No._____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES DEVAN FULTON, Sr.,
also known as Black, also known as Blacc,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Government can whitewash, via *United States v. Leon*, 468 U.S. 897 (1984), its predicate illegal seizure of a citizen's cellphone and salvage the evidence contained therein by obtaining a subsequent search warrant after significant delay.

LIST OF PARTIES

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IN THE

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit, issued June 27, 2019, denying petition for rehearing and withdrawing the court's January 29, 2019 opinion appears at the Appendix (Pet. App. 1-13) to the petition and is reported at 928 F.3d 429 (5th Cir. 2019).

The memorandum opinion of the United States District Court for the Southern District of Texas, Galveston Division, denying Petitioner's motion to suppress his cellphone and its fruits appears at the Appendix (Pet. App. 14-21) to the petition and is reported at 192 F. Supp. 3d 728 (S.D. Tex. 2016).

JURISDICTION

Petitioner timely appealed his conviction and sentence in the United States District Court for the Southern District of Texas, Galveston Division, to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1291. The Fifth Circuit initially affirmed the judgment in a published opinion issued on January 29, 2019. *United States v. Fulton*, 914 F.3d 390 (5th Cir. 2019). On June 27, 2019, the Fifth Circuit issued a published opinion denying Petitioner's petition for rehearing and withdrawing its January 29, 2019 opinion. *United States v. Fulton*, 928 F.3d 429 (5th Cir. 2019).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was convicted by a jury of four counts of sex trafficking and one count of conspiracy. The Petitioner's cellphone and its contents were critical to the Government's case because such evidence helped connect Petitioner to the alleged victims.

A. Initial Seizure and Subsequent Warrants

The seizure of Petitioner's cellphone was precipitated by Galveston Police Department's ("GPD") 2014 and 2015 investigations into Petitioner's alleged drug activity. Also, in 2014, a Galveston, Texas juvenile probation officer learned that one of the young women she supervised was pictured in an online advertisement offering her services as an "escort" or prostitute. Further investigation revealed a connection between Petitioner and several female minors as his house was the site of the arrest of the girl that the probation officer supervised and other female minors. In February and March, 2015, GPD joined with the FBI in investigating Petitioner for possible sex trafficking of minors. Pet. App. 2-3.

In February 2015, GPD Detective Roark obtained a state warrant to arrest Petitioner and search his residence. Notably absent in Roark's probable cause affidavit as well as the warrant itself was any reference to phones and/or electronic devices or even Petitioner's use of such items in the sale or possession of narcotics. In describing the scope of the search, Detective Roark included the following language in his probable cause affidavit:

> Affiant asks for the issuance of a warrant that will authorize Affiant to search said suspected place and premises for controlled substance and

> seize the same, and in addition, to search and seize any all implements and instruments used in the commission of possession, distribution, and or manufacturing of a controlled substance in violation of the Texas Health and Safety Code, Chapter 481, and property and items constituting evidence of the above, including but not limited to scales, baggies, ledgers, US currency, measuring devices, weapons, other items that contain residue or other amounts of controlled substances…

ROA.211. Roark further stated that he "knows through training and experience that drug traffickers will possess instruments to facilitate their drug trafficking activities, i.e.: baggies, scales, drug ledgers, weapons, etc." ROA.210. Roark also referenced prior investigations and/ or arrests of Petitioner for drug offenses as well as a controlled purchase transaction between Petitioner and a confidential informant with no mention of Petitioner using phones to facilitate his drug activities. ROA.209-11; Pet. App. 3, 15.

Without mentioning phones or cellphones, the warrant sought evidence of illegal narcotics activity and authorized seizure of the following:

> Cocaine, and any all implements and instruments used in the commission of possession, distribution, and or manufacturing of a controlled substance in violation of the Texas Health and Safety Code, Chapter 481, and property and items constituting evidence of the above, including but not limited to scales, baggies, ledgers, US currency, measuring devices, other items that contain residue or other amounts of controlled substances…

ROA.213; Pet. App. 3, 15.

Upon execution of the search warrant at Petitioner's residence, GPD officers encountered a minor female, A.V., who they suspected was a runaway. Police arrested Petitioner and seized his cellphone. Pet. App. 3, 15.

