he testified that agents found a total of 397 grams of cocaine, and could not immediately determined whether the cocaine was powder or crack. J.A. 26.

which the officers had conducted any part of their investigation. J.A. 33-35. Mr. Jordan's counsel argued that for the officers to establish probable cause to support the search warrant, they were required to make allegations showing the time when the information about criminal activity was collected. J.A. 37-39. Mr. Jordan's counsel contended that the evidence against Mr. Jordan, including the physical evidence and his post-arrest statements, was obtained through a facially defective search warrant. J.A. 39, 42.

The Government's counsel argued that it was common practice to leave required dates and times out of a written probable cause affidavit. J.A. 39. The Government's counsel stated that Bateman may have orally supplemented his affidavit by giving the magistrate dates and times related to the investigation, but admitted that the Government had no evidence that Bateman did so. J.A. 40. Although Bateman was present at the courthouse during the probable cause hearing, the Government did not call Bateman to testify. *See* J.A. 203-04.

The United States Magistrate Judge found probable cause to charge Mr. Jordan, reasoning that the search warrant was not so deficient as to destroy probable cause for the charges, but noting that Mr. Jordan could pursue a suppression motion at the appropriate time. J.A. 42-43.

After the probable cause hearing, Mr. Jordan was indicted on the same charges in the criminal complaint. *See* J.A. 4.

At the request of the Government's counsel, on 6 February 2017, Bateman signed a supplemental report stating that, before the search warrant was issued, he

had provided oral testimony to the magistrate about the specific dates and times when the information about Mr. Jordan's alleged drug activity was obtained. J.A. 110; *see* J.A. 88, 152. Bateman wrote that he provided sworn testimony that agents had been conducting an investigation of Mr. Jordan since September 2016, that they had observed hand-to-hand transactions on several dates, and that they had interviewed James Calvin Brooks on 8 September 2016, and Mr. Brooks said he had been purchasing cocaine from Mr. Jordan every day for more than one year. J.A. 110. Bateman also wrote that he had testified to the magistrate that the trash pull was conducted the morning of 28 December 2016, the same day Bateman applied for the search warrant. J.A. 110.

On 5 April 2017, Mr. Jordan moved to suppress the fruits of the search of his residence. J.A. 64. Mr. Jordan argued that the search warrant affidavit was insufficient to support the magistrate's probable cause determination, because of the absence of time allegations necessary to show that the information was not stale. J.A. 66, 69-71. Mr. Jordan argued that, based on the signed search warrant application, the magistrate had relied only on Bateman's deficient affidavit, and no other information. J.A. 66-67, 71-72. Because state law required that, before the magistrate could consider oral testimony in support of probable cause, the testimony must be reduced to writing or recorded, Mr. Jordan argued that the magistrate could not consider any oral testimony. J.A. 71-72.

In the alternative, Mr. Jordan argued that the federal district court could not consider any unrecorded testimony purportedly given to the magistrate, because the

investigation of Mr. Jordan was federal, and therefore the search warrant was required to comply with Rule 41 of the Federal Rules of Criminal Procedure. J.A. 72-74. Mr. Jordan cited the federal investigation James Calvin Brooks, which led to the investigation of Mr. Jordan. J.A. 74; *see* J.A. 337-38. Mr. Jordan argued that the involvement of an ATF task force officer, including Boyce's statements during the post-arrest interrogation of Mr. Jordan advising Mr. Jordan that he would be federally prosecuted, showed that the search warrant was obtained as part of a federal investigation. J.A. 74.

Shortly after Mr. Jordan filed his motion to suppress, the Government filed a superseding indictment with the same three charges, but now alleging that the drug quantity in Count 1 was at least 28 grams of a mixture or substance containing crack cocaine. J.A. 116-17.

