No. 19-5676

IN THE SUPREME COURT OF THE UNITED STATES

JEREL LEON JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

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

2. Whether the district court correctly denied petitioner's motion to compel the production of the government's communications with the search warrant affiant and the state magistrate who issued the warrant, on the ground that petitioner had identified no basis to believe that any such communications would have been material or exculpatory under Brady v. Maryland, 373 U.S. 83 (1963).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Jordan, No. 17-cr-4 (May 7, 2018)

United States Court of Appeals (4th Cir.):

United States v. Jordan, No. 18-4386 (May 22, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5676

JEREL LEON JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 774 Fed. Appx. 119. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. The petition for a writ of certiorari was filed on August 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of possessing 28 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2012); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1-2. The district court sentenced petitioner to 195 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-6.

1. On December 28, 2016, Officer T. Bateman of the Elizabeth City Police Department applied to a state magistrate for a warrant to search petitioner's house for evidence of drug trafficking. Gov't C.A. Br. 4.

In a sworn affidavit attached to the warrant application, Officer Bateman stated that the police had "been conducting an investigation" of petitioner and his house in Elizabeth City and that officers had used "surveillance, interviews, debriefs, [and] confidential sources" to determine that petitioner was "a major source of cocaine to the Elizabeth City and Pasquotank County area." C.A. App. 83. The affidavit stated that officers had "conducted over fifty (50) hours of surveillance on" petitioner and that the surveillance revealed that petitioner was "using [his

house] to store and sell cocaine." Ibid. The affidavit further stated that officers had "witnessed hand to hand transactions of suspected narcotics involving [petitioner] on multiple occasions" and that, "over the past several months," officers had "made several drug arrests" in which the "arrested suspects admitted to purchasing cocaine from" petitioner. Ibid. The affidavit also stated that officers had reviewed petitioner's criminal history, which showed that he had been arrested on multiple occasions for drug and gun crimes, including "maintain[ing] a dwelling for the purpose of illegal narcotics." Id. at 83-84. Finally, the affidavit stated that officers had conducted a "trash pull" at petitioner's home and had recovered from the trash "a small amount of crack cocaine in a plastic bag, several vacuum bags previously holding cocaine and a rectangular shaped bag," all of which tested positive for cocaine, as well as mail matter addressed to petitioner at the residence. Id. at 84.

The warrant application included photographs of evidence recovered from the trash pull. Gov't C.A. Br. 28. One photograph depicted a piece of mail, addressed to petitioner, with a date stamp of November 15, 2016. Gov't C.A. Supp. App. 367. Another photograph showed a vehicle inspection report -- for a vehicle that officers had observed petitioner using for drug sales -- dated December 7, 2016. Id. at 365; see Gov't C.A. Br. 6. Officer Bateman also testified under oath in support of the application before state Magistrate Judge Donna Holland, informing her that

officers had been investigating petitioner since September 2016 and that officers had conducted the trash pull at petitioner's home earlier that day (i.e., December 28). C.A. App. 110; see id. at 112.

Magistrate Holland signed the search warrant and application form, which indicated that Officer Bateman had sworn to the affidavit attached to the search warrant. C.A. App. 104-105. The application form included a box to check to indicate that the warrant was also supported by sworn testimony, which was left blank. Id. at 105. Officers executed the search warrant later that day and recovered a loaded handgun, 218 grams of powder cocaine, 126 grams of cocaine base (crack), scales, packaging materials, a money counter, and a large sum of cash. Gov't C.A. Br. 6-7.

2. A grand jury in the Eastern District of North Carolina charged petitioner with possession of 28 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2012); possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). See Gov't C.A. Br. 3; C.A. App. 116-117.

a. Petitioner moved to suppress the evidence recovered from his home on the theory that the warrant affidavit failed to establish probable cause because it omitted "the time frame during

which [officers] developed their allegations offered in support of probable cause." C.A. App. 64. In opposing that motion, the government submitted a written statement from the affiant, Officer Bateman, explaining that he had provided the date of the trash pull and other information about the timing of the investigation in his oral testimony to Magistrate Holland when applying for the search warrant. Gov't C.A. Br. 10; see C.A. App. 110. The government also submitted an affidavit from Magistrate Holland, in which she confirmed that Officer Bateman had told her in his oral testimony that officers had conducted the trash pull earlier in the day. Gov't C.A. Br. 10-11; see C.A. App. 112-113.

