No. 20-5776

IN THE SUPREME COURT OF THE UNITED STATES

JOEL THOMAS AUGARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

United States v. Augard, No. 18-cr-134 (Feb. 25, 2019)

United States Court of Appeals (8th Cir.):

United States v. Augard, No. 19-1507 (Mar. 31, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-26) is reported at 954 F.3d 1090.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on March 31, 2020. A petition for rehearing was denied on May 15, 2020 (Pet. App. 29). The petition for a writ of certiorari was filed on September 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted on two counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Judgment 1; Pet. App. 11. He was sentenced to 480 months of imprisonment, to be followed by 20 years of supervised release. Judgment 2-3; Pet. App. 12-13. The court of appeals affirmed. Pet. App. 20-26.

1. In 2005 or 2006, petitioner met "G.P.," a boy who was then 11 or 12 years old, through a volleyball league in Des Moines, Iowa. Pet. App. 21. Petitioner began methodically grooming G.P. for sexual purposes, playing video games with him, showing him pornography, and ultimately sexually abusing G.P. in an increasingly intense fashion over the course of approximately one year. Id. at 2, 21. At some point, petitioner began filming and photographing the sexual abuse, taking numerous photographs and, on at least three occasions, setting up a tripod to videotape the sexual abuse. Presentence Investigation Report (PSR) ¶ 23; Pet. App. 21. One of the scenes videotaped by petitioner was "a bondage scene with G.P. as the victim." Pet. App. 3. Petitioner would transfer the photos and videos onto his computer and show them to G.P. PSR ¶ 23; Pet. App. 21.

The abuse only ended when petitioner was fired from his job and left Des Moines. Pet. App. 21. Petitioner's interest in G.P.

did not disappear, however. When G.P. was 15 years old, he attended a sporting event at the University of Iowa, where petitioner was then employed in the information technology department. Ibid. When petitioner saw G.P. on a security camera, he sent G.P. a text message saying, "I see you." Ibid. And in 2016, petitioner sent G.P. a Facebook message asking why he had not been invited to G.P.'s wedding. Ibid.

In 2018, G.P. reported the abuse and more recent contacts with petitioner to Detective Lori Kelly of the Des Moines Police Department. Pet. App. 21. Detective Kelly applied for a warrant to search petitioner's residence, which a state district court judge issued. Id. at 2, 21-22. The warrant affidavit detailed the abuse -- including petitioner's documentation of the abuse through photographs and videos which he had also copied into computer files -- as well as petitioner's more recent efforts to contact G.P. Id. at 2-3; Mot. to Suppress Ex. 2, at 15-20. The affidavit described the house to be searched as petitioner's current residence, as verified by Iowa Department of Transportation Records and recent observations of petitioner's car parked outside the house. Pet. App. 3-4, 22; Mot. to Suppress Ex. 2, at 20. The affidavit made clear that petitioner's current residence was not the same location at which the abuse had occurred. See Mot. to Suppress Ex. 2, at 18-19. The affidavit also stated that petitioner had left Des Moines in 2009 and obtained employment at the University of Iowa, which is commonly

known to be located in Iowa City. Pet. App. 3; see Gov't C.A. Br. 4.

Police executed the warrant at petitioner's residence and seized a video camera recorder and a number of other electronic devices, which contained over 90,000 images of child pornography and two videos of petitioner sexually abusing G.P. on separate occasions in approximately 2008. PSR ¶¶ 28-31, 36.

2. A federal grand jury in the Southern District of Iowa returned an indictment charging petitioner with two counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). See Indictment 1-2.

Petitioner moved to suppress the evidence obtained from his residence. See Pet. App. 1; Mot. to Suppress. He argued that the warrant did not adequately establish probable cause because the warrant affidavit contained stale information and failed to establish a sufficient nexus between the evidence sought and the house to be searched. Pet. App. 1. Petitioner additionally argued that the good-faith exception did not apply because the stale information and lack of nexus made executing the warrant unreasonable, and because the affidavit had not disclosed that petitioner had moved several times since the abuse or that the house to be searched belonged to petitioner's parents. Id. at 1, 7.

