IN THE SUPREME COURT

FOR THE UNITED STATES

STEVEN VINCENT SMITH	)	
Petitioner	)	
v.	)	Case No.: 23-6193
UNITED STATES OF AMERICA	)	
Respondent	)	

MOTION FOR REHEARING

PURSUANT TO RULE 44

Submitted by:

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MOTION FOR REHEARING
PURSUANT TO RULE 44

Appellant STEVEN VINCENT SMITH presents his Petition for Rehearing pursuant to Rule 44 in this matter, and in support of same states the following:

1. This Court denied the Appellant's Petition for Certiorari on January 8, 2024.

2. A rehearing of the decision in this matter is in the interest of justice as this case involves the question of a "void" warrant as opposed to a "voidable" warrant and whether the good faith doctrine CAN apply.

3. Since the original decisions were filed in the various Circuit Courts of Appeal involving this same warrant, the Circuits have used those decisions to support the admission of evidence obtained as a result of ssimilar unconstitutional searches. See e.g.: U.S. v. Thompson, 2016 U.S. Dist. Lexis 83133 (E.D. La. 2016)(DNA testing); U.S. v. Brito-Arroyo, 2021 U.S. App. Lexis 24595 (11th Cir. 2021)(tracking device); U.S. v. Pacheco, 884 F.3d 1031 (10th Cir. 2018)(warrant and search exceeded jurisdictional limitations); U.S. v. Ackies, 918 F.3d 190 (1st Cir. 2019)(precise location information warrants).

4. The Court's rulings in the line of cases resulting from the warrant in the Petitioner's case are contrary to established Supreme Court and Circuit precedents, as case precedent clearly shows that a jurisdictional violation is per se

harmful, cannot be overcome, and thus suppression of the evidence is mandated. Thus the "good-faith" doctrine under Leon does not apply as determined by the Circuit Courts, and to allow those Court's rulings, including that ruling in this matter would represent a deterioration in Constitutional protections.

A. The warrant was void ab initio and not merely "voidable".

In it's decision in this matter the Eleventh Circuit Court of Appeals stated that "[b]ecause the NIT warrant was void at issuance, the ensuing search was effectively warrantless and therefore - because no party contends that an exception to the presumptive warrant requirement applies here - violative of the Fourth Amendment." U.S. v. Taylor, Smith, 935 F.3d 1279 (11th Cir. 2019).

Courts have long differentiated between "void" (void ab initio) and "voidable." See: Weeks v. Bridgeman, 40 L.Ed. 253, 159 U.S. 541 (1895)("Things are **voidable** which are valid and effectual until they are avoided by some act; while things are said to be **void** which are without validity until confirmed."); Bryan v. Congdon, 86 F. 221 (8th Cir., 1898)("**Void process** is defined to be such as was issued without power in the Court to award it, or which the Court **has not acquired jurisdiction** to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process. **Irregular process** is such as a court has general jurisdiction

to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case."); Ex Parte Randolph, 20 F.Cas. 242 (4th Cir. 1833)("It was well settled in the great Marshalsea case, in 10 Coke, 76, and the principle has never been departed from, that where a Court has jurisdiction and proceeds in verso ordine, or erroneously, there the proceeding is only **voidable**; but where the court has not jurisdiction of the case, there the whole proceeding is coram non judice, and **void**; the books, both English and American, abound in cases exemplifying this principle. But a habeas corpus will not lie, where the imprisonment is under voidable process, but only where it is merely void, for **void process is the same thing as if there were none at all**; and then the party is in effect imprisoned, without any authority whatever.").

B. U.S. v. Leon does not purport to apply to void (void ab initio) warrants.

In U.S. v. Leon, 468 U.S. 897, 82 L.Ed. 2d 677, 104 S.Ct. 3405 (1984), the court established the "good-faith" exception, which was liberally applied in this matter. However, the Court in Leon spoke only to "subsequently invalidated warrants" (voidable process) and never to "invalid warrants". See: 468 U.S. at 918 ("If exclusion of evidence obtained pursuant to a **subsequently invalidated warrant** is to have any deterrent

effect..."); p. 918, n.19 ("Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a **subsequently invalidated warrant** assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant."); p. 922 ("We conclude that the marginal or non-existent benefits produced by suppressing evidence obtained in an objectively reasonable reliance on a **subsequently invalidated warrant...**"); p. 922, n.23 ("We also eschew inquiries into the subjective belief of law enforcement officers who seize evidence pursuant a **subsequently invalidated warrant.**"); p. 926 ("We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers relied on a **subsequently invalidated search warrant.**"). In fact, the court specifically noted that "In so limiting the suppression remedy, we leave untouched the probable cause standard and the various requirements for a valid warrant." Id. p. 923.