In opposition to the suppression motion, the Government conceded that no dates were provided in the search warrant affidavit to show that the information was not stale. J.A. 88. Nevertheless, the Government argued that the search warrant met the requirements of the Fourth Amendment. J.A. 86-88. The Government submitted Bateman's supplemental statement, and an affidavit from Magistrate Holland. J.A. 109-13. In her affidavit, given four months after she issued the search warrant, the magistrate stated that she recalled the search warrant proceeding, and although she had not taken any notes or made any recordings, she remembered Bateman's oral testimony in support of the search warrant. J.A. 112. She stated that she remembered Bateman saying he had

performed a trash pull on December 28, and showing her photographs of the evidence recovered. J.A. 112-13. She also stated that although she received oral testimony, she failed to check the box on the search warrant application indicating that she relied on this additional information, characterizing this omission as an "administrative oversight." J.A. 113. Citing Bateman's supplemental statement and Magistrate Holland's affidavit, the Government argued that the evidence showed that oral testimony was presented that, along with the written search warrant affidavit, was sufficient to establish probable cause. J.A. 89; *see* J.A. 110, 112-13. Because the Fourth Amendment did not require oral testimony to be written or recorded, the Government argued that all of the information presented to the magistrate was properly considered, and supported the probable cause determination. J.A. 86-89.

Further, the Government argued that a state search warrant resulting from a joint state and federal investigation is not subject to Rule 41 of the Federal Rules of Criminal Procedure. J.A. 91-95. The Government argued that a local police officer applied for the warrant, the warrant alleged violations of state law, and the return of the warrant was to a state judge, not a federal magistrate. J.A. 92-93.

Finally, the Government argued that even if the search warrant was deficient under the Fourth Amendment or Rule 41, the motion to suppress should be denied under the good faith exception articulated in *Leon*. J.A. 95-101. Because the officers executing the search warrant had knowledge of the investigation, including the trash pull, the Government argued that they reasonably believed probable

cause existed to search Mr. Jordan's residence for evidence of suspected drug activity. J.A. 97-98.

Prior to the hearing on Mr. Jordan's motion to suppress, Mr. Jordan also filed a motion to compel the Government to produce for in camera review communications between Government agents, including counsel, and Magistrate Holland leading to the execution of her affidavit, and communications among agents regarding whether and when to charge Mr. Jordan federally. J.A. 120-30. The Government had asserted work product protection over the requested communications. *See* J.A. 133-35. Mr. Jordan contended that the communications were relevant to the issues for the suppression hearing, and the Government's obligations under the Jencks Act, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), required production. *See* J.A. 129-30. The Government opposed the motion to compel, arguing that Mr. Jordan failed to show that the requested information was relevant to the suppression argument. J.A. 138-41. With its opposition brief, the Government produced an email exchange showing that the Government's counsel drafted the magistrate's affidavit. J.A. 156-59; *see* J.A. 142-43.

The district court held a hearing on the motions to suppress and to compel production. J.A. 7; *see* J.A. 160-245. The district court first denied the motion to compel, concluding that Mr. Jordan failed to make a plausible showing that the requested material contained *Brady* or *Giglio* information, or Jencks Act statements that had not already been produced. J.A. 179-82; *see* J.A. 246.

Turning to the motion to suppress, the district court heard testimony from Bateman. J.A. 182-226. Bateman testified that he was an officer with the Elizabeth City Police Department, and that he did not work with any federal agency. J.A. 183-85. Bateman described his involvement in the surveillance of Mr. Jordan. J.A. 185. He testified that he witnessed hand-to-hand drug transactions, and performed the trash pull outside Mr. Jordan's residence in the early morning hours of 28 December 2016. J.A. 186-87. He testified that the officers found cocaine in Mr. Jordan's trash, and took photographs of the evidence. J.A. 187-88. According to Bateman, narcotics agent Dowdy—who was not a federal agent—and ATF task force officer Boyce assisted him. J.A. 188-89.

Bateman identified his search warrant application and photographs he said he submitted to the magistrate. J.A. 190-91. He testified that he showed the photographs to the magistrate and explained what was pictured. J.A. 191. He also testified that he told the magistrate why there was not a controlled buy, how long the investigation of Mr. Jordan had been going on, and what the color change on the pictures of trash meant. J.A. 192. Bateman also identified his supplemental statement, and explained his oral testimony to the magistrate. J.A. 199-201.

