Case No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

United State of America,

Respondent,

vs.

Russell Davis,

Petitioner.

On Application for Extension of Time to File Petition
for a Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

Ms. Rebecca C. Lutzko, Esq.
United States Attorney, Northern District of Ohio
Office of the United States Attorney
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852

Attorney for Respondent

Mr. Russell Davis
Reg. No. 64267-060
Northeast Ohio Correctional Center
2240 Hubbard Road
Youngstown, Ohio 44505

Mr. Russell Davis, pro-se.

To: The Honorable Brett M. Kavanaugh, Chief Justice for the United States Court of Appeals for the Sixth Circuit.

Re: *United States v. Davis*, 6th Cir. No. 22-3603. Application for 60-day extension of time to file Petition for a Writ of Certiorari.

Counsel undersigned moves this Honorable Court for a 60-day extension of time to file Petitioner Russell's Petition for a Writ of Certiorari, which is currently due April 3, 2024. The final order affirming Petitioner Russell's direct appeal was entered on January 4, 2024. *See* Appendix A. As good cause, Petitioner Davis submits that the extension is requested is needed to perfect and perform the desired petition. Counsel hired to represent the application (who represented Petitioner in the Sixth Circuit Court of Appeals) has an application to practice before this being filed within days. The requested continuance will account for processing the application and the time requested for proper briefing. This case is poised to present an opportunity to establish much needed precedent on issues of paramount importance and constitutional value. Including, but limited to:

1. Whether the "death results" clause of Title 21 U.S.C. § 841 (a) (1), (b) (1) (C), applies to subject A where: subject A sells a user amount of narcotics to subject B, and subject B, without knowledge or agreement with subject A, sells the narcotic to subject C, and subject C dies from overdose?

2. Whether the Fourth Amendment doctrine of "good faith" properly applies to save a facially defective warrant where the affidavit in support of the warrant was held by the court of appeals to lack the required nexus between the place to be searched and criminal activity, and after limited remand, the magistrate who issued the warrant and the detective who applied for the warrant could not testify to specific facts orally communicated to the magistrate which justified issuance of the warrant?

3. Whether a magistrate abandons his role as a neutral arbiter where he systemically disregards established legal procedure based on a confessed trust of the integrity of the particular affiant who applied for the warrant, which admittedly causes the magistrate not to inquire into and consider the credibility of the affiant's source?

CONCLUSION

Petitioner Russell refreshes his request for a 60-day extension to engage counsel and allow counsel engaged the time necessary to perfect and perform the intended Petition for a Writ of Certiorari.

Respectfully submitted,

Russell Davis

Mr. Russell Davis, pro-se

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0232p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUSSELL DAVIS,

Defendant-Appellant.

No. 22-3603

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:16-cr-00260-1—Christopher A. Boyko, District Judge.

Decided and Filed: October 23, 2023

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: William Bernard Norman, W.E.B. NORMAN LAW, INC., Berea, Ohio, for Appellant. Matthew B. Kall, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

MURPHY, J., delivered the opinion of the court in which KETHLEDGE, J., joined. GILMAN, J. (pp. 15–19), delivered a separate dissenting opinion.

OPINION

MURPHY, Circuit Judge. If a police officer violates the Fourth Amendment by conducting a search without probable cause, the "exclusionary rule" requires a court to prohibit the use of any recovered evidence at the defendant's criminal trial. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). In *United States v. Leon*, 468 U.S. 897 (1984), however, the Supreme

Court held the exclusionary rule typically will not apply if the officer obtained a warrant for this search—even if the judge who issued the warrant erred in finding that probable cause existed. *See id.* at 922. That said, *Leon* added that the officer cannot rely on the judge's probable-cause ruling to avoid the exclusionary rule if the affidavit requesting the warrant was so bare bones that no reasonable officer could believe that it established probable cause. *See id.* at 923. This case, which reaches us for a second time, raises a novel issue under *Leon*'s framework.

Russell Davis sold fentanyl that caused a deadly overdose. After a thorough 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). But we 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.

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. We also reject Davis's other challenges to the warrant. So we now affirm Davis's conviction in full.

I

A

On the morning of March 7, 2016, Jacob Castro-White's mother tragically discovered that he had died from a drug overdose in their Lorain home. *Id.* at 654. A first responder alerted Detective Ernest Sivert of the Lorain Police Department. *Id.* At Davis's trial, Sivert detailed his ensuing investigation. *Id.* at 663. Sivert noticed that Castro-White's phone had many missed calls from Zaharias ("Harry") Karaplis. *Id.* During an initial interview, Karaplis implicated an

individual known as "Red" as the drug dealer who might have sold the fatal drugs to Castro-White. *Id.* But Karaplis also lied to Sivert by denying any involvement. *Id.*

Sivert learned of this lie after receiving Castro-White's phone records. *Id.* Those records revealed Castro-White's activities on the evening of March 6. *Id.* at 654–55. Around 10:00 p.m., Castro-White began to text another friend, Corey Stock, about obtaining heroin. *Id.* Stock said that he could ask a drug-dealer acquaintance if she had heroin, but Castro-White declined the offer and said he would wait for Red. *Id.* at 654. Shortly before midnight, he texted Karaplis to see if Karaplis could arrange a drug deal with this person. *Id.* at 654–55.

