23-7636

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Russell Davis,

Petitioner,

v.

United States of America,

Respondent.

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

Mr. Russell Davis
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Petitioner, Russell Davis, pro se.

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Attorney for Respondent

QUESTIONS PRESENTED

1. Does the Leon good-faith exception apply to salvage a barebones affidavit where at an evidentiary hearing conducted to establish a record of sworn unrecorded facts provided to the magistrate to establish probable cause, the magistrate testified that he cannot recall any sworn unrecorded facts relayed, and the officer who applied for the warrant testifies that he "thinks" he summarized "the entire case" but cannot testify under oath to any specific fact relayed?

2. Does the Leon good-faith exception apply to salvage a barebones affidavit where the magistrate who issued the warrant testifies under oath that based on his longstanding perception of the credibility of the officer who applied for the warrant, he accepts the accusations of the officer to establish probable cause without independently evaluating the credibility of the source of information provided by the officer?

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PARTIES TO THE PROCEEDING

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RELATED PROCEEDINGS

1. *United States v. Russell Davis*, 1:16-CR-00260-CAB, United States District Court, Northern District of Ohio.
2. *United States v. Russell Davis*, 970 F.3d 650 (6th Cir. 2020)
3. United States v. Davis, 1:16-cr-00260-CAB, Doc #: 152 Filed: 06/28/22
4. United States v. Russell Davis, 84 F.4th 672 (6th Cir. 2023)

JURISDICTION

This Court's jurisdiction is invoked under United States Constitution Article III, Title 28 U.S.C. § 1254(1), and Supreme Court Rule 10.

STATEMENT OF THE CASE AND FACTS

After trial by jury, Russell Davis suffered conviction and a life sentence for selling fentanyl that caused a deadly overdose. After an investigation, a detective obtained a warrant from an Ohio magistrate to search Davis's home in Lorain, Ohio. In Davis's first appeal, the government conceded that the detective's affidavit in support of this warrant omitted facts showing the required probable-cause "nexus" between Davis and his home. *United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020). The Sixth Circuit remanded for an evidentiary hearing because the government contended that the detective had provided additional (unrecorded) oral testimony in front of the magistrate. *Id.* During this later federal hearing, the detective stated that he believed he had told the magistrate about the evidence connecting Davis to the home, but he could not recall any specifics. The district court held that this general belief sufficed to avoid the "bare bones" label and thus to trigger Leon's exception to the exclusionary rule. *United States v. Davis*, 1:16-cr-00260-CAB, Doc #: 152 Filed: 06/28/22. The Sixth Circuit affirmed, reasoning: (a) the detective had uncovered overwhelming evidence tying Davis to the home; and (b) the magistrate (not the detective) bore the blame for failing to transcribe the detective's additional oral testimony. *United States v. Davis*, 84 F.4th 672, 675 (6th Cir. 2023). This timely request for intervention follows.

REASONS THIS WRIT SHOULD BE GRANTED

This case involves three issues of paramount importance and precedential value which warrant review.

First, this case involves a search of a home based on a warrant infected by a barebones affidavit. *See* Appendix A, (*United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020)). In a split decision, the Sixth Circuit remanded the case to allow the government to produce a record after an evidentiary hearing to establish sworn unrecorded facts relayed to the magistrate to establish probable cause.[1]

On remand, both the detective and the magistrate testified under oath to a lack of memory concerning these facts. *See* Appendix B, (*United States v. Davis*, 1:16-CR-00260, Doc. # 152, filed June 28, 2022). The detective testified that he "thinks," but could not be certain, that he went over the

[1] *See Id.* at 666: "Davis [] argues that Sivert's affidavit did not establish probable cause to search 1832 Garden Avenue because it included no facts connecting Davis to this home. For an affidavit to establish probable cause, our precedent requires the affidavit to contain a sufficient nexus between the evidence sought and the place to be searched. ... The government now concedes that Sivert's affidavit did not contain enough facts tying Davis (and his phone) to this location. It raises two other arguments. The government asserts that if the admission of evidence seized from Davis's home violated the exclusionary rule, the error was harmless in light of the other evidence showing his guilt. Alternatively, it argues that we should issue a limited remand for a hearing because Sivert gave additional oral testimony to the magistrate. We opt for the second course without resolving the first. The hearing could obviate the need to conduct this harmlessness inquiry. And the district court, having overseen the trial, should initially conduct the inquiry if it turns out to be necessary."

