No. 20-5303

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

LAWRENCE A. DIBBLE,
Petitioner,

-vs-

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(as formulated by Respondent)

Whether a court applying the good-faith exception in regard to the issuance of a search warrant must consider all of the circumstances involved in the issuance of the warrant, including the information providing a substantial basis to search in the written affidavit and including sworn oral information provided by the officer at the time of the issuance of the warrant that showed an additional substantial basis to search?

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Petitioner's question presented does not fairly portray what occurred in this case. Petitioner's arguments also proceed from mistaken views on how the law-of-the-case doctrine would apply to the question of probable cause. Petitioner builds on those mistaken views by failing to acknowledge the Fourth Amendment "mere evidence" doctrine that supported the search of his home based on the search warrant affidavit. Petitioner then compounds these errors by seeking to prevent a court from considering sworn testimony that the police officer had given to the judge who issued the search warrant, which provided an additional substantial basis for believing there was probable cause to search petitioner's home. And the supposed conflict of the Ohio Supreme Court with the federal Sixth Circuit is nonexistent, as the Sixth Circuit has reaffirmed the ability of a court to consider information that was revealed to the issuing magistrate at the time the warrant was issued.

Considering such sworn testimony as part of assessing good faith is perfectly consistent with the text of the Fourth Amendment and the purposes underlying the exclusionary rule and good-faith exception. When the judge swears in the officer, allows the officer to provide supplemental information under oath, and then approves the warrant, a reasonable officer has zero reason to think that the Fourth Amendment has been disregarded. The very act of taking supplemental testimony would reasonably lead the officer to believe that such testimony has legal significance and that it is being properly considered, and, under the Fourth Amendment, it *can* be considered.

Overall, petitioner presents no compelling reason for this Court to grant his petition for writ of certiorari in a case having this unusual procedural history and posture. And numerous problems would hinder this Court's ability to reach the flawed question presented

in a way that would make any real difference in the case.

OPINIONS BELOW

Petitioner omits to mention the March 3, 2015, decision of the Tenth Appellate District. *State v. Dibble*, 10th Dist. No. 13AP-798 (Memo Decision, 3-3-15). That decision (and an accompanying defense concession) made it clear that the trial court would not be prevented on remand from going beyond the four corners of the written affidavit to consider the sworn oral information that the detective had given the judge who issued the warrant.

Petitioner also omits to mention the decisions of the Tenth Appellate District rendered on March 6 and 8, 2018. *State v. Dibble*, 10th Dist. No. 16AP-629 (Memo Decision, 3-6-18) (denying certification); *State v. Dibble*, 10th Dist. No. 16AP-629 (Memo Decision, 3-8-18) (denying reconsideration). Although denying the State's motions, the decisions confirmed various flaws in that court's reasoning, including that court's mistaken legal conclusion that the Fourth Amendment would not allow the police to search for photographic evidence related to victim E.K.

STATEMENT OF THE CASE

I. Initial Proceedings

Petitioner faced twenty counts of voyeurism and one count of sexual imposition. The evidence for the voyeurism counts had been discovered through the execution of a search warrant on February 3, 2010. The affidavit supporting the warrant stated:

> On February 2, 2010 Victim #1 reported to the Upper Arlington Police Department that while a student at The Wellington School one of her teacher's, Lawrence A. Dibble touched her inappropriately. Victim #1 stated that she was rehearsing line for a play with Dibble in the school when he asked for a reward for getting his lines correct. He asked to touch Victim #1's stocking on her leg. Upon touching the stocking Dibble then proceeded to run his

> hand up under Victim #1's skirt brushing his fingers across her vaginal area. Victim #1 stated she was shocked and froze as Dibble then ran his hands over her buttocks, and lower abdomen area. Victim #2 was with Victim #1 while she made the report. Victim#2 stated she also had inappropriate contact with Dibble. Victim #2 stated it was after she had graduated high school where Dibble had also been her teacher. Victim #2 stated that Dibble had taken photo's of her nude vaginal area during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble used a digital camera to take the photo's, and made her wear a pillow case over her head while he took them.
>
> On February 2, 2010 Victim #1 went to The Wellington School at the direction of the Upper Arlington Police wearing a recording device. She had a conversation with Dibble about the inappropriate touching where he stated "I just wasn't thinking".
>
> Investigators from Upper Arlington believe Dibble's computers, camera's, media storage devices, etc. may contain correspondence, and photos to substantiate Victim #1 and Victim#2's claims.

The warrant was approved on February 3rd and authorized the seizure of, inter alia, computers, memory devices, and storage media. The warrant was executed the same day, and the search resulted in the seizure of a number of media storage devices, including a laptop computer, camera, and tapes and DVDs.

The search uncovered video evidence that petitioner had used a hidden camera in a school locker room to tape 20 different girls disrobing and trying on leotard-type costumes. (6-11-13 Tr. 7) Petitioner had specifically instructed the girls that they should be wearing nothing underneath while they were trying on the costumes. (*Id.* 8) The video showed the girls naked and focused on the mid-part of the girls' bodies. (*Id.* 8)

The defense filed a motion to suppress. The defense contended that the inclusion

of information regarding "Victim #2" had been intentionally false. The State filed a memorandum opposing the motion, contending, inter alia, that no constitutional violation occurred and that the good-faith exception applied.

II. Suppression Hearing

The court convened a hearing on June 29, 2010. (6-29-10 Tr. 2 et seq.) The defense called Detective Andrew Wuertz of the Upper Arlington Police Department, who testified that he was involved in an investigation involving Wellington School in February 2010. (*Id.* 4-5) Wuertz filed a complaint for gross sexual imposition on February 3, 2010, and the victim listed therein was E.S. ("Victim #1"). (*Id.* 5-6, 26)

Wuertz presented a request for a search warrant to Judge Peeples on February 3rd. (*Id.* 11) Wuertz conceded that the affidavit did not describe the use of computers or picture taking regarding E.S. (*Id.* 13)

Wuertz identified "Victim #2" as E.K. (*Id.* 14) Wuertz testified that E.K. had described touching and other activities that occurred after she graduated from Wellington School and turned 18. (*Id.* 14)

Under the prosecutor's cross-examination, Wuertz indicated that the investigation began on February 2, 2010, when E.K., E.S., and E.S.'s mother came to the police to report what had happened to E.S. (*Id.* 23) E.S. said that petitioner was theater director at Wellington, and every year he picks a student to be his "right-hand" aide to assist him. (*Id.* 24) Wellington is a K-12 school, and she had been involved in theater since 7th grade. (*Id.* 25-26) He had become a father figure to her. (*Id.* 25)

In April 2009 in her senior year, E.S. was working as that aide, rehearsing lines with petitioner. (*Id.* 24) She was wearing a skirt and stockings. (*Id.* 24) Petitioner

commented that he liked how the stockings felt. (*Id.* 24) "[A]s they were rehearsing lines, he said, 'As a reward every time I get my lines correct, I get to touch your stockings.' And she allowed him to do that." (*Id.* 25) But the events that followed resulted in unwanted sexual contact:

> At one point while they were rehearsing them, he got his lines right. And he said, "I believe I deserve a reward for that." And she said that she was standing in front of him. At which time Mr. Dibble closed his eyes, placed his hand on her leg, ran his hand up her inner thigh, forcing it up underneath her skirt, brushing his fingers against her vaginal area, and then took his hands around to her buttocks area feeling her buttocks, and then removed his hands.