In a follow-up interview with Sivert, Karaplis continued to lie about his involvement. Sivert confronted him with the texts. *Id.* at 663. Karaplis then requested a lawyer. *Id.* Before doing so, he identified the "Stock" in Castro-White's texts as Corey Stock. *Id.* Stock later told Sivert that he had bought drugs from "Red" at a "Garden Avenue home" in Lorain. *Id.*

After retaining counsel, Karaplis spoke with Sivert a third time. At last, Karaplis admitted his role. *Id.* He had arranged the heroin deal with Davis, and Castro-White had driven him to Davis's Garden Avenue house at 12:34 a.m. on March 7. *Id.* at 655. Karaplis paid Davis $50 for "what he thought was heroin," and Karaplis and Castro-White split the drugs. *Id.* It turns out that Davis had provided the men with fentanyl—a much stronger drug. *Id.* When speaking to Sivert this third time, Karaplis described Red and Red's car, provided Red's phone number, and located on Google Maps the specific home where he had bought drugs from Red. *Id.* at 663.

Sivert traveled to this home and spotted a car parked nearby that fit Karaplis's description. *Id.* Sivert learned that the car's license plate was registered to "Russell Davis" and that Davis's nickname was "Big Red." *Id.* He also asked Karaplis to look at a photo array. *Id.* Karaplis identified Davis's picture as "Red" with "100 percent" confidence. *Id.*

About a week later, Karaplis received a text message from Davis. *Id.* Karaplis contacted Sivert. *Id.* Sivert had Karaplis set up a phone call with Davis. When Karaplis began to discuss Castro-White's death, Davis asked if the police had "sweat[ed]" him about it. *Id.*

After this call, Sivert asked an Ohio magistrate for a warrant to search Davis's Garden Avenue home for his cellphone. *Id.* Sivert's affidavit summarized the events as follows:

> 1. In the early morning hours of . . . March 7, 2016, Jacob Castro-White was in contact with Zaharias Karaplis, another heroin user, for the purpose of obtaining heroin.
> 2. Zaharias Karaplis and Jacob Castro-White made contact with a male known as "Red" and later identified as Russell Davis, on his cellular phone (216) 526-8810 for the purpose of purchasing heroin, both through text and voice communication.
> 3. Zaharias Karaplis and Jacob Castro-White met with Russell "Red" Davis on March 7, 2016 for the purpose of buying heroin from him.
> 4. Jacob Castro-White ingested the purported heroin from Russell "Red" Davis and it caused him to overdose. The time between the purchase of the heroin from Russell "Red" Davis and the estimated time of death, by the Lorain County Coroner Steven Evans is approximately one (1) hour.
> 5. Toxicology tests conducted by the Lorain County Coroner's Office revealed that Jacob Castro-White had a lethal dose of Fentynal in his sytem [sic].
> 6. On April 12, 2016 at 0945 hours Zaharias Karaplis received a text message from Russell "Red" Davis via his cellular telephone with the number (216) 526-8810.

Id. at 663–64. "Based on this investigation," Sivert added, he believed that Davis had been "trafficking in heroin" from the Garden Avenue home and using his cellphone as an "instrument" of that "trafficking business." Aff., R.31-1, PageID 121. Sivert also opined that the phone was likely still at the Garden Avenue home, referring to it as the "residence of Davis." *Id.*

The magistrate granted the search warrant. *Davis*, 970 F.3d at 664. During the search of Davis's home, police found, among other things, the phone and illegal drugs. *Id.*

The government indicted Davis on two drug counts. *Id.* at 654. Davis moved to suppress the evidence recovered from his home. *Id.* at 664. The district court denied this motion. *Id.*

Davis stood trial on one of the drug counts. *Id.* at 654–55. A jury convicted him of distributing fentanyl and found that the distribution caused Castro-White's death. *Id.* at 655. Given this fatality, the district court sentenced Davis to a mandatory life sentence. *Id.*