After he obtained the search warrant, Bateman participated in the execution of the warrant. J.A. 196-97. He testified that officers found crack cocaine, powder cocaine, and drug paraphernalia in Mr. Jordan's residence, along with a firearm. J.A. 196-98. Bateman testified that Mr. Jordan was arrested on state charges and taken before Magistrate Holland, where Bateman swore out warrants on state drug

and firearm charges. J.A. 198. He also testified that he returned the search warrant to the Pasquotank County Clerk's Office on 4 January 2017. J.A. 198.

Bateman denied that Boyce instructed him to obtain a search warrant. J.A. 198. He testified that Boyce had helped with surveillance of Mr. Jordan. J.A. 198. Bateman testified that it was his investigation, and therefore it was his responsibility to "follow up with the case, to prepare it for court, to take out the charges that [he] had to take out and collect the evidence, to follow up with any leads past that." J.A. 198-99.

On cross-examination, Bateman testified that he remembered being told after the federal probable cause and detention hearings that Mr. Jordan was going to move to suppress the evidence. J.A. 205-06. He testified that the Assistant United States Attorney asked him to prepare a supplemental report about what he said to the magistrate on 28 December 2016, and that his supplemental report was based on his memory. J.A. 207. Bateman confirmed that the section for additional information in the search warrant application was left blank. J.A. 210-11.

The Government did not call Magistrate Holland to testify. J.A. 226. According to the Assistant United States Attorney, the Government "prefer[red] not to set the standard of calling judicial officers to court to testify on their decisions." J.A. 226. However, the Government relied on the affidavit of Magistrate Holland, and asked the court to consider it in connection with the suppression motion. J.A. 226-27.

After hearing argument from counsel, J.A. 227-37, the district court denied

Mr. Jordan's motion to suppress. J.A. 244; *see* J.A. 246. The court credited Bateman's live testimony, and Magistrate Holland's testimony by affidavit, and found that Bateman had recounted the information reflected in his supplemental statement to the magistrate. J.A. 238-41. Therefore, the district court concluded that the information presented to the magistrate was sufficient to establish probable cause to support the search warrant. J.A. 241.

Bench trial and sentencing

After the suppression hearing, Mr. Jordan pleaded not guilty to all three counts in the superseding indictment. J.A. 262; *see* J.A. 116-17. With the consent of the Government, Mr. Jordan filed a request for a bench trial pursuant to Rule 23 of the Federal Rules of Criminal Procedure. J.A. 8, 262. The court allowed the motion and set the case for a bench trial. J.A. 8, 262-63.

The case was tried to the United States District Court for the Eastern District of North Carolina, before then-Chief United States District Judge James C. Dever III, on 1 December 2017. J.A. 8-9. Mr. Jordan did not contest his factual guilt of the offenses charged, but proceeded to trial to preserve his suppression argument. J.A. 271, 289.

At the conclusion of the evidence, the district court found Mr. Jordan guilty on all three counts of the superseding indictment. J.A. 291-92.

Following a sentencing hearing, the district court imposed a sentence of 135 months' imprisonment on Count 1, 60 months' imprisonment on Count 2, to be served consecutively, and 120 months' imprisonment on Count 3, to be served

concurrently, producing a total sentence of 195 months' imprisonment. J.A. 319, 325.

Mr. Jordan timely filed a notice of appeal on 5 June 2018. J.A. 331.

Mr. Jordan's appeal

On appeal, Mr. Jordan argued that the search warrant was invalid because it was not supported by probable cause, and that the district court erred by applying the good faith exception to the exclusionary rule. Mr. Jordan also challenged the district court's denial of Mr. Jordan's motion to compel the production of evidence.