GPD waited nine days to obtain a state warrant authorizing the search of the cellphone; however, GPD personnel were unable to access the contents of the cellphone because it was password protected. GPD turned the cellphone over to the FBI which, along with GPD, was investigating Petitioner for sex trafficking of minors. Pet. App. 3, 15, 20.

On March 25, 2015, FBI Special Agent Rennison obtained a federal warrant to search the contents of Petitioner's cellphone for evidence of sex trafficking. Law enforcement eventually gained entry into the phone and retrieved incriminating data. Pet. App. 3, 16.

B. District Court Proceedings

-suppression hearing

Petitioner moved to suppress the evidence obtained from his cellphone arguing that its seizure violated the Fourth Amendment because (1) the phone was not properly seized within the scope of the warrant; (2) the phone was not properly seized incident to arrest or the plain view exceptions; (3) even if the phone was seized legally, the nine days that GPD waited to obtain a warrant to search the phone was unreasonable; and finally (4) the good faith exception did not apply. Pet. App. 4, 17.

During the suppression hearing, GPD Detective Roark readily admitted that the search warrant and accompanying affidavit did not include the cellphone. He conceded that his probable cause affidavit did not include a cellphone as an item to be seized nor did the affidavit reference Petitioner using a cellphone for drug transactions. ROA.2232-33. Further, Roark admitted that there were no statements

in the warrant application itself regarding a phone or the use of a phone to further narcotics trafficking. ROA.2250; Pet. App. 5.

Detective Roark's suppression hearing testimony and incident report established that he even doubted his authority to seize Petitioner's phone under the warrant. Roark admitted that his incident report reflected that he seized Petitioner's cellphone as part of an investigation into A.V. being a runaway rather than the narcotics investigation:

> Q: At the time you seized the phone, you didn't seize it as evidence in the drug investigation, you seized it as evidence in an investigation concerning whether [A.V.] was a runaway; isn't that true?
>
> A: That is also part of it, sir.
>
> Q: Okay, so in fact if we look at your incident report, you don't say anything about seizing the phone as part of your drug investigation. You say that you seize the phone to – let me see here –"Darlene, Charles Montrey Evan (phonetics), and A.V.'s cellphones were recovered pending investigation for evidence of crime in regarding to [A.V.] being a runaway since 9/23/2014, and the circumstances documented in Case Number 2014A299." That's what you wrote, isn't it?
>
> ***
>
> A: Yes, sir.

ROA.2237-39.

The district court issued a memorandum opinion and order denying Petitioner's suppression motion. Specifically, the court found that, even if the warrant did not authorize the phone's seizure, its seizure was proper incident to Petitioner's arrest. The court reasoned that it was necessary for GPD to take

Petitioner's phone incident to his arrest because Petitioner told arresting officers that the phone was his but the house where he was arrested did not belong to him. Additionally, the court held that law enforcement did not delay an unreasonable period of time in obtaining a warrant to search the phone, and the extraction of evidence from the cellphone was accomplished pursuant to a valid federal search warrant. The district court did not address the application of the good faith exception. Pet. App. 18-21.

-trial

During trial, the Government presented call logs, photos and text messages that were recovered from Petitioner's phone as evidence against him. Pet. App. 3.

In July, 2016, a jury returned a verdict finding Appellant guilty of one count of conspiracy and four counts of sex trafficking. Petitioner was sentenced to life imprisonment with a 15-year term of supervised release on all five counts to run concurrently. Pet. App. 1.

C. Fifth Circuit Applies "Close Enough" Analysis and Good Faith Exception

-initial panel opinion

In January, 2019, a panel of the Fifth Circuit overruled Petitioner's arguments for suppression of his phone and its contents. The court held that, even though the warrant did not refer to phones or specific electronic devices, the warrant did refer to "ledgers" which were the functional equivalent of a cellphone.[1] Therefore, the court

[1] In its opinion, the Fifth Circuit defined "ledger" as a "book … ordinarily employed for recording … transactions." OXFORD ENGLISH DICTIONARY (2d ed. 1989). Pet. App. 5.

held that the cellphone's seizure was authorized under the language of the warrant. The court also concluded that the nine-day delay in obtaining a warrant to search the cellphone was reasonable and that the Government's interests in seizing the phone and allowing time for its proper search prevailed over Petitioner's privacy interests. *Fulton*, 914 F.3d at 395-98.