Before a hearing on petitioner's motion to suppress, petitioner moved to compel the production, for in camera inspection, of evidence of communications between the government and Officer Bateman and between the government and Magistrate Holland. Gov't C.A. Br. 11. The government opposed the motion on the ground that it had met or exceeded its discovery obligations, but the government nonetheless provided petitioner with several email exchanges between the government and Officer Bateman regarding his supplemental report, as well as email exchanges between the government and Magistrate Holland regarding her affidavit. Id. at 11-12; see C.A. App. 146-159. In one email, for example, the Assistant United States Attorney (AUSA) handling the case had asked Officer Bateman to "prepare a supplemental report * * * detailing [his] recollection of what [he] testified

to before Magistrate Holland on Dec. 28, 2016 in seeking a search warrant for" petitioner's residence. C.A. App. 152. In another email, the AUSA sought to confirm with Magistrate Holland that a draft affidavit that the AUSA had prepared "based on [their] conversation a few minutes ago" reflected "as accurately as possible" the details Magistrate Holland had provided by phone. Id. at 156.

b. At the start of the suppression hearing, the district court denied petitioner's motion to compel. C.A. App. 179-182. The court agreed with the government that petitioner was not entitled to the communications he sought under Brady v. Maryland, 373 U.S. 83 (1963), or the Jencks Act, 18 U.S.C. 3500(a). C.A. App. 179-180. The court also found that "the Government ha[d] met its discovery obligations." Id. at 182.

The district court then heard testimony from Officer Bateman, who testified, consistent with his written statement, that he had informed Magistrate Holland that the trash pull had occurred on the same day that he had applied for the search warrant. Gov't C.A. Br. 13-14. Officer Bateman further testified that he had provided Magistrate Holland with color photographs of the items recovered in the trash pull as part of the warrant application. Ibid. The government also introduced Magistrate Holland's affidavit into evidence. Id. at 16.

After "consider[ing] all the evidence that's been received at the hearing," the district court denied petitioner's motion to

suppress. C.A. App. 238; see id. at 246. The court specifically credited the testimony of Officer Bateman and Magistrate Holland concerning "the events that took place on December 28th, 2016, prior to Magistrate Holland executing and signing and authorizing the search warrant." Id. at 238. The court stated that the Fourth Amendment does not require that the basis for probable cause be in writing, ibid., and it determined that, considering the totality of the circumstances, including the information in the affidavit as well as the additional information Officer Bateman provided orally to Magistrate Holland, there was "more than probable cause for the issuance of the warrant," id. at 241. The court also stated that, even if it had not credited the testimony of Officer Bateman and the affidavit from Magistrate Holland, it would have found that there were "sufficient indicia of the timeliness associated with the affidavit * * * to establish probable cause." Id. at 243. And the court alternatively determined that, in any event, the good-faith exception to the exclusionary rule would apply under the circumstances. Ibid.

c. The parties subsequently agreed to a bench trial, and the district court found petitioner guilty on all three counts. Gov't C.A. Br. 18. The court sentenced petitioner to 195 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-6. The court found that, even

"assuming the warrant was invalid, the good-faith exception" to the exclusionary rule applied. Id. at 2. The court observed that it had "consistently rejected the notion that reviewing courts may not look outside the four corners of a deficient affidavit when determining, in light of all the circumstances, whether an officer's reliance on the issuing warrant was objectively reasonable." Id. at 4 (quoting United States v. McKenzie-Gude, 671 F.3d 452, 459 (4th Cir. 2011)). The court explained that "refusing to consider such information risks the anomalous result of suppressing evidence obtained pursuant to a warrant supported by the affidavit of an officer, who, in fact, possesses probable cause, but inadvertently omits some information from his affidavit." Ibid. (quoting McKenzie-Gude, 671 F.3d at 460) (brackets omitted). And here, in light of all the circumstances, the court determined that Officer Bateman had acted in good faith in relying on the warrant, even though "his affidavit [in support of the warrant] omitted the dates of" the trash pull and other steps in the investigation preceding the warrant application. Id. at 5. The court also rejected petitioner's challenge to the district court's credibility finding with respect to the testimony of Officer Bateman, and the affidavit of Magistrate Holland, that Officer Bateman had orally provided the date of the trash pull and other timing information in seeking the warrant. Id. at 3.