The Fourth Circuit issued an unpublished opinion rejecting Mr. Jordan's arguments, and affirming the judgment of the district court. The Fourth Circuit assumed, without deciding, that the search warrant was invalid. App. 2. Nevertheless, the Fourth Circuit ruled that the suppression motion was properly denied because the good faith exception to the exclusionary rule applied. App. 3-5. The Fourth Circuit also rejected Mr. Jordan's argument that the district court erred by denying Mr. Jordan's motion to compel. App. 5-6.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The first question presented, the application of the good faith exception to the exclusionary rule, was argued and reviewed below, because Mr. Jordan moved to suppress the evidence obtained pursuant to the search warrant, and the district court denied the motion. Mr. Jordan challenged the denial of the suppression motion on appeal, and the Fourth Circuit affirmed the district court's denial of the motion. The Fourth Circuit assumed without deciding that Mr. Jordan was correct that the search warrant was invalid, but ruled that the good faith exception to the exclusionary rule applied, and therefore the suppression motion was properly denied.

The second question presented, the denial of Mr. Jordan's motion to compel production of evidence, was argued and reviewed below, because Mr. Jordan moved to compel evidence and the district court denied the motion. Mr. Jordan challenged this ruling on appeal, and the Fourth Circuit affirmed the denial of the motion to compel.

REASONS FOR GRANTING THE WRIT

Mr. Jordan contends that there are two compelling reasons for granting his petition for writ of certiorari.

First, the Fourth Circuit's decision is in conflict with the decisions of other United States Court of Appeals on the same important matter: the scope of information a district court may consider when determining whether a search

warrant is "based on 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. at 923 (internal quotation omitted). The Eighth, Fourth, and Eleventh Circuits require district courts to consider all information known to the officers executing the warrant, even information not presented to the issuing magistrate. *United States v. Houston*, 665 F.3d 991, 995 (8th Cir. 2012) ("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."); *United States v. McKenzie-Gude*, 671 F.3d 452, 460 (4th Cir. 2011) ("[O]fficers . . . who swore out the affidavit and executed the search[] acted with the requisite objective reasonableness when relying on uncontroverted facts known to them but inadvertently not presented to the magistrate."); *United States v. Martin*, 297 F.3d 1308, 1318-1319 (11th Cir. 2002) (adopting "totality of the circumstances" approach, including consideration of "facts not presented to the issuing judge"). The Fifth, Sixth, Seventh, and Tenth Circuits limit district courts to considering evidence presented during the warrant application process, whether orally or in writing. *United States v. Knox*, 883 F.3d 1262, 1272 (10th Cir. 2018) ("[G]ood faith is confined to reviewing the four corners of the sworn affidavit and any other pertinent information actually shared with the issuing judge under oath prior to the issuance of the warrant, as well as information relating to the warrant application process."); *United States v. Frazier*, 423 F.3d 526, 535-536 (6th Cir. 2005) ("[A] court reviewing an officer's good faith

under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing magistrate."); *United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002) ("[T]he probable cause determination is based solely on the information presented during the warrant application process . . . ."); *United States v. Maggitt*, 778 F.2d 1029, 1036 (5th Cir. 1985) (holding that where law enforcement officers appeared before judge who questioned them about portions of warrant affidavit, "[i]t was objectively reasonable for the officers to believe that whatever flaws may have existed in the warrant were cured by the city judge's questions and their answers at the warrant application proceeding"). The Ninth Circuit holds that district courts may consider only the information contained within the four corners of the written search warrant affidavit. *United States v. Luong*, 470 F.3d 898, 904 (9th Cir. 2006) (refusing to consider information conveyed to magistrate orally). This circuit split warrants granting the petition for writ of certiorari. *See* S. Ct. R. 10(a).

Second, the Fourth Circuit's position that a district court may consider information known to the executing officer, but not presented to the magistrate in support of the search warrant application, conflicts with this Court's decision in *Leon*. Under *Leon*, the good faith exception to the exclusionary rule applies only when an officer's reliance on a warrant is "objectively reasonable." 468 U.S. at 922. By considering information known to the officer but not presented to the magistrate, the Fourth Circuit applies a subjective test in conflict with *Leon*. This conflict warrants granting the petition for writ of certiorari. *See* S. Ct. R. 10(c).