-opinion on motion for rehearing

Petitioner filed a motion for rehearing. In June, 2019, the Fifth Circuit issued an opinion denying rehearing and withdrawing its January, 2019 opinion. The court abandoned its earlier position that a cellphone was the functional equivalent of a ledger, but held that, even though the warrant did not authorize the seizure of the cellphone, the federal search warrant was obtained in good faith, and the evidence from the phone was properly introduced into evidence. Pet. App. 3-7.

In so holding, the Fifth Circuit relied on its "close enough to the line of validity" analysis applied previously in *United States v. Massi*, 761 F.3d 512, 525 (5th Cir. 2014). Pet. App. 6-7. In *Massi*, federal agents detained the defendant who had chartered a private airplane to take him home without probable cause for approximately five hours. *Massi*, 761 F.3d at 517-19. During that time, agents conducted an investigation which included obtaining and executing a warrant to search the defendant's plane. *Id.* Ultimately, agents recovered 10.50 kilograms of marijuana, and the defendant was charged with possession with intent to distribute. *Id.*

In a divided opinion, the Fifth Circuit decided that the defendant's prolonged detention violated the Fourth Amendment and that there was a clear link between the constitutional violation and the warrant's issuance. *Id*. at 525. However, the Fifth Circuit, relying on the Sixth Circuit's decision in *United States v. McClain*, 444 F.3d 556 (6th Cir. 2005), concluded that the *Leon* good faith exception defeated suppression of the evidence because (1) the agents' tactics were "close enough to the line of validity" that an objectively reasonable officer preparing the warrant affidavit would believe that the information therein was not tainted by unconstitutional conduct; and (2) the warrant was obtained and executed in good faith. *Id*. at 528. In so doing, the Fifth Circuit acknowledged that such extension of the good faith exception deepened conflicts among the circuit courts. *Id*.

In applying *Massi* to Petitioner's case, the Fifth Circuit acknowledged the Fourth Amendment's requirement that a warrant should not issue without "particularly describing" what is to be seized. Pet. App. 4. Nevertheless, the Fifth Circuit proceeded to remark that the question of whether the warrant applied to Petitioner's cellphone was not an easy negative answer, and the initial seizure of the cellphone was "close enough to the line of validity" to permit the second warrant to search the cellphone. The court concluded that, when "viewed objectively", the FBI agent who obtained the warrant to search Petitioner's phone would "not have had reason to believe the seizure and continued possession of the cellphone by the Galveston police was unlawful"; therefore, the federal search warrant was "sought and executed by a law enforcement officer in good faith." Pet. App. 7.

In so holding, the Fifth Circuit completely ignored law enforcement's underlying motivation for obtaining the federal search warrant. As noted above, GPD had already secured a state warrant to search the phone, leaving one to question the need for the federal search warrant. The obvious answer is that law enforcement doubted the validity of the initial seizure of the cellphone and its ability to withstand scrutiny in a state suppression proceeding.[2] Therefore, the federal search warrant was secured for purpose of hopefully removing the taint of the earlier unconstitutional seizure and salvaging the Government's evidence which consisted of data from Petitioner's cellphone.

2 The Texas exclusionary rule, TEX. CODE CRIM. PROC. art. 38.23, is broader in scope and provides more protection to a defendant than its federal counterpart. *Wilson v. State*, 311 S.W.3d 452, 458-59 (Tex. Crim. App. 2010).

REASONS FOR GRANTING THE PETITION

The adage that "bad facts make for bad law" should be applied to the Fifth Circuit's continued expansion of the good faith exception permitting the Government to salvage tainted evidence by obtaining a subsequent search warrant notwithstanding obvious constitutional errors in the original seizure of such evidence. The Fifth Circuit's decision conflicts with this Court's precedents. Further, the courts of appeals are divided over whether a law enforcement agency may exploit a constitutional violation in such manner. Accordingly, Petitioner respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the Fifth Circuit's judgment.