In his first appeal, Davis sought to overturn his conviction on many grounds. We rejected all of his claims except for two concerning Davis's Fourth Amendment challenge to Sivert's affidavit. *Id.* at 656–66. Alleging that Sivert had omitted material facts from his affidavit, Davis argued that the district court should have held a hearing to examine the detective's truthfulness under *Franks v. Delaware*, 438 U.S. 154 (1978). *Davis*, 970 F.3d at 664. Alternatively, Davis argued that Sivert's affidavit did not assert any facts to show that Davis lived at the Garden Avenue home. In response to the second argument, the government conceded that the affidavit lacked the required probable-cause "nexus" between Davis and this home. *Id.* at 666. But it suggested that Sivert had given more oral testimony in front of the magistrate who issued the warrant. *Id.*

Ultimately, we remanded the case so the district court could hold an evidentiary hearing about what Sivert told the magistrate in person. *Id.* at 664, 666. We reasoned that the Fourth Amendment did not require written testimony. *Id.* at 666. We added that Sivert's investigation showed that he had plenty of facts connecting Davis to the Garden Avenue home. *Id.*

B

On remand, the district court held a hearing at which two witnesses testified: the magistrate who issued the warrant and Detective Sivert. Tr., R.147, PageID 2868. The magistrate explained that he followed a standard "process" when reviewing warrant requests. *Id.*, PageID 2880. He would "swear the officer," "review" the affidavit, and "discuss the issue with the officer[.]" *Id.* The magistrate did not use a court reporter to transcribe these conversations. *Id.* If an affidavit fell well short of probable cause but the officer knew more facts, the magistrate would ask the officer to draft another affidavit. *Id.*, PageID 2889–90. But the magistrate might not require a second affidavit if the first one fell "close" to the probable-cause line and the magistrate "needed clarification" on just one issue. *Id.*, PageID 2891. Although the magistrate described his general practice, he lacked a "specific recollection" of Davis's case. *Id.*, PageID 2882. But he would have been "shocked" if he had not spoken with Sivert about the warrant. *Id.*

Detective Sivert recalled more. Davis's case "stuck in [his] mind" because he knew the victim's grandfather, a retired police officer. *Id.*, PageID 2932. Sivert "discussed the majority of the case" with the magistrate but could not remember any details that he had disclosed. *Id.*, PageID 2933. He stated that he was "sure" that he had conveyed the many facts connecting Davis to the Garden Avenue home, but he added that he could not "be a hundred percent certain[.]" *Id.*

After this hearing, the district court again denied Davis's motion to suppress. *See United States v. Davis*, 2022 WL 2314009, at *1 (N.D. Ohio June 28, 2022). The court agreed that the affidavit failed to establish a probable-cause nexus between Davis and the Garden Avenue home. *See id.* at *4. It also found that the magistrate had put Sivert under oath to discuss the case. *Id.* at *6. But neither the magistrate nor Sivert could recall what Sivert had said. *Id.* at *6–7. Given the "unknown specifics," the court held that this testimony did not prove that Sivert conveyed facts to create probable cause that Davis lived at the home. *Id.* at *7.

Even so, the court held that the exclusionary should not apply under *Leon* because Sivert had relied on the magistrate's issuance of the warrant. *Id.* at *8–10. It initially rejected Davis's claim that *Leon*'s exception to the exclusionary rule could not apply because the magistrate had "abandon[ed] his role as a judicial officer." *Id.* at *9. The court next rejected Davis's claim that *Leon*'s exception should not apply because Sivert's supporting affidavit was "bare bones." *Id.* at *9–10. It decided that Sivert's general "belief" that he had told the magistrate the facts that connected Davis to the home sufficed to avoid the bare-bones label. *Id.* at *10. The court lastly rejected Davis's claim that Sivert's affidavit presented materially false information. *Id.* at *5.

Davis appeals a second time. We review the district court's findings of historical fact for clear error and its legal conclusions de novo. *United States v. Baker*, 976 F.3d 636, 641 (6th Cir. 2020). And we treat the court's ultimate decision to apply *Leon*'s warrant exception to the exclusionary rule as a legal conclusion. *United States v. Reed*, 993 F.3d 441, 446 (6th Cir. 2021).

II

The Fourth Amendment provides 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. To establish the probable cause necessary for a warrant, an officer's supporting affidavit must show a "probable-cause 'nexus'" tying the place to be searched to the items to be seized. *Reed*, 993 F.3d at 447. Here, Detective Sivert sought to seize Davis's phone from the Garden Avenue home. But Sivert's affidavit mistakenly omitted facts showing that Davis lived there. So the government does not dispute that the affidavit failed to establish probable cause that the police would find the phone at this location.