The district court concluded that the warrant was not supported by probable cause, but found that the good faith exception to the exclusionary rule applied and that the affidavit's omissions were immaterial and therefore did not warrant a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Pet. App. 1-9. Petitioner pleaded guilty to the indictment, reserving his right to appeal the denial of the suppression motion. See PSR ¶¶ 2-3, 5. The district court sentenced petitioner to 480 months of imprisonment, to be followed by 20 years of supervised release. Pet. App. 12-13.

3. The court of appeals affirmed. Pet. App. 20-26. The court found that, even if the warrant lacked probable cause, the good-faith exception to the exclusionary rule applied because the executing officers had acted in good faith in relying on the warrant. Id. at 23-26.

The court of appeals first rejected petitioner's argument that the police unreasonably relied on the warrant because information in the affidavit was too stale to support the search. Pet. App. 23-24. The court observed that the affidavit "described [petitioner]'s prolonged unusual interest in G.P., his need to memorialize and revisit the sexual abuse by retaining and viewing videos, and his efforts to preserve the recordings on a computer for future viewing," all of which indicated that the evidence was "not so stale as to render the officer's reliance on the warrant entirely unreasonable." Id. at 24. The court also observed that

the "type of property subject to search included digital images and videos of child pornography, which are typically retained for long periods of time," an inference supported here by petitioner's "particular interest and investment in recording the videos on one device, saving and transferring them to another, and revisiting them with G.P. on numerous occasions." Ibid. The court accordingly found that both the "nature of the crimes" and the "type of evidence sought" established that "the warrant was not so stale" as to foreclose the application of the good faith exception. Ibid.

The court of appeals also rejected petitioner's argument that the police unreasonably relied on the warrant because the affidavit did not establish a sufficient nexus between the evidence sought and the place to be searched. Pet. App. 24-25. The court determined that the affidavit supported "a reasonable inference that images and videos [petitioner] took and preserved at a prior residence would be located at his current residence" based on the particular facts of the case, "including the prolonged grooming, repeated acts of sexual abuse, pornography production, transfer to a storage device, and repeated viewing that occurred regularly over the course of a year." Id. at 25. The court also determined that the affidavit had not omitted any significant information, because the affidavit "notes that petitioner had moved after the abuse," and because "actual ownership" information about the house to be searched was immaterial given the evidence confirming

petitioner's residence there. Ibid. The court accordingly found that the district court had not abused its discretion in declining to hold an evidentiary or Franks hearing. Ibid.

ARGUMENT

Petitioner contends (Pet. 8-15) that the court of appeals erred in determining that the good-faith exception to the exclusionary rule applied here, arguing that the court considered facts outside the four corners of the search warrant affidavit and that the court's assessments of staleness and nexus were wrong. The court of appeals was correct in its application of the good-faith exception. Although some disagreement exists regarding the relevance of facts outside the warrant affidavit to analyzing good faith, this case would be an especially unsuitable vehicle for considering that disagreement. Petitioner's current contention about outside evidence was neither pressed to nor passed upon by the court of appeals; it is not clear that the court of appeals actually relied on facts outside the warrant affidavit in determining that the good-faith exception applied; and the affidavit alone would have established good faith in the circuits whose methodology petitioner invokes. This Court has repeatedly and recently denied review of petitions raising similar questions. See Thomas v. United States, 140 S. Ct. 49 (2019) (No. 18-1344); Escobar v. United States, 139 S. Ct. 2639 (2019) (No. 18-8202); Combs v. United States, 139 S. Ct. 1600 (2019) (No. 18-6702); Campbell v. United States, 138 S. Ct. 313 (2017) (No. 16-8855);

Fiorito v. United States, 565 U.S. 1246 (2012) (No. 11-7217). The same result is warranted here.