Because the search warrant in this matter was "void ab initio," and thus a "void process," Leon, by its own wording, (which time and again refers to a "subsequently invalidated warrant" ("voidable process")), cannot apply, as it specifically, and notably, does not address a "void warrant." This is not a novel idea, as it has been addressed previously in various

courts, see e.g., U.S. v. Baker, 894 F. 2d 1144 (10th Cir. 1990) ("We hold that the search of the Defendant's property was not authorized by a valid warrant...the evidence [is] inadmissable in the Defendant's federal prosecution."); U.S. v. Vinnie, 683 F. Supp. 285, 288-289 (D. Mass. 1988)("Lack of subject matter jurisdiction is qualitatively different [than the question posed in Leon: 'Adjudications on the merits go for naught where lack of federal jurisdiction is discovered...' Moore's Federal Practice par. 60(4), (Second Ed. 1986). The conceerns motivating the Leon decision do not apply...The judge in this case 'had no business issuing a warrant' - he had no jurisdiction. Under these circumstances, the good faith exception established in U.S. v. Leon does not apply and the illegally seized evidence must be suppressed."),

Notably, too, is that Leon specifically states that "in so limiting the suppression remedy, we leave untouched the probable cause standard and the various requirements for a valid warrant." Id at 923.

As stated in Hudson v. Michigan, 547 U.S. 586, 593, 165 L.Ed. 2d 56, 126 S. Ct. 2159 (2006), "Until a **valid warrant** has issued, citizens are entitled to shield their persons, houses, papers, and effects...from the Government's scrutiny. Exclusion of evidence obtained by a warrantless search vindicates that entitlement."

C. Violation of Rule 41's and 28 U.S.C. 636's jurisdictional requirements mandates suppression of evidence obtained as a result of the Eastern District of Virginia warrant and all subsequent warrants.

"The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy... This purpose is realized by Rule 41 of the federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring than an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justifies the issuance of a search warrant." Jones v. U.S., 78 S. Ct. 1253, 2 L.Ed. 2d 1514, 357 U.S. 493,498 (1958).

Inherent in a determination by an "impartial" or "neutral and detached" magistrate is that that magistrate have the authority to issue the warrant. See: Shadwick v. City of Tampa, 407 U.S. 345, 32 L.ed. 2d 783, 92 S.Ct. 2119 (1972)("The single question is whether power has been lawfully vested..."); U.S. v. Krueger, 809 F.3d 1109 (10th Cir. 2015)("In discussing the Fourth Amendment's demands, the Supreme Court has spoken of the need for a 'valid warrant' and indicated that for warrants to be valid they must emanate from 'magistrates empowered to issue them. U.S. v. Lefkowitz, 205 U.S. 452, 464, 52 S.Ct. 420,

76 L.Ed. 877 (1932)") (Gorsuch concurrence); U.S. v. Glover, 736 F.3d 509, 515 (D.C. Cir. 2013)("Rule 41 is...crystal clear. It states that 'a magistrate with authority within 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'..In any event, it is quite a stretch to label the government's actions so clearly in violation of Rule 41 as motivated by good faith.").

Also, the notes to Rule 41, from 1972 when the Rule was amended, state clearly Congressional intent. "Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a **lawfully issued search warrant**." Further, it should also be noted, that after the changes to Rule 41 in 2016 (after this warrant was issued), adding subsection (b)(6), the notes state that "[t]he amendment does not address constitutional questions, such as the specificity of the description that the Fourth Amendment may require in a warrant for a remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this or other constitutional standards to ongoing case development." (This is noted here, although not directly applicable to this matter, but that certain cases in other circuits have stated that because of this rule change, the discussion is moot. That is certainly not the case, as even

Congress acknowledged that they didn't know if the change would be constitutional. As stated in U.S. v. Eldred, 933 F.3d 110 (2nd Cir. 2019), "the Fourth Amendment issues raised could recur, but now pursuant to §636(a) alone[,]" and, at that point, a conflict between the Rule and the Statute occurs).

The government's violation extends, however, beyond the rule. As noted, the warrant was in violation of Federal Statute 28 U.S.C. 636, entitled (appropriately) "Jurisdiction, Powers, and Temporary Assignment" and states that "[e]ach United States Magistrate [magistrate judge] serving under this chapter [28 U.S.C. §631 et seq.] shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where the court may function, or elsewhere as authorized by law - (1) all powers and duties conferred or imposed upon United States commissioners or by the Federal Rules of Criminal Procedure for the United States District Courts..."

