No. ___-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN TRAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit erroneously applied the good faith exception to the exclusionary rule where the government violated Fed. R. Crim. P. 41 intentionally?

2. Whether the First Circuit erroneously applied the good faith exception to the exclusionary rule to a warrant that was void *ab initio* because it was issued without jurisdiction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John Tran, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit is included in the Appendix at A2. The Memorandum and Order of the United States District Court is included in the Appendix at A3 and published at 226 F. Supp. 3d 58 (D. Mass. 2016).

JURISDICTION

The court of appeals affirmed the judgment of the district court on May 5, 2019. This petition is being filed within 150 days of the entry of judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STAUTES, AND RULES INVOLVED

28 U.S.C. § 636(a)(1)

> (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts . . . .

Fed. R. Crim. P. 41(b)(1) (2015)

> (b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district . . . .

STATEMENT OF THE CASE

This case arises from the FBI's "Operation Pacifier" investigation and its operation of the "Playpen" child pornography website.

A. The Local and NIT Search Warrants

On November 16, 2015, FBI agents assisted by local law enforcement executed a search warrant on the house where the defendant, John Tran, resided in Waltham, Massachusetts. The search was conducted pursuant to a warrant issued on November 12, 2015 (the "local warrant").

The search of Mr. Tran's home pursuant to the local warrant was actually the second Fourth Amendment search to which he and his property in Massachusetts were subjected. The first search — which identified Mr. Tran's IP address and led to the search of his home — occurred between February 20 and March 5, 2015, when the FBI used a "Network Investigative Technique" ("NIT") — essentially, malware — to conduct remote searches of Mr. Tran's personal computer, purportedly pursuant to a warrant issued in the Eastern District of Virginia (the "NIT warrant").

The events leading to the search of the defendant's home began on February 19, 2015, when the FBI took control of a child pornography website called "Playpen" and moved it to a government server in Virginia. While the FBI ran the site, approximately 100,000 unique users logged into the site, with approximately one million total logins.

On February 20, 2015, the FBI submitted the NIT warrant application to a Magistrate Judge in the Eastern District of Virginia. This application sought authorization to use the NIT to search "activating computers," defined as the computers "of any user or administrator who logs into [Playpen] by entering a username and password."

The cover sheet of the NIT warrant application identified the locations to be searched pursuant to the warrant in a sworn statement that reads as follows:

> I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that *on the following person or property. . . located in the Eastern District of Virginia*, there is now concealed (see attachment B).

(Emphasis added). Consistent with this statement, the warrant itself specified the location to be searched as "*property located in the Eastern District of Virginia*." The warrant did not incorporate the warrant application by reference, nor was the application physically attached to the warrant.

On November 16, 2015, FBI agents executed the local warrant at Mr. Tran's home and seized, among other items, his personal computer.

B. Procedural Synopsis

Mr. Tran was charged by complaint on November 16, 2015, with receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A), and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

On January 14, 2016, a grand jury returned an indictment for the same charges. On November 14, 2016, Mr. Tran moved to dismiss the indictment based on outrageous government conduct. On November 16, 2016, he moved to suppress the fruits of the NIT search and the local search on the grounds that they violated the Fourth Amendment.

The district court held a motion hearing on December 14, 2016, and denied both motions by a Memorandum and Order issued on December 28, 2016. On March 23, 2017, Mr. Tran pleaded guilty pursuant to a reservation of rights permitting him to appeal denial of the motion to dismiss and the motion to suppress.

On October 24, 2017, the district court sentenced Mr. Tran to 60 months imprisonment on each count, to be served concurrently, followed by five years of supervised release and a $200 special assessment. Judgment entered on November 6, 2017.

Mr. Tran filed a timely notice of appeal on November 6, 2017, and his opening brief on May 16, 2018. The government filed a motion for summary disposition on May 22, 2019, which the First Circuit granted by judgment dated May 5, 2020.

REASONS FOR GRANTING THE PETITION

In *United States v. Leon*, 468 U.S. 897 (1984), this Court carved out the "good faith" exception to the exclusionary rule. This case presents an appropriate vehicle for the Court to make clear that the "good faith" doctrine does not apply where the government intentionally violates a defendants rights and/or where a warrant is void *ab initio* because it was issued without authority or jurisdiction.