(*Id.* 25) Wuertz testified about the unusual relationship between E.S. and petitioner:

> Q. As the father figure, did she detail any other inappropriate or strange conduct that the defendant committed against her?
>
> A. Part of – part of her role as being an aide to him, I found to be kind of strange, was that she had to give him back massages. The back massages turned out to be – they would be in his office. He would close the door. He would remove his shirt back so that she could touch her hands against his skin, and she would have to rub his back basically any time he asked her to do so.
>
> Q. Did she indicate any other activity, either photographs or touching or otherwise?
>
> A. She did. She relayed that she felt kind of strange. There were times that Mr. Dibble took pictures of them in kind of – she described them as unitard suits in order for costumes for plays and that in describing those she said he would have them specific instructions to wear nothing underneath these unitard suits, and he would then take pictures of them wearing these unitard suits in some way to aid in the creation of costumes for them.
>
> Q. And these unitards, they were somewhat see-through, you indicated?

> A. Correct. She described them as practically see-through, if not see-through.

(*Id.* 26-27) Wuertz viewed E.S. as having been "brain-washed" "to basically get her to do whatever he asked her to do." (*Id.* 27-28)

After the April 2009 incident, E.S. had gone to her next class. (*Id.* 28) But she was disturbed by what had happened, and so she wrote a letter to petitioner. (*Id.* 28) But he tore it up, saying "You can't tell anyone about this, or it will ruin my life." (*Id.* 28) The incident continued to weigh on E.S., and so she came forward. (*Id.* 28)

Wuertz also interviewed E.K., whom he had described as "Victim # 2." (*Id.* 29)

> She described a very similar situation to what [E.S.] had described, starting in the 7th grade had been involved in theater, had been close with Mr. Dibble. She's a year older than [E.S.], had been his aide, had had to teach [E.S.] how to give massages to Mr. Dibble. She said that she had basically no father figure in her life, that she considered him as a father. In fact, I believe he would refer to himself to her as her stepdad or some kind of a situation like that.
>
> It was just all very similar to the way that he had kind of cultivated [E.S.] along.
>
> * * *
> [E.K.] confirmed about the photos that were taken of them in the unitard suits, but she did not say there was any inappropriate contact while she was in school.

(*Id.* 29-30)

When Wuertz went to see Judge Peeples seeking the warrant, she swore him in, and he gave her sworn oral information. (*Id.* 33-34)

> Q. Okay. Do you recall what else you told her, whether it be in answer to a question or other testimony?
>
> A. I believe I went back to a little more detail about how the relationship with these girls was started in 7th grade,

> how they were cultivated to the point to where they were.
>
> I told her about the photographs of the unitards and the see-through unitards that they felt uncomfortable about, some just different things to give her a little bit more background than what was actually typed in the search warrant.
>
> I believe in that I said due to the possible see-through of the unitards I was very concerned about where those photos were and what exactly those were being used for.

(*Id.* 34, 47) Wuertz was concerned that photographs of the see-through body suits might be disseminated by petitioner. (*Id.* 46-47)

III. First Trial Court Ruling

On July 1, 2010, the court filed a decision and entry granting the motion to suppress. The court found that the "victim" reference to E.K. was false, that Wuertz knowingly and intentionally made the false statement, and that Wuertz used the false characterization of E.K. as "victim" in order to create probable cause to search petitioner's home. The court refused to consider Wuertz' testimony that he had provided additional sworn oral information to Judge Peeples, stating that such information could not be considered because it was not transcribed. The court rejected the State's reliance on the good-faith exception.

The State filed a motion to reconsider or reopen the hearing on July 8, 2010. The State contended that the court had prematurely reached the full merits. The State tendered the affidavit of Judge Peeples as to how she would have testified if called as a witness at the hearing. Judge Peeples stated she did not believe the detective had lied to her or intentionally misrepresented "victim" status. Judge Peeples "understood the

reference to 'victim # 2' to be provided to me to reflect a M.O. utilized by a theater teacher at the Wellington school in Upper Arlington as to past and present students." Judge Peeples also confirmed that there was a conversation between herself and Wuertz: "In this case there was conversation with Det. Wuertz when the search warrant application was submitted regarding the teacher, students who did not have a father figure in the home, that the court was generally familiar with Wellington school."

IV. State's Appeal

The State timely appealed. The Tenth District (2-1) affirmed, but the Ohio Supreme Court (6-1) reversed. *State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247. The majority agreed with the Tenth District dissenter that the "victim" characterization was not false. *Id.* ¶¶ 21-22. "[W]e find that the statements made by the detective were not false statements made intentionally or with reckless disregard for the truth." *Id.* ¶ 16. The Court indicated it was "remand[ing] this cause to the trial court to hold a new suppression hearing consistent with this opinion." *Id.* ¶¶ 1, 26.

V. New Round of Proceedings on Remand

The parties briefed the remaining issues on remand. At an oral hearing on March 12, 2013, the parties stipulated Wuertz' prior testimony. (3-12-13 Tr. 3-4) The court denied a defense motion to strike Wuertz' testimony about the sworn oral information he gave to Judge Peeples. (*Id.* 4-7) There was also a discussion of Judge Peeples' affidavit and the prosecution possibly proffering her testimony. (*Id.* 5-6) The court indicated that, if there was a motion to strike the affidavit, the court would not strike it, and that the court "will give [the affidavit] whatever weight is necessary." (*Id.* 6-7)

At court's request, (*Id.* 23), the parties later submitted supplemental briefing on

whether probable cause was so clearly lacking that no reasonable officer could rely on it.

VI. Second Trial Court Ruling

The trial court eventually denied the motion to suppress on April 30, 2013. The court ruled that the search warrant affidavit had been insufficient to support probable cause but that the good-faith exception applied. The court abstained from ruling on the State's argument that the additional sworn information should be considered in determining probable cause and good faith, concluding that the issue was now moot. "Without consideration of the extrinsic conversations between the Detective and the issuing judge, this Court has found that the good-faith exception applies."

When the trial court reached the issue of good faith, the court found "that Detective Wuertz acted in objectively reasonable reliance on a search warrant issued by a detached and neutral judge under the good faith exception to the exclusionary rule."

VII. Plea and Sentence

Petitioner later pleaded no contest to all counts and was sentenced to four years.

VIII. Second Appeal and Result

Petitioner appealed. In a decision rendered on December 30, 2014, the Tenth District reversed the trial court's denial of the motion to suppress and remanded. *State v. Dibble*, 10th Dist. No. 13AP-798, 2014-Ohio-5754, 2014 WL 7462904.

The Tenth District concluded that it was "without jurisdiction to consider the state's challenge to the trial court's probable cause ruling in this appeal" because the State had not appealed. *Id.* ¶ 14.

