

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2019

JACOB LICKERS,

Petitioner,
vs.

UNITED STATES,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI
AND APPENDIX TO PETITION

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QUESTION PRESENTED

The Seventh Circuit has recently indicated, in its Decision in this present matter, that the good faith exception to the exclusionary rule with respect to federal search warrants applies even when the affidavit supporting that federal warrant is based upon evidence obtained in violation of the Fourth Amendment. In the instant case, the Seventh Circuit denied the Petitioner's request to suppress the evidence seized from Defendant's cell phone as a result of the federal warrant, to vacate the Judgement of Conviction, and to allow Defendant to withdraw his guilty plea. The Supreme Court case law relating to the good faith exception to the exclusionary rule is United States vs. Leon, 468 U.S. 897 (1984). Leon requires that the good faith reliance be reasonable. Here, the F.B.I. had obtained a federal search warrant to search Defendant's cell phone. However, the complete basis of the federal affidavit supporting that federal warrant had been derived from an earlier illegal state search warrant to search that cell phone, and evidence derived from that illegal warrant. The Seventh Circuit itself had indicated that this state search warrant had lacked probable cause. Yet, the Seventh Circuit had concluded that it was not unreasonable, and in good faith, for a trained agent of the F.B.I. to completely rely upon that illegal search warrant, and the fruits of that resulting search, in preparing the federal warrant and its supporting affidavit.

Furthermore, this present Seventh Circuit Decision cites case law from another Circuit that, under the same circumstances as presented here, the good faith exception does not apply where a search warrant affidavit had been supported by evidence obtained in violation of the Fourth Amendment. This other Circuit had been the Ninth Circuit. This Seventh Circuit Decision also had cited a Sixth Circuit Decision that had aligned with this present Seventh Circuit Decision. Hence, the Circuits are in conflict concerning this standard. Clearly, the Ninth Circuit indication conflicts with that of the Sixth Circuit, as well as the Seventh Circuit's recent Decision in the present matter. Furthermore, the Eleventh and Second Circuits are aligned with the Ninth Circuit. On the other hand, the Eighth Circuit is aligned with the Sixth and Seventh Circuit. This raises a question of law, which has never been considered by the United States Supreme Court.

As indicated, the Seventh Circuit had concluded that the good faith exception to the exclusionary rule applies even when an affidavit supporting a search warrant had been tainted by evidence obtained in violation of the Fourth Amendment. Other Circuits are aligned with the Seventh Circuit. However, as discussed, these Circuits are in conflict with other cited Circuits.

Accordingly, the question presented for review is:

WHETHER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES WHEN AN AFFIDAVIT SUPPORTING A SEARCH WARRANT HAD BEEN TAINTED BY EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2019

ERNEST CLARK,

Petitioner,

vs.

JACOB LICKERS,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

The Petitioner, Jacob Lickers, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered June 27, 2019.

OPINION BELOW

The Decision and Order of the United States Court of Appeals for the Seventh Circuit has not been published. It is printed in the Appendix. (A1-A19).

The relevant portions of the record, to consist of the District Court's oral Decision before the United States District Court for the Central District of Illinois, are printed in the Appendix (A20-A21).

JURISDICTION

Petitioner seeks review of a Decision and Order of the United States Court of Appeals for the Seventh Circuit entered June 27, 2019. That Decision and Order affirmed the final Judgment of Conviction imposed and entered by the United States District Court for the Central District of Illinois on May 29, 2018.

Jurisdiction of the United States Supreme Court to review the decision and Order of the Seventh Circuit is derived from 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Mr. Lickers was originally charged in a two Count Indictment in the case. Defendant was the only Defendant charged in this case. Count One charged him with, on or about September 3, 2015, in Warren County in the Central District of Illinois, knowingly transporting child pornography, as defined in Title 17, United States Code, Section 2256(8), that is an identified file, using any

means or facility of interstate and foreign commerce, in violation of Title 18 U.S.C.A. 2252(a)(1) and (b)(1); and Count Two, on or about September 3, 2015, in Warren County in the Central District of Illinois, knowingly possess visual depictions of child pornography, as defined in Title 18, United States Code, Section 2256(8), addition to those charged in Count One of the Indictment, and including depictions involving prepubescent minors who had not attained the age of twelve years, and said child pornography had been shipped and transported in interstate and foreign commerce by any means, including by computer, in violation of Title 18 U.S.C.A. 2252(a)(5)(B) and (b)(2). The indictment was dated March 23, 2016.

