No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2020

JOHN CHRISTOPHER FERGUSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the good faith exception to the exclusionary rule under the Fourth Amendment applies where law enforcement officials knew or should have known that the affidavit submitted in support of the warrant would lead the magistrate to mistakenly belief that a warrant only authorized a search within the magistrate's jurisdictional limits.

PARTIES TO THE PROCEEDING

1. United States of America: Respondent.

2. John Christopher Ferguson: Petitioner.

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PRAYER

The Petitioner, John Christopher Ferguson, respectfully petitions for a writ of certiorari to review Fifth Circuit's judgment.

OPINIONS BELOW

The Fifth Circuit's opinion, *United States v. Ferguson*, 821 Fed. App'x.380 (5th Cir. 2020) (unpublished) is reproduced and attached at Appendix A. The district court opinion and order denying Mr. Ferguson's Motion to Suppress is reproduced and attached at Appendix B. The Fifth Circuit addressed the same warrant in its published opinion, *United States v. Ganzer*, 922 F.3d 579 (5th Cir.), *cert. denied*, 140 S. Ct. 276 (2019) which is reproduced and attached at Appendix C.

JURISDICTION

The Houston Division of the United States District Court for the Southern District of Texas exercised jurisdiction under 18 U.S.C. § 3231 because an indictment charged Mr. Ferguson with violations of 18 U.S.C. §§ 2251(a), 2251(e), 2252A(2)(B), 2252A(a)(5)(B), and 2252A(b)(2). The Fifth Circuit entered its judgment affirming John Christopher Ferguson's conviction on September 15, 2020. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Mr. Ferguson has timely filed this petition in accordance with this Court's Order Regarding Filing Deadlines (extending deadline to file petition for writ of certiorari to 150 days from the date of the lower court's judgment) and Rule 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

In 2015, Federal Rule of Criminal Procedure 41(b) provided:

(b) Authority to Issue 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;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge – in an investigation of domestic terrorism or international terrorism – with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside the district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside of the jurisdiction of any state or district, but within [certain enumerated locales].

Effective December 1, 2016 – after a Virginia magistrate issued the warrant here –

Congress amended Rule 41(b) to include paragraph 6:

> (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:
>
> (A) the district where the media or information is located has been concealed through technological means; or
>
> (B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

The Federal Magistrates Act, 28 U.S.C. § 636(a), provides:

> (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 an imposed upon United States commissioners by law or by the Rule of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, an depositions;
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
>
> (4) the power to enter a sentence for a petty offense; and
>
> (5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

STATEMENT OF THE CASE

A. Course of Proceedings.

Playpen was a hidden website on the Tor Network where registered users advertised, distributed, and accessed child pornography. On February 19, 2015, the Federal Bureau of Investigation ("FBI") arrested Playpen's administrator. The FBI seized the server in North Carolina that was hosting Playpen and moved the server to the Eastern District of Virginia. The FBI then operated and monitored the Playpen website in the Eastern District of Virginia for approximately two weeks pursuant to a court order. But the FBI could not identify those who accessed the website because the Tor Network concealed the user's identifying information, including their true Internet Protocol ("IP") address.

To determine the IP addresses and other information about the website's users, the FBI applied for search warrant from a magistrate judge in the Eastern District of Virginia authorizing the deployment of a network investigative technique ("NIT") from the server in the Eastern District of Virginia onto a user's computer when they logged into the Playpen website. Regardless of where the user's computer was located when it log into the website, the NIT would download onto the user's computer and cause it to transmit identifying information from the user's computer back to the server in the Eastern District of Virginia.

Using the NIT, the FBI identified an IP address associated with Playpen user "joedirt". The NIT also gathered information that showed the logon name for the

computer; that the IP address was in Houston, Texas; that AT&T was the user's service provider; and the user's email address. This information allowed the government to then trace the IP address to Mr. Ferguson and determine that he accessed the website from his residence in Houston, Texas. Law enforcement then obtained a warrant for the search of Ferguson's home from a magistrate judge in the Southern District of Texas which was executed on July 17, 2015. ROA. 275, 380.

Based on the evidence discovered during the search of his home, Mr. Ferguson was charged in a four-count indictment with charges of producing; receiving; accessing; and possessing child pornography as prohibited by 18 U.S.C. §§ 2251(a) and 2251(e); 18 U.S.C. §§ 2252A(a)(2)(B) and 2252A(b)(1); 18 U.S.C. §§ 2252A(a)(5)(B) and Section 2252A(b)(2); and 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2).