The Tenth District further concluded that "the trial court erred when it failed to fully consider" the question of whether the search warrant affidavit was so lacking in

indicia of probable cause as to render official belief in its existence entirely unreasonable. *Id.* ¶ 24. The Tenth District repeatedly indicated that, in addressing the good-faith exception, the trial court's focus would be on the "affidavit."

The State timely sought reconsideration on a number of grounds. In regard to the emphasis on the "affidavit" in the 12-30-14 decision, the State noted the sworn oral information that Wuertz had provided to Judge Peeples and pointed out that such information must be considered in assessing probable cause and the good-faith exception.

The State also moved to certify a conflict on the question of whether a judge deciding the good-faith exception can consider sworn but unrecorded oral information that the police gave to the judge who issued the warrant. The State cited another Ohio appellate decision as the case in conflict.

The defense opposed the State's motions in a January 30, 2015, memorandum contra. Insofar as the "affidavit" issue was concerned, the defense contended there was no basis for reconsideration or certification because the Tenth District in fact did *not* limit the trial court's ability to consider the sworn oral information. The defense conceded that the assessment of good faith can include looking beyond the four corners of the affidavit:

> Appellee *is correct* in stating that a reviewing court may look beyond the four corners of an affidavit to determine whether an officer acted in good faith reliance on the issuance of a warrant by a magistrate or judge. However, *nothing in this Court's decision precludes the trial court from doing so on remand*.

(1-30-15 Defense Memo, at 14; emphasis added; see, also, 3-10-16 Tr. 13-14) The defense further stated that, "[a]lthough this Court did instruct the trial court to *first* examine whether the affidavit was lacking in indicia of probable cause, it certainly put

forth no language prohibiting the trial court from looking outside of the four corners of the affidavit." (1-30-15 Memo, at 14-15) The defense conceded that the court could consider the unrecorded oral testimony in regard to good faith, and "there is no language in this Court's opinion prohibiting the district court from doing so." (*Id.* at 15)

On March 3, 2015, the Tenth District denied reconsideration and denied certification because there was no conflict. The Tenth District quoted the defense concession and agreed that the 12-30-14 decision "did not provide any instruction to the trial court regarding the evidence that it should or should not consider in making its determination" under the good-faith exception. (3-3-15 Memo Decision, ¶¶ 10-11)

IX. Further Proceedings on Remand

On remand again (now before a different trial judge), the parties provided more briefing and oral arguments. (3-10-16 Tr. 2 et seq.; 8-16-16 Tr. 3 et seq.)

The court issued its decision on August 16, 2016, concluding that there was probable cause to search petitioner's home given the photo-taking of the minor victim and the similar course of conduct with E.K. The court further stated:

> During argument, Defendant argued that the Court could only decide the issue of the propriety of the good faith exception and is precluded from addressing the initial warrant. To that point, the Court finds that an affidavit that contains evidence sufficient to support a finding of probable cause is certainly not so lacking in indicia of probable cause as to render official belief in its existence unreasonable. More specifically, the Court finds that the affidavit discusses two similar situations of deviant behavior and connects aspects of that behavior to the location specified in the warrant. Further, based upon the evidence, any deficiencies within the affidavit are not so egregious that the executing officers could not reasonably presume the warrant was valid.

X. Third Appeal and Result

Upon petitioner's appeal, the Tenth District reversed (2-1) and ordered suppression in a decision rendered on December 29, 2017. The Tenth District majority later denied motions for certification and for reconsideration on March 6 and 8, 2018.

The Ohio Supreme Court (5-2) later reversed the Tenth District's ruling and reinstated the trial court's order denying the motion to suppress. *State v. Dibble*, 159 Ohio St.3d 322, 2020-Ohio-546, 150 N.E.3d 912.

ARGUMENT

> IN APPLYING THE GOOD-FAITH EXCEPTION IN REGARD TO RELIANCE ON THE ISSUANCE OF A SEARCH WARRANT, THE COURT HEARING THE SUPPRESSION MOTION MUST CONSIDER ALL OF THE CIRCUMSTANCES, INCLUDING THE INFORMATION PROVIDED IN THE WRITTEN AFFIDAVIT AND INCLUDING ANY INFORMATION PROVIDED UNDER OATH BY THE OFFICER AT THE TIME OF THE ISSUANCE OF THE WARRANT.

Petitioner's arguments oversimplify the case in ways that demonstrate that this case would be a poor vehicle in which to review the question he seeks to present. While petitioner asserts that the "law of the case" makes it *a fait accompli* that the search warrant was issued in the absence of probable cause, the issue of the existence of probable cause is (still) fully in play. Moreover, applying the good-faith exception would involve more than just the issue of whether the additional sworn testimony given by the officer to the issuing judge can be considered in assessing good faith.

In fact, as the prosecution has repeatedly argued in this case, a reasonable officer could believe that there were *two* substantial bases to support probable cause to search petitioner's home. As detailed in the written affidavit, the allegations of former student

assistant E.K. reasonably could be viewed as providing probable cause that petitioner's home would have photographic evidence related to E.K., thereby showing the ultimate sexual purpose behind his manipulations and grooming of the student assistants, and, thus, his ultimate sexual purpose vis-à-vis assistant E.S, who he had touched improperly.

In addition, Detective Wuertz had been sworn in by the issuing judge and had given additional information about petitioner taking photographs of E.K. and E.S. in see-through or nearly see-through unitards. A reasonable officer could view this sworn oral information as providing probable cause that petitioner would still have in his possession the photographs of E.S. and E.K. in their see-through unitards, thereby also confirming the modus operandi described in the accounts given by E.S. and E.K., and, again, providing grounds to think that petitioner's home would still have such evidence.

While a reasonable officer could believe that both grounds were sufficient individually to support the issuance of the warrant, it is also necessarily true that such an officer could believe that the grounds *together* supported the warrant as well.

Petitioner wrongly portrays this case as being narrowly focused on the additional sworn information alone. There was more, and, in the State's view, there was probable cause to support the search warrant. The flawed question presented does not fairly "fit" this case and ironically makes this case a poor vehicle to review the question presented.

Petitioner's arguments ultimately fail under the text of the Fourth Amendment itself, which requires only that the information be provided under oath or affirmation and imposes no recording requirement. The exclusionary rule and its accompanying good-faith exception must be grounded in the requirements of the Fourth Amendment itself, rather than creating out of whole cloth new after-the-fact requirements that an officer

could not be expected to anticipate.

A. Law of the Case

Petitioner errs in arguing that it is undisputable that the search warrant was not supported by probable cause. According to petitioner, the original trial judge found that the affidavit was insufficient to find probable cause, and, when the defense appealed from the denial of the motion to suppress, the State failed to appeal or cross-appeal from the no-probable-cause conclusion, as the Tenth District concluded in its 12-30-14 decision. Petitioner assumes that the courts must agree henceforth that probable cause was lacking, citing, mainly, the Tenth District's 12-29-17 decision making this point. But this assumption breaks down for a number of reasons.

