No. 22-

IN THE

Supreme Court of the United States

LEROY HENRY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road, Suite 202
St. Thomas, VI 00802
Tel: (340) 774-4449
Email: Matt_Campbell@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Here, the District Court denied Mr. Henry's motion to suppress the search of his automobile—despite finding that the warrant authorizing that search lacked probable cause—based on the 'good faith doctrine' as established in in *United States v. Leon*, 468 U.S. 897 (1984). The Third Circuit upheld the District Court's decision despite the fact that this Court's twenty-year-old binding precedent in *Florida v. J.L.*, 529 U.S. 266 (2000) unequivocally established that corroboration of non-predictive information only cannot be used to confirm the reliability of an anonymous informant under the less demanding reasonable suspicion standard. The Third Circuit's decision makes clear that the good faith "exception" has now swallowed the probable cause "rule", and the Fourth Amendment guarantee that "no Warrants shall issue, but upon probable cause" is largely illusory.

The questions presented are:

1. Whether *United States v. Leon*, 468 U.S. 897 (1984) was wrongly decided; and
2. Whether subsequent decisions of this Court and the lower courts have so expanded the *Leon* decision as to require this Court's intervention in order to narrow the *Leon* exception to its proper constitutional limits.

PARTIES TO THE PROCEEDING

Leroy Henry, Jr., petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decision below in the U.S. Court of Appeals for the Third Circuit:

United States v. Leroy Henry, Jr., No. 21-3254 (3rd Cir.) (April 4, 2023) (unpublished)(panel decision holding that good faith doctrine was properly applied to justify the search of Mr. Henry's automobile)(Pet.App. 1a-12a).

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Leroy Henry, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

INTRODUCTION

The District Court correctly found that the search warrant authorizing the search of Mr. Henry's automobile lacked probable cause, and the Third Circuit left that determination untouched. Both of those Courts, however, found that the search of that vehicle was nonetheless permissible under the 'good faith doctrine' as first articulated in *United States v. Leon*, 468 U.S. 897 (1984). The Third Circuit rejected Mr. Henry's challenge to the application of the good faith doctrine despite the

fact that this Court's twenty-year-old binding precedent in *Florida v. J.L.*, 529 U.S. 266 (2000) unequivocally established that corroboration of non-predictive information only cannot be used to confirm the reliability of an anonymous informant under the less demanding reasonable suspicion standard. Here, law enforcement had only corroborated non-predictive information, and thus *Florida v. J.L.* dictated that the warrant failed to establish probable cause. Nevertheless, the Third Circuit applied good faith after finding that a reasonably well-trained officer would not be aware of decades-old Supreme Court precedent.

The Third Circuit's decision demonstrates that the *Leon* exception has now swallowed the Fourth Amendment rule that warrants shall only issue based on probable cause. Indeed, in this case, as in countless federal cases around the country, the Third Circuit skipped past the probable cause analysis entirely and simply decided that good faith applied—presumably because the good faith analysis is far easier to resolve since it applies in most cases. Because the *Leon* exception has become virtually omnipresent in cases challenging warrants, it is necessary for this Court to revisit *Leon* to determine whether it was wrongly decided, or at least wrongly interpreted and expanded by subsequent decisions.

OPINIONS BELOW

The Third Circuit's opinion is unpublished. Pet. App. 1a-12a.

JURISDICTION

The Third Circuit judgment became final upon the entry of judgment by the Court of Appeals on April 4, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV

> 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.

STATEMENT

Procedural Background

On January 30, 2020, the grand jury returned an indictment charging Mr. Henry in Count One with felon in possession of a firearm pursuant to 18 U.S.C. §922(g)(1) and in Count Two with felon in possession of ammunition pursuant to 18 U.S.C. §922(g)(1). Mr. Henry filed a motion to suppress the fruits of a search of his automobile. An evidentiary hearing was held on Mr. Henry's motion to suppress. Ultimately, the District Court determined that the search warrant authorizing the search of the automobile failed to establish probable cause. Nevertheless, the District Court denied the motion to suppress based upon the good faith doctrine. The case proceeded to trial and Mr. Henry was convicted of felon in possession of a firearm and acquitted of felon in possession of ammunition.