Mr. Ferguson filed a motion to suppress arguing that the NIT warrant violated the Fourth Amendment because, among other things, the search it authorized exceeded the magistrate's territorial jurisdiction under Federal Rule of Criminal Procedure 41(b) and the Federal Magistrate Act. Mr. Ferguson further argued that the good-faith exception did not apply because agents knowingly misrepresented facts relevant to the magistrate judge's authority to issue the warrant by failing to disclose that the warrant would authorize searches outside of the Eastern District of Virginia and therefore beyond the jurisdictional limits of the magistrate's authority. Specifically, Mr. Ferguson argued:

> The Government … knew how the NIT worked, including that it took private information directly from the target computers, wherever those target computers are located. […] Yet despite this knowledge, and the intent to deploy the NIT all over the world, the Government's warrant application represented that the property to be searched was located in the Eastern District of Virginia.

The district court issued a written order denying Mr. Ferguson's motion to suppress. *See* Appendix B. The district court assumed, without deciding, that the NIT warrant violated the territorial limits of Rule 41(b) but held that the good-faith exception to the exclusionary rule applied. *Id*. In reaching this conclusion, the district court rejected Mr. Ferguson's argument that the NIT warrant violated the Fourth Amendment because it was "void ab initio." *Id.* The district court further held that the good-faith exception to the exclusionary rule applied because any Rule 41 violation was "technical" rather than "fundamental" error. *Id.*

Mr. Ferguson waived his right to a jury trial to and agreed to a bench trial in order to preserve for appeal his argument that the evidence should have been suppressed. The district court found Ferguson guilty of the four counts charged and later sentenced Mr. Ferguson to serve a total prison term of 324 months.

On September 15, 2020, the Fifth Circuit affirmed the district court's denial of Mr. Ferguson's motion to suppress in *United States v. Ferguson*, 821 Fed. Appx. 380 (5th Cir. 2020), based on its decision in *United States v. Ganzer*, 922 F.3d 579 (5th Cir.), *cert. denied*, 140 S. Ct. 276 (2019) which considered a challenge to the NIT warrant

issued by the magistrate judge in the Eastern District of Virginia. More specifically, the Fifth Circuit reasoned:

> In line with our opinion in *Ganzer*, we assume without deciding that the magistrate judge who issue the NIT warrant lacked authority to do so, that a Fourth Amendment violation occurred as a result of the warrant's issuance, and that the warrant was void ab initio. We nevertheless conclude that "the law enforcement officials involved in the issuance and execution of the NIT warranted acted with an objectively reasonable good-faith belief that their conduct was lawful" and, therefore that the good-faith exception to the exclusionary rule applies.

United States v. Ferguson, 821 Fed. App'x. 380, 381 (5th Cir. 2020), quoting *United States v. Ganzer*, 922 F.3d 579 (5th Cir.), *cert. denied*, 140 S. Ct. 276 (2019).

REASONS FOR GRANTING THE WRIT

I. This Court should grant the petition because application of the good-faith exception to the invalid NIT warrant is inconsistent with the limits of the good-faith exception developed by this Court's precedent and undermines the deterrent effect of the exclusionary rule.

A. The search warrant application misrepresented facts relevant to the independent magistrate's determination of its statutory authority to issue the search warrant.

Under the Federal Magistrates Act, United States magistrate judges have judicial authority "within the district in which sessions are held by the court that appointed the magistrate judge … and elsewhere as authorized by law." 28 U.S.C. § 636(a). And at the time the magistrate in the Eastern District of Virginia issued the

NIT warrant in this case, Rule 41(b) authorized a magistrate judge "to issue a warrant to search for and seize a person or property located within the district." Fed. R. Crim. P. 41(b)(1). The NIT warrant therefore exceeded the magistrate judge's jurisdiction because the warrant authorized searches of computers outside the Eastern District of Virginia. *United States v. Horton*, 863 F.3d 1041, 1048 (8th Cir. 2017) Several circuits have therefore held that the NIT warrant "void ab initio" and the search based on the warrant violated the Fourth Amendment. See *United States v. Horton*, 863 F.3d 1041, 1048 (8th Cir. 2017); *United States v. Werdene*, 883 F.3d 204, 212 (3rd Cir. 2018); *United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir. 2018); *United States v. Taylor*, 935 F.3d 1279, 1285-89 (11th Cir. 2019). The Fifth Circuit has assumed without deciding that the NIT warrant exceeded the magistrate's authority under Rule 41(b) and 28 U.S.C. § 636(a) and therefore violated the Fourth Amendment. *United States v. Ganzer*, 922 F.3d 579, 586 (5th Cir. 2019).