I. THE FIRST CIRCUIT ERRONEOUSLY APPLIED THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHERE THE GOVERNMENT VIOLATED FED. R. CRIM. P. 41 INTENTIONALLY.

A. The NIT Warrant Violated Rule 41.

At the time the NIT warrant issued, Fed. R. Crim. P. 41 provided that "[A] magistrate judge with authority in the district . . . has authority to issue a warrant to search for and seize a person or property located within the district." Fed. R. Crim. P. 41(b)(1) (emphasis added). Here, the NIT warrant, if read to authorize searches anywhere in the world (it should not be so read, as argued in Part I, supra), including Mr. Tran's computer in Waltham, Massachusetts, plainly violated the rule. Consistent with its decision in an earlier case, *United States v. Anzalone*, 208 F. Supp. 3d 358, 369-70 (D. Mass. 2016), the district court correctly concluded that the search of Mr. Tran's computer was not permitted by Rule 41.

B. The Government Violated Rule 41 Intentionally.

Suppression is required if law enforcement acted in "intentional and deliberate disregard" of Rule 41. *United States v. Weiland*, 420 F.3d 1062, 1071 (9th Cir. 2005) (citations omitted); *see also United States v. Martinez-Garcia*, 397 F.3d 1205, 1213 (9th Cir. 2005) (same). That is what occurred here.

The Government's campaign to change Rule 41 started in 2013. Prior to that time, when the government sought to employ a NIT with extraterritorial effect, it expressly stated in search warrants that the property to be searched was located in the issuing district "and elsewhere." But then a decision in case styled *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) ("In re Warrant"), called the government's practice into question. There, the court denied a government application for a NIT warrant because it would violate Rule 41. *See id*. at 761. In a detailed analysis of Rule 41 and its constitutional underpinnings, the *In re Warrant* decision put the government on notice that using a warrant issued by a Magistrate Judge in one district to execute malware searches in another is not legal.

This decision was very much on DOJ's radar because it substantially curtailed the FBI's early hacking efforts. Implicitly acknowledging the soundness of the *In re Warrant* opinion (which the Government did not appeal), DOJ sent a letter in September, 2013, to the Advisory Committee on Criminal Rules, citing the case as a reason to change the Rule's jurisdictional limits. *See* https://www.uscourts.gov/sites/default/files/fr_import/CR2013-10.pdf at 159. This letter shows that DOJ fully understood, at least two years before it sought the NIT warrant here, that Rule 41 did not permit multi-district computer hacking. *Id*. (DOJ stated that the Rule should be changed to "remove an unnecessary obstruction currently impairing the ability of law enforcement to investigate. . . multi-district Internet crimes").

Moreover, DOJ's internal analysis of Rule 41 reached the same conclusion. According to DOJ's manual on Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (DOJ Electronic Evidence Manual), when "data is stored remotely in two or more different places within the United States and its territories, agents should obtain additional warrants for each location where the data resides to ensure compliance with a strict

reading of Rule 41(a). For example, if the data is stored in two different districts, agents should obtain separate warrants from the two districts" (emphasis added). *See* https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf at 84.

The DOJ manual also addresses situations where, as here, "agents do not and even cannot know that data searched from one district is actually located outside the district[.]" *Id* at 85. In these types of situations, the manual cautions agents that they will be inviting suppression if they deliberately disregard the Rule's jurisdictional limits. *See id*. Despite the manual's guidelines, a DOJ attorney reviewed and presumably approved the EDVA application.

In light of *In re Warrant*, DOJ was on notice that a magistrate judge could not authorize a worldwide warrant under Rule 41. Nevertheless, DOJ attempted to remove this "obstruction" to the FBI's hacking operations, without waiting for a rule change, by simply ignoring Rule 41, removing "and elsewhere" from warrant paperwork to conceal or obfuscate the unlawful sweep of the warrant, and taking its chances on whether the courts would impose sanctions.