DISCUSSION

Jerel Jordan was arrested and charged by criminal complaint with a federal drug offense and two federal firearms offenses two days after an Elizabeth City Police Department officer obtained and executed a warrant to search Mr. Jordan's residence. The search warrant was facially invalid—the Government does not dispute that the search warrant affidavit did not contain any facts showing when the events allegedly giving rise to probable cause occurred.

The Fourth Circuit assumed without deciding that the warrant was invalid. App. 2. The Fourth Circuit nevertheless affirmed the district court's denial of the motion to suppress, holding that under circuit precedent in *McKenzie-Gude*, the district court could properly consider information outside the four corners of a deficient warrant. The Fourth Circuit also found that the district court could properly consider Bateman's testimony and Magistrate Holland's affidavit. The Fourth Circuit's rulings conflict with this Court's recognition of the good faith exception to the exclusionary rule in *Leon*, and granting this petition will enable the Court to confirm *Leon* and remedy the circuit split.

The Fourth Circuit also erroneously affirmed the district court's denial of Mr. Jordan's motion to compel. Mr. Jordan made a sufficient showing that the Government may have withheld, as allegedly privileged, exculpatory evidence it was required to produce under the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Even if this Court were to conclude that the magistrate could have considered information outside the

warrant, the Fourth Circuit's error warrants granting this petition so that Mr. Jordan will have the benefit of evidence he can use to undermine the credibility of the evidence the Government presented beyond the warrant application.

I. THE FOURTH CIRCUIT ERRED IN APPLYING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The Fourth Amendment guarantees that "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." U.S. Const. amend. IV. Evidence obtained in violation of the Fourth Amendment may be suppressed pursuant to the exclusionary rule. *See United States v. Doyle*, 650 F.3d 460, 466 (4th Cir. 2011) ("Ordinarily, when a search violates the Fourth Amendment, the fruits thereof are inadmissible under the exclusionary rule . . . .").

This Court has "expressed a strong preference for warrants." *United States v. Leon*, 468 U.S. at 914; *see Katz v. United States*, 389 U.S. 347, 357 (1967). A magistrate issuing a search warrant must determine, based on the totality of the circumstances set forth in the information presented to the magistrate, that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause . . . ." *Id.* at 239. "[T]ime is a crucial element of probable cause," and "[a] valid search warrant may issue only upon allegations of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable

cause at that time.'" *United States v. McCall*, 740 F.2d 1331, 1335-36 (4th Cir. 1984) (quoting *Sgro v. United States*, 287 U.S. 206, 210-11 (1932)). To ensure that the magistrate does not abdicate the duty to determine probable cause, courts "conscientiously review the sufficiency of affidavits on which warrants are issued." *Illinois v. Gates*, 462 U.S. at 239.

Despite finding a Fourth Amendment violation, a court will not suppress the resulting evidence if the unlawful search or seizure falls within the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. at 922. The good faith exception applies when it would be objectively reasonable for the officer to have relied on an invalid warrant, believing that it was valid. *See id.* This Court made clear that the good faith inquiry is an objective one: It is "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. Because no reasonable officer could have relied on the search warrant issued by Magistrate Holland, the good faith exception does not apply. *See id.* at 922.

The search warrant in this case was facially invalid because, as the Government concedes, the search warrant affidavit did not contain any facts showing when the events allegedly giving rise to probable cause occurred. *See* J.A. 88. The good faith exception cannot save the search based on the invalid warrant, because *Leon* clearly and unequivocally states that when the affidavit itself is entirely lacking in indicia of probable cause, it cannot be said that the officer acted

in good faith in relying on a warrant that issues." *United States v. Luong*, 470 F.3d at 904.