This Court created the exclusionary rule to "compel respect for the constitutional guaranty" of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 231, 236 (2011) quoting *Elkins v. United States*, 364 U.S. 206, 217 (196). The rule aims to deter Fourth Amendment violations by "bar[ring] the prosecution from introducing evidenced obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231, 236-237 (2011) citing *Herring v. United States*, 555 U.S. 135, 137 (2009); *United States v. Leon*, 468 U.S. 897, 909, 921, n.22 (1984); *Elkins*, *supra*, at 217; see also *United States v. Calandra*, 414 U.S. 338, 348 (1974);

This Court has therefore limited application of the exclusionary rule to those cases "where it results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 140 (2009). The focus of the inquiry to determine whether the exclusionary rule would serve this purpose is the "flagrancy of the police misconduct." *Leon*, *supra,* at 909. Accordingly, the deterrent value of the exclusionary rule is strongest "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights[.]" *Davis v. United States*, 564 U.S. 229, 231, 236-237 (2011) citing *Herring*, 555 U.S. at 144. The rule will therefore not apply where the officer acted in good-faith reliance on a warrant. *Leon*, 468 U.S. at 923. But the exclusionary rule should be applied where "it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348-349 (1987) quoting *United States v. Peltier*,422 U.S. 531, 542 (1975); see also *Herring*, 555 U.S. at 143. Accordingly, "reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant" issued is not objectively reasonable "if the magistrate or judge … was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923.

B. The Good Faith Exception should not apply to the NIT warrant because the application in support of the warrant knowingly misled the magistrate about a material issue relevant to the issuing magistrate's determination of its authority to issue the warrant.

The Department of Justice knew that the NIT warrant application presented an issue relevant to the magistrate's statutory authority to issue the warrant because a magistrate judge had already issued a published opinion denying a search warrant application that presented a similar jurisdictional issue in *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F.Supp.2d 753, 755 (S.D. Tex. 2013). There, the magistrate denied the application for search warrant because the government could not satisfy Rule 41(b)'s jurisdictional requirement where the location of the target computer was unknown. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F.Supp.2d 753, 755 (S.D. Tex. 2013). After the *In re Warrant to Search a Target Computer at Premises Unknown* opinion was issued, the Department of Justice proposed an amendment to "Rule 41 of the Federal Rules of Criminal Procedure to update the provisions relating to the territorial limits for searches of electronic storage media" which would permit magistrates to issue warrants for remote searches in cases "involving Internet anonymizing technologies." *United States v. Taylor*, 935 F.3d 1279, 1296 (11th Cir. 2019) (Tjoflat, J., dissenting) quoting Letter from Mythili Raman, Acting Assistant Att'y Gen., to Hon. Reena Raggi, Chari, Advisory Comm. On the Crim. Rules (Sept. 18, 2013). Given the magistrate's published opinion denying the government's application for a warrant presenting the same jurisdictional issues in *In re Warrant to Search a Target Computer at Premises Unknown* and the Department of Justice's subsequent request to change Rule 41 to authorize United States magistrate judges authority to issue

such warrants beyond the district in which sessions are held by the district court appointing them, a reasonable officer in the shoes of the law enforcement officials seeking the warrant knew or should have known that the NIT warrant presented a jurisdictional issue for the magistrate to consider. *United States v. Taylor*, 935 F.3d 1279, 1296, n. 5 (11th Cir. 2019) (Tjoflat, J., dissenting). Although "[t]he officials knew or should have known that there was an issue with jurisdiction and that the search would occur outside the district" they nevertheless "told the magistrate repeatedly that the search would take place inside the district." *United States v. Taylor*, 935 F.3d 1279, 1293 (11th Cir. 2019) (Tjoflat, J., dissenting) In fact, "[t]he only reference to a search that potentially would occur outside the district comes buried on page 29 of the 31-page affidavit after repeated representations by the officers that the search would take place within the district." *United States v. Taylor*, 935 F.3d 1279, 1293 n. 2 (11th Cir. 2019) (Tjoflat, J., dissenting).

Because law enforcement officials knowingly misled the magistrate judge about the location of the property to be searched the search and therefore the magistrate judge's authority to issue the warrant, the good-faith exception to the exclusionary rule does should not apply to the NIT warrant.

C. This case is an excellent vehicle for resolving this issue.

i. *The constitutional violation affected the outcome of the trial.*

Mr. Ferguson's motion to suppress was case dispositive. Mr. Ferguson waived his right to a jury trial and proceeded to a bench trial to preserve the error raised in the motion to suppress he filed in the district court.

ii. *Mr. Ferguson presents an important constitutional issue on direct review and preserved the issue through his motion to suppress in the district court.*

This case comes to the Court on direct review and therefore involves no collateral relief complications. Mr. Ferguson persevered the issue presented for review by presenting his argument in his motion to suppress filed in the district court that the good-faith exception did not apply because the government knowingly misrepresented the facts relevant to the magistrate judge's authority to issue the NIT warrant.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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