The court of appeals also affirmed the district court's denial of petitioner's motion to compel the production of communications

involving the government, Officer Bateman, and Magistrate Holland for in camera inspection. Pet. App. 6. The court of appeals explained that, to establish a claim under Brady, petitioner was required to show "(1) the evidence is either exculpatory or impeaching, (2) the government suppressed the evidence, and (3) the evidence was material to the defense." Id. at 5 (citation omitted). The court determined that petitioner had failed to identify any "exculpatory material" and had also failed to "make a plausible showing that such exculpatory material exists." Id. at 6. The court observed that "[t]he only evidence in the record is that the Government disclosed the only statements made -- Bateman's supplemental statement and the magistrate's affidavit -- and they were disclosed prior to the suppression hearing." Ibid. The court further determined that petitioner's "belief that * * * someone may have taken notes of other conversations is insufficient to warrant an in camera review," and that petitioner could "'only speculate as to what the requested information might reveal'" if it existed. Ibid. (quoting United States v. Caro, 597 F.3d 608, 619 (4th Cir. 2010), cert. denied, 565 U.S. 1110 (2012)).

ARGUMENT

Petitioner contends (Pet. 19-23) that the court of appeals erred in determining that, even assuming the search warrant was invalid, the good-faith exception to the exclusionary rule applied in the circumstances of this case. He also contends (Pet. 15-16) that the decision below implicates a division of authority within

the courts of appeals on "the scope of information a district court may consider" in applying the good-faith exception. Those contentions do not merit this Court's review. The court of appeals was correct in its application of the good-faith exception and in its consideration of facts outside the four corners of the search warrant affidavit. Moreover, although some disagreement exists regarding the relevance of such facts to analyzing good faith, this case presents a poor vehicle for considering that disagreement because the affidavit alone would have established good faith in the circuits whose methodology petitioner invokes. This Court has repeatedly and recently denied review of the first question presented. See Thomas v. United States, No. 18-1344 (Oct. 7, 2019); Escobar v. United States, 139 S. Ct. 2639 (2019) (No. 18-8202); Combs v. United States, 139 S. Ct. 1600 (2019) (No. 18-6702); Campbell v. United States, 138 S. Ct. 313 (2017) (No. 16-8855); Fiorito v. United States, 565 U.S. 1246 (2012) (No. 11-7217). The same result is warranted here.

Petitioner separately contends (Pet. 24-26) that the district court erroneously denied his motion to compel the production of evidence of communications between the government and Officer Bateman, as well as between the government and Magistrate Holland. The court of appeals' fact-bound decision was correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals correctly applied the good-faith exception to the exclusionary rule to the facts of this case.

a. 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. 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 is 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.'" Leon, 468 U.S. 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 Leon 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." 468 U.S. at 922 n.23.

Petitioner is mistaken in suggesting (Pet. 21-22) that Leon bars courts analyzing good faith from considering information outside of the four corners of the warrant affidavit. In making 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. See Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984) (considering the circumstances under which the 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). Officers 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, officers in that circumstance commit the type of negligent omission for which this Court has indicated that suppression is not ordinarily appropriate. Ibid. Moreover, officers already have considerable incentives to include the facts needed to establish 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 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 societal costs of a suppression remedy. See Herring, 555 U.S. at 141.

b. In this case, suppression was not required 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 gravamen of petitioner's suppression claim was that the affidavit needed to include dates or other timing information to establish probable cause for searching his home at the time officers searched it. But contrary to petitioner's suggestion (Pet. 20), the government has never "conceded" insufficiency in that respect; it has instead consistently maintained that the district court "properly concluded that probable cause existed with or without the additional information presented to Magistrate Holland." Gov't C.A. Br. 27 (capitalization and emphasis omitted). That is because, even without Officer Bateman's oral testimony, the affidavit provided sufficient indication of the recent nature of the facts supporting probable cause, notwithstanding that it did not itself list dates. The warrant application included