Defendant filed a pretrial Motion to Suppress Evidence. This Motion included suppression of evidence derived from an illegal search and seizure. He had indicated that law enforcement had conducted an illegal search against him and his vehicle. He had moved for suppression of evidence derived from this illegal search. Further, this suppression included the subsequent search of his telephone, notwithstanding subsequent state and federal search warrants to search this phone. The state had originally prosecuted the Defendant. The State had obtained a state search warrant to search Defendant's property, including his cell phone. However, the state prosecution had resulted in state suppression of that evidence. However, subsequently, the F.B.I. had obtained a separate federal search warrant to search that same phone. However, the federal warrant had recited the language of the state warrant, except for a paragraph indicating an image resulting from the

search of that phone based upon the issuance of that state warrant. On July 15, 2016, the District Court had conducted an evidentiary hearing on Defendant's Motion. After taking testimony and evidence, the trial court had orally denied the Motion.

On February 7, 2017, the Defendant-Appellant (hereinafter referred to as "Lickers" or "Mr. Lickers") had pled guilty to both Counts of the Indictment. Sentencing occurred on May 25, 2018. Mr. Lickers timely filed his Notice of Appeal on May 31, 2018.

In a panel decision dated June 27, 2019, this Court affirmed the District Court's Judgment of Conviction.

REASONS FOR GRANTING THE PETITION

I. CONFLICTS REGARDING THE APPROPRIATE STANDARD FOR APPLICATION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHERE AN AFFIDAVIT SUPPORTING A SEARCH WARRANT HAD BEEN TAINTED BY EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT ARE TO BE RESOLVED BY THIS SUPREME COURT.

The Seventh Circuit's Decision in the present case is in conflict with Holdings of Other Circuits

Petitioner had been arrested on September 3, 2015 by two narcotics officers in Monmouth, Illinois. He was in his vehicle, in a park. However, the police had initially detained him for curious behavior in that park. The police initially arrested him for drug possession. However, the police had also seized Defendant's cell phone. Later that day, a state court judge had approved a state warrant authorizing the search of that cell phone. The search had revealed sexually explicit videos of young children on Lickers' phone. Lickers had moved to suppress the evidence from the phone.

The state court had granted the motion. A dismissal of all state charges against Lickers had then followed.

Subsequently, federal authorities began investigating the case. The F.B.I. sought a federal warrant to search Lickers' cell phone. The affidavit presented to the district court had included a copy of the earlier state search warrant application and had disclosed that the prior search by state authorities, pursuant to that state search warrant, had uncovered child pornography on Lickers' phone. The district court issued the warrant, and the F.B.I.'s ensuing search had uncovered child pornographic images.

A federal grand jury had subsequently indicted Lickers for possessing and transporting child pornography. He then again moved to suppress the evidence, arguing that his initial detention by the Monmouth police, as well as the subsequent search of his phone by the state and federal authorities, had been illegal and in violation of the Fourth Amendment. The District Court denied the Motion. The Court found, with respect to the validity of the search warrant, that probable cause had backed the searches of Lickers' phone. The Court had concluded that the affidavit had described Lickers' engaging in indecent conduct while looking at children on the playground and viewing Craigslist on his phone. The District Court also found the facts in the F.B.I. agent's affidavit also sufficient to establish probable cause as to the presence of child pornography on Lickers' phone.