Initially, a dispute over state-law concepts of "law of the case" are ill-suited to this Court's review of federal questions, and yet petitioner's arguments initially depend on this Court agreeing with his view of state law. In addition, the Tenth District's 12-29-17 assumptions about law of the case are not the governing law of the case that emerges from the Ohio courts, since that decision now stands reversed and therefore could not be controlling for "law of the case" purposes. A reversed decision would have no "law of the case" or other preclusive properties. *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747, 805 N.E.2d 173, ¶ 18 (8th Dist.) (reversed decision "thereby deprived of all conclusive effect").

While the Tenth District did conclude in the 12-30-14 decision that it lacked jurisdiction to entertain the State's argument against first trial judge's no-probable-cause conclusion because the State did not appeal, the Tenth District subsequently made it clear that a non-appealing appellee *can* argue alternative grounds for affirming the trial court's

suppression decision, even a ground that had been rejected by the trial court. *State v. Pinckney*, 10th Dist. No. 14AP-709, 2015-Ohio-3899, 2015 WL 5638096, ¶ 21 (allowing appellee to challenge court's "valid stop" conclusion). An intervening change in law by a controlling court is an exception to the law-of-the-case doctrine under Ohio law. *Nolan v. Nolan*, 11 Ohio St.3d 1, 4, 462 N.E.2d 410 (1984); *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90, 2006 WL 60778, ¶ 30. As a result, the language in the 12-30-14 decision complaining about the State's failure to appeal would no longer be controlling.

There would be other strong reasons under Ohio law not to apply "law of the case" to the issue of whether probable cause supported the warrant: (1) the explicit text of the Ohio Appellate Rules and accompanying staff notes recognize that the non-appealing appellee can argue alternative grounds for affirming the trial court's judgment, even those grounds rejected by the trial court; and (2) the case law expressly recognizes that same principle, including in criminal cases. Oh.App.R. 3(C)(2); 1992 Staff Note to Oh.App.R. 3(C); 2013 Staff Note to Oh.App.R. 3(C)(2); *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944); *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990); *State v. Campbell*, 90 Ohio St.3d 320, 329, 738 N.E.2d 1178 (2000); *State v. Allen*, 77 Ohio St.3d 172, 173, 672 N.E.2d 638 (1996); *Columbus v. Ridley*, 10th Dist. No. 13AP-1035, 2014-Ohio-4356, 2014 WL 4923307, ¶ 12 n. 2; *State v. Humphrey*, 2nd Dist. No. 25063, 2013-Ohio-40, 2013 WL 139530, ¶ 17 n. 2; see, also, Painter and Pollis, *Ohio Appellate Practice* (2017-18 ed.), §§ 3.3, 5.23, pp. 180, 253-54.

The Staff Note to the 2013 amendment to Oh.App.R. 3(C) emphasized that "App.R. 3(C)(2) is amended to clarify that a party seeking to defend a judgment on a ground other than that relied on by the trial court need not file a cross-assignment of error

to do so; instead, that party may simply raise the arguments in the appellate brief." The prosecution would not need to appeal from the *denial* of a motion to suppress in order to raise alternative grounds for affirmance in opposing a defendant's appeal therefrom.

Even viewed from a federal-law perspective, the prosecution would not have needed to appeal from the denial of the motion to suppress in order to argue alternative grounds for affirming that denial. This is the federal principle, see *United States v. American Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924), as reaffirmed in *Jennings v. Stephens*, 574 U.S. 271, 135 S.Ct. 793, 190 L.Ed.2d 662 (2015).

Another flaw with petitioner's law-of-the-case assumption arises out of the narrow procedural posture of the case at the time of the second round of appeals. The trial judge had only made a narrow "no probable cause" ruling at that time, concluding that the written affidavit alone was insufficient to support probable cause. But because the trial judge was finding that the good-faith exception applied, he held that the State's additional arguments based on the sworn oral information were moot. Thus, the trial judge did not fully address the existence of probable cause and did not fully reject it.

Because of that narrow procedural posture, the lack of a State's appeal could not be entirely preclusive of the existence of probable cause, since the trial judge's ruling itself was not entirely dispositive of that issue, as the State noted below. (3-10-16 Tr. 12) At most, the supposed need for the State to appeal would have applied only to the extent that the trial judge had *rejected* the State's probable-cause argument. But since he had only rejected that argument in a narrow way and had mooted the remainder of the State's argument, the State's failure to appeal could not create a complete procedural default.

Since probable cause is assessed under the totality of circumstances, the trial

judge's narrow ruling, and the lack of a State's appeal, could not have been preclusive of the larger question of whether probable cause existed based on all of the information provided to the issuing judge. The existence of probable cause remained fully in play in the latest round of appeals, especially after the new trial judge in the latest remand had actually relied on the sworn oral information to conclude there was probable cause.

Finally, the issue of probable cause was still in play because the issue remanded by the Tenth District itself called for the determination of whether the information was so lacking in "indicia of *probable cause*" as to make it "entirely unreasonable" for the police to rely on the judge's approval of the warrant. The State's arguments regarding probable cause were therefore *still* relevant to the question of whether the police could reasonably rely on the judge's approval of the warrant. As the new trial judge correctly noted, if the "indicia of probable cause" leads to the ultimate conclusion that probable cause supported the warrant, then the good-faith exception would necessarily be satisfied.

The State has maintained throughout this litigation that the issuance of the search warrant was supported by probable cause based on the search warrant affidavit and as supplemented by the sworn oral information. The existence of probable cause supporting the warrant remains a part of the case.

B. "Mere Evidence" Standard for Probable Cause

In a further effort to take the focus off the entire case, petitioner asserts that the search warrant affidavit was entirely bereft of any support for probable cause because its information regarding photo taking as to victim E.K. did not describe a crime and therefore was irrelevant to probable cause. This is legally false.

Even though the affidavit did not describe a crime against E.K., her allegations

related to photo-taking in the affidavit were relevant to support the issuance of the warrant for petitioner's home. A warrant can issue for "mere evidence" having a nexus to criminal behavior because it "will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 306, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus – automatically provided in the case of fruits, instrumentalities or contraband – between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

Id. at 306-307. "[T]here is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband." *Id.* at 310.

In *Messerschmidt v. Millender*, 565 U.S. 535, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012), the Court likewise acknowledged that mere evidence is searchable evidence. The Court quoted the *Hayden* standard and recognized that the police could search for evidence of gang affiliation because it was reasonable "for an officer to believe that evidence regarding * * * gang affiliation would prove helpful in prosecuting him for the attack" on his ex-girlfriend. *Id.* at 551-53. In particular, "such evidence help[ed] to establish motive" because it would explain why he was so angry after the ex-girlfriend called police about her fear of him because of his domestic violence. *Id.* The Court also found that the gang-affiliation evidence could be helpful at trial because "evidence demonstrating Bowen's membership in a gang might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial. For example, evidence that Bowen had ties to a gang that uses guns such as the one he used to assault Kelly would certainly

be relevant to establish that he had familiarity with or access to this type of weapon." *Id.* This Court concluded that it was not entirely unreasonable that an officer would believe there was probable cause that "such evidence would aid the prosecution of Bowen for the criminal acts at issue." *Id.*

In *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), the Court held that it was proper to search for other-acts evidence to show intent.