I. Conflicts with United States Supreme Court Precedent

The exclusionary rule is a judicially created remedy "to effectuate the Fourth Amendment right of citizens [to be free from] unreasonable searches and seizures." *Illinois v. Gates*, 462 U.S. 213, 254 (1983). However, the Fifth Circuit's extension of its previous decision in *Massi* to Petitioner's case allows the good faith exception to trump an unconstitutional seizure and the fruit of the poisonous tree doctrine. Specifically, in Petitioner's case, the court applied the exception to allow law enforcement to whitewash an unlawful seizure of Petitioner's cellphone by state officials – a seizure that was accomplished via a poorly drafted and illegally executed warrant – and nevertheless salvage the improperly seized evidence by obtaining a subsequent search warrant.

A. Conflicts with Leon and its Progeny

The basic principle of *United States v. Leon,* 468 U.S. 897 (1984), and its line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. *Herring v. United States*, 555 U.S. 135, 143 (2009). When police exhibit "deliberate," "reckless" or "grossly negligent" disregard for Fourth Amendment rights, the benefits of exclusion outweigh the costs. *Id.* Deterrence loses its value when police act with an objectively "reasonable good-faith belief" that their conduct is lawful or when their conduct involves simple "isolated" negligence. *Id*. at 137.

This Court, in *Davis v. United States*, 564 U.S. 229 (2011), discussed the range of cases where the good faith exception has been appropriately applied. What those cases have in common is officers relying, in an objectively reasonable manner, on prior erroneous decisions of neutral third parties, such as a magistrate judge, the legislature, an administrative clerk, or the courts. *See e.g., Davis*, 564 U.S. at 248 (extending good faith exception to situation where police conducted a search in objectively reasonable reliance on binding appellate precedent); *Herring*, 555 U.S. at 137, 144 (applied good faith exception when police employees erred in maintaining records in warrants database); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (good faith exception applied where police reasonably relied on erroneous information concerning an arrest warrant in database maintained by judicial employees); *Illinois v. Krall*, 480 U.S. 340, 349-50 (1987)(good faith exception extended to searches conducted in reasonable reliance on subsequently invalidated statutes); *Massachusetts v.*

Sheppard, 468 U.S. 981, 990 (1984)(declined to apply exclusionary rule were warrant held invalid as result of judge's clerical error); *Leon*, 468 U.S. at 922-24 (exclusionary rule not applied when police conduct search in "objectively reasonable reliance" on subsequently invalidated warrant).

The Fifth Circuit's application of *Massi's* "close enough" standard is incompatible with this Court's precedents. The federal search warrant obtained in Petitioner's case, like the warrant obtained by law enforcement in *Massi*, was actually fruit of the poisonous tree. In obtaining the federal search warrant, the FBI agent was not relying on a mistake or wrong decision by a neutral or detached third party. Rather, close to the time that GPD was investigating Petitioner for illegal narcotics activity, GPD was also investigating Petitioner for sex trafficking in conjunction with the FBI. In drafting the narcotics warrant, GPD's omission of a "cellphone" or similar device from the warrant, whether deliberate or just negligence, did not constitute a mistake by a detached or neutral entity. Further, GPD's warrantless seizure of the cellphone constituted a willful disregard of Petitioner's constitutional rights – again, not an action by a detached or neutral party.

B. Conflicts with Fourth Amendment Requirements

Further, *Massi's* "close enough" standard is difficult to apply as there is no bright line rule for its implementation, and such standard conflicts with the Fourth Amendment in Petitioner's case. Although the Fifth Circuit ultimately rejected the idea that the warrant's reference to "ledgers" sufficed to allow law enforcement to seize Petitioner's cellphone, the court evidently felt that such determination was not

"an easy negative answer", hence the seizure was "close enough to the line of validity." Pet. App. 7.

Such determination seems to fly in the very face of the Fourth Amendment's purpose which this Court recently reiterated in *Carpenter v. United States*, __ U.S. __, __, 138 S.Ct. 2206, 2217-18 (2018). The Court noted the Founding generation's motive for crafting the Fourth Amendment which was to protect against the general warrants and writs of assistance that British officers used in colonial times to conduct unrestrained rummages of homes for evidence of criminal activity. *Id.*(citation omitted). "The 'basic purpose of this Amendment,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Id.* at 2213(citation omitted).