The Fourth Circuit's rule, which requires district courts to consider all information known to the officers executing the warrant, even information not presented to the issuing magistrate, improperly substitutes the officer's judgment for the judgment of a neutral judicial officer. As this Court has made clear, the "informed and deliberate determinations of magistrates" are "preferred over the hurried action of officers and others who may happen to make arrests." *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). Thus, "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whitley v. Warden*, 401 U.S. 560, 565 n.8 (1971) (quotation omitted).

The Fourth Circuit's rule also improperly turns the good faith exception into a subjective inquiry. *See United States v. Leon*, 468 U.S. at 922. The Fourth Circuit's inquiry into what the officers knew—their subjective beliefs—is in direct conflict with this Court's directive in *Leon* to "eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant." *United States v. Leon*, 468 U.S. at 922 n.23; *see United States v. Knox*, 883 F.3d at 1271-72 (rejecting *McKenzie-Gude* as inconsistent with *Leon*).

The district court's rejection of Mr. Jordan's motion to suppress, and the Fourth Circuit's affirmance of that ruling, was error even if this Court determines that the district court in determining good faith may consider information actually

presented to the magistrate, even if not reflected in the search warrant affidavit. *See*, *e.g.*, *United States v. Knox*, 883 F.3d at 1272. Here, the district court clearly erred by crediting Bateman's testimony and Magistrate Holland's affidavit as evidence that Bateman presented, and Holland considered, the critical timing information omitted from the warrant. *See* J.A. 238. Bateman's and Holland's statements are implausible and inherently incredible, reflecting an after-the-fact attempt to defend a suppression motion, rather than sincere recollections:

- The contemporaneous written record does not reflect that additional testimony was presented to Magistrate Holland. *See* J.A. 81, 210-11. Bateman and Magistrate Holland each signed their names immediately above the section of the warrant application where additional testimony is required to be noted. J.A. 81. To decide that additional testimony was presented, the district court would have had to believe that each Bateman and Holland, both of whom are familiar with warrant applications, ignored that section of the application when they signed immediately above it. *See* J.A. 81.

- Although Bateman was present in federal court on the day of the probable cause hearing when Mr. Jordan's counsel first raised the deficiency of Bateman's warrant affidavit, the Government's counsel said only that Bateman *may* have orally supplemented his affidavit by giving the magistrate dates and times related to the investigation, but admitted that the Government had no evidence that Bateman did so. J.A. 40, 203-04.

- Bateman did not purport to remember that he had provided specific dates in sworn oral testimony until after Mr. Jordan's counsel pointed out that the search warrant affidavit was deficient in that respect. J.A. 37-39, 110. Then, at the prompting of the Government's counsel, J.A. 152, Bateman claimed to recall that, before the search warrant was issued, he provided to the magistrate exactly those facts defense counsel argued were missing from the affidavit. J.A. 37-39, 110.

- Holland did not purport to remember that Bateman had provided specific dates—and that Holland improperly considered Bateman's statement—until four months after she issued the warrant, shortly

after Mr. Jordan filed his motion to suppress. *See* J.A. 156-59. Like Bateman, Holland suddenly claimed to remember that Bateman had provided exactly the omitted details defense counsel highlighted. *See* J.A. 156-59.

- When Mr. Jordan sought discovery of Bateman's and Holland's communications with the Government's counsel leading to Bateman's and Holland's purported recollection of the facts necessary to defend a suppression motion, the Government refused and claimed work product protection. *See* J.A. 133-35.

- The Government shielded Magistrate Holland from cross-examination about her sudden specific recollection by presenting only a written affidavit drafted by the Assistant United States Attorney for the magistrate to sign, electing not to call Magistrate Holland as a live witness. J.A. 226; *see* J.A. 156-59.

- To credit Magistrate Holland's unconfronted affidavit as evidence that she considered oral information from Bateman to find probable cause, the district court would have had to believe that Magistrate Holland violated state law. *See* J.A. 112-13; N.C. Gen. Stat. § 15A-245(a).