Mr. Henry filed an appeal in the United States Court of Appeals for the Third Circuit. That Court ultimately affirmed the District Court's determination that the good faith doctrine applied to validate the search, without first addressing whether the search warrant established probable cause.

REASONS FOR GRANTING THE PETITION

I. THE GOOD FAITH DOCTRINE AS ESTABLISHED IN *UNITED STATES V. LEON* WAS WRONGLY DECIDED

A. *United States v. Leon* erroneously classified the exclusionary rule as a judicially-created remedy as opposed to a constitutional right

One of the abuses of the British Crown which fueled the American Revolution was the unconstrained power of the Crown to search the homes, business, private papers, and effects of the people, which was often used as a means of stifling freedom of the press. The omission of a Bill of Rights, including protections against unreasonable search and seizure, from the draft Constitution proposed by the Constitutional Convention meeting in Philadelphia in 1787, generated considerable opposition to ratification of the Constitution. Because of this widespread criticism, President Washington urged the addition of a Bill of Rights and James Madison assumed the role of sponsor of the Fourth Amendment. LaFave, *Search and Seizure,* West Pub. Co. 1978, 1995, Sec. 1.1(a).

In 1886, the U.S. Supreme Court rendered its decision in *Boyd v. U.S.,* 116 U.S. 616 (1886), characterized by the Court itself as "the leading case on the subject of search and seizure." See, *e.g., One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965); *Carroll v. United States,* 267 U.S. 132 (1925). Justice Bradley found that the Fourth Amendment's prohibition against unreasonable searches and seizures was inextricably linked to the Fifth Amendment's protection against self-incrimination. Justice Bradley concluded, accordingly, that an order for the Boyds to produce an invoice was tantamount to an order to give up self-incriminating evidence, which would have been unconstitutional and therefore void, so that the admission of the invoice in evidence was held to be equally erroneous. Thus, the birth of a rule to exclude illegally obtained evidence is found in a situation in which *deterrence* was not even a relevant consideration.

When the Supreme Court first articulated the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), it characterized the rule as a constitutional right. The *Weeks* Court stated that the use of the illegally seized evidence denied the defendant his constitutional rights. *Id.* at 398. The Court relied on the judicial integrity rationale for the rule, explaining that courts must not sanction unlawful searches and seizures. *Id.* at 392. In *Weeks*'s progeny, the Court adhered to the view that the exclusionary rule rested on a constitutional foundation.[1]

The next step in the evolution of the exclusionary rule was *Mapp v. Ohio,* 367 U.S. 643 (1961). In *Mapp,* Cleveland police officers searched Dollree Mapp's home without a warrant and found evidence which was used to convict her in a state court prosecution. The *Mapp* Court made the Exclusionary Rule, as recognized in *Weeks,* obligatory upon the states. Speaking for the Court, Justice Clark enumerated several justifications for concluding that *due process* requires that evidence obtained through an unreasonable search be excluded from use at trial. First, Justice Clark quoted extensively from the Court's observation in *Boyd v. United States,* 116 U.S. 616 (1886), that the Fourth and Fifth Amendments run "almost into each other." *Mapp,* 367 U.S. at 630 (quoting *Boyd,* 116 U.S. at 630).

[1] *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is "an essential part of both the Fourth and the Fourteenth Amendments.")

Justice Clark then described a second justification for considering the exclusionary rule, "basic to due process." Justice Clark observed, "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, *might as well be stricken from the Constitution.*" (emphasis added). These words echo the sentiment expressed by Chief Justice John Marshall in his famous statement in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury,* at 163.

Justice Clark then articulated a third justification for the exclusionary rule, which is interrelated with the second justification. "But, as was said in *Elkins,* 'there is another consideration—the imperative of *judicial integrity.*'" (emphasis added) Justice Clark explained: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Justice Clark also stated that admitting improperly seized evidence at trial was an "ignoble shortcut to conviction left open to the State" which "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."