This case instead concerns the proper response to this Fourth Amendment problem. The Fourth Amendment's text does not require any specific remedy when a magistrate issues a warrant lacking probable cause. *See Herring v. United States*, 555 U.S. 135, 139 (2009). But the Supreme Court has long adhered to a judge-made "exclusionary rule" that sometimes bars the use of evidence at a defendant's trial if the police uncovered it in violation of the amendment. *See Davis v. United States*, 564 U.S. 229, 236–38 (2011); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995). The Court now applies this rule only if its benefits in stopping constitutional violations exceed its costs in hindering the trial's "truth-finding function" and permitting "wrongdoers" to escape punishment. *United States v. Robinson*, 63 F.4th 530, 534 (6th Cir. 2023).

Engaging in this cost-benefit balance, the Court in *Leon* held that the exclusionary rule generally should not apply if a judge issues a search warrant that violates the Fourth Amendment because it rests on an affidavit that does not establish probable cause. 468 U.S. at 916–21. *Leon* reasoned that the exclusionary rule exists to deter the misconduct of police officers—not judges. *See id.* at 916. In most cases, moreover, the officer seeking a warrant will "defer to the judge's legal conclusion" about whether probable cause exists. *Reed*, 993 F.3d at 450. So the blame for a bad warrant generally will fall on the judge. *See Leon*, 468 U.S. at 920–21.

Leon's rejection of the exclusionary rule would seem to govern Davis's case. After all, Sivert relied on the magistrate's conclusion that probable cause existed when he searched Davis's home based on the warrant that the magistrate had issued. And the magistrate (not Sivert) would have committed the primary "error" by overlooking that Sivert's affidavit failed to disclose facts showing that Davis lived at the home that Sivert sought to search. *Id.* at 921.

At the same time, *Leon* recognized that officers might sometimes bear the blame for unlawful warrants in "unusual" situations. *Id.* at 918. The Court identified "four" circumstances in which the exclusionary rule will still apply even if an officer obtains a warrant. *Baker*, 976 F.3d at 647 (citation omitted); *see Leon*, 468 U.S. at 923. Davis invokes three of these circumstances.

Circumstance One: "Bare-Bones" Affidavits. *Leon* held that the exclusionary rule should still apply even when an officer gets a warrant if the officer's supporting affidavit contained so little information that no reasonable officer could believe it established probable cause. 468 U.S. at 923. The classic example of this "bare-bones affidavit" alleges the officer's conclusory belief that probable cause exists without identifying any facts. *United States v. White*, 874 F.3d 490, 496, 498–99 (6th Cir. 2017). If, by contrast, an affidavit alleges "some modicum of evidence, however slight," connecting the sought-after items to the to-be-searched place, it will fall within *Leon*'s exception to the exclusionary rule. *Reed*, 993 F.3d at 451 (citation omitted).

Davis argues that Sivert drafted a bare-bones affidavit because it did not identify even a "modicum" of a connection between himself and his home. The government does not dispute Davis's claim that the affidavit *alone* was bare bones. So we need not consider that issue.

Rather, we must ask only whether Sivert's further testimony took this case outside the "bare-bones" camp. The district court could not identify any specific facts that Sivert told the magistrate because neither witness could recall the details years later. *See Davis*, 2022 WL 2314009, at *7. At best, Sivert stated a general "belief" that he told the magistrate about the information tying Davis to the residence. *Id.* at *10. The district court held that this belief provided the "modicum of evidence" required to trigger *Leon*'s exception. *Id.* We agree for two reasons.

First, Sivert uncovered plenty of evidence tying Davis to the Garden Avenue home. Stock told Sivert that he had bought drugs from "Red" at this home. *See Davis*, 970 F.3d at 663. Karaplis likewise identified the home on Google Maps as the place of the drug deal that led to the fatal overdose. *See id.* And Sivert corroborated their information. *See id.* When surveilling the home, he noticed the car that Karaplis identified as Red's and confirmed that the car belonged to Davis. *Id.* At the evidentiary hearing, Sivert added that he had run Davis's phone number through a police database, which also listed the Garden Avenue address as Davis's home. Tr., R.147, PageID 2946–47, 2960. If disclosed in Sivert's testimony, this evidence would have satisfied the Fourth Amendment by establishing probable cause that Davis lived at the home. *Davis*, 970 F.3d at 666.

In some courts, this evidence also would have triggered *Leon*'s exception to the exclusionary rule even if Sivert had not disclosed it to the magistrate. These courts hold that they may consider all of the circumstances (including facts "outside of the four corners of the affidavit") to evaluate whether an officer reasonably relied on a judge's finding that probable cause existed when issuing a warrant. *United States v. Farlee*, 757 F.3d 810, 819 (8th Cir. 2014); *United States v. McKenzie-Gude*, 671 F.3d 452, 459–60 (4th Cir. 2011); *United States v. Martin*, 297 F.3d 1308, 1318–19 (11th Cir. 2002); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992); *see also State v. Dibble*, 150 N.E.3d 912, 916–17 (Ohio 2020); *Adams v. Commonwealth*, 657 S.E.2d 87, 93–94 (Va. 2008); *Moore v. Commonwealth*, 159 S.W.3d 325, 328 (Ky. 2005); *State v. Edmonson*, 598 N.W.2d 450, 460–61 (Neb. 1999); *Moya v. State*, 981 S.W.2d 521, 525–26 (Ark. 1998).