photographs of two recently dated items that officers recovered in the trash pull: a letter addressed to petitioner, dated November 15, 2016, and petitioner's vehicle registration document, dated December 7, 2016. Id. at 28. Those dates conveyed to Magistrate Holland that the trash pull was recent. Ibid. Moreover, the affidavit was written in the present and present perfect tenses, thereby conveying the ongoing nature of the petitioner's drug trafficking and the officers' investigation. See C.A. App. 83 ("[Confidential sources] have stated that [petitioner] is involved in mid-level sales of powder and crack cocaine.") (emphasis added); ibid. (explaining that law enforcement officers "have been conducting an investigation" into petitioner and that confidential sources "have provided" information about "this and other ongoing narcotics investigation[s]") (emphasis added); ibid. (referring to the information learned from "several drug arrests over the past several months") (emphasis added). The affidavit further described the various investigative techniques used during the ongoing investigation, including more than 50 hours of surveillance, the trash pull, confidential sources and cooperating witnesses, as well as details about petitioner's criminal history. Id. at 83-84.

The district court therefore correctly found that the affidavit itself contained "sufficient indicia of the timeliness" of the investigation "to establish probable cause." C.A. App. 243. At a minimum, the affidavit 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). And Officer Bateman's good faith is only confirmed by considering the facts outside the four corners of the affidavit. As the court of appeals explained, Officer Bateman himself had "performed [the] trash pull that uncovered evidence of cocaine on the same day that he applied for the search warrant," and Officer Bateman "had been investigating [petitioner] over the course of several months" and was thus familiar with the timing of the investigation. Pet. App. 4-5. The court of appeals also correctly found "no basis" to disturb the district court's decision to credit Officer Bateman's testimony (corroborated by Magistrate Holland's affidavit) that he in fact conveyed the date of the trash pull to Magistrate Holland orally before obtaining the warrant. Id. at 3. Petitioner dismisses that testimony as "implausible" (Pet. 22-23), but the district court credited Officer Bateman's account after observing him testify in person, see pp. 6-7, supra, and, in any event, petitioner's disagreement with the fact-bound credibility findings of the district court provides no basis for this Court's review. See Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which two lower courts agree).

c. Although some disagreement exists in the courts of appeals concerning whether a court may consider facts outside of search warrant affidavits under Leon, this case is not a suitable

vehicle for considering that disagreement because the affidavit in this case would establish probable cause or good faith under any of the approaches petitioner identifies.

A "majority of circuits" to consider the question have "taken into consideration facts outside the affidavit when 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 1319-1320 (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) (explaining that court may consider "undisputed, relevant facts known to the officers prior to the search" but inadvertently not disclosed to magistrate, as part of good-faith analysis); 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); United States v. Taxacher, 902 F.2d 867, 871 (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).

As petitioner notes (Pet. 16-17), 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. See 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, 751-752 (6th Cir. 2005); United States v. Koerth, 312 F.3d 862, 869 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003); United States v. Hove, 848 F.2d 137, 139-140 (9th Cir. 1988). But see 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"); United States v. Dickerson, 975 F.2d 1245, 1250 (7th Cir. 1992) (determining that good-faith exception applied based on facts known to officers at the scene but not disclosed to magistrate), cert. denied, 507 U.S. 932 (1993).*

* Contrary to petitioner's suggestion (Pet. 17), the Fifth Circuit's decision in United States v. Maggitt, 778 F.2d 1029 (1985), cert. denied, 476 U.S. 1184 (1986), does not address the question presented. In that case, the Fifth Circuit determined that the good-faith exception applied when "investigating officers

This case, however, does not present a suitable vehicle for addressing that disagreement. First, this case does not squarely present the question on which there is some disagreement in the courts of appeals. That disagreement has primarily centered on the extent to which courts may consider facts known to the officer but not disclosed to the magistrate. Cf. Pet. 16, 21 (describing the issue as concerning "information not presented to the issuing magistrate"). In this case, however, the district court found that Officer Bateman in fact orally informed Magistrate Holland of the relevant information -- including the fact that officers had performed the trash pull earlier in the same day -- but omitted that information from the search warrant affidavit. See pp. 6-7, supra. The good-faith finding in this case therefore does not depend upon facts known to the officer but not the magistrate.