That Bateman and Holland would recall these critical facts only when such recollection became necessary to avoid suppression of evidence is implausible. The district court committed clear error by crediting Bateman's testimony and Holland's affidavit and finding that Bateman did present date information to Magistrate Holland. *See, e.g.*, *United States v. Wooden*, 693 F.3d 440, 451-52 (4th Cir. 2012) (even under deferential standard of review, district court's decision to credit testimony of one witness over another was clearly erroneous).

II. THE FOURTH CIRCUIT ERRED BY DENYING MR. JORDAN'S MOTION TO COMPEL PRODUCTION TO THE EXTENT MR. JORDAN SOUGHT COMMUNICATIONS BETWEEN THE GOVERNMENT AND AGENT BATEMAN OR MAGISTRATE HOLLAND ABOUT THE INFORMATION PRESENTED IN SUPPORT OF THE SEARCH WARRANT.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." *Brady v. Maryland*, 373 U.S. at 87. The prosecutor's obligation to disclose evidence favorable to the defendant extends to information that may impeach the testimony of a government witness. *Giglio v. United States*, 405 U.S. at 154 ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." (internal quotation omitted)). Because Bateman's and Holland's credibility in saying that Bateman had presented sworn oral testimony was central to the suppression motion, Mr. Jordan was entitled to discover any evidence of their lack of credibility. *See id.*

The Government refused to produce, in response to Mr. Jordan's request, communications between the Government and Magistrate Holland, and between the Government and the drug enforcement agents (Bateman's unit) from the Elizabeth City Police Department. *See* J.A. 121, 128. Because Mr. Jordan made a "plausible showing" that some exculpatory communications may have existed, the district court erred by denying Mr. Jordan's motion to compel production of these documents for in camera review, depriving Mr. Jordan of information that may have supported his suppression arguments. *See United States v. King*, 628 F.3d

693, 703 (4th Cir. 2011).

The evidence before the district court was that some communications occurred between the United States Attorney's Office and Bateman and Holland regarding the information presented prior to the issuance of the warrant. *See* J.A. 146-59. The circumstances suggested that the communications could contain exculpatory information—such as information tending to show that Bateman and Holland did not actually remember Bateman giving oral testimony regarding the dates of the events allegedly establishing probable cause. Although the contemporaneous record—the warrant application—indicated that no additional information had been presented, upon learning that Mr. Jordan might seek to suppress the results of the search, Bateman and Magistrate Holland claimed to remember that Bateman had given sworn testimony establishing the specific dates necessary to support probable cause. *See supra* pp. 20-21. The fact of these sudden, and for the Government, convenient, recollections was sufficient to make a plausible showing that communications between the Government and Bateman and Holland about the search warrant issues could contain exculpatory information. *See United States v. King*, 628 F.3d at 703-04. The Government's counsel attempt, in a communication produced in discovery, to discourage Bateman from making written statements about the testimony he purportedly gave to Holland, further supports the inference that Bateman may have made statements that tended to undermine his credibility and therefore support Mr. Jordan's arguments. *See* J.A. 152.

The Fourth Circuit held that Mr. Jordan did not make a plausible showing

because "[t]he only evidence in the record is that the Government disclosed the only statements made." App. 6. Where, as here, the Government has refused to produce the evidence at issue, the Fourth Circuit's rejection of Mr. Jordan's arguments undermines the dictates of *Brady* and *Giglio* that entitle Mr. Jordan to evidence that may undermine the reliability of the Government's evidence.

CONCLUSION

For the foregoing reasons, Appellant Jerel Leon Jordan respectfully requests that the Court reverse the district court's order denying Mr. Jordan's motion to suppress, vacate his convictions on Counts 1, 2, and 3, and remand for dismissal of all charges in the superseding indictment, or in the alternative, vacate his convictions on Counts 1, 2, and 3, and remand for a new trial. Alternatively, Mr. Jordan requests that the Court reverse the district court's order denying Mr. Jordan's motions to compel production and to suppress, vacate his convictions on Counts 1, 2, and 3, and remand for in camera review and further proceedings.

This the 20th day of August, 2019.

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