Justice Clark also discussed, but only *briefly,* a fourth justification for the exclusionary rule, that being *deterrence. Mapp,* at 648. At one point he characterized the exclusionary rule as a "clear, specific,

and *constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to '*a form of words*.'" (emphasis added) At another point, Justice Clark quoted briefly from *Elkins v. United States,* 364 U.S. 206 (1960), in which the purpose of the exclusionary rule was said to be "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

At the conclusion of his opinion for the Court in *Mapp,* Justice Clark summarized the Court's decision. His summary does not even mention the deterrence justification. Further it suggests even a fifth justification for the exclusionary rule: restoration of the *status quo, ante.* "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and, to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp,* 367 U.S., at 660 (quoting *Elkins,* 364 U.S., at 217). By these words, Justice Clark declares that the exclusionary rule is designed and intended to put the individual in the position he would have been in had his rights been respected—neither better nor worse.

In *United States v. Calandra*, 414 U.S. 338 (1974), however, the Court divorced the exclusionary rule from its constitutional foundation and introduced deterrence as the preeminent purpose of the rule. *Calandra* stated that the rule was a judicially-created remedy promulgated to protect Fourth Amendment rights through its deterrent effect, rather than an individual right of the aggrieved party.

Id. at 348. The Court then explained the significance of the rule's demotion from right to remedy: As with any remedy, the rule's application was limited to those cases in which its purposes would be served most effectively. *Id.* As a remedy, the rule's application was not automatic but contingent on a balancing of the costs and the benefits of exclusion. Accordingly, *Calandra* narrowed the scope of the exclusionary rule considerably.

After *Calandra*, the Court continually narrowed the rule's application. For example, it has held illegally seized evidence admissible: (1) in grand jury proceedings, *id.* at 349, (2) to impeach the defendant's testimony during his criminal trial,[2] (3) in federal civil tax proceedings when the illegal search was conducted by state officials,[3] and (4) in the trials of defendants who are the targets, but not the victims, of illegal searches.[4]

Following *Calandra*'s lead, suppression was appropriate only when its deterrent function was served most effectively. *Leon*, 468 U.S. at 906. *Leon* further restricted the exclusionary rule's application by creating the good faith exception. As the dissenters argued, however, the *Leon* Court's classification of the exclusionary rule as a remedy rather than a right rested on a very narrow reading of the Fourth Amendment. *See Leon*, 468 U.S. at 931-38 (Brennan, J., dissenting). First, it hardly follows from the

[2] *United States v. Havens*, 446 U.S. 620, 627-28 (1980).
[3] *United States v. Janis*, 428 U.S. 433, 454 (1976).
[4] *United States v. Payner*, 447 U.S. 727, 735 (1980).

Fourth Amendment's lack of reference to the exclusionary rule that the rule has no constitutional foundation. Much of our constitutional doctrine is the product of judicial implication.[5]

Second, the *Leon* Court read the Fourth Amendment as prohibiting police from executing illegal searches and seizures but allowing courts to admit illegally obtained evidence. *Leon*, 468 U.S. at 906.[6] The dissent, however, argued that the Fourth Amendment's prohibition against unreasonable searches and seizures, like other guarantees in the Bill of Rights, should be read to constrain the government as a whole. *Leon*, 468 U.S. at 932 (Brennan, J., dissenting). The dissenters suggested that the artificial line drawn by the *Leon* Court between the constitutional responsibilities of the police and the courts denigrates the integrity of the judiciary. *See id.* at 935-38 (Brennan, J., dissenting); *id.* at 976-78

[5] *See id.* at 932; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?,* 16 CREIGHTON L. REV. 565, 581-83 (1983)(citing examples such as the rule barring involuntary confessions).

[6] The fragmentary model and the unitary model, developed by Professors Schrock and Welsh, represent the differing views of the government's role in a criminal prosecution and explicate a discussion of the constitutional foundations of the exclusionary rule. *See* Thomas S. Schrock and Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). The unitary model considers the police's illegal search or seizure and the court's subsequent admission of the resulting evidence as a single transaction prohibited by the Fourth Amendment. *Id.* at 298-99. Therefore, the exclusionary rule is constitutionally mandated. In contrast, the fragmentary model severs the illegal police conduct from the judiciary's admission of tainted evidence. *Id.* at 255. The unconstitutionality ends with the illegal seizure under this view; therefore, courts can admit the fruits without violating the Fourth Amendment. *Id.* at 256. By reading the Amendment as restraining police but not courts, the *Leon* Court necessarily adopted the fragmentary model of government.