These authorities allow searches for mere evidence, wherever such evidence might be found, when the evidence will be relevant to issues at trial like motive, state of mind, absence of mistake or accident, opportunity, impeachment, and rebuttal. Admissible "other acts" evidence under Ohio law need not rise to the level of being a crime unto itself. Oh.Evid.R. 404(B) ("other crimes, wrongs *or* acts"). Impeachment with non-crime specific instances is allowed under Ohio law too. Oh.Evid.R. 608(B). Evidence of "grooming" and the offender's long-term goals are relevant to show purpose, motive, preparation, and plan in sex-crime prosecutions involving young victims. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶¶ 21-22.

Although the information contained in the affidavit did not describe a crime committed against E.K., E.K. was still a witness with valuable information showing the ultimate sexual purpose behind his manipulations and grooming of the student assistants, and, thus, his ultimate sexual purpose vis-à-vis his offense committed against student assistant E.S. The taking of sexual photos of E.K. would show petitioner had harbored long-term sexual designs on his assistant E.K., which would provide relevant evidence to the issue of petitioner's motives, designs, and sexual purposes vis-à-vis his act committed against assistant E.S. There was a substantial basis to search for such evidence.

Even under evidentiary standards governing a trial, "many Ohio courts have held that nonremote acts of the same sexual perversion may be admissible as tending to show a motive, purpose, or passion for commission of the offense." *State v. Pennington*, 10th Dist. No. 91AP-13, 1991 WL 476699 (1991). "This enables the state to demonstrate the present fetish or uncommon deviancy which drove the accused, or was consistent with the commission of the offense." *Id.*; *State v. Jackson*, 82 Ohio App. 318, 81 N.E.2d 546 (9th Dist. 1948). Petitioner's deviant acts regarding E.K. were relevant to his motive, purpose, and passion in committing the act of abuse against E.S., and would have served to impeach or rebut any claim of accident. Given the relevance of petitioner's acts with E.K. in a prosecution for the crime committed against E.S., the mere-evidence principle justified the search for photographic/digital evidence related to the sexual photos of E.K.

Contrary to petitioner's assumptions, the sexual photos of E.K. did not need to be the fruit of a crime in order for those photos to be searchable evidence.

The Tenth District was likewise mistaken when it repeated this flawed theory that the lack of a crime against E.K. meant that the sexual photos of E.K. were off limits. (12-29-17 Decision, ¶¶ 37, 39, 40) The Tenth District majority reached this conclusion based on the extremely-confused premise that there is no current doctrine allowing the police to search for "mere evidence" because that "long-since-overruled principle" was "abandoned" 50 years ago. (3-8-18 Memo Decision, ¶¶ 8-11)

The Tenth District majority did not understand that the State in fact was relying on *Hayden* (1967), which recognized that police *can* search for "mere evidence", and such items need not arise from criminal activity themselves. The State was relying on *current* law, not a principle abandoned over 50 years ago.

The Tenth District majority helpfully conceded that the digital photos of E.K. were likely to be found at petitioner's home. (12-29-17 Decision, ¶¶ 39-40) This concession reflected the common-sense point that persons taking such photos would be likely to hoard them at home on computers and devices there. See *State v. Byrne*, 972 A.2d 633, 640-41 (R.I. 2009); *United States v. Summage*, 481 F.3d 1075, 1078 (8th Cir. 2007). So, factually, there *was* a nexus between the information of photo taking regarding E.K. and petitioner's home.

What was left to consider was whether the photos legally were a proper object of a search. The mere-evidence principle placed the photos of E.K. within the plain reach of the Fourth Amendment and therefore allowed a search on that basis alone.

The defense would contend that the criminal conduct committed against E.S. occurred only at the school, not at petitioner's home, and that there was no "direct" evidence creating a nexus to his home. But the warrant did not need to establish a direct connection between the crime at the school and his home. Rather, the warrant could seek evidence that was merely relevant to the crime against E.S. No crime needed to have occurred at petitioner's home; there only needed to be a substantial basis to conclude there was probable cause to believe that the home would have evidence relevant to the apprehension or prosecution of petitioner for the crime committed against E.S.

Petitioner's bizarre sexual photo-taking of E.K. easily supported an inference that his home would still contain such images. Per the warrant affidavit:

> Victim #2 stated it was after she had graduated high school where Dibble *had also been her teacher*. Victim #2 stated that *Dibble had taken photo's of her nude vaginal area* during one of their meetings where inappropriate touching was involved. Victim #2 told investigators that Dibble *used a digital camera* to take the photo's, and *made her*

> *wear a pillow case over her head* while he took them. (Emphasis added)

The very nature of such photo-taking indicated that petitioner has a bizarre sexual fetish/focus on these matters, thereby giving him a motivation to keep the photos on a lasting basis. The use of a digital camera confirmed the ability to store such photos indefinitely in digital formats, such as on computer hard-drives. The use of a pillow case indicated an intent to share the photos with others by making the subject of the photos anonymous so that the photos could not later be traced back to E.K. or petitioner. There is a reasonable inference that offenders tend to hoard sexual images and secrete them in secure places, like their home. *Byrne*, 972 A.2d at 640-41. In fact, the Tenth District majority conceded that such sexual photos would likely be present at petitioner's home.

It was not necessary that the information supporting the warrant spell out these reasonable inferences in A-to-Z, chapter-and-verse fashion in order for the issuing judge to draw such inferences. "[T]he necessary nexus need not be established by direct evidence. While ideally every affidavit would contain direct evidence linking the place to be searched to the crime, it is well established that * * * probable cause can be, and often is, inferred by considering the type of crime, the nature and items sought, the suspect's opportunity for concealment and normal inferences about where the criminal might hide [the] property." *State v. England*, 1st Dist. No. C-040253, 2005-Ohio-375, 2005 WL 267669, ¶ 10 (internal quotation marks omitted). The issuing judge "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 evidence." *Id.* ¶ 12 (internal quotation marks omitted). The "affiant officer need not draw an explicit connection between a suspect's

activities and his residence for a Fourth Amendment nexus to exist." *United States v. Biglow*, 562 F.3d 1272, 1280 (10th Cir. 2009). The support for finding a nexus "may also take the form of inferences a magistrate judge reasonably draws from the Government's evidence" based on the judge's "practical considerations of everyday life" and "common sense conclusions." *Id.*

Petitioner was undertaking bizarre, fetishistic steps in photographing E.K. Common sense supported the inference that a person bent on taking such photographs would be likely to hoard them at least for the purpose of viewing them in the privacy of the home. *Byrne*, 972 A.2d at 641. "Having succeeded in obtaining images," petitioner would be "unlikely to destroy them." *Id.* (quoting another case). A reasonable officer could believe that, under these circumstances, there was a substantial basis to conclude that the sexual photos of E.K. would still be in petitioner's home.

