NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY REED,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the good faith exception to the warrant requirement extends so far as to excuse an officer's reliance upon an affidavit he drafted with the only probable cause nexus being that a crime was committed outside of the home and the fruits of any crime are likely to be kept in the home.

LIST OF PARTIES

All of the parties to the proceeding are listed in the style of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The Sixth Circuit opinion is available at United States v. Reed, 993 F.3d 441 (6th Cir. 2021). It is also submitted in Appendix A.

JURISDICTION

On April 1, 2021, a divided three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Reed, 993 F.3d 441 (6th Cir 2021). Rehearing en banc was denied April 29, 2021. See United States v. Reed, No. 20-5631, 2021 U.S. App. LEXIS 12927 (6th Cir. Apr. 29, 2021). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Granting Petitioner's motion to suppress, the district court determined that: (1) evidence in this case should be suppressed for lack of a probable cause nexus in the affidavit supporting the search warrant for Mr. Reed's home; and (2) the affidavit was so deficient that it could not avoid the exclusionary rule under the good-faith exception of United States v. Leon, 468 U.S. 897 (1984). A divided Sixth Circuit panel published its opinion reversing the district court's judgment.

The facts were not in dispute. Memphis Police Department Officers suspected Mr. Reed of distributing marijuana. See United States v. Reed, 993 F.3d 441, 445 (6th Cir. 2021). Detective Brandon Evans filed three affidavits seeking search warrants for three locations. Id. The first sought to search the business "OK Tire" for marijuana, drug paraphernalia, and drug-related records. Id. In the affidavit, Evans described his training and experience and indicated that within the last five days, a reliable confidential informant ("CI") had made a controlled buy from Mr. Reed at OK Tire and had seen Mr. Reed "selling and storing marijuana" there. Id. Evans noted that Dominique Johnson, Mr. Reed's girlfriend and the business's owner, had witnessed the buy. Id. Evans added that he had surveilled Johnson and Mr. Reed leaving their home on Kate Bond Road and traveling to OK Tire. Id.

Evans' second affidavit sought a warrant to search a home on Orchi Road for the same evidence. Id. In this affidavit, Evans noted that this was the address of Mr. Reed's mother, and listed on Mr. Reed's driver's license. Id. Evans also indicated that the CI had made a controlled buy from Mr. Reed at this address within the last 20 days. Id. Evans stated that he had watched people pull into the home's driveway, where Mr. Reed would engage in hand-to-hand transactions, and he had seen Mr. Reed drive the streets near this home in a maroon Mustang and "conduct hand

to hand transactions" with individuals. Id. Evans added that within the last five days, he saw Mr. Reed drive a brown Cadillac Escalade and park it at the home. Id.

Evans' third affidavit sought a warrant to search Mr. Reed's and Ms. Johnson's home on Kate Bond Road for financial records and drug proceeds, but not for drugs. Id. In this affidavit, Evans again recounted his experience investigating drug crimes and the CI's controlled buys at the other two locations. Id. Evans noted that Ms. Johnson had active utilities in her name at the Kate Bond Road residence, and that she and Mr. Reed had lived together at different homes in Memphis. Id. Evans also indicated that he had watched Mr. Reed and Ms. Johnson leave this home in a brown Cadillac Escalade. Id. The CI had likewise confirmed to Evans that Ms. Johnson and Mr. Reed lived together. Id.

A state judge decided that probable cause existed to issue the warrants, signing them within a minute of each other, with the warrant for the Kate Bond Road address likely signed first. Id. at 445-46; see also id. at 459 (Clay, J. dissenting). Officers executed the warrants the next day. Id. at 446. They seized nothing from OK Tire and only baggies and a digital scale from the Orchi Road home. Id. The search at Kate Bond Road uncovered two guns, about 18 rounds of ammunition, 18.7 grams of marijuana, 2.1 grams of THC wax, and $5,636 in cash. Id. After the search, Mr. Reed waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966), confessed that the guns and drugs belonged to him, and that he had been selling marijuana. Id.

The government indicted Mr. Reed for violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 922(g), and 18 U.S.C. § 924(c). Id. Mr. Reed moved to suppress the evidence obtained from the search of the Kate Bond Road residence, including his statement to police. Id.