(Stevens, J., dissenting) By admitting illegally seized evidence, courts condone Fourth Amendment violations. *Id.*[7]

The majority's Fourth Amendment interpretation ignores the fact that the police seize evidence primarily to be used in criminal prosecutions.[8] When this evidentiary link is acknowledged, courts should read the Fourth Amendment to prohibit not only illegal police activity but also the court's admission of this evidence.[9] The *Leon* Court based its classification of the rule as a remedy

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[7] Many of the Court's earlier cases espoused the judicial integrity rationale for the exclusionary rule. *See*, *e.g., Weeks*, 232 U.S. at 391-92 (violations of the Fourth Amendment "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights"); *id.* at 393-94 ("to sanction [ilegal searches and seizures] would be to affirm by judicial decision manifest neglect if not an open defiance of the prohibitions of the Constitution"); *Elkins v. United States*, 364 U.S. 206, 222-24 (1960) (courts must not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

[8] *Leon*, 468 U.S. at 933 (Brennan, J., dissenting); *id.* at 978 (Stevens, J., dissenting). *See Weeks*, 232 U.S. at 393 (noting that law enforcement executes searches and seizures to bring "proof to the aid of the Government"). *See generally* Schrock and Welsh, 59 MINN. L. REV. at 289- 307.

[9] *Leon*, 428 U.S. at 933 (Brennan, J., dissenting). Justice Brennan explained:

> Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence.... Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect.

Id. He concluded, "The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy-which is done, after all, for the purpose of securing evidence-but also the subsequent use of any evidence so obtained." *Id.* at 934.

rather than a right on a very narrow reading of the Fourth Amendment's prohibition against searches and seizures.

B. *Leon*'s cost-benefit analysis was flawed

The *Leon* Court incorrectly assessed both the costs and the benefits of the exclusionary rule by overstating the rule's costs and understating its benefits. Wayne R. LaFave, 1 *Search and Seizure* § 1.3 at 51-59 (West, 2d ed. 1987). The Court's assertion that the exclusionary rule's costs were substantial contradicted the available empirical data. *See Leon,* 468 U.S. at 907. Assessments of then-available empirical data revealed that the rule's effect on criminal prosecutions is minimal.[10]

The results were further exaggerated because of errors in the Court's analysis. First, the Court measured the costs attributable to exclusion in all cases. The only costs at issue in *Leon*, however, were those that would have been alleviated by the proposed modification to the exclusionary rule. The Court should have measured the costs only in cases in which the police made objectively reasonable

[10] LaFave, 1 *Search and Seizure* § 1.3(c) at 52 (citing Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 Am. Bar Found. Res. J. 611). *See also* Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment,* 1983 Am. Bar Found. Res. J. 585, 606 (reaffirming that the exclusion of evidence has a truly marginal effect on the criminal court system); Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited,* 1987 U. Ill. L. Rev. 223, 238-39 (confirming earlier findings, based on a study of a larger jurisdictional area).

mistakes. See LaFave, 1 *Search and Seizure* § 1.3(c) at 52; Silas J. Wasserstrom and William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?,* 22 Am. Crim. L. Rev. 85, 103 (1984)

The Court's cost assessment did not consider the impact of *Illinois v. Gates,* 462 U.S. 213 (1983). Decided one year before *Leon*, *Gates* replaced the *Aguilar-Spinelli* probable cause test[11] with a more relaxed totality-of-the-circumstances standard. *Gates,* 462 U.S. at 238. Because *Gates* made suppression of evidence seized under a warrant less likely than under the *Aguilar-Spinelli* probable cause test, it reduced the already minimal costs of the rule.[12]

The Court's cost assessment is fundamentally flawed. Although the majority repeatedly referred to the costs of the exclusionary rule, attributing those costs to the Fourth Amendment may have been more accurate. *Leon,* 468 U.S. at 940-41 (Brennan, J., dissenting). The Amendment, not the rule, imposes limitations on the government's ability to secure evidence and, accordingly, demands the suppression of illegally obtained evidence.[13]

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[11] *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969), established a two-pronged probable cause test that required that an affidavit reveal the informant's "basis of knowledge" and provide sufficient facts to establish either the informant's veracity or reliability. *See Spinelli,* 393 U.S. at 412-13.