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

a. The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). This Court has explained that in order to justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. Herring v. United States, 555 U.S. 135, 144 (2009); see Davis v. United States, 564 U.S. 229, 236-239 (2011).

United States v. Leon, supra, recognized a good-faith exception to the exclusionary rule in the context of search warrants. The Court explained that application of the exclusionary rule is "restricted to those areas where its remedial objectives are thought most efficaciously served." 468 U.S. at 908 (citation omitted). It observed that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." Id. at 922. The Court thus held that evidence should not be suppressed if officers acted in an objectively reasonable manner in relying on

a search warrant, even if the warrant is later deemed deficient. Ibid.

The Court noted that in some cases an officer's reliance would not be objectively reasonable because the officer lacked "reasonable grounds for believing that the warrant was properly issued," such as when a warrant was "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Leon, 468 U.S. at 923 (citation omitted). The Court has explained, however, "that the threshold for establishing" such a deficiency "is a high one, and it should be." Messerschmidt v. Millender, 565 U.S. 535, 547 (2012). And Leon emphasized that whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" is to be decided based on "all of the circumstances." 468 U.S. at 922 n.23.

Petitioner is mistaken in contending (Pet. 8-11) that courts categorically err by considering information outside of the four corners of the warrant affidavit in analyzing good faith. To the contrary, in making clear that an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant" must be "objectively reasonable," the Court in Leon held that "all of the circumstances * * * may be considered" when deciding whether objective reasonableness is established. 468 U.S. at 922-923 & n.23; accord Herring, 555 U.S. at 145 (explaining that the good-faith inquiry is based on

"'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances'" and that "[t]hese circumstances frequently include a particular officer's knowledge and experience") (quoting Leon, 468 U.S. at 922 n.23). Indeed, Leon itself listed a circumstance outside the four corners of the affidavit -- "whether the warrant application had previously been rejected by a different magistrate" -- as among the circumstances that courts might consider. 468 U.S. at 923 n.23. And in a companion case decided the same day as Leon, the Court again examined circumstances outside the four corners of the warrant affidavit in concluding that the good-faith exception was applicable. See Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984) (considering the circumstances under which the warrant application was presented).

That approach accords with the principles that underlie the good-faith doctrine and the exclusionary rule more generally. This Court has explained that suppression is appropriate "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." Davis, 564 U.S. at 238 (citation and internal quotation marks omitted). Officers do not engage in any "deliberate, reckless, or grossly negligent" conduct when they omit incriminating facts that would have only helped them gain the magistrate's approval. Instead, at most, officers in that circumstance commit the type of negligent omission for which this Court has indicated that suppression is not ordinarily

appropriate. Ibid. Moreover, officers already have considerable incentives to include the facts needed to establish probable cause in their search warrant affidavits, because doing so increases the likelihood that the magistrate will issue a warrant. Those existing incentives suggest that any marginal benefit that a narrow construction of the good-faith doctrine might theoretically provide in deterring officers from omitting inculpatory facts from warrant applications does not outweigh the high societal costs of a suppression remedy. See Herring, 555 U.S. at 141.

b. In this case, suppression was not required because the warrant affidavit established probable cause or, at a minimum, was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted).

The affidavit described petitioner's "extensive grooming of G.P., his repeated abuse of G.P. over a one year period, and his efforts to contact G.P. as recently as 2016," as well as Detective Kelly's successful efforts to independently corroborate details of G.P.'s allegations. Pet. App. 24. The affidavit also described petitioner's repeated documentation of his crimes in videos and photographs, which petitioner then preserved as computer files as well. Ibid. Petitioner does not dispute that the affidavit established probable cause to believe that he had sexually abused G.P. or created child pornography, but instead contends (Pet. 11-12) that the information in the affidavit was stale and failed to

establish a nexus between the items to be seized and his residence. But as the court of appeals recognized, "[g]iven [petitioner's] particular interest and investment in recording the videos on one device, saving and transferring them to another, and revisiting them with G.P. on numerous occasions, the property subject to search in this case was reasonably likely to be retained and kept * * * close at hand." Pet. App. 24.