At the very least, in terms of the good-faith exception, it would not have been entirely unreasonable for an officer to believe that the Fourth Amendment allowed the search for the photos of E.K. Wuertz testified that E.K.'s information provided probable cause to search. (6-29-10 Tr. 17, 22)

C. No Concession that Affidavit Lacked Probable Cause

Petitioner repeats the claim that Wuertz admitted he knew the search warrant affidavit was insufficient. This is simply untrue, no matter how many times petitioner repeats it. While Wuertz testified that, *as written*, the warrant affidavit did not state a basis "*as it applies to [E.S.]*" to search petitioner's home, (6-29-10 Tr. 13), this narrowly-focused questioning missed the point. The questioning was focusing on the direct allegations involving the crime against E.S., and such a narrow focus wrongly ignored the

issuing judge's ability to find probable cause for the home based on the information from E.K. It also ignored the issuing judge's ability to draw reasonable inferences about the location of the evidence.

Wuertz in fact testified that E.K.'s information provided "the probable cause basis to be able to search the home". (*Id.* 17, 22) Thus, Wuertz' testimony actually *confirmed* the existence of probable cause, not the absence of it.

D. Additional Sworn Information Properly Considered

Above and beyond the sexual photos of E.K. providing a basis to search, Detective Wuertz testified that he gave sworn oral information to the issuing judge that petitioner had photographed E.S. and E.K. in see-through unitards, thereby providing an additional basis to search petitioner's home. Such photographs would have provided evidence relevant to petitioner's "grooming" of these two students and to petitioner's long-term sexual purposes, including when he touched E.S.

The detective's testimony about the sworn oral information was admitted without objection at the suppression hearing, and was later credited by the new trial judge in the latest remand. But, relying heavily on Oh.Crim.R. 41(C)(2), the Tenth District held that Ohio courts could not consider such information because it was not recorded or transcribed at the time it was given to the issuing judge.

The Ohio Supreme Court concluded that the rule posed no such obstacle to the admission and consideration of such sworn information even though not recorded. That conclusion under state law is beyond this Court's review. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976). Even so, petitioner attempts to institute a recording requirement as part of enforcing the

Fourth Amendment itself and/or as part of enforcing an exclusionary rule thereunder. This argument is unsupported by the text of the Fourth Amendment and would wrongly divert the exclusionary rule from its narrow deterrent purpose.

E. Exclusionary Rule Strictly Construed and Narrowly Applied

The exclusionary rule carries "substantial social costs" and must not be applied indiscriminately. *United States v. Leon*, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. * * * Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. * * *

Stone v. Powell, 428 U.S. 465, 489-90, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (footnotes omitted).

An exclusionary rule "allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. of Probation v. Scott*, 524 U.S. 357, 364, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). "The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo v. Louisiana*, 556 U.S. 778, 796, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (quoting *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d

496 (2009)). Letting the guilty go free is "something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141, quoting *Leon*, 468 U.S. at 908.

These negative effects should weigh heavily against any ruling that would expand the exclusionary rule by limiting the good-faith exception. "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Herring*, 555 U.S. at 141, quoting *Scott*, 524 U.S. at 364-65.

F. Good-Faith Exception Broadly Applied

In an effort to mitigate the harshness of the exclusionary rule, this Court has recognized that the existence of a Fourth Amendment violation "does not necessarily mean that the exclusionary rule applies." *Herring*, 555 U.S. at 140. "[E]xclusion 'has always been our last resort, not our first impulse' * * *." *Id.* (quoting another case). "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Id.* at 141 (quote marks & brackets omitted). The exclusionary rule applies *only* when its deterrence benefits outweigh its substantial social costs. *Utah v. Strieff*, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016). "[E]ven when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits." *Id.* at 2059.

"The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers. We have already held that our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances" taking into account the "particular officer's knowledge and experience * * * but not his subjective intent." *Herring*, 555 U.S. at 145-46 (internal quote marks

omitted). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 143.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. "[W]hen police mistakes are the result of negligence * * *, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way. In such a case, the criminal should not go free because the constable has blundered." *Id.* at 147-48 (internal quote marks omitted).

As can be seen, the good-faith exception is not really an "exception" to the exclusionary rule, but a basic predicate for its applicability "across a range of cases." *Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

G. Good-Faith Exception as Applied to Warrants

When an officer relies in reasonably objective good faith on the judge's approval of a search warrant, the evidence seized pursuant to such warrant will not be suppressed. *Leon*, supra. As stated by the Court in the context of qualified immunity from civil liability, but equally applicable here because the standard is the same, the standard for suppression is a high one when a judge has approved the warrant:

> Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." *United States v. Leon*, 468 U.S. 897, 922-923 (1984). Nonetheless, under our precedents, the fact that a neutral magistrate has issued a warrant

> authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley* [v. *Briggs*, 475 U.S. 335,] 341 (1986)]. The "shield of immunity" otherwise conferred by the warrant, *id*., at 345, will be lost, for example, where the 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 (internal quotation marks omitted).
>
> Our precedents make clear, however, that the threshold for establishing this exception is a high one, and it should be. As we explained in *Leon*, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination" because "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.*, at 921; see also *Malley*, *supra*, at 346, n. 9 ("It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable" (internal quotation marks and citation omitted)).

Messerschmidt, 565 U.S. at 546-47 (parallel cites omitted).

Thus, suppression can be justified only if it was "entirely unreasonable" for the officer to rely on the issuing judge's approval of the warrant because "no reasonably competent officer would have concluded that a warrant should issue" because it was "plainly incompetent" to do so. *Id.* at 546-47, 555; *Leon*, 468 U.S. at 923. To trigger suppression, the officer must have acted with at least a grossly-negligent disregard of Fourth Amendment rights in relying on the judge's approval. *Herring*, 555 U.S. at 144.

"[A] warrant issued by a magistrate normally suffices to establish that a law

enforcement officer has acted in good faith in conducting the search." *Leon*, 468 U.S. at 922 (quote marks omitted). Per *Messerschmidt*, the threshold is a "high one" for the defense to establish that it was entirely unreasonable for the officer to rely on the judge's issuance of the warrant.

For purposes of the good-faith exception, it makes no difference that the officer who obtained the warrant also participated in its execution. The test is governed by objective reasonableness of all of the officers involved, without regard to who obtained it or executed it . *Herring*, 555 U.S. at 140; *Leon*, 468 U.S. at 923 n. 24.

H. Even Reviewing Courts are Deferential to Issuing Judge's Approval of Warrant

A police officer is not expected to second-guess the judge's probable-cause determination. *Leon*, 468 U.S. at 920-21. Even when a *court* is reviewing the sufficiency of probable cause vis-à-vis a search warrant, that court should not substitute its judgment for that of the issuing magistrate or engage in a de novo review of the facts, as the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Under *Gates*, a totality-of-the-circumstances approach applies. Great deference is afforded to the issuing magistrate's determination, and doubtful or marginal cases should be resolved in favor of the warrant. *Id.*; *Massachusetts v. Upton*, 466 U.S. 727, 732-33, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). "A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner."

Gates, 462 U.S. at 236 (internal quote marks, brackets, and ellipses omitted).

In short, the issuing judge only needed to have a substantial basis to approve the search warrant. The reasonableness of the officer's reliance therefore must be judged in terms of whether the officer could reasonably believe that there was a substantial basis for the judge to approve the warrant.