Admittedly, our court rejects this rule. When engaging in the *Leon* inquiry, we will not rely on information known only to the officer (and not the magistrate). *See United States v. Waide*, 60 F.4th 327, 342 (6th Cir. 2023); *United States v. Laughton*, 409 F.3d 744, 751–52 (6th Cir. 2005); *see also United States v. Knox*, 883 F.3d 1262, 1270–73 & n.7 (10th Cir. 2018); *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988). We instead will consider only the outside-the-affidavit information that an officer discloses to a magistrate by other means. *See United States v. Frazier*, 423 F.3d 526, 535–36 (6th Cir. 2005); *see also United States v.*

Thomas, 852 F. App'x 189, 198–99 (6th Cir. 2021). Under our approach, then, Sivert's personal knowledge that Davis lived at the Garden Avenue home does not alone satisfy *Leon*.

Yet this approach brings us to our *second* reason why we will apply *Leon*'s warrant exception to the exclusionary rule: Sivert provided more facts to the magistrate. And the magistrate bears the blame for failing to make a record of these facts.

To begin with, the district court found that the magistrate had put Sivert under oath and obtained more information about the case. *See Davis*, 2022 WL 2314009, at *6. Our caselaw permits us to consider this extra information. *See Frazier*, 423 F.3d at 535–36. Sivert later opined that he "believe[d]" he told the magistrate the facts connecting Davis to the residence. Tr., R.147, PageID 2933. And the district court concluded that his testimony did not satisfy the Fourth Amendment only because nobody transcribed it. *See Davis*, 2022 WL 2314009, at *6–7.

Who is to blame for this oversight? That question matters under *Leon*. The Supreme Court has made clear that the exclusionary rule exists to deter only *police* misconduct. *See Davis*, 564 U.S. at 246. When an unlawful search arises from a *judge's* action, the Court has refused to exclude any evidence. That occurred in *Leon* itself, which reasoned that a judge bears the blame for issuing a warrant without probable cause. 468 U.S. at 921. The Court has since expanded this principle to other judicial errors. It refused to apply the exclusionary rule when a court clerk wrongly failed to notify the police that an arrest warrant had been quashed. *See Evans*, 514 U.S. at 4–5, 14–16. And it refused to apply the exclusionary rule when a police officer relied on an appellate court's misreading of the Fourth Amendment. *See Davis*, 564 U.S. at 241.

This principle applies here too. The magistrate (not Detective Sivert) had a duty to record his testimony under Ohio law. *See Dibble*, 150 N.E.3d at 921. When considering warrant requests, Ohio judges "may require the affiant to appear personally . . . , and may examine under oath the affiant and any witnesses the affiant may produce." Ohio Crim. R. 41(C)(2). This Ohio rule adds: "Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit." *Id.* The Ohio Supreme Court has held that any blame for failing to record this testimony belongs

to a judge. *Dibble*, 150 N.E.3d at 921. It reasoned that the "officer has no control over the court's recording and transcription procedures." *Id.* In this case, then, the "very fact" that the magistrate took more testimony would have led Sivert to reasonably "believe that the testimony [had] legal significance and [was] being properly considered in assessing probable cause." *Id.*

In sum, even if Sivert's affidavit could be described as bare bones, the added information that he gave the magistrate suffices to avoid the exclusionary rule. Sivert had substantial evidence connecting Davis to the Garden Avenue home. He testified about his investigation. And we lack specific details about his testimony only because the magistrate failed to transcribe it. Since Sivert did not engage in any intentional or reckless misconduct, the exclusionary rule should not apply to the evidence recovered from his search. *See Herring*, 555 U.S. at 147–48.

In response, Davis argues that we may not consider Sivert's oral testimony because Ohio law allegedly prohibits courts from relying on unrecorded evidence at later suppression hearings. Ohio Crim. R. 41(C)(2). His argument suffers from two problems. For one thing, this Ohio rule regulates state courts and does not govern in these federal proceedings. *See, e.g.*, *United States v. Beals*, 698 F.3d 248, 263–64 (6th Cir. 2012); *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994). And under our court's view of federal law, we may rely on information outside an affidavit where, as here, an officer conveys the information to the magistrate. *See Frazier*, 423 F.3d at 535–36. We have not limited this principle only to recorded information. For another thing, the Ohio Supreme Court itself recently held that this Ohio rule does not bar the use of unrecorded testimony when evaluating a *Leon* defense in Ohio's own courts. *See Dibble*, 150 N.E.3d at 920–21. So it would make no sense for us to rely on the rule to reject the testimony in federal court.