There is no dispute in this matter that Magistrate Judge Theresa Buchanan did not have the statutory jurisdictional authority to issue the warrant in this matter that resulted in the search outside of her district. Therefore, aside from being a warrant void ab initio due to a Rule violation, the warrant was **violative of a statutory jurisdictional limitation**, which is **per se harmful**. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, n.3, 108 S.Ct. 2405, 101 L.Ed. 2d 285 (1988)

("A litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by the court. Although a court may construe rules liberally in determining whether they have been complied with, **it may not waive the jurisdictional requirements**...even for good cause, if it finds that they have not been met.")

In addition, 28 U.S.C. 2111 emphasizes this point. Entitled "Harmless Error," the section states that "the Court shall give judgment after an examination of the record without regard to errors or defects **which do not affect the substantial rights of the parties.**

Clearly, the Fourth Amendment does not prohibit unwarranted searches, only unreasonable ones, and a warrantless search may still be reasonable if the government shows consent or exigent circumstances. But as previously noted, the Eleventh Circuit has eliminated that possibility ("...the ensuing search was effectively warrantless and therefore - because no party contends that an exception to the presumptive requirement applies here - violative of the Fourth Amendment.").

As stated in Katz v. U.S., 389 U.S. 347, 357, 19 L.ed. 2d 576, 88 S. Ct. 507 (1967), "[o] ver and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge

or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions."

The warrant was, therefore, void (not voidable), differentiating it from Leon (which addresses only "subsequently invalidated warrants" (voidable), per se unreasonable and per se harmful.

Interestingly, a search on LexisNexis under the terms "search conducted outside the judicial process per se unreasonable"@15 and "U.S. v. Leon"@5, yields one (1) result, a district court ruling from the Seventh Circuit (U.S. v. Reed, 2015 U.S. Dist. Lexis 30825 (S.D. Ind. 2015)) wherein the government argued that the warrantless search of a vehicle was made in good faith under Leon. The court rejected that argument, stating that "Unlike Leon, Lieutenant Master was exceeding the scope of a warrantless search. Therefore, the warrantless search of Mr. Reed's vehicle was a violation of Mr. Reed's Fourth Amendment rights and evidence seized during the search would be suppressed."

Not only Rule 41, but the Fourth Amendment, too, is "crystal clear." "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." Clearly the warrant and search were violative of the Constitution, Rule

41, and the federal statute (28 U.S.C. 636). Even if the Court could somehow find Officer MacFarlane in "good-faith" after his admission that he knew the search would occur outside of the district and thus, that he had actual knowledge of the invalidity of the search warrant , (the Defendant does not concede how that determination could be made), the evidence is mandated to be suppressed as shown thusfar. Further, because the warrant represented a "fundamental violation of Rule 41" as defined in U.S. v. Burke, 517 F.2d 377 (2nd Cir. 1973), the good faith determination under Leon is moot and the evidence is mandated to be suppressed.

D. A fundamental violation of Rule 41 requires suppression.

Each federal circuit has a precedent setting case as it applies to Rule 41 violations, and each is nearly identical to the other circuits, and all based, effectively on Judge Friendly's ruling in U.S. v. Burke, 517 F.2d 377 (2nd Cir., 1973). (A listing of each Circuit's case is listed in Appendix A.)

In Burke, the Court wrote that "only a fundamental violation requires automatic suppression, and a violation is "fundamental" only where it renders the search unconstitutional under traditional Fourth Amendment standards." Violations which do not rise to constitutional error are classified as "non-fundamental" (or technical) violations, which require suppression only where: (1) there was "prejudice" in the sense that the search

might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of the rule.

While the Supreme Court has not yet adopted a similar precedent, U.S. v. Burke and U.S. v. Gerber, 994 F.2d 1556 (11th Cir. 1993) were both noted in U.S. v. Jones, 181 U.S. L.Ed. 2d 911, 934, n.11, 565 U.S. 400, 132 S.Ct. 945 (2012).

Further, this rule is consistent with Supreme Court precedent pertaining to Rule 41 and 28 U.S.C. 636.

Applying the definition to this matter, not only was the violation "fundamental", which requires suppression, but parts (1) and (2) of the "non-fundamental" definition were satisfied as well, again requiring suppression.