The Fifth Circuit's determination that the warrant's reference to a "ledger" sufficed to authorize seizure of a cellphone was not "an easy negative answer" is contrary to the Fourth Amendment's requirement that warrants "*particularly describ[e]* the place to be searched, and *the persons or things to be seized.*" U.S. CONST. amend. IV; *Massachusetts v. Sheppard,* 468 U.S. 981, 988, n. 5 (1984)(holding that a warrant that fails to comply with the Fourth Amendment's particularity requirement is unconstitutional). The purpose of such requirement is so that "…nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Further, this Court has held that officers tasked with executing a sufficiently particular warrant must conduct their search "strictly within the bounds set by the warrant." *Bivens v. Six Unknown Named Agents of Fed. Bureau of*

Narcotics, 403 U.S. 388, 395, n. 7 (1971)(quoting *Marron*, 275 U.S. at 196 (1927). This Court has held that, "[i]f the scope of [a] search exceeds that permitted by the terms of a validly issued warrant … the subsequent seizure [of evidence] is unconstitutional without more." *Horton v. Californa*, 496 U.S. 128, 140 (1990).

C. Conflicts with Heightened Protection Afforded Cellphones

Additionally, the Fifth Circuit's "close enough" standard ignores the heightened protection that this Court increasingly affords cellphones and related data. Indeed, this Court has remarked on its expansion of Fourth Amendment protection beyond the traditional notion of property rights and the Government obtaining information "by physically intruding on a constitutionally protected area" to protect "certain expectations of privacy as well." *Carpenter*, 138 S.Ct. at 2213 (*citing United States v. Jones*, 565 U.S. 400, 405, 406, n. 3 (2012)). To that end, this Court in *Riley v. California*, 573 U.S. 373, 403 (2014), held that a search warrant was required to search the cellphone of a arrestee. This Court recognized an individual's significant privacy interests in his cellphone, commenting that "[w]ith all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'")(citation omitted). *Id*. More recently, this Court applied the same rationale in extending Fourth Amendment protection to cell-site location data obtained from a defendant's wireless carrier. *Carpenter*, 138 S.Ct. at 2217-18.

II. Circuits Conflict as to Application of Good Faith Exception to Warrants that are the Fruit of the Poisonous Tree

The lower courts are divided on the application of the good faith exception to situations where evidence obtained pursuant to an unconstitutional search or seizure

taints a subsequent warrant, albeit most of the circuit courts' discussions focus on the viability of search warrants predicated on unconstitutional searches. With the instant case, the Fifth Circuit perpetuated *Massi's* "close enough" standard allowing the Government to defeat Petitioner's suppression motion with a showing of good faith reliance on a search warrant notwithstanding an initial unconstitutional seizure.

A. Sixth Circuit Applies Good Faith Exception with a Distinction

In addition to the Fifth Circuit, the Sixth Circuit has also applied the good faith exception, but with a distinction that the Fifth Circuit declined to implement. In *United States v. McClain*, 444 F.3d 556, 559 (6th Cir. 2005), police were summoned when a neighbor noticed lights in a house that was supposed to be vacant. *Id*. When the responding officer approached the house, he found that the front door was slightly open. *Id*. The responding officer and a backup officer then entered the house to check for an intruder and discovered evidence of a marijuana grow operation. *Id*. at 560. This evidence formed the basis for a subsequent investigation by other officers who, pursuant to a search warrant, entered the residence and found marijuana plants and growing equipment. *Id*. The affidavit supporting the search warrant relied on evidence viewed in the original warrantless entry and described the circumstances surrounding that search. *Id*.

While finding that the initial entry into the residence violated the Fourth Amendment and that the fruits of the search, including the subsequent warrant, were subject to suppression as fruit of the poisonous tree, the Sixth Circuit applied *Leon's*

good faith exception and declined to suppress the evidence. *Id*. at 566. The Sixth Circuit found that, although the initial entry into the house was unconstitutional, the court "did not believe that the officers were objectively unreasonable in suspecting that criminal activity had occurred inside," and there was "no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home." *Id*. The court concluded:

> Because the officers who sought and executed the warrants acted with good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable, we conclude that despite the initial Fourth Amendment violation, the *Leon* exception bars application of the exclusionary rule in this case.

Id.