A magistrate judge recommended denial of Mr. Reed's motion. Id. The judge noted that an affidavit in support of a search warrant must identify a probable-cause nexus between the place

to be searched and the items to be seized. Id. The magistrate judge concluded that this nexus existed based on precedent stating that officers can reasonably infer that instrumentalities and fruits of drug trafficking may be found inside a known drug dealer's residence. Id.

The district court disagreed and suppressed the evidence. Id. The district court acknowledged Mr. Reed's status as a known drug dealer, but held that Evans' affidavit for the Kate Bond Road residence fell short because it contained no allegations that Mr. Reed conducted drug activity from his home. Id. The court next held that the Leon good-faith exception did not apply. Id. The court reasoned that Evans should have known that the affidavit needed to contain more than the allegation that Mr. Reed, who happened to be a drug dealer, resided at the home. Id. The district court suppressed the evidence recovered from the home and Mr. Reed's derivative statement. Id.

The government appealed, arguing only that the Leon good faith exception was applicable even if the warrant contained insufficient probable cause. Mr. Reed argued that plain error review should apply because the government argued for the first time on appeal that the district court should have applied the Leon exception based upon the information known to the officer and revealed to the issuing judge. Id. at 453. Specifically, the government argued for the first time that the information in the other two affidavits (stating that Mr. Reed sold drugs from OK Tire and his mother's home), allowed Evans to make a reasonable inference that that Mr. Reed also engaged in criminal activity from his residence. Id. The majority found that because the government had made an argument under Leon generally, plain error review was unwarranted. Id.

The majority then analyzed the case in the government's favor. At the outset of the opinion, the majority noted the Fourth Amendment principle that the home is "first among equals," which at its "very core stands the right of a man to retreat into his own home and there be free from

unreasonable governmental intrusion." Id. at 447 (citing Florida v. Jardines, 569 U.S. 1, 6 (2013)). The majority even stated that, "whether there is a fair probability that a person has committed a crime versus whether there is a fair probability that the person's home will contain evidence of one involve two different inquiries." Id. (citing United States v. Savoca, 761 F.2d 292, 297 (6th Cir. 1985)). Yet, as noted by the dissent, the majority incorrectly equated probable cause to arrest someone with probable cause for searching a home. Id. at 454 (Clay, J. dissenting).

The majority relied upon this Court's precedent providing that probable cause is a "practical and common-sensical standard . . .," which requires only "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." Id. at 447 (quoting Florida v. Harris, 568 U.S. 237, 244 (2013)). From there, it was easy to get to the idea that it is a common-sense matter that evidence of a crime would likely be kept at a suspect's home regardless of whether there was probable cause that a crime had been committed there. Id.

The majority took note of Leon's holding that the good faith exception does not apply if an officer's affidavit in support of a warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Id. at 450 (citing Leon, 468 U.S. at 923). The majority observed, however, that this type of "bare bones affidavit" only comes into play when an officer recklessly relies on a judge's decision that probable cause exists for the warrant. Id. at (quoting United States v. White, 874 F.3d 490, 496 (6th Cir. 2017)).

The majority found that even if an affidavit does not establish a probable-cause nexus between the place to be searched and evidence of drug activity, it will avoid the bare-bones label so long as it identifies a "minimally sufficient" nexus between the two. Id. The majority noted that a minimally sufficient nexus had been described as one in which there was "some connection,

regardless of how remote it may have been—some modicum of evidence, however slight—between the criminal activity at issue and the place to be searched." Id. at 451 (citation omitted).