Given these facts, the Court should now conclude that the Government deliberately violated Rule 41. Suppression is the required remedy. *See United States v. Martinez-Garcia*, 397 F.3d 1205, 1213 (9th Cir. 2005) (stating grounds for suppression, including deliberate rule violation and prejudice, in the disjunctive).

II. THE FIRST CIRCUIT ERRONEOUSLY APPLIED THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO A WARRANT THAT WAS VOID AB INITIO BECAUSE IT WAS ISSUED WITHOUT AUTHORITY OR JURISDICTION.

More than a mere violation of Rule 41, the NIT warrant was void *ab initio* because it was issued in violation of the Federal Magistrates Act and therefore without jurisdiction or judicial authority.

The NIT warrant was issued by a U.S. Magistrate Judge, whose powers are defined and limited by 28 U.S.C. § 636 (the Federal Magistrates Act). The Act both establishes and limits the powers of a Magistrate Judge; it expressly provides that their jurisdiction extends only "within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law." 28 U.S.C. § 636(a). Consistent with this law, the Ninth Circuit has stated that "[f]ederal magistrates are creatures of statute, and so is their jurisdiction. We cannot augment it; we cannot ask them to do something Congress has not authorized them to do." *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996) (citation omitted).

Since Magistrate Judges are not "Article III" judges under the U.S. Constitution, the Magistrate Judge who issued the NIT warrant had no more power to authorize searches outside the EDVA than did, for example, her law clerk or a U.S. Marshall. *See Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009) ("Section 636 outlines the jurisdiction, powers, and temporary assignments of magistrate judges."); *see also United States v. Luk*, 859 F.2d 667, 672 (9th Cir.1988) (noting that "warrants issued by unauthorized persons" defeat the purpose of "requiring an appropriate federal or state judge or magistrate to review the reasonableness and probable cause basis of a search warrant"); *United States v. Glover*, 736 F.3d 509, 514-15 (D.C. Cir. 2013) (explaining that a warrant issued in "blatant disregard" of a judge's territorial

jurisdiction cannot be excused as a mere "technical" defect); *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001) (holding that "when a warrant is signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void *ab initio*"), *overruled on other grounds*, *United States v. Master*, 614 F.3d 236, 242 (6th Cir. 2010).

In *United States v. Barber*, 2016 U.S. Dist. LEXIS 56282 (D. Kan. Apr. 27, 2016), the court addressed a warrant that was issued by a Maryland Magistrate Judge for digital evidence in California. The court concluded that the judge had no authority to issue the warrant and "warrants issued without jurisdiction are void from their inception[.]" *Id*. at *8. It next held that "[a] warrant that is void from its inception is no warrant at all." *Id*. The court also determined that "the good faith exception applies only to evidence seized under a once-valid warrant that was subsequently invalidated—not evidence seized pursuant to a warrant that was void at its inception." *Id*. at *4; *see also United States v. Vinnie*, 683 F. Supp. 285, 288 (D. Mass. 1988) (holding that good faith exception did not apply because case involved not a "determination of what quantum of evidence constitutes probable cause" but rather "the more fundamental problem of a magistrate judge acting without subject matter jurisdiction.").

This Court has not expressly addressed a situation in which a warrant is issued without legal authority. However, *Nguyen v. United States*, 539 U.S. 69 (2003) is instructive. In that case, the petitioners challenged the composition of a Ninth Circuit panel consisting of two Article III judges and one Article IV Judge (from the Northern Mariana Islands). See id. at 72-73. This Court concluded that while a district judge from within a circuit could be assigned to sit on the Court of Appeals under 28 U.S.C. § 292(a), judges from the Northern Mariana Islands were not "district judges" within the meaning of the statute. *See id.* at 74-73. "If the statute made [the judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and

perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari." *Id*. at 78.

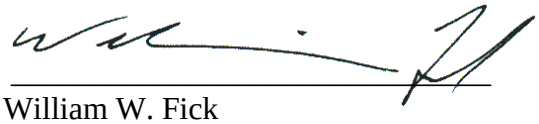
Accordingly, the Could should make clear that a wrrant issued without authority is a nullity and not susceptible to "good faith" analysis.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully Submitted,

JOHN TRAN
by his attorney,



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