The affidavit specifically documented, for example, petitioner's "need to memorialize and revisit the sexual abuse" through the videos, and "his efforts to preserve the recordings on a computer for future viewing." Pet. App. 24. The affidavit also described petitioner's "prolonged unusual interest in G.P." and "his efforts to contact G.P. as recently as 2016," which was only two years before the warrant was issued. Ibid. And as petitioner does not dispute, the affidavit established through multiple sources that petitioner lived at the residence to be searched. See id. at 22. Those allegations established probable cause to search petitioner's residence. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"). At minimum, the affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted).

Good faith in executing the warrant is only reinforced by the additional points noted by the court of appeals: that delayed reporting is common for crimes of child sexual abuse, which involve "the abuse of a trust and power relationship," and that "digital images and videos of child pornography * * * are typically retained for long periods of time." Pet. App. 24 (citing United States v. Huyck, 849 F.3d 432, 498 (8th Cir. 2017)). As the court of appeals observed, those points find support in the specific facts of this case, as alleged in the affidavit -- including the nature of the abuse and petitioner's efforts to preserve and revisit the child pornography that he had created. Id. at 24-25.

Petitioner errs in contending that the good-faith exception does not apply because the affidavit failed to state that petitioner "had moved several times" after the abuse and "did not own the house" that was to be searched. Pet. 13-14. As the court of appeals observed, the affidavit did, in fact, "note[] that [petitioner] had moved after the abuse." Pet. App. 25; see also Mot. to Suppress Ex. 2, at 18-19. The specific number of times he changed his stated residence does not materially alter the probable cause analysis or the reasonableness of relying on the issued warrant. Similarly, the fact that petitioner's parents owned the house, rather than petitioner himself, "was immaterial to a probable cause determination" given that Detective Kelly had separately confirmed petitioner's residence through multiple sources. Pet. App. 25; see Franks v. Delaware, 438 U.S. 154, 155-

156 (1978) (explaining that a defendant seeking a hearing based on omitted information must make a substantial showing that the affiant knowingly or recklessly omitted material information from an affidavit that, if included, would have made a difference to the probable-cause analysis). The court of appeals thus correctly upheld the denial of the suppression motion and found no abuse of discretion in the district court's refusal to hold a Franks hearing. See Pet. App. 25.

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

A "majority of circuits" to consider the question have "taken into consideration facts outside the affidavit when determining whether the Leon good faith exception applies." United States v. Martin, 297 F.3d 1308, 1319 (11th Cir.), cert. denied, 537 U.S. 1076 (2002); see id. at 1319-1320 (considering information known to officer but not included in affidavit in making good-faith determination); see also United States v. Farlee, 757 F.3d 810, 819 (8th Cir.) ("[W]hen assessing the officer's good faith reliance on a search warrant under the Leon good faith exception, we can look outside of the four corners of the affidavit and consider the totality of the circumstances, including what the officer knew but did not include in the affidavit."), cert. denied, 574 U.S. 1002 (2014); United States v. McKenzie-Gude, 671 F.3d 452, 461 (4th

Cir. 2011) (explaining that court may consider "undisputed, relevant facts known to the officers prior to the search" but inadvertently not disclosed to magistrate, as part of good-faith analysis); see also United States v. Procopio, 88 F.3d 21, 28 (1st Cir.) (applying Leon where "only omission [in an affidavit] was the failure to explain how the agent -- who had ample basis for the contention -- knew that" place to be searched belonged to subject of search), cert. denied, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997).

