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In The

SUPREME COURT OF THE UNITED STATES

October Term 2023

***Bentley Streett*,**

Applicant,

v.

United States of America,

Respondent.

Application for Extension of Time Within Which to File a Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

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APPLICATION TO THE HONORABLE NEIL M. GORSUCH AS CIRCUIT JUSTICE

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March 1, 2024

APPLICATION FOR AN EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Bentley Streett respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including April 24, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States* v. *Streett*, 83 F.4th 842 (10th Cir. 2023) (attached as Exhibit 1).

JURISDICTION

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Tenth Circuit issued its judgment on October 5, 2023 and then denied Mr. Streett's timely rehearing petition on December 26, 2023. Thus, a petition to this Court is currently due by March 25, 2024. In accordance with Rule 13.5, this application is being filed more than 10 days before that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. This case involves an important question of Fourth Amendment law that implicates two circuit splits: Whether and how the inevitable-discovery doctrine applies to a defective warrant. This doctrine holds that evidence obtained in violation of the Fourth Amendment need not be suppressed if the government can prove "that the information ultimately or inevitably would have been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). Below, the Tenth Circuit held that (i) the "inevitable discovery doctrine can apply to cases where a warrant was improperly issued" and (ii) suppression was not warranted because the police

"likely … would have" secured a non-defective warrant *if* the magistrate had denied the actual warrant application and pointed out their mistake—which never happened. Ex. 1 at 9, 14 (emphasis omitted). This decision warrants review for three reasons.

First, the decision below conflicts directly with other federal and state appellate decisions, including the Second Circuit's nearly contemporaneous ruling in *United States v. Lauria*, 70 F.4th 106 (2d Cir. 2023). *Lauria* held that inevitable-discovery doctrine did *not* apply on materially indistinguishable facts because the doctrine "does not ask whether the government lawfully *could have* obtained the evidence at issue by means of corrected warrant affidavits" if it had learned of the "defects in its initial affidavits." *Id.* at 124. "Rather, inevitable discovery asks whether the government has shown that it *certainly would have* discovered the evidence by a lawful means even if no warrant had been issued or challenged." *Id.* (emphasis altered).

Some state high courts likewise reject the kind of "we-could-have-done-it-lawfully-so-it-doesn't-matter-that-we-didn't" argument that the Tenth Circuit accepted below. See *State* v. *Haidle*, 285 P.3d 668, 677 (N.M. 2012). Inevitable discovery requires that the evidence "would have been otherwise discovered through a different and independent lawful means," so in a defective-warrant case, it requires the government to point to a "method other than a search warrant." See *id.*; see also *State* v. *Handtmann*, 437 N.W.2d 830, 838 (N.D. 1989) ("The State's assertion that it would have obtained a lawful search warrant based upon the

information subsequently discovered would emasculate the requirement for a search warrant under the Fourth Amendment."); 6 LaFave, Search & Seizure § 11.4(a) (6th ed.) (explaining that *Handtmann*'s analysis is "quite correct[ ]").

Second, the decision below also implicates a broader split about "hypothetical warrants": "[W]hen law enforcement fails to comply with some element of the warrant process at the outset, inevitable discovery gives the state an opportunity to argue it *could have* and *would have* obtained proper judicial sign-off"—even if the failure to comply was a failure to secure any warrant at all, even a defective one. See Tonja Jacobi & Elliot Louthen, *The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 Penn. L. Rev. 1, 34–35 (2022). Some courts reject these arguments categorically, others accept them, and still others take middle-ground approaches. See *id.* at 34–43 (cataloging these different approaches); *compare*, *e.g.*, *United States* v. *Young*, 573 F.3d 711, 723 (9th Cir. 2009) ("to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement" (cleaned up)), *with United States* v. *Jackson*, 596 F.3d 236, 242 (5th Cir. 2010) ("had there been no [invalid] state search warrant, we have little doubt that the officers nonetheless could have secured a search warrant and conducted the search").