With such a low bar now in place, finding such "minimal connection" was a foregone conclusion. Id. The majority held that that Evans could reasonable rely on the state judge's probable cause determination for four reasons. Id. First, the majority observed that Mr. Reed had not disputed that there was probable cause to find that he was dealing drugs, had engaged in recent drug sales at other locations, and that he lived at the Kate Bond Road residence. Id. The majority's second reason was a restatement of the first: Because Evans knew that Mr. Reed had engaged in recent drug sales away from his home, his affidavit "at least showed" enough drug activity to search the home. Id. The majority bolstered its reasoning by observing the conflicting opinions of the lower magistrate and district court judges to conclude that Evans could not have acted recklessly by relying upon the state judge's issuance of the warrant. Id. The majority's third reason was that Evans did not rely upon Mr. Reed's drug activity alone, but also his own experience in investigating drug crimes. Id. at 452. The majority's final reason was a contradiction of its third – that despite Evans' experience investigating drug crimes, Evans could not be expected, as a mere non-lawyer officer, to discern a general probable cause standard except in the most obvious cases. Id. The majority thus determined that the imprecise nature of the inquiry supported a conclusion that Evans' actions fell within the range of reasonableness permitted by Leon. Id.

The dissenting judge found that the majority's opinion functionally dispensed with the probable cause requirements for home searches under the guise of a law enforcement officer's "good faith" reliance on a facially invalid search warrant. Id. at 454 (Clay, J. dissenting).

REASONS FOR GRANTING THE PETITION

The majority's opinion will allow officers in all states encompassed by the Sixth Circuit to search a suspect's home on "good faith" reliance on an insufficient warrant, period. After all, there is always "some connection, regardless of how remote," "some modicum of evidence, no matter how slight," that anyone accused of virtually any crime would place the fruits of said crime inside their home. And, it's not just a problem in the Sixth Circuit. The Tenth Circuit has recently adopted the Sixth Circuit's approach. If this Court does not intervene to stop, or at least clarify the applicable standard, other circuits will begin taking this route and the exception will swallow the rule. After all, no court likes to be overruled, so the lower courts will simply default to the good faith exception any time there is a close call as to whether a warrant is sufficient.

The majority below was right about one thing, that "when it comes to the Fourth Amendment, the home is first among equals." Jardines, 569 U.S. at 6. Indeed, this Court has emphatically recognized that, "[a]t the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). This Court's intervention is necessary not only in this case, but nationwide because the Sixth Circuit has taken a path that expands the Court's Leon good-faith exception to the exclusionary rule to the point of eviscerating the rule. The home will no longer be sacrosanct, as officers will be able to justify a search on the flimsiest of probable cause reeds – where there is only some connection, regardless of how remote, or some modicum of evidence, however slight, between the criminal activity at issue and the place searched. This was not, and cannot now be, the standard this Court endorses based upon its precedent.

The Fourth Amendment to the United States Constitution provides in relevant part that "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." U.S. Const. amend. IV. In cases where the Fourth Amendment requires a warrant to search, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. See Camara v. Mun. Court of the City & County of San Francisco, 387 U.S. 523, 534 (1967). In a criminal case, this means there must be a nexus between the item sought to be uncovered and a particular dwelling. Id. at 535.

In 1914, this Court created the "exclusionary rule," which states that the Fourth Amendment bars the use of evidence secured through an illegal search and seizure. See Mapp v. Ohio, 367 S. Ct. 643, 648 (1961) (citing Weeks v. United States, 232 U.S. 383 (1914)). Seventy years later, this Court recognized a "good-faith exception" to the exclusionary rule in Leon. The good-faith exception states that courts generally should not hold inadmissible evidence obtained by officers acting in reasonable reliance upon a search warrant later found to be unsupported by probable cause or technically insufficient. Leon, 468 U.S. at 922. The Leon good-faith exception does not apply, however, where the warrant is so lacking in indicia of probable cause that official belief in its validity is entirely unreasonable. Id. at 923.

The Sixth Circuit has created a rule of law that this Court has never endorsed. It states that even if a suspect's criminal activity does not establish a probable cause nexus between the place to be searched and the evidence of that activity, the warrant will be upheld so long as the underlying affidavit contains a minimally sufficient nexus between the illegal activity and the place to be searched. See, e.g., United States v. Carpenter, 360 F.3d 591, 596 (2004). The Sixth Circuit describes this minimally sufficient nexus as one in which there is "some connection, regardless of

how remote it may have been – some modicum of evidence, however slight – between the criminal activity at issue and the place to be searched." United States v. McCoy, 905 F.3d 409, 416 (6th Cir. 2018) (quoting White, 874 F.3d at 497). The Sixth Circuit is the sole circuit that has stretched the good faith exception this far with regard to probable cause.