As petitioner notes (Pet. 9), some courts of appeals have, at least in some circumstances, disapproved of consideration of facts outside the four corners of the search warrant affidavit in the Leon analysis. See ibid. (citing United States v. Laughton, 409 F.3d 744, 751-752 (6th Cir. 2005)); see also, e.g., United States v. Hove, 848 F.2d 137, 139-140 (9th Cir. 1988); but see United States v. Mendonsa, 989 F.2d 366, 369 (9th Cir. 1993) (determining that good-faith exception applied because detective "sought advice from county attorneys concerning the substantive completeness of the affidavit before he submitted it to the magistrate" and "the attorney advised him that the affidavit seemed complete").

This case, however, does not present a suitable vehicle for addressing that disagreement. First, although the district court observed that "collectors [of child pornography] are unlikely to destroy images after having succeeded in obtaining or creating them" as part of its good-faith analysis, Pet. App. 7, petitioner

did not argue to the court of appeals that the district court had erred by referencing facts outside the four corners of the affidavit, and the court of appeals therefore did not pass on that legal question. This Court's usual practice is to "refrain from addressing issues not raised in the [c]ourt of [a]ppeals." EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam); see United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted). Petitioner offers no reason to depart from that practice here.

Second, although the court of appeals cited its prior decision in United States v. Jackson, 784 F.3d 1227, 1231 (8th Cir. 2015), for the proposition that the "good-faith exception may apply based on information reasonably known to the executing officer but not included in the warrant," Pet. App. 23, it is not clear that the court's good-faith determination rested on any specific facts outside the affidavit. The court did note the common sense points that sexual abuse of a child often leads to delayed reporting and that "digital images and videos of child pornography * * * are typically retained for long periods of time." Id. at 24. But the court ultimately determined that the Leon good-faith exception applied because of the specific facts in the affidavit, including that petitioner had a "particular interest and investment in recording the videos on one device, saving and transferring them

to another, and revisiting them with G.P. on numerous occasions," had a "prolonged unusual interest in G.P.," and made "efforts to contact G.P. as recently as 2016." Ibid.

Third, the officers' reliance on the warrant here would meet the good-faith standards developed by the courts on whose decisions petitioner relies. See Pet. 8-9 (citing United States v. Weber, 923 F.2d 1338, 1346 (9th Cir. 1990); and Laughton, 409 F.3d at 751-752). In United States v. Laughton, supra, the Sixth Circuit explained that the good-faith exception applies when there is "some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be searched." 409 F.3d at 749; see also id. at 750 (applying good faith exception where the affidavit contained "some connection, regardless of how remote it may have been, between the criminal activity at issue and the place to be searched") (emphasis omitted). Similarly, in the Ninth Circuit it suffices if the affidavit in some fashion "link[s]" the defendant to the place to be searched, even if the affidavit is not "'the model of thoroughness.'" United States v. Crews, 502 F.3d 1130, 1137 (2007) (citation omitted).

The affidavits at issue in Laughton and United States v. Weber, supra, fell short of these courts' good-faith standards, but the affidavit in this case would not. The affidavit in Laughton "failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit," and "also failed to indicate any

connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there," 409 F.3d at 747, while the affidavit in Weber relied on "rambling boilerplate recitations" that had no particular connection to the facts of that case or the defendant, instead "describing generally information about different types of perverts who commit sex crimes against children," 923 F.2d at 1345 (emphasis added). Detective Kelly's affidavit, by contrast, described specific instances of petitioner's sexual abuse and production of child pornography, described petitioner's efforts to preserve and review that child pornography, and linked petitioner to his residence through multiple sources. See, e.g., Pet. App. 24 (affidavit described petitioner's "particular interest and investment in recording the videos on one device, saving and transferring them to another, and revisiting them with G.P. on numerous occasions").

A case in which petitioner did not object to the consideration of facts outside the warrant affidavit, in which it is not clear whether the good-faith determination actually rested on facts outside the warrant affidavit, and in which no significant basis exists for concluding that another circuit would have ordered suppression, is not a suitable vehicle for addressing the relevance of facts outside the warrant affidavit in good-faith analysis. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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