The Court of Appeals had eventually issued a Decision. This, pursuant to Lickers' Notice of Appeal. However, the Court had

concluded that the federal agents had sought and received a warrant by relying upon facts supplied in, and evidence derived from, a prior state court warrant, that, in the Court's independent assessment, had lacked probable cause. Hence, the Court had disagreed with the District Court in its assessment of the validity of the state court warrant. Contrary to the District Court, the Seventh Circuit panel had determined that the state warrant was illegal, and had lacked probable cause. However, the government had argued that, in an effort to save the federal search warrant, the good faith exception of United States vs. Leon, 468 U.S. 897 (1984) would apply.

The panel Decision had indicated that the federal warrant had essentially, with one exception, mirrored the state affidavit submitted to obtain the state warrant. The Decision had indicated that the federal reliance on the state search warrant had been so extensive that the F.B.I. agent's affidavit had expressly referenced the state affidavit and had attached a copy of that state affidavit. But, the federal warrant had also indicated that the state search, pursuant to that state warrant, had revealed a video showing a man sexually assaulting a girl who had appeared younger than three years old. Based upon these showings, the District court had issued the federal search warrant.

The Decision had indicated that, both the state and federal warrants had lacked probable cause, when one focused on the federal warrant minus the reference to the child pornography video. The state affidavit had all but acknowledged a lack of probable cause

for believing child pornography would be present on the cell phone. Disregarding the reference to the child pornography video in the F.B.I. agent's affidavit, the federal warrant had also fallen short for the same reason.

However, the Decision had discussed the good faith exception to the exclusionary rule under United States vs. Leon. An officer's decision to obtain a warrant is *prima facie* evidence that he or she was acting in good faith. United States vs. Koerth, 312 F.3d 862, 868 (7th Cir. 2002). A Defendant can rebut that presumption by showing that the affidavit submitted in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. United States vs. Olson, 408 F.3d 366, 372 (7th Cir. 2005) (quoting Leon, 468 U.S. 923).

Here, the Decision had indicated that the F.B.I. had acted in good faith in the application and execution of the federal warrant. According to the Decision, the agent took care to obtain a new warrant to authorize a new, federal examination. Nothing had reflected bad faith. However, the Decision had essentially ignored the requirement that the good faith must be reasonable. Here, the three judges of the Seventh Circuit had unanimously concluded that the state warrant had lacked probable cause. Accordingly, the Court had concluded that, therefore, any evidence derived from the search resulting from that warrant would have been illegally obtained. There is no reason to dispute that, if three judges had determined the state warrant lacking, then, therefore, a trained F.B.I.'s

agent reliance on that same warrant, and evidence derived from that warrant, would be unreasonable. The Decision itself contradicts any assertion that the F.B.I. agent's reliance upon that state warrant, and evidence derived from that warrant, had been objectively reasonable.

Furthermore, the Decision cites supportive law from the Sixth Circuit, as well as contrary law from the Ninth Circuit. In U.S.A. vs. McClain, the Sixth Circuit had concluded that the officer's warrantless entry and search of Defendant's home had lacked both probable cause and exigent circumstances. Subsequently, the police had obtained a warrant to search that home, and other homes owned by the same resident, based upon the illegal search. The Sixth Circuit had concluded that the warrant had been fruit of the poisonous tree. However, the Sixth Circuit had also concluded that there was no evidence that the officer's decision to enter and search had been in bad faith. The Sixth Circuit had also concluded that the officers seeking the warrant had not been the same officers as had conducted the initial warrantless search. Hence, the Sixth Circuit had concluded that the good faith exception to the exclusionary rule had applied with respect to the search warrant. This, even though the basis for that warrant had been illegal. The Court also cited Eighth Circuit case law for this proposition. See United States vs. Fletcher, 91 F.3d 48, 51-52 (8th Cir. 1996). United States vs. McClain, 444 F.3d 556 (6th Cir. 2005).