[12] Together *Leon* and *Gates* produce "a form of incomprehensible double counting." Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon, *Its Rationale and Ramifications,* 1984 U. Ill. L. Rev. 895, 924.

[13] Justice Stewart explained:

Conversely, the Court discounted the rule's benefits by denying that the exclusionary rule could deter magistrates. Mistakenly focusing on the rule's role in deterring "the occasional ill-spirited magistrate," the Court did not consider the rule's more general role—to encourage magistrates to take their warrant-issuing function seriously.[14] The rule deters magistrates by encouraging them to err in favor of constitutional behavior. LaFave, 1 *Search and Seizure* § 1.3(d) at 55 (citing *United States v. Johnson,* 457 U.S. 537,561 (1982)). An appellate court's suppression of evidence seized under an invalid warrant sends a message to the issuing magistrate that her mistakes are of consequence, and accordingly, she must review applications vigilantly.

The Court further minimized the benefits of the rule by narrowly construing the rule's deterrent effect on police misconduct. According to the Court, the rule's deterrent effect operates only when police knew or should have known that they were acting unconstitutionally. *See Leon,* 468 U.S.

> The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.

Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Colum. L. Rev. 1365, 1392-93 (1983).

[14] See LaFave, 1 *Search and Seizure* § 1.3(d) at 55 (quoting *Leon,* 468 U.S. at 916) (explaining that the Court's statement that it had no evidence before it that magistrates were "inclined to ignore or subvert the Fourth Amendment" revealed that it focused on intentional noncompliance of issuing magistrates rather than noncompliance resulting from carelessness).

at 918-19 (rejecting the notion that the exclusionary rule could have any deterrent effect when police act in an objectively reasonable manner). By focusing exclusively on the rule's deterrent effect on individual police officers, however, the Court ignored two other important ways in which the exclusionary rule deters police misconduct. First, through its general deterrent effect, the rule deters police officers as a group.[15] Second, through its systemic deterrence function, the exclusionary rule promotes institutional compliance with Fourth Amendment requirements. For example, police departments may develop training programs and guidelines to educate officers on how to conduct legal searches and seizures.[16] The *Leon* Court minimized the exclusionary rule's benefits by focusing exclusively on the rule's special deterrent effect.

Commentators accused the Court of balancing these costs and benefits "with its thumb on the scale."[17] Two reasons explain why balancing the costs and benefits of the exclusionary rule necessarily may involve the imposition of a value judgment on the part of the Court. First, the costs and

[15] William J. Mertens and Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 Georgetown L. J. 365, 394 (1981).

[16] *Id. See also Leon,* 468 U.S. at 953 (Brennan, J., dissenting) (asserting that the rule's chief deterrent function is to promote institutional compliance with the Fourth Amendment on the part of law enforcement agencies).

[17] Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 87.

benefits of the rule are not subject to precise empirical quantification.[18] Second, the Court's cost-benefit analysis attempts the impossible task of weighing the defendant's privacy interest against society's interest in the suppression of crimes. *Leon* clearly did not contain a fair and honest assessment of the costs and benefits of exclusion.[19]

C. The negative consequences of *Leon* far outweigh its beneficial consequences

The Court's denial of the constitutional right to exclusion and its faulty balancing analysis permitted it to recognize a constitutional violation to which no sanction attaches.[20] Under *Leon*, a search unsupported by probable cause but executed pursuant to a facially valid warrant is legal. The Court thus failed to treat the Fourth Amendment as law.[21]

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[18] *Id.* The benefits are even more difficult to quantify than the costs because they are conjectural, essentially measuring non-events. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?,* 16 Creighton L. Rev. 565, 621 (1983).

[19] "We have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand." *Leon,* 468 U.S. at 929 (Brennan, J., dissenting).

[20] "Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding." *Leon,* 468 U.S. at 977 (Stevens, J., dissenting). Stevens noted that civil damages are not available in the cases in which the good faith exception would apply. *Id.* at 977 n.35.