In addition, "[p]robable cause * * * is not a high bar * * *." *Kaley v. United States*, 571 U.S. 320, 338-39, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014). "Probable cause exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Grubbs*, 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006), quoting *Gates*, 462 U.S. at 238.

"[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. "Rigid legal rules are ill-suited to an area of such diversity." *Id.* at 232. Probable cause is not to be analyzed under a "complex superstructure of evidentiary and analytical rules." *Id.* at 235. "We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 568 U.S. 237, 244, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013). "Our precedents recognize that the whole is often greater than the sum of its parts * * *." *D.C. v. Wesby*, 138 S.Ct. 577, 588, 199 L.Ed.2d 453 (2018).

I. Sworn Oral Information Properly Considered in Assessing Probable Cause and Good Faith

The Fourth Amendment by its plain terms only requires that *sworn* information be used for the issuance of a warrant: "[N]o Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, * * *." "We have previously rejected efforts to expand the scope of [the Fourth Amendment] to embrace unenumerated matters." *Grubbs*, 547 U.S. at 97.

Accordingly, "the Fourth Amendment does not forbid supplementation of written warrant affidavits with sworn, unrecorded oral testimony * * *." *United States v. Clyburn*, 24 F.3d 613, 614 (4th Cir. 1994). "The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information provided the issuing magistrate be supported by 'Oath or affirmation.'" *Id.* at 617. "Moreover, the Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit. It follows that magistrates may consider sworn, unrecorded oral testimony in making probable cause determinations during warrant proceedings, * * *." *Id.* at 617 (quoting another case).

As numerous cases have held, "the Fourth Amendment does not require that a written affidavit establish probable cause". *United States v. Williamson*, 859 F.3d 843, 864 (10th Cir. 2017) (citing *Clyburn*); *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992) (citing three federal circuits). "[O]ur court has repeatedly held the Fourth Amendment does not require the issuing judge to record sworn supplementary oral testimony." *United States v. Cote*, 569 F.3d 391, 392-93 (8th Cir. 2009). Even when a rule or statute would require recording, such a recording requirement would not be of constitutional dimension, as "[t]here is no requirement that oral testimony in support of the warrant be recorded." *United States v. Skarda*, 845 F.3d 370, 375 (8th Cir. 2016).

Moreover, as discussed in *U. S. ex rel. Gaugler v. Brierley*, 477 F.2d 516, 520-22

(3d Cir. 1973), at least two decisions from this Court have acknowledged that probable cause is to be determined by reference to the "information brought to the magistrate's attention" or "disclosed to the issuing magistrate." *Id.*, citing *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Whiteley v. Warden*, 401 U.S. 560, 565 n. 8, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). Sworn oral information can be brought to the issuing judge's attention and thereby support probable cause even though it was not put into a written affidavit or recorded.

Much of petitioner's argument is premised on the notion that the Ohio rule required recording. But that premise is now undercut by the Ohio Supreme Court's conclusion that the Ohio rule's reference to recording "is a rule of admission, not a rule of exclusion". *Dibble*, ¶ 30. Recording ensures admissibility at a later suppression hearing; lack of recording does not bar its admission or consideration altogether. And, as the Ohio Supreme Court further explained, violation of Ohio's state-law rule would not lead to exclusion anyway.

Of some note, too, would be doubts about the constitutionality of the Ohio rule's recording provision if it were turned into a substantive bar to prevent the prosecution from proving that the search warrant complied with Fourth Amendment requirements. The prosecution repeatedly preserved its contention that such an interpretation would exceed the Ohio Supreme Court's procedural rule-making power under Article IV, Section 5(B), of the Ohio Constitution. The Ohio Supreme Court had no need to reach that state constitutional question because it rejected petitioner's interpretation outright.

In any event, regardless of the recording provision in the Ohio rule, the Fourth Amendment itself imposes no such requirement. Given that the exclusionary rule would

be enforcing the Fourth Amendment, the exclusionary rule would not operate differently in this regard. It would not impose a recording requirement under the good-faith exception when the Fourth Amendment does not impose one.

Accordingly, "a court reviewing an officer's good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing magistrate." *United States v. Frazier*, 423 F.3d 526, 535-36 (6th Cir. 2005). "[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." *United States v. Farlee*, 757 F.3d 810, 819 (8th Cir. 2014). Courts "can look beyond the four corners of the affidavit" to assess the issue of good faith. *United States v. Robinson*, 336 F.3d 1293, 1297 (11th Cir. 2003).

Indeed, "the Supreme Court has, in the past, looked beyond the four corners of the warrant affidavit in assessing an officer's good faith * * *." *Frazier*, 423 F.3d at 534. The decision in *Leon* referred to matters outside the affidavit in evaluating the officers' reasonableness by considering the officers' interaction with prosecutors after the affidavit was drafted. *Leon*, 468 U.S. at 903, 904 n.4. The Court in *Messerschmidt* also considered matters outside the affidavit in assessing the same question of good faith as part of determining the qualified immunity of the officers. *Messerschmidt*, 565 U.S. at 553-55. The Court also has found good faith by considering the back-and-forth between the officer and issuing magistrate. *Massachusetts v. Sheppard*, 468 U.S. 981, 989, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). *Leon* itself instructs that "all of the circumstances" may be considered. *Leon*, 468 U.S. at 922-23 n. 23.

Petitioner errs in contending that only the "affidavit" could be considered because *Leon* referenced the good-faith exception in relation to what the "affidavit" showed. It is true enough that *Leon* at times referenced an affidavit being the source of the court's information for issuing a warrant. But this is because most warrants are supported by an affidavit alone, and no supplemental oral testimony is provided, as occurred in *Leon* itself. Just because *Leon* referenced the most common practice does not mean that such practice is the *only* practice.

It is "dubious logic * * * that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it". *United States v. Knights*, 534 U.S. 112, 117, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). Courts often "decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citations omitted). A decision is not binding precedent on a legal point unless it "squarely addressed the issue". *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Leon*'s referring to an "affidavit" in a case in which only an affidavit was involved does not decide that an "affidavit" is required every time or that only the "affidavit" counts for good-faith purposes.

Petitioner's flawed focus on the word "affidavit" in *Leon* also disregards the text of the Fourth Amendment and aforementioned case law, all of which recognizes that warrants *can* be based in whole or in part on sworn oral information that was presented to the issuing judge, even if such information was not contemporaneously recorded at the

time. Recording is *not* a Fourth Amendment requirement, and so there is no basis to think that *Leon*'s reference to "affidavit" was meant to be determinative on the good-faith issue, especially in light of *Leon*'s accompanying statement that *all* of the circumstances should be considered, and especially in light of the numerous instances in which the Court has considered events and statements occurring outside the four corners of the affidavit in applying the good-faith exception.

A rigid enforcement of a "four corners" restriction would be inconsistent with these cases and does not serve the deterrent purposes that underlay the exclusionary rule, especially in a case in which such a restriction would be created out of whole cloth several years after the fact without any textual basis in the Fourth Amendment. And, in terms of the deterrent purposes of the exclusionary rule, "we are unable to envision *any* scenario in which a rule excluding from the *Leon* analysis information known to the officer and revealed to the magistrate would deter police misconduct." *Frazier*, 423 F.3d at 535 (emphasis sic).