The Tenth Circuit adopted "the minimally sufficient nexus" requirement in United States v. Gonzales, 399 F.3d 1225, 1230 (10th Cir. 2005) (citing Carpenter). The Tenth Circuit has not yet, however, had occasion to stretch the "minimally sufficient nexus" definition as far as the Sixth Circuit. So far, the Tenth Circuit has stuck closer to this Court's precedent, observing that, "[a]n affidavit meets this minimal nexus requirement when it describes circumstances which would warrant a person of reasonable caution in the belief that the articles sought are in a particular place." United States v. Villanueva, 821 F.3d 1226, 1236 (10th Cir. 2016) (internal quotations and citations omitted).

It is true that this Court's precedent establishes that the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given the totality of the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. See Illinois v. Gates, 462 U.S. 213, 238 (1983). The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Id. Outside of the context of bare bones affidavits, this Court has been loath to create a bright line rule in this area because it simply does not lend itself to a prescribed set of rules. Id. at 239. The Court has assumed that the common-sense standard articulated it articulated in Gates better serves the purposes of the Fourth Amendment's probable cause requirement. Id.

The Sixth Circuit's own conflicting case law shows that this "common sense" inquiry has gone astray, particularly for the type of crime at issue in this case. As noted by the majority below:

> With categorical statements pointing in opposite directions, our decisions "have struggled to identify the quantum of evidence needed to connect drug trafficking by an individual to a probability that evidence will be found at the individual's residence." United States v. Ardd, 911 F.3d 348, 351 (6th Cir. 2018). When finding probable cause to search a home, we have asserted broad propositions like: "[I]n the case of drug dealers, evidence is likely to be found where the dealers live." United States v. Sumlin, 956 F.3d 879, 886 (6th Cir. 2020) (quoting United States v. Jones, 159 F.3d 969, 975 (6th Cir. 1998)); see, e.g., United States v. Feagan, 472 F. App'x 382, 392 (6th Cir. 2012); United States v. Gunter, 551 F.3d 472, 481-82 (6th Cir. 2009); United States v. Goward, 188 F. App'x 355, 358-59 (6th Cir. 2006) (per curiam); United States v. Newton, 389 F.3d 631, 635-36 (6th Cir. 2004) (vacated on other grounds); United States v. Miggins, 302 F.3d 384, 393-94 (6th Cir. 2002). These decisions suggest that courts generally may find a nexus to search a drug dealer's home "even 'when there is absolutely no indication of any wrongdoing occurring'" there. Sumlin, 956 F.3d at 886 (quoting Goward, 188 F. App'x at 358-59).
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> When finding the absence of probable cause to search a home, by contrast, we have rejected "the proposition that the defendant's status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home." [United States v.] Brown, 828 F.3d [375, 383 (6th Cir. 2016)] (quoting [United States v.] Frazier, 423 F.3d [526, 533 (6th Cir. 2005)]); see, e.g., United States v. Fitzgerald, 754 F. App'x 351, 361 (6th Cir. 2018); United States v. Bethal, 245 F. App'x 460, 466-67 (6th Cir. 2007). These decisions suggest that courts generally may not find a nexus to search a drug dealer's home when "the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable[.]" Brown, 828 F.3d at 384.

Reed, 993 F.3d at 448.

To put an end to its own conflicting case law, the Sixth Circuit has stretched Leon as far as it can possibly go. That is, if someone commits a crime, the crime in and of itself provides the probable cause to search the suspect's home because that is a likely place that the fruits of the crime may be stored. The Sixth Circuit's low bar is "some connection, regardless of how remote, some modicum of evidence, however slight, between the criminal activity at issue and the place to be searched." Unless this Court steps in, Leon will swallow the protections of the Fourth

Amendment, and in particular this Court's recognition of the sanctity of the home. The leap is too far to bear Fourth Amendment scrutiny.