Second, petitioner has failed to demonstrate that the result in this case would have been different in any of the other circuits he invokes as supporting a narrower approach to the good-faith exception. The Ninth Circuit, for example, has explained that the good-faith exception applies if the affidavit in some fashion "link[s]" the defendant to the place to be searched, even if the

---

appeared before a judicial authority who carefully examined them about the portions of [an] affidavit that he apparently considered to be lacking," reasoning that "[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." Id. at 1036. The court did not address whether it was permissible to consider facts known to officers but not disclosed to the magistrate as part of the good-faith analysis.

affidavit is not "the model of thoroughness." United States v. Crews, 502 F.3d 1130, 1137 (2007) (citations omitted). The Seventh Circuit has stated that a "search warrant may issue even in the absence of direct evidence linking criminal objects to a particular site taking into account the totality of the circumstances," United States v. Garey, 329 F.3d 573, 578 (2003) (citation and internal quotation marks omitted), and that "[a]n issuing court is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense," United States v. Lamon, 930 F.2d 1183, 1188 (1991) (citations and internal quotation marks omitted). And the Sixth Circuit has 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." Laughton, 409 F.3d at 749; see id. at 750 (good-faith exception applied where 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).

Officer Bateman acted in good faith under any of those formulations. His affidavit detailed several sources of information that established a strong connection between petitioner, his cocaine trafficking, and his home. C.A. App. 83-84. The affidavit cited police surveillance, information from reliable confidential sources, drug-related items recovered from a trash pull at petitioner's home, and information from arrested

individuals. Ibid. Although the affidavit could have been more precise with regard to the timeframe of the information, the affidavit's use of the present tense and its reference to arrests "over the past several months" provided a sufficient temporal nexus to at least establish good faith, even on the four corners of the affidavit. Id. at 83. The affidavit noted, for example, that confidential sources stated that petitioner "is involved in mid-level sales of powder and crack cocaine." Ibid. (emphasis added). Thus, the affidavit was not so lacking in a temporal nexus that other courts of appeals would have declined to apply the good-faith exception. A case in which no sound basis exists for concluding that 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.

2. Petitioner separately argues (Pet. 24-26) that the district court erred, under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, in denying his motion to compel the production of evidence of communications between the government and Officer Bateman and between the government and Magistrate Holland Petitioner. Petitioner offers no sound basis to review the unpublished, per curiam decision of the court of appeals on that fact-specific point. Petitioner does not suggest that the decision below rejecting his Brady claim conflicts with any decision of this Court or any other court of appeals.

To establish a Brady claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to the establishment of his guilt or innocence. Brady, 373 U.S. at 87. Evidence is material under Brady "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-434 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion)). Brady does not empower a defendant to conduct his own search of the government's files for relevant materials. See Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987); Weatherford v. Bursey, 429 U.S. 545, 559 (1977). If the defendant makes a request for specific material, the trial court may review the documents in camera to determine whether they should be disclosed. See Ritchie, 480 U.S. at 61; see also, e.g., United States v. Abdallah, 911 F.3d 201, 218 (4th Cir. 2018). In order to support in camera review of requested material, however, a defendant must make a "plausible showing" that the evidence he seeks would be "both material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); see Ritchie, 480 U.S. at 58 n.15.

The court of appeals correctly applied that standard here, finding that petitioner "failed to make a plausible showing that" any "exculpatory material exists." Pet. App. 6. Although the

government had already produced to petitioner email exchanges with Officer Bateman and Magistrate Holland regarding the supplemental materials those witnesses submitted before the suppression hearing (see C.A. App. 152-156; pp. 5-6, supra), petitioner nonetheless continued to speculate that "someone may have taken notes of other conversations" (Pet. App. 6) and that those hypothesized notes or other communications "could contain exculpatory information" (Pet. 25). The lower courts correctly rejected petitioner's unsupported claim, and petitioner identifies no sound basis for further review. Cf. Exxon Co., U.S.A., 517 U.S. at 841.

Indeed, petitioner's only stated purpose in seeking to compel additional discovery was to impeach the testimony of Officer Bateman and Magistrate Holland concerning Officer Bateman's oral statements in support of the search warrant application. See Pet. 25. But, as explained above, the district court correctly found that the warrant itself contained sufficient information to support a finding of good faith, so petitioner's second question presented would not affect the proper resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

OCTOBER 2019