Significant to the Sixth Circuit's decision were the following factors: (1) that the officers who obtained the search warrant were not the same officers who performed the initial warrantless search, and (2) that the warrant affidavit fully disclosed the circumstances of the initial warrantless search to a neutral detached magistrate.[3] *Id*. Neither of these factors were cited or even discussed by the Fifth Circuit in Petitioner's case. Given that GPD and the FBI were working in tandem to

[3] The Sixth Circuit continues to adhere to the different officer requirement. In *United States v. Fugate*, 599 F.App'x 564 (6th Cir. 2014), the court addressed a situation where a warrant relied on by officers conducting a search was based on a prior unconstitutional entry onto the defendant's property. The court applied the good faith exception and declined to suppress the evidence, citing in support the fact that the officer who made the original unconstitutional entry was not the same officer who obtained or executed the search warrant. *Id*. at 569 (J. White concurring). Citing *McClain*, the Sixth Circuit recently remanded another case to the district court for further development of the factual record, including for a determination of whether the same officers were involved in the initial intrusion into the defendant's cellphone as well as securing and executing a subsequent warrant. *United States v. Evans*, __ F.App'x __, 2019 WL 3945580, *4 (6th Cir. Aug. 21, 2019).

investigate and apprehend Petitioner, the first factor - whether the same or different officers performed the initial improper seizure and then obtained the subsequent warrant - would have been significant factors in a Sixth Circuit review. However, the Fifth Circuit has declined to require, as a necessary element of the interaction between the good faith use of a search warrant and the underlying taint of evidence supporting the warrant, that the officers engaged in the prior conduct differed from those who later obtained a warrant, commenting :

> We see no basis for creating such a requirement.... What is important is that the officer presenting the information to a magistrate be objectively reasonable in concluding that the information being used to support the warrant was not tainted. It is not awareness of the existence of the conduct that later is found to be improper that is important, but awareness at the time of presenting the affidavit that the conduct violated constitutional rights that would affect the application of the good faith exception.

Massi, 761 F.3d at 528.

B. Circuits Declining to Extend Good Faith Exception

Meanwhile, other circuit courts of appeals have refused to extend *Leon's* good faith exception to predicate Fourth Amendment violations. Specifically, the Ninth Circuit in *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987), held that the good faith exception did not apply to a warrant based on information obtained in an illegal warrantless search because "[t]he constitutional error was made by the officer ..., not by the magistrate." *See also United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989). The Eleventh Circuit, in *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005), refused to apply the good faith exception where an unlawful entry into the defendant's apartment led to an officer's request for a search warrant.

Analogous to Petitioner's case, the Tenth Circuit, in *United States v. Scales*, 903 F.2d 765 (10th Cir. 1990), held that *Leon's* good-faith exception did not excuse law enforcement's reliance on a search warrant predicated on an unlawful seizure. On appeal, the defendant in *Scales* challenged the district court's denial of his motion to suppress cocaine found in his suitcase. *Id*. at 766. The seizure of the defendant's suitcase occurred when two DEA agents investigating drug-related activity encountered the defendant on a train and asked him to open his suitcase. Inside, the agents found boxes that the defendant explained contained china for his mother but that the defendant refused to open. *Id*. The agents were suspicious because the boxes were lighter than expected and nothing in them rattled. *Id*. After determining that the defendant had a prior drug conviction, the agents seized the suitcase but did not arrest the defendant. *Id*. at 767. Six and a half to seven hours after the seizure, drug dogs alerted on the suitcase. *Id*. Twenty-four hours later, the agents obtained a warrant to search the suitcase inside which agents found 2,109 grams of cocaine. *Id*.

In declining to apply the good faith exception in *Scales* and holding that the district court erred in denying his suppression motion, the Tenth Circuit noted the inapplicability of the rationale behind *Leon's* good faith exception and further stated:

> When the DEA agents seized the suitcase and held it for more than twenty-four hours before obtaining a search warrant, they were not acting pursuant to a warrant subsequently deemed invalid. The "illegality" which arguably existed here was not a function of the agent's good faith reliance on a presumptively valid warrant. Moreover, the search of the suitcase *after* the search warrant was issued does not prevent us from evaluating the agents' behavior *prior* to that time.

Id. at 768.