Circumstance Two: Officer Falsehoods. *Leon* also held that the exclusionary rule should apply despite a magistrate's issuance of a warrant if a police officer obtained the warrant by making a knowingly or recklessly false statement in the affidavit requesting it. 468 U.S. at 923. *Leon* cited the Court's earlier holding in *Franks* for this rule. *Leon*, 468 U.S. at 923. *Franks* held that a false statement in an affidavit can invalidate an ensuing warrant if the defendant proves two elements: that the officer knowingly or recklessly included the false statement and that the affidavit would not have established probable cause without it. 438 U.S. at 155–56.

Davis argues that this *Franks* rule should apply here because Sivert's affidavit did not tell the magistrate about Harry Karaplis's credibility issues, including his lies during their first two interviews. Davis thus does not rely on a *false statement* of fact in Sivert's affidavit. He relies on the *omission* of facts from the affidavit.

Although we have not categorically excluded these types of omissions from the *Franks* inquiry, we have repeatedly held that a defendant must meet a "higher" standard to invalidate a warrant based on an omission (rather than a false statement). *United States v. Neal*, 577 F. App'x 434, 450 (6th Cir. 2014) (quoting *United States v. Fowler*, 535 F.3d 408, 415 (6th Cir. 2008)); *see, e.g.*, *United States v. Fisher*, 824 F. App'x 347, 353–54 (6th Cir. 2020); *United States v. Alford*, 717 F. App'x 567, 570 (6th Cir. 2017); *United States v. Martin*, 920 F.2d 393, 398 (6th Cir. 1990). When describing this higher standard, we have sometimes noted that a defendant must prove that an officer omitted the information "with an intention to mislead" (not just with recklessness) and that the omission of the information was "critical to the finding of probable cause[.]" *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998); *see Hale v. Kart*, 396 F.3d 721, 726–27 (6th Cir. 2005). Other times, though, we have suggested that the defendant must show that the officer omitted the information intentionally or with reckless disregard. *See United States v. Graham*, 275 F.3d 490, 506 (6th Cir. 2001); *United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997). If the latter rule applies, it is unclear how we have set a "higher" standard for omissions than the one that governs false statements (as we have said).

Regardless, Davis cannot meet any version of *Franks*'s first element. The district court found that Sivert had not intentionally misled the magistrate or acted in reckless disregard of the truth when failing to disclose Karaplis's credibility problems. *See Davis*, 2022 WL 2314009, at *5. We treat this conclusion as a finding of historical "fact" about Sivert's state of mind and so review it under the deferential clear-error standard. *See United States v. Poulsen*, 655 F.3d 492, 504 (6th Cir. 2011); *United States v. Bonds*, 12 F.3d 540, 568–69 (6th Cir. 1993). Yet Davis does not point to any evidence to suggest—nor does he even argue—that Sivert intended to mislead the magistrate or acted in reckless disregard of the truth. Plenty of evidence shows the contrary. Sivert testified that he found Karaplis's statements credible despite his earlier lies. *See*

Davis, 2022 WL 2314009, at *5. Sivert also did much to corroborate the statements. *See id.* He reviewed Castro-White's phone records, interviewed Corey Stock, and surveilled Davis's house.

Circumstance Three: Biased Magistrates. *Leon* lastly held that the exclusionary rule should apply despite a magistrate's issuance of a warrant if the magistrate "wholly abandoned" a "judicial role" and failed to act as a neutral adjudicator. 468 U.S. at 923. *Leon* highlighted the decision in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), as containing the prototypical facts that fit this exception. *See Leon*, 468 U.S. at 923. In *Lo-Ji*, a "Town Justice" issued a warrant to search a store for allegedly obscene films. 442 U.S. at 321–22. This judge then accompanied the police to the store and oversaw the search. *Id.* at 322–23. The Court held that the judge had not acted with the "neutrality and detachment" required of those who have the duty to issue warrants because he had joined in the executive branch's criminal investigation. *Id.* at 326–27.

Since *Leon*, we have interpreted this exception to apply if a magistrate acted as a mere "rubber stamp" for an officer by issuing the warrant without independently examining whether probable cause exists. *See United States v. Abdalla*, 972 F.3d 838, 847 (6th Cir. 2020); *United States v. Thomas*, 605 F.3d 300, 311 (6th Cir. 2010); *United States v. Leake*, 998 F.2d 1359, 1366 (6th Cir. 1993); *see also Leon*, 468 U.S. at 914. But prevailing on this theory takes more than a perfunctory allegation. Indeed, we have repeatedly rejected claims that magistrates abdicated their roles in this way. We, for example, held that a magistrate did not act as a "rubber stamp" just because he failed to catch that the warrant listed the wrong address in one section of the document. *See Abdalla*, 972 F.3d at 847–48. We also rejected such a claim when the magistrate edited an affidavit on the officer's behalf, noting that this attention to detail instead revealed that the magistrate had reviewed the warrant request "with a critical eye." *United States v. Warren*, 365 F. App'x 635, 637 (6th Cir. 2010) (quoting *Frazier*, 423 F.3d at 538).