Had Rule 41 been followed, the search of the Defendant's residence could not have occurred (1) because there was no probable cause to search the Defendant, because the Defendant and his location were unknown at the time, and (2) "but-for" the illegal search by MacFarlane and the government, the subsequent warrants in Alabama could not have been issued, because, again, the Government only discovered the Defendant's name and location through the unconstitutional search.

As stated in U.S. v. Taylor, 250 F. Supp. 3d 1215 (N.D. Ala. 2017), the district court case of the defendant whose case was consolidated with this Defendant at the appellate level, the court wrote "Even if not a constitutional violation, Mr. Taylor

was prejudiced by the Rule 41 violation...this court concurs with the majority in Krueger that the correct standard inquires "whether the issuing federal magistrate judge could have complied with the rule"...Mr. Taylor had a reasonable expectation of privacy in the contents of his computer, meaning that the seven pieces of information seized by the NIT warrant could not have been obtained in the absence of the NIT warrant. The issuing magistrate judge could not comply with Rule 41 because it did not empower her to authorize searches outside of her district. Mr. Taylor was therefore prejudiced by the Rule 41(b) violation." Inexplicably, then, the Court stated that there was no evidence of intentional and deliberate disregard of the rule. Granted, the Court was unaware of Agent MacFarlane's testimony (as stated in the initial Petition for Writ of Certiorari, that testimony was never divulged to the Defendants, constituting a Brady violation), but the rule is an "either/or" rule, both options do not have to be present. And the Circuit Court did not consider Gerber at all.

Nevertheless, the "fundamental violation" ends any discussion as to the mandate to suppress the evidence obtained (and, of course, all "fruits" that resulted), and sub-parts (1) and (2) are then unnecessary. However, they are noted here to show that at any angle or approach, Gerber also should apply requiring suppression.

As the Court noted in Krueger, eiting U.S. v.Pennington

635 F. 2d. 1387 (10th Cir. 1990) (the Tenth Circuit version of Burke and Gerber), "Because Krueger met his burden of establishing prejudice and because suppression furthers the purpose of the exclusionary rule by deterring law enforcement from seeking and obtaining warrants that clearly violate Rule 41(b)(1), see Herring v. U.S., 555 U.S. 135...we affirm the district court's order granting Krueger's motion to suppress.

Finally, as stated in Fahy v. Connecticut, 84 S.Ct. 229, 11 L.Ed. 2d 171, 375 U.S. 85, 86-87 (1963), "it is now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error...We find that the erroneous admission of this unconstitutionally obtained evidence at the Petitioner's trial was prejudicial; therefore the error was not harmless, and the conviction must be reversed."

So should it be here as well. To allow evidence so clearly obtained in violation of the Constitution, the Federal Rules, and the U.S. Code would effective eviscerate the Fourth Amendment as it would give the green light to federal law enforcement that the Rules and Statutes passed by Congress are meaningless, and that they only need to cry "we thought" and unconstitutionally obtained evidence becomes constitutional.

As such, the Defendant respectfully requests this Honorable Court to reconsider its denial of its Writ of Certiorari in this matter, and further, determine that the evidence obtained should be suppressed and the conviction reversed.

Respectfully,

APPENDIX A

The following cases stand for the principal that unless a clear constitutional violation occurs, non-compliance with Rule 41 requires suppression of evidence only where (1) there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed; or (2) there is evidence of intentional and deliberate disregard of a provision of the rule.

First - No Circuit precedent - follows U.S. v. Burke

Second - U.S. v. Burke, 577 F.2d 377 (2nd Cir. 1975)

Third - U.S. v. Martinez-Zayas, 857 F.2d 122 (3rd Cir. 1988)

Fourth - No Circuit precendent - follows U.S. v. Burke

Fifth - U.S. v. Comstock, 805 F.2d 1194 (5th Cir. 1996)

Sixth - U.S. v. Hopper, 58 Fed. Appx. 619 (6th Cir. 2003)

Seventh - No Circuit precedent - follows U.S. v. Burke

Eighth - U.S. v. Freeman, 897 F.2d 346 (8th Cir. 1989)

Ninth - U.S. v. Stefanson, 648 F.2d 1231 (9th Cir. 1981)

Tenth - U.S. v. Pennington, 635 F.2d 1387 (10th Cir. 1980)

Eleventh - U.S. v. Gerber, 994 F.2d 1556 (11th Cir. 1993

D.C. - Criales v. U.S., 621 A.2d 374 (D.C. Cir. 1993)