Third, the Tenth Circuit's approach conflicts with *Nix* and *United States* v. *Leon*, 468 U.S. 897 (1984), and threatens to swallow the Fourth Amendment's warrant requirement.

Under *Nix*, the inevitable-discovery exception applies only if the government proves that police would have lawfully obtained the evidence anyway through a source *different* and *independent* from the illegal source they actually used. 467 U.S. at 448. But a hypothetical valid warrant that might have been issued if the actual warrant had been denied is neither different nor independent from the real warrant.

What's more, *Leon* dictates how to apply the exclusionary rule when police obtained only one warrant, and that warrant was constitutionally defective: Suppression applies if the warrant has obvious, egregious defects, but not if it contains only minor or debatable defects. 468 U.S. at 922–23. Here, the defect was obvious: The warrant affidavit contained no information at all connecting Mr. Streett to the address to be searched. Thus, *Leon* would require suppression—but the Tenth Circuit declined to apply its approach. As a leading Fourth Amendment scholar explained in critiquing the decision below:

> Instead of *Leon*'s blaming the government for submitting and relying on an obviously defective warrant, *Streett* imagines the magistrate judge spotting the error, patiently explaining it to the government, and then the government correcting the error so that no constitutional violation occurred. Under that view, the culpable action by the police is effectively erased.

Orin S. Kerr, *Does the Inevitable Discovery Exception Include Imagined Revised Attempts to Get Warrants?: The Tenth Circuit says "yes," but I think the answer is "no,"* The Volokh Conspiracy (Oct. 9, 2023).[1]

[1] https://reason.com/volokh/2023/10/09/does-the-inevitablediscovery-exception-include-imagined-revised-attempts-to-get-warrants/.

And by improperly invoking the imagined help of a more careful magistrate, the Tenth Circuit's rule would reduce every future warrant challenge to a dispute over the warrant's curability, viewed with the benefit of hindsight. That will be true not just for warrants lacking probable cause, but for overbroad warrants lacking particularity, and even for the general warrants that the Founders so forcefully rejected. In every such case, so long as the warrant's error is one that *could have* been fixed, no exclusion—and thus no deterrence—will follow, no matter how egregious or unreasonable the officer's error.

2. An extension is warranted to allow counsel time to coordinate and prepare a petition that will aid the Court's review of these issues. Mr. Streett has asked the Northwestern Supreme Court Practicum to help prepare his petition. An extension of time will permit the Practicum students the time necessary to complete a cogent and well-researched petition without interfering with their other studies or the academic calendar.

An extension is also warranted because of the press of counsel's other client business. The Practicum is assisting with the merits briefing, and Mr. Green will present oral argument, in *Fischer* v. *United States*, No. 23-5572, set for argument on April 16. The Practicum and undersigned counsel are also responsible for reply briefs in support of petitions in *Vincent* v. *Garland*, No. 23-683, *Johnson* v. *United States*, No. 23-6496, *Robbertse* v. *Garland*, No. 23-873, *Lopez-Aguilar* v. *Garland*, No. 23-6801, and a forthcoming petition in *Wilfred H.* v. *Ames*, No. 22-0506 (W. Va.).

Assistant Federal Public Defender Amy Senia has also been working diligently on other cases with imminent deadlines. Ms. Senia has an opening brief due on March 14 in *United States v. Lopez*, No. 23-2121 (10th Cir.), and an opening brief due on March 25 in *United States v. Campbell*, No. 23-6186 (10th Cir.). Ms. Senia will also be assisting and mooting several colleagues in preparation for the Tenth Circuit's March 19–21 oral argument session.

A 30-day extension will allow counsel the necessary amount of time to effectively handle Applicant's petition and other client business, and will allow the Northwestern Practicum students sufficient time for research and drafting efforts.

CONCLUSION

For these reasons, Applicant respectfully requests an extension of 30 days, to and including April 24, 2024, within which to petition for review in this case.

Respectfully submitted,

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