On the other hand, as cited in the Decision, Ninth Circuit case law holds contrary to the present panel Decision. Accordingly,

the Ninth Circuit is also contrary to both the Sixth and Eighth Circuits. However, the Eleventh Circuit and Second Circuits are aligned with the Ninth Circuit. Therefore, the Ninth Circuit, Eleventh, and Second Circuits are contrary to the Sixth, Seventh, and Eighth Circuits. In United States vs. Vasey, the police had conducted both warrantless and warrant searches of the Vasey's vehicle. The police had conducted an initial warrantless search, and had then obtained a search warrant. The Ninth Circuit had concluded that the initial warrantless search had been illegal. Furthermore, the Ninth Circuit had concluded that the subsequent warrant search had also been illegal. The government had countered that the good faith exception should apply to the warrant search. However, the Ninth Circuit had disagreed. Simply, the Ninth Circuit had concluded that the initial warrantless search that had violated Vasey's Fourth Amendment rights had precluded any reliance upon the good faith exception. The warrantless search had resulted in tainted evidence. The officer had presented this tainted evidence to a magistrate in an effort to obtain a search warrant. The search warrant was issued, at least in part, on the basis of this tainted evidence. As in the present situation, the constitutional error was made by the officer in that case, not by the magistrate. However, contrary to the present situation, the Ninth Circuit had concluded that the officer's conducting of an illegal warrantless search and including evidence found in this search in an affidavit in support of a warrant is an activity that the exclusionary rule was meant to deter. Furthermore, the magistrate's consideration does not protect

from exclusion evidence seized during a search under a warrant if that warrant was based upon evidence seized in an unconstitutional search. United States vs. Vasey, 834 F.2d 872 (9th Cir. 1987). See also United States vs. Wanless, 882 F.2d 1459, 1466 (9th Cir. 1989), noting that "good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search.

Both the Eleventh and Second Circuits have ruled in accord with the Ninth Circuit in Vasey. In U.S.A. vs. Mcgough, an Eleventh Circuit case, the police had conducted a warrantless, search of Mcgough's apartment. The police had then obtained a search warrant based upon this warrantless search. The Eleventh Circuit had found the warrantless search illegal, contrary to the government's assertion that the search had been a community caretaking search. Furthermore, the Eleventh Circuit had concluded that the subsequent warrant had not been saved by the good faith exception to the exclusionary rule. The Court had considered that the good faith exception should apply when officers engage in an objectively reasonable law enforcement activity and act in good faith and in reliance upon a search warrant from a judge. In Mcgough, it was not an "objectively reasonable law enforcement activity" but rather the officers' unlawful entry into Mcgough's apartment that had led to the request for a search warrant. The search warrant had been tainted with evidence obtained as a result of a prior Fourth Amendment violation by unlawful entry into a person's dwelling. The Eleventh Circuit also cited Second Circuit case law that held in

accordance. See United States vs. Reilly, 76 F.3d 1271, 1280 (2nd Cir. 1996) (declining to apply the good faith exception when the "issuance of the warrant was itself premised on material obtained in a prior search that today's holding makes clear was illegal"). United States vs. Mcgough, 412 F.3d 1232 (11th Cir. 2005).

Accordingly, there is a clear conflict among the Circuits as to the appropriate standard for finding that the good faith exception to the exclusionary rule applies when the basis for a search warranted is tainted, illegally obtained evidence. Based upon the foregoing, the Second, Ninth, and Eleventh Circuits are in dispute with the Sixth, Seventh, and Eighth Circuits. Hence, multiple Circuits disagree with the Decision.

Based upon the clear conflict among the Circuits as to the appropriate standard for a finding of a good faith exception to the exclusionary rule when the basis for a search warrant is illegal evidence obtained in violation of the Fourth Amendment, Petitioner respectfully requests that the United States Supreme Court resolve this conflict by determining what is the appropriate standard for such a situation.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision and opinion of the Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED, at Waukesha, Wisconsin, this _____
day of August, 2019.

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CERTIFICATION FOR THE PETITION FOR WRIT OF CERTIORARI
FOR THE PETITIONER JACOB LICKERS

The attached Petition for Writ of Certiorari complies with all page and Petition requirements of Federal Rules of Supreme Court Procedure Rules 13, 14, 33, and 34.

Mark S. Rosen
Attorney for Petitioner