Superimposing a "four corners" requirement on the consideration of good faith would also defy practical workability. Logically, and legally, a "four corners" limitation cannot be given any be-all and end-all status because Fourth Amendment law is far more nuanced and complicated than that. The operation of the exclusionary rule often involves matters that would not appear within the four corners of a search warrant affidavit, including the existence or absence of standing, the presence or absence of causation, issues related to independent-source and inevitable-discovery doctrines, and so on.

The give-and-take discussion between the police and the issuing judge could also be important to the good-faith analysis. The issuing judge very well could make

comments about the warrant that would lead a reasonable officer to believe that the warrant is properly issued based on the information before the judge. *Sheppard*, supra. Equally so, the issuing judge's taking of supplemental testimony from the officer would reasonably lead the officer to believe that the taking of such testimony has legal significance and that such testimony is being properly considered.

Moreover, the nature of the purported error in failing to record the affiant's supplemental oral testimony also would implicate all of the reasons for *having* the good-faith exception. The act of ordering recording would be the judge's role, not the officer's, as the court reporter is a court officer supervised and controlled by the judge. "[I]t was the judge, not the police officers, who [would be making] the critical mistake". *Sheppard*, 468 U.S. at 990.

Having a recording requirement would also likely involve clerical steps – transcription and making the testimony a part of the affidavit – that would not even occur until after the officer has left with the judge's approval in hand. When the judge swears in the officer, allows the officer to provide supplemental information under oath, and then approves the warrant, a reasonable officer has zero reason to think that the Fourth Amendment has been disregarded, which itself does not even require recording. In that circumstance, it is difficult to envision what more the officer should have done. *Sheppard*, 468 U.S. at 989 ("officers in this case took every step that could reasonably be expected of them").

The text of the Fourth Amendment plainly does not impose written-affidavit or recording requirements, as numerous lower-court cases have held. Superimposing such requirements after the fact here would implicate all of the reasons for having a good-faith

exception. Moreover, any noncompliance with a supposed recording requirement would have been a judicial error. Such noncompliance would not show the *officer* was acting in culpable disregard of Fourth Amendment rights. "Penalizing the officer for the [judge's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

J. Cited Cases Create No Conflict

Cases cited by petitioner as creating a "conflict" do not create a conflict. One of the Sixth Circuit decisions actually was vacated by the en banc court. *United States v. Christian*, 893 F.3d 846 (6th Cir. 2018), vacated en banc, 925 F.3d 305 (6th Cir. 2019).

In addition, none of the Sixth Circuit cases addressed the issue of additional information actually being conveyed to the issuing judge. *Christian*, 893 F.3d 846 (no additional information beyond affidavit); *United States v. Laughton*, 409 F.3d 744, 746 (6th Cir. 2005) (rejecting "information known to the officer but not conveyed to the magistrate"); *United States v. White*, 874 F.3d 490 (6th Cir. 2017) (upholding good faith based on affidavit; no indication that any additional information provided to issuing judge); *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006) (lack of good faith based on affidavit alone; no indication that any additional information provided to issuing judge); *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008) (lack of good faith based on affidavit alone; no indication that any additional information provided to issuing judge); *United States v. Weaver*, 99 F.3d 1372, 1376 (6th Cir. 1996) (mentioning that officer "may have orally supplemented the affidavit with additional information" but not otherwise addressing that issue or indicating whether information submitted under oath).

The Sixth Circuit authorities have repeatedly acknowledged that information

conveyed to the issuing judge can be considered in assessing good faith. *Hython*, 443 F.3d at 488 ("the rule announced in *Laughton* is inapplicable when the extra-affidavit information was made known to the issuing magistrate"); *Frazier*, 423 F.3d at 534, 534 n. 4, 535 ("we do not read *Laughton* as prohibiting a court in all circumstances from considering evidence not included in the affidavit."; "That case gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit"; "*Weaver* did not hold that a court is limited to the four corners of the affidavit for the purposes of the *Leon* analysis."). The Sixth Circuit has cited *Frazier* as showing that the good-faith exception allows the court deciding the suppression motion to go outside the four corners of the affidavit to consider information that was known to the officer and revealed to the issuing judge. *United States v. Farrad*, 895 F.3d 859, 891 (6th Cir. 2018). The Sixth Circuit cases simply do not create any conflict, let alone a conflict that is deep or meaningful enough to necessitate this Court's intervention.

Petitioner's citation to *United States v. Luong*, 470 F.3d 898 (9th Cir. 2006), and its disagreement with *United States v. Legg*, 18 F.3d 240 (4th Cir. 1994), does not show any conflict that is relevant or meaningful to the present case either. *Luong* declined to consider oral information that the officer had conveyed to the issuing magistrate, emphasizing that the original affidavit had been "entirely lacking in indicia of probable cause", and further emphasizing that the additional oral information had been "an unsworn, unrecorded oral colloquy" that did not comply with the Constitution's requirement that probable cause be established "by Oath or affirmation." *Luong*, 470 F.3d at 905. Neither of these factors is involved here, as the original affidavit here was

not "entirely lacking in indicia of probable cause", and the additional information here was sworn and therefore compliant with the Fourth Amendment's requirement of an oath or affirmation. A "conflict" with a single Ninth Circuit case would not justify this Court's intervention anyway.

In effect, petitioner is attempting to constitutionalize his interpretation of a state-law criminal rule when that very interpretation was rejected as a matter of state law. Moreover, it is plain that a rule imposing recording requirements in a particular jurisdiction would not alter the Fourth Amendment's protections. *Virginia v. Moore*, 553 U.S. 164, 176, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). "[T]he Court's analysis must be guided by the requirements of the Fourth Amendment, not any preferences as to the best procedure for conducting warrant applications." *United States v. Donaldson*, 2012 WL 1142922, *11, n. 11 (S.D. Ga. 2012), aff'd, 558 Fed.Appx. 962, 967 n. 3 (11th Cir. 2014)

K. Probable Cause and Good Faith

There were two substantial bases to support probable cause that petitioner's home had evidence that would aid in conviction. E.K.'s allegations reasonably could be viewed as providing a substantial basis to conclude there was probable cause that petitioner's home would have photographic evidence related to E.K., thereby showing the ultimate sexual purpose behind his manipulations and grooming of the student assistants, and, thus, his ultimate sexual purpose vis-à-vis assistant E.S.

In addition, the sworn oral information about photo-taking in unitards reasonably could be viewed as providing probable cause that petitioner would still have in his possession the photographs of E.S. and E.K. in their see-through unitards, thereby also confirming the modus operandi described in the accounts given by E.S. and E.K.

The officer was prima facie acting in good faith in seeking the issuance of a warrant. He was not being plainly incompetent or entirely unreasonable or grossly negligent in thinking there was a substantial basis for the warrant's issuance.

In light of the totality of the affidavit and additional sworn oral information, and in light of the "mere evidence" standard, there was probable cause to search petitioner's home, and the detective was not acting in a deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights.

CONCLUSION

For the foregoing reasons, respondent State of Ohio respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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