"entire case" with the magistrate. The magistrate testified that he could not remember the case and could not recall any unrecorded facts relayed.[2]

Despite this, the Sixth Circuit upheld the introduction of the evidence and denied suppression, reasoning that the detective had "uncovered overwhelming evidence" tying Davis to the home, and that the magistrate bore the blame for failing to transcribe the detective's oral testimony. *See* Appendix C, (*United States v. Davis*, 84 F.4th 672, 675 (6th Cir. 2023)).[3]

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[2] *See id.*, *United States v. Davis*, 1:16-CR-00260, Doc. # 152, filed June 28, 2022, at pages 13-14: "The issue for the Government, however, is that the record does not definitively establish what Detective Sivert told Magistrate Cook under oath. And this is where Rule 41's requirement of transcribed oral statements would be helpful. But the Court does not have that evidence because Magistrate Cook neglected to memorialize the conversation. Instead, the Court is left with the evidence revealed at the hearing on remand and the witnesses' (understandably) hazy memories. Start with Magistrate Cook – he testified that he could not specifically recall issuing the warrant in this case. While it was his practice to talk about the investigation with affiants, he cannot recall doing so with Detective Sivert. For his part, Detective Sivert does remember talking about this case with Magistrate Cook. That is because this investigation stood out to him – a retired officer's grandson dying of an overdose. But as to the substance of the conversation, that remains unclear. While on direct examination (and subject to substantial leading from the prosecutor), Detective Sivert testified that he "believed" he talked about Defendant's connection to 1832 Garden Avenue. Specifically, Detective Sivert said he: Believed we talked about the vehicle and the residence. Like I explained, I think we pretty much discussed a lot about the case, as far as how we obtained evidence and how we obtained information that led us to this point. That's a standard thing I would do in any search warrant, but specifically, verbatim I don't know if I could explain exactly what was said, but it was mostly about the process of the case, how it went through investigation. On cross-examination, Detective Sivert reiterated he could not recall any specifics of the conversation and that he did not make a contemporaneous record. On redirect then, the Government focused on all the information the Detective had at the time of the search that tied Defendant to 1832 Garden Avenue: i) a description of the suspect house, including location; ii) a description of the suspect vehicle; iii) police records tying Defendant to the residence; iv) surveillance of the residence by law enforcement; v) confirmation that the residence matched the provided information; and vi) confirmation that the vehicle matched the provided information, as well as that it was owned by Defendant. The witnesses' 'hazy' recollections make these 'frothy nexus waters' even more unclear. To approve this warrant and supplementation, the Court must find that Magistrate Cook had a 'substantial basis' to find probable cause to search a location. But the unknown specifics here, even considering Detective Sivert's 'belief,' make it impossible to determine if that substantial basis – and the all-important nexus – were discussed here. Because of this, the Court finds that the Affidavit, even after considering Detective Sivert's additional sworn testimony, did not provide a substantial basis to search the residence."

[3] *See id.* at 675: "In Davis's first appeal, the government conceded that the detective's affidavit in support of this warrant omitted facts showing the required probable-cause "nexus" between Davis and his home. United States v. Davis, 970 F.3d 650, 666 (6th Cir. 2020). But we remanded for an evidentiary hearing because the

Dissenting, Honorable Ronald Lee Gilman, Circuit Judge, wrote:

> Because the record is still devoid of what information was conveyed to the state-court magistrate at the time Detective Sivert applied for the search warrant in question, I am not persuaded that the testimony on remand saves the bare-bones affidavit. I would therefore reverse the judgment of the district court and remand for the court to consider the government's alternative argument predicated on harmless error.
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> *Id.* at 684-86.[4]

Facts known to an officer but not included in the probable cause affidavit and facts not communicated to the issuing judge are insufficient to salvage a barebones warrant affidavit without proof that such facts were relayed to, considered by, and relied on by the magistrate. The detective could not recall specific facts, and the magistrate could not remember any unrecorded facts, failing to demonstrate the required probable cause.

Second, this petition questions whether Federal Criminal Rule 41(c) permits a search warrant affidavit to be supplemented by subsequent testimony at a suppression hearing, which was not recorded or

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government contended that the detective had provided additional (unrecorded) oral testimony in front of the magistrate. During this later federal hearing, the detective stated that he believed he had told the magistrate about the evidence connecting Davis to the home, but he could not recall any specifics. The district court held that this general belief sufficed to avoid the "bare bones" label and thus to trigger Leon's exception to the exclusionary rule. ... We agree for two basic reasons. First, the detective had uncovered overwhelming evidence tying Davis to the home. And second, the magistrate (not the detective) bore any blame for failing to transcribe the detective's additional oral testimony under state law."

[4] *See also*, Appendix D, (*United States v. Davis*, 6th Cir. No. 22-3603, Document: 34-1, Filed: 01/04/2024, Page: 1 (Gilman, C.J.) (dissenting from denial of rehearing, with suggestion for rehearing en banc)).

incorporated into the affidavit. This issue has divided courts,[5] including this Court,[6] and resolution is necessary to clarify Fourth Amendment requirements.