The majority used the sometimes-hazy constitutional border between a sufficient nexus and an insufficient hunch to excuse Evans' deficient affidavit, explaining that he could not be "reckless" where there was room for reasonable legal debate. It is worth mentioning here that this Court, in Herring v. United States, 555 U.S. 135 (2009), provided that suppression is warranted not only when law enforcement officials operate in a reckless manner, but also in deliberate or grossly negligent disregard for Fourth Amendment rights. Id. at 144. Yet, the majority opinion implies only that reckless conduct should be sanctioned with suppression.

The real problem, however, is that this is not a case resting on such a hazy border. Evans only had a hunch that evidence of a crime might be found in Mr. Reed's home because Mr. Reed was doing illegal things outside his home. Common sense dictates that when someone commits a crime, it does not give the government cart blanche to search their home for evidence of that crime without more. This is simply not this Court's probable cause standard.

Even if this case were hazy, Leon posits an expectation that officers will be reasonably well-trained and have a reasonable knowledge of what the law prohibits when it comes to the limits of the Fourth Amendment. See Leon, 468 U.S. at 921, n.20; id. at 923 n.23; see also Groh v. Ramirez, 540 U.S. 551, 563 (2004) ("It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted."). More recently, this Court even noted that the test for probable cause looks to an officer's knowledge and experience when discussing the pertinent objective (versus subjective) analysis of deterrence and culpability. See Herring, 555 U.S. at 145.

Here, the majority relied upon Evans' statements about his general experience in drug investigations to say that he drafted more than a bare bones affidavit. Then, the majority turned around and averred that he could not be expected to wade into the frothy waters of the probable cause nexus requirement without specialized legal knowledge. While Evans certainly should not be held to the same standard as lawyers or judges, he could at the very least have provided that in his experience, drug dealers keep evidence of their trade in their homes. This likely would have cleared this Court's probable cause nexus standard. This, however, he did not do.

The affidavit was simply devoid of facts connecting Mr. Reed's residence to the alleged drug dealing activity. Any inference that Mr. Reed had contraband in his home needed to be supported by some reference in the affidavit to drug activity at the residence; otherwise, it was not objectively reasonable to presume that the home would contain such evidence.

It is important to recall that the animating principle behind the good faith exception is that "the exclusionary rule is designed to deter police misconduct," and "when the offending officers act[] in the objectively reasonable belief that their conduct did not violate the Fourth Amendment" the exclusionary rule does not serve the same deterrent effect. Leon, 468 U.S. at 916, 918. The Leon Court thus based its refusal to suppress evidence in such situations on its conclusion 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. Where, as is the case here, there is no such objectively reasonable reliance, deterrence outweighs the costs of exclusion.

In the end, the majority opinion sets the dangerous precedent of excusing police conduct that falls below what is expected of a reasonably well-trained officer by labeling it good faith.

Lowering this bar has Fourth Amendment ramifications for everyone's right to be free from warrantless searches of their home.

Lastly, the government did not argue below that the good faith exception should apply to the affidavit at issue when read in the context of all three affidavits. This was raised for the first time on appeal. Mr. Reed argued that plain error was therefore the correct standard of review. Misconstruing Mr. Reed's position as a general statement that the government had failed to raise the good faith exception at all, the majority rejected it.

The dissent would hold that the government forfeited the argument because, "[w]hen a party neglects to advance a particular issue in the lower court, we consider that issue forfeited on appeal." Reed, 993 F.3d at 460(Clay, J., dissenting) (quoting Greer v. United States, 938 F.3d 766, 770 (6th Cir. 2019)). Review for plain error pursuant to Fed. R. Crim. P. 52(b) extends to claims "forfeited," but not to rights "waived," and is "permissive, not mandatory." United States v. Olano, 507 U.S. 725, 731-33, 735 (1993). Mr. Reed did not argue that the appeal court should eschew the government's new argument altogether, but rather urged plain error review. See, e.g., United States v. Ramamoorthy, 949 F.3d 955, 962 (6th Cir. 2020) (citing Olano, 507 U.S. at 735) (explaining that amendments to Fed. R. Crim. P. 12 allow plain error permissive review so long as all questions of fact are resolved). Mr. Reed urges this Court, as well, to review this Petition under the plain error standard.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 23rd day of July, 2021.

Respectfully submitted,

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