[21] Donald Dripps, *Living with* Leon, 95 Yale L. J. 906, 933-34 (1986)

Leon threatens to erode the probable cause standard because it removes some of the incentives that the exclusionary rule creates for police, magistrates, and police departments. First, it tells police that they only need obtain a warrant, not a warrant that will necessarily stand up on review.[22] The good faith exception encourages police to spend less time establishing probable cause and more time shopping for a sympathetic magistrate.

Second, it tells magistrates that their mistakes are of little consequence because evidence seized under a defective warrant generally will be admissible under the good faith exception. *Leon,* 468 U.S. at 956 (Brennan, J., dissenting). *Leon* thus removes the rule as an incentive to encourage magistrates to be vigilant in performing their warrant-issuing duties. *Id.* (predicting that "inevitably, the care and attention devoted to such an inconsequential chore will dwindle.") Third, *Leon* renders magistrates' decisions virtually unreviewable because reviewing courts probably will determine the good faith issue before reaching the underlying Fourth Amendment issue in the case.[23] Accordingly, it diminishes the rule's role in guiding magistrates in deciding close Fourth Amendment cases.[24] Fourth, *Leon* places a premium on police ignorance of the law because evidence seized under an invalid warrant generally

[22] Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 109.

[23] Although the majority asserted that "nothing will prevent reviewing courts from deciding [the underlying Fourth Amendment] question before turning to the good faith issue," *id.* at 925, the dissenters stressed the unlikelihood of busy courts issuing these essentially advisory opinions. *Id.* at 957 (Brennan, J., dissenting).

[24] *See* Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 112.

will be admissible. *Leon,* 468 U.S. at 955 (Brennan, J., dissenting). *Leon*, therefore, encourages police departments to train officers simply to rely on a signed warrant rather than to scrutinize the magistrate's probable cause determination independently. *Id.* As such, *Leon* destroyed some of the rule's institutional incentives. *Leon,* 468 U.S. at 953 (Brennan, J., dissenting).

The most unsettling consequence of *Leon* is its effect on the future of the exclusionary rule. Although the Court made it appear that it only slightly restricted the exclusionary rule, similar to decisions in *Stone v. Powell*, 428 U.S. 465 (1976), *United States v. Calandra*, 414 U.S. 338 (1974) and *United States v. Janis*, 428 U.S. 433 (1976), in fact, it took a much larger leap.[25] The Court in those earlier cases whittled away at the exclusionary rule in proceedings collateral to the criminal prosecution itself, whereas the *Leon* Court concluded for the first time that the costs of the exclusionary rule outweighed its benefits in the prosecution's case-in-chief.[26] *Leon* thus opened the door to further incursions on the exclusionary rule.[27]

[25] LaFave, 1 *Search and Seizure* § 1.3(b) at 50.

[26] Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 90; LaFave, 1 *Search and Seizure* § 1.3(b) at 50-51.

[27] *See* Steven Duke, *Making* Leon *Worse,* 95 Yale L. J. 1405, 1422 (1986); LaFave, 1984 U. Ill. L. Rev. at 930 (predicting that the temptation will be great to extend the good faith exception to without-warrant cases); Wasserstrom and Mertens, 22 Am. Crim. L. Rev. at 91 (referring to the bleak future of the exclusionary rule after *Leon*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road,
Suite 202
St. Thomas, VI 00802
Tel: (340) 774-4449
Email: Matt_Campbell@fd.org
Counsel for Petitioner

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,593 words.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/S/MATTHEW CAMPBELL

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road,
Suite 202
St. Thomas, VI 00802
Tel: (340) 774-4449
Email: Matt_Campbell@fd.org
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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY pursuant to Supreme Court Rule 29.5(b) that on June 23, 2023, one copy of the PETITION FOR A WRIT OF CERTIORARI in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

ELIZABETH PRELOGAR
Solicitor General
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Respectfully submitted,

Respectfully submitted,

/S/Mathew Campbell
MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road,
Suite 202
St. Thomas, VI 00802
Tel: (340) 774-4449
Email: Matt_Campbell@fd.org
Counsel for Petitioner
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