Third, this case calls into question the neutrality of a magistrate who testified, under oath, that, where the officer who requested the warrant is involved, he relies exclusively on the credibility of the officer to determine

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[5] *See State v. Adkins*, 176 W. Va. 613, 619 (W. Va. 1986) ("The underlying rationale of the [1972] amendment to Rule 41(c) is important, and the note to the amendment is instructive: 'If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to ensure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.' Fed. R. Crim. P. 41(c). It is apparent the reason for adopting this procedural safeguard is to assure that the constitutional rights involved are adequately protected. The probable cause requirement would be significantly weakened if a court can rely on the recollection of those concerned to support a probable cause finding long after the search warrant has been issued). *Accord State v. White*, 707 P.2d 271, 277-78 (Alaska App. 1985); *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971) (*En Banc*); *Blue v. State*, 441 So.2d 165, 167 n. 1 (Fla. App. 1983); *State v. Daniel*, 373 So.2d 149 (La. 1979); *Commonwealth v. Simmons*, 450 Pa. 624, 626, 301 A.2d 819, 820 (1973); *State v. Appleton*, 297 A.2d 363, 367 (Me. 1972); *State v. Hendrickson*, 701 P.2d 1368 (Mont. 1985); *State v. Smith*, 281 N.W.2d 430 (S.D. 1979); *Hall v. State*, 394 S.W.2d 659 (Tex. Crim. App. 1965); *contra United States v. Hittle*, 575 F.2d 799 (10th Cir. 1978) (holding unrecorded sworn oral testimony could not be considered in determining probable cause because the recording requirement in the federal rules and Kansas statutes was necessary to protect constitutional rights); *accord State v. Jansen*, 15 Wn. App. 348, 549 P.2d 32 (1976); *United States v. Sellers*, 520 F.2d 1281, 1282 (4th Cir.); *United States v. Acosta*, 501 F.2d 1330 (5th Cir.).

[6] *E.g.*, *Christofferson v. Washington*, 393 U.S. 1090, 1091 (1969) (Justice BRENNAN, with whom Justice MARSHALL joins, dissenting) ("The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, commands that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation.' The question presented by this case is whether the Constitution requires that, at or before the time a warrant issues, the judicial officer make a permanent record of the evidentiary basis for its issuance. In this case the entire record of the proceeding on the application for the warrant consisted of the complaint for the warrant, a copy of the warrant and the return on the warrant. The complaint, considered alone, failed to state sufficient probable cause for the warrant and, on that ground, petitioner made a motion to suppress the evidence seized on its authority. The State resisted the motion on the basis of affidavits of the judge who issued the warrant, of the prosecuting attorney who applied for it, and of two police officers, purporting to set forth what had transpired at the hearing on the application. The finding of probable cause was sustained on the basis that the affidavits supplied the evidentiary basis not provided in the complaint. Federal courts have held that this procedure cannot be countenanced under Fed. Rules Crim. Proc. 41(c). The substantive right created by the requirement of probable cause is hardly accorded full sweep without an effective procedural means of assuring meaningful review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right. It is for this reason that some States have imposed the requirement of a contemporaneous record").

probable cause, without independently evaluating the credibility of the source of information provided by the officer as required by established law. *See Nathanson v. United States*, 290 U.S. 41, 47 (1933) ("Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough").[7] This practice, admitted by the magistrate, undermines the appropriateness of "good faith" findings to salvage a warrant infected by a barebones affidavit and violates Fourth Amendment protocol.[8]

This Court adopted the good-faith exception to the exclusionary rule to deter Fourth Amendment violations. **United States v. Leon**, 468 U.S. 897 (1984).

In *Leon*, this Court established that the good-faith exception does not apply, *inter alia*, when the magistrate acts as a rubber stamp, when the

[7] Under *Nathanson*, this process was mandatory; this mandate existing to insure that the inference of probable cause from facts known to an officer be drawn by a neutral and detached magistrate rather than the officer himself, "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

[8] *See United States v. Ventresca*, 380 U.S. 102, 108-09 (1965) (*citing Aguilar v. Texas*, 378 U.S. 108 (1964)) ("Probable cause cannot be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police").

application lacks a substantial basis for probable cause, or when the warrant is facially deficient.

All three of these exceptions apply here:

- The warrant affidavit has been held "barebones" by the courts.
- It was unreasonable for the officer to rely on a warrant lacking probable cause.
- The magistrate acted as a rubber stamp by failing to require facts establishing probable cause, failing to create a record, in violation of established law, and relying solely on the officer's credibility.

This case provides an opportunity to address these concerns and bring consistency to the rule that suppression is required for Fourth Amendment violations absent clear applications of established exceptions to the exclusionary rule.

This case also provides an opportunity to address the defect forecasted by *Christofferson, supra.*

The exceptions were not intended to swallow the rule. Consideration is therefore requested.

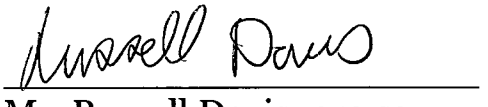
CONCLUSION

This petition embodies the criteria for granting certiorari, addressing a fundamental issue of federal law affecting legal system integrity and individual rights. Granting review allows this Court to affirm its commitment to justice, equity, and the rule of law, providing necessary guidance to lower courts and ensuring consistent application of justice.

RELIEF SOUGHT

Petitioner Davis respectfully requests a writ of certiorari. Alternatively, Petitioner Davis moves this Honorable Court to grant this petition, vacate the lower court order, and remand the case for further consideration under the principles pronounced and applied in *Leon, Nathanson, Ventresca,* and *Christofferson, supra.*

Respectfully submitted,



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