Davis's claim here suffers from the same fate as the claims in these other cases. The magistrate neither participated in Sivert's investigation nor "rubber stamped" his affidavit. Indeed, the magistrate did not even rely solely on the affidavit. Rather, he put Sivert under oath and interrogated him about the investigation. As in our other cases, then, the record shows that

the magistrate reviewed Sivert's warrant request with healthy skepticism, not blanket trust. *See id.*

Davis counters that the magistrate violated Ohio Rule of Criminal Procedure 41 by failing to record Sivert's testimony. As the Ohio Supreme Court noted, however, this rule provides only that oral testimony will be admissible in later suppression hearings if a magistrate records it. *Dibble*, 150 N.E.3d at 920. The rule did not require such a recording.

Davis also makes much of the magistrate's opinion that Sivert had "unquestionable" credibility based on the 25 years that they have known each other. Tr., R.147, PageID 2902. Yet the magistrate still did not "rubber stamp" Sivert's affidavit despite the high regard in which he held the detective's character. And Davis cites no caselaw holding that a judge's favorable opinion of a witness's credibility alone renders the judge biased under *Leon*.

We affirm.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. 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.

I. BARE-BONES ANALYSIS

In *United States v. Leon*, 468 U.S. 897, 920 (1984), the Supreme Court held that evidence obtained pursuant to an invalid search warrant need not be suppressed "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." But an officer does not act in objective good faith if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)). Such an affidavit has been characterized as "bare bones." *Id.* at 915, 926.

When assessing an officer's good-faith reliance on a search warrant, "[t]his court has been unequivocal in holding that . . . 'a determination of good faith reliance . . . must be bound by the four corners of the affidavit.'" *United States v. Waide*, 60 F.4th 327, 342 (6th Cir. 2023) (quoting *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir. 2005)). But our court carved out a narrow exception to this rule in *United States v. Frazier*, 423 F.3d 526, 534–36 (6th Cir. 2005), for omitted information known to the affiant and revealed to the magistrate.

In *Frazier*, this court affirmed a district-court order denying the defendant's motion to suppress evidence that yielded marijuana and firearms. *Id.* at 529. The record in *Frazier* contained highly probative information concerning the defendant's participation in two prior drug transactions that was omitted from the affidavit. *Id.* at 535. Neither party disputed that the officers independently informed the magistrate that an informant had recorded the defendant's

participation in these two transactions. *Id.* The officers included this probative information in five related warrant affidavits presented contemporaneously to the magistrate. *Id.* This court held that "a court reviewing an officer's good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and *revealed to the magistrate*." *Id.* at 535–36 (emphasis added).

Frazier's narrow exception was subsequently applied in *United States v. Thomas*, 852 F. App'x 189 (6th Cir. 2021). In that case, a magistrate evaluated two related affidavits concerning a house and a barber shop. *Id.* at 191. The affidavit pertaining to the house contained highly probative information about the defendant's frequent meetings with a known drug dealer that was omitted from the barber-shop affidavit. *Id.* at 197. There was also evidence in the house affidavit that the drug dealer met with the defendant only when the dealer's drug supply was low. *Id.* at 197–98. Both warrants were issued the same day. *Id.* at 198. Because there was no question that the magistrate was presented with the key facts relevant to each warrant, there was no reason to believe that the magistrate did not recall and consider these key facts omitted from the barber-shop affidavit. *Id.* The omitted facts were therefore permitted to be considered under these circumstances. *Thomas* ultimately interpreted *Frazier* as standing for the proposition that "the good-faith exception could apply where *information clearly known and considered by the magistrate*, but inadvertently excluded from an affidavit, supported a finding of probable cause." *Id.* (emphasis added) (citation omitted).

In the present case, the government does not dispute that the affidavit at issue is bare bones. *See* Majority Op. at 8. Reliance on the affidavit alone would therefore be objectively unreasonable. *See Leon*, 468 U.S. at 923. To address this issue, we remanded this case with instructions for the district court to hold an evidentiary hearing. *United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020). We reasoned that a remand was necessary because "[n]o evidence tells us whether [Detective] Sivert conveyed these facts [connecting Davis to the residence] under oath to the magistrate before the magistrate issued the warrant." *Id.* (citing *United States v. Beals*, 698 F.3d 248, 268 (6th Cir. 2012)).