More recently, in reviewing a district court's denial of a suppression motion urged by a defendant charged with possession of child pornography, the Tenth Circuit in *United States v. Loera*, 923 F.3d 907 (10th Cir. 2019),[4] reiterated its position that the good faith exception should be narrowly applied. In *Loera*, federal agents discovered four CDs containing child pornography while executing a warrant to search the defendant's home for computer fraud evidence. *Id.* at 911. The search continued while one agent proceeded to search the CDs with the child pornography and another agent searched other electronic devices belonging to the defendant. *Id.* The agents then seized several electronic devices that appeared to contain evidence of computer fraud as well as the four CDs with the child pornography. *Id.* A week later, an agent prepared an affidavit for a second warrant to search all of the seized electronic devices for child pornography, reopening the CDs that he knew contained child pornography and using that information to describe some of the pornographic images for his affidavit. *Id.* A magistrate judge issued the search warrant which led to the discovery of additional child pornography. *Id.*

While the Tenth Circuit ultimately affirmed the lower court's denial of the suppression motion under the inevitable discovery doctrine, the court rejected the lower court's determination that the good faith exception could be applied to the execution of a search warrant based on information obtained through an unlawful predicate search. *Id.* at 925-28. The court cited *Leon* and the circuit's prior decision in *Scales*, for the proposition that the "good faith exception [did] not apply … because

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4 A petition for certiorari has been docketed in *Loera*.

the illegality at issue stems from unlawful police conduct, rather than magistrate error, and therefore the deterrence purposes of the Fourth Amendment are best served by the exclusionary rule." *Id*. at 925.

Significant to Petitioner's case, the *Loera* court specifically rejected the Fifth Circuit's "close enough" standard noting the limited role of the magistrate when presented a subsequent warrant application based on illegally obtained evidence and stating that "typically the manner in which the affidavit evidence is obtained is not before the magistrate, and the magistrate is not asked explicitly to endorse the evidence-gathering procedure." *Id*. at 927; *see also Vasey*, 834 F.2d at 789 (recognizing that magistrate is "simply not in a position," in an *ex parte* proceeding, to "evaluate the legality" of a predicate search or seizure).

The analysis in *Loera* is supported by at least two commenters. *See* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(f) (5th ed. 2016)(because courts rarely require affiants to prove that they obtained the evidence listed in an affidavit lawfully, "there is no reason why that process should, via *Leon*, shield that activity from full scrutiny at the suppression hearing"); Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercise in Futility*, 60 Ind. L.J. 287, 302 (1985)(quoting *Leon*, 468 U.S.at 914)("When the magistrate issued the warrant, he did not endorse past activity; he only authorized future activity. … [T]he function of the magistrate is to determine 'whether a particular affidavit establishes probable cause,' not whether the methods used to obtain the information in that affidavit were

legal."). In sum, suppression of evidence remains essential to deter unlawful conduct by officers prior to a warrant's issuance. *McGough*, 412 F.3d at 1240.

C. Circuit Conflict is Widely Acknowledged

The conflict outlined in this petition has existed for many years and is ripe for review by this Court. Indeed, courts and commentators, examining the application of the good faith exception to warrants predicated on Fourth Amendment violations have often noted the conflict although characterizing the circuit splits in different manners. *See e.g., Loera*, 923 F.3d at 926-7; *United States v. Bain*, 874 F.3d 1, 21-2 (1st Cir. 2017); *Massi*, 761 F.3d 512, 525-8; Cox, Note, *Does It Stay, or Does It Go?: Application of the Good-Faith Exception When the Warrant Relied Upon is Fruit of the Poisonous Tree*, 72 Wash & Lee L. Rev. 1505, 1547-48 (2015); Lipson, *The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance?*, 60 Hastings L.J. 1147, 1156-71 (2009). Therefore, it is important for this Court to adopt a uniform standard for the application of the good faith exception to warrants predicated on constitutional violations.

D. This Case Provides a Suitable Vehicle for Resolving the Split

The Fifth Circuit was incorrect in its resolution of Petitioner's Fourth Amendment issue through its "close enough" analysis and *Leon's* good faith exception. The proper result would have been an application of Tenth Circuit jurisprudence, namely a rejection of the Fifth Circuit's "close enough" standard and a strict application of the good faith exception resulting in a reversal of Petitioner's conviction. Such resolution would be in accord with the tenets of the Fourth Amendment as well as this Court's precedent.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Date: September 25, 2019

Respectfully submitted,

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