But even after the remand, we have no clue about what material information Detective Sivert conveyed to the magistrate, let alone information "clearly known and considered by the magistrate." *See Thomas*, 852 F. App'x at 198. The magistrate has no recollection at all of any additional facts that Detective Sivert discussed with him. And Detective Sivert has no more than a "belief" that he informed the magistrate about the facts tying Davis to the residence in question.

The majority, for its part, agrees that, "[a]t best, Sivert stated a general belief that he told the magistrate about information tying Davis to the residence." Majority Op. at 8. But the majority contends that Detective Sivert's general belief provided "a modicum of evidence" to trigger *Leon*'s good-faith exception. *Id.* This court, however, has never applied the modicum-of-evidence analysis to settle what the magistrate was clearly told. The modicum-of-evidence test is instead relevant only in analyzing *Leon*'s good-faith nexus between criminal activity and the places to be searched. *See, e.g.*, *Laughton*, 409 F.3d at 749 (observing that good faith may be found where review "turn[s] up some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be searched"); *United States v. Rose*, 714 F.3d 362, 368 (6th Cir. 2013) (holding that a modicum of evidence triggered the good-faith exception because "the . . . affidavit does . . . establish a link between criminal activity and [the defendant] . . . .").

Neither the majority nor the government has identified a case equating *Leon*'s good-faith nexus analysis with the quantum of proof necessary to clearly show that the magistrate knew of and considered facts omitted from an affidavit. The facts here are thus materially different from those in the cases of *Frazier*, 423 F.3d at 535, and *Thomas*, 852 F. App'x at 191, that are cited by the majority. Given that we lack what information Detective Sivert told the magistrate, I find no basis for the majority's conclusion that we may look beyond the affidavit under these circumstances. Absent additional evidence supplementing the affidavit, then, the bare-bones affidavit is insufficient to support a finding of good faith.

II. DETECTIVE SIVERT'S UNREASONABLE RELIANCE

The majority's second reason for applying *Leon*'s good-faith exception is because "the magistrate bears the blame for failing to make a record of these facts [provided by Detective Sivert]." Majority Op. at 10. To the contrary, good faith under *Leon* is a question of the officer's reasonableness, not the reasonableness of the issuing magistrate. *Frazier*, 423 F.3d at 533 ("The 'good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'") (quoting *Leon*, 468 U.S. at 922 n.23); *Thomas*, 852 F. App'x at 198 ("[G]ood-faith is ultimately a question of officer reasonableness in executing the warrant, not the reasonableness of the issuing magistrate.").

Consequently, irrespective of the magistrate's failure to transcribe Detective Sivert's oral testimony (whatever it was), the blame for relying on an undisputedly bare-bones affidavit falls on Detective Sivert. And bare-bones affidavits do not fall within *Leon*'s good-faith exception to the exclusionary rule. *United States v. Reed*, 993 F.3d 441, 450 (6th Cir. 2021).

III. HARMLESS ERROR

Alternatively, the government argues that affirming on the basis of harmless error would be appropriate because the government had already obtained phone records, text messages, and "compelling evidence" proving that Davis sold the heroin that caused Castro-White's death. The district court did not reach the government's harmless-error argument because the court found that *Leon*'s good-faith exception applied. *See United States v. Davis*, No. 1:16CR260, 2022 WL 2314009, at *10 (N.D. Ohio June 28, 2022). I would remand this case so that the district can address in the first instance whether the government's error was harmless in light of the other evidence implicating Davis in Castro-White's death. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975) ("[This] is a matter best decided, in the first instance, by the District Court. That court will be free to take . . . new evidence . . . .").

IV. CONCLUSION

In sum, because Detective Sivert's testimony on remand does not shed any light on why he relied on a bare-bones affidavit, I believe that the *Leon* good-faith exception does not apply. I would therefore reverse the judgment of the district court and remand this case for the court to consider the government's alternative argument predicated on harmless error. Accordingly, I respectfully dissent.

No. 22-3603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 4, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUSSELL DAVIS,

Defendant-Appellant.

ORDER

BEFORE: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Kelly L. Stephens
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 04, 2024

Mr. William Bernard Norman
Norman Law
115 Lincoln Avenue
Berea, OH 44017

Re: Case No. 22-3603, *USA v. Russell Davis*
Originating Case No.: 1:16-cr-00260-1

Dear Mr. Norman,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Matthew B. Kall

Enclosure

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing motion for a 60-day extension of time was served on the office of the Respondent, this 4th day of March, 2024, by delivering the same to proper prison officials for mailing purposes, first-class postage prepaid.

Respectfully,

Russell Davis

Mr. Russell Davis, pro-se.