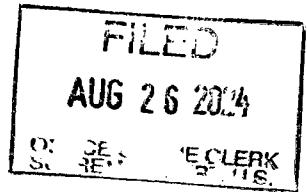


24-5513 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Jacob D. Lickers,

Petitioner



vs.

United States of America

Respondent

PETITION FOR CERTIORARI

From the Judgment of:

The United States Circuit Court of Appeals
for the Seventh Circuit

Petitioner:

Jacob D. Lickers, In Pro Se
Federal Inmate Reg. No. 21519-026

Independence House
2765 South Federal Blvd.
Denver, Colorado 80236

Respondent:

Katherine V. Boyle, AUSA
United States Attorney's Office
201 South Vine St., Ste 226
Urbana, Illinois 61802

PETITION FOR CERTIORARI
QUESTIONS PRESENTED FOR REVIEW

1. May a search warrant affiant take advantage of the Good Faith Exception under Leon when he or she lacks subjective good faith when submitting an affidavit that lacks probable cause?
2. When a search warrant affiant demonstrates subjective bad faith by including information that he or she knows either was -- or was probably -- illegally obtained due to previous state court suppression after a full Franks hearing, may he or she be excused and the Good Faith Exception applied when in a later federal criminal proceeding the information was subsequently ruled to have been lawfully obtained?
3. Does intentionally withholding from a federal magistrate the fact that critical information in a search warrant affidavit was previously suppressed in a state court constitute bad faith under Leon?
4. Must a federal magistrate consider whether the information contained in a search warrant was lawfully obtained prior to issuing the warrant?
5. Was it ineffective assistance under Strickland for Mr. Lickers' counsels to fail to argue lack of good faith

when the affiant intentionally withheld from the federal magistrate that the facts in support of the application had been previously suppressed in state court after a full Franks hearing?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Jacob D. Lickers, Case No. 4:16-CR-40011, U.S. District Court for the Central District of Illinois. Judgment entered May 29, 2018.

United States v. Lickers, Case No. 18-2212, U.S. Circuit Court of Appeals for the Seventh Circuit. Judgment entered April 12, 2024.

Jacob D. Lickers v. United States, Case No. 20-CV-4164, U.S. District Court for the Central District of Illinois. Judgment entered December 23, 2021.

Lickers v. United States, Case No. 22-1179, U.S. District Court of Appeals for the Seventh Circuit. Judgment entered April 12, 2024.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States courts of appeals appears at Appendix A to the Petition and is reported at 98 F.4th 847 (7th Cir. 2024).

The opinion of the United States district court appears at Appendix C of the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was April 12, 2024.

A timely petition for rehearing was denied by the United States Court of Appeals on June 5, 2024, and a copy of the order denying rehearing appears at Appendix G.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched or things to be seized.

2. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. The statutes under which Petitioner was prosecuted, though nothing turns on their terms, were 18 U.S.C. §2252A(a)(1) and 18 U.S.C. §2252(a)(5)(B), which provided:

Certain Activities Relating to Material Constituting or Containing Child Pornography

[§2252(a)(1)] Any person who knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or affecting interstate or foreign commerce by any means, including by computer, any child pornography....

and

[§2252(a)(5)(B)] who knowingly possesses, or knowingly accesses with intent to view, any book,

magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography [shall be punished as provided in subsection (b)].

4. The statute under which the Petitioner sought post-conviction relief was 28 U.S.C. §2255:

Federal Custody; Remedy on Motion Attacking Sentence

A prisoner in custody under a sentence of a court established by an act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as, may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus....

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

1. Law Enforcement Actions Implicating the Fourth Amendment.

In September 2015, local Illinois law enforcement officers detained Petitioner and conducted a warrantless search of his vehicle. Petitioner's cell phone, a laptop computer, and a digital camera were seized. State prosecutors then obtained a warrant from an Illinois state magistrate authorizing their search. The searches of these electronic devices disclosed evidence that led to Petitioner's indictment on Illinois state charges substantially identical to the federal charges that are the basis of this Petition.

A Motion to Suppress both the detention and warrantless search was subsequently granted by the Illinois state court after a Franks hearing. All evidence seized and the fruits thereof were suppressed and the state charges dismissed.

Soon afterward, in February 2016, an FBI agent took possession of the seized evidence and sought a new search warrant from a federal magistrate. Although he was well aware that the foundational warrantless search had been found to be in violation of the Fourth Amendment after a Franks hearing in state court, he failed to include this in the warrant application to the federal magistrate, keeping them entirely in the dark about the state charges and their dismissal. The search warrant was granted. These federal charges ensued.

2. Course of Proceedings in the Section 2255 Case Now Before This Court.

On June 1, 2016, Petitioner filed a Motion to Suppress Evidence in this cause then pending in the United States District Court for the Central District of Illinois, entitled United States v. Jacob D. Lickers, Criminal No. 16-cr-40011. On December 17, 2015, a Franks hearing was held in the District Court. On January 22, 2016, the District Court entered an Opinion and Order denying the Motion to Suppress. (App. E).

On February 7, 2017, Petitioner pleaded guilty to the indictment while reserving his right to appeal the District Court's order denying his motion to suppress. This indictment alleged a violation of 18 U.S.C. §2252A(a)(1) and §2252(a)(5)(B) on September 3, 2015.

The District Court entered judgment on May 28, 2018, and Petitioner was sentenced to a sentence of 132 months imprisonment on Counts One and Two, to be served concurrently, and to be followed by a life-time term of supervised release. A timely appeal to the Seventh Circuit Court of Appeals was then filed, and the judgment was affirmed. United States v. Lickers, 928 F.3d 609 (7th Cir. 2019). A Petition to this Court for a Writ of Certiorari was denied on October 15, 2019 (Case No. 19-5795, _____ U.S. _____ (2019)). Petitioner was serving this sentence when the motion under Section 2255 was filed, and continues to be in custody at a Residential Community Correctional Center in Denver, Colorado.

On July 20, 2020, Petitioner filed the motion in the case at bar under 28 U.S.C. §2255 to vacate and set aside the judgment of conviction. (App. D). An answer was ordered and a hearing conducted.

On December 23, 2021, the District Court entered its judgment denying the Motion under 28 U.S.C. §2255. (App. B). On the same day, the District Court issued its Order and Opinion in support of this judgment. (App. C). The District Court declined to issue a certificate of appealability. Petitioner then requested that the Seventh Circuit issue the Certificate. This motion was granted, and an appeal of the order denying the motion under Section 2255 ensued. After oral argument, on January 8, 2024, the Seventh Circuit denied the appeal on April 12, 2024. United States v. Lickers, 98 F.4th 847 (7th Cir. 2024). (App. A).

3. Relevant Facts Concerning Petitioner's Claim of Ineffective Assistance of Counsel.

The relevant facts in support of Petitioner's claim of Ineffective Assistance of Counsel under Strickland are contained in Petitioner's Motion Under 28 U.S.C. §2255 (App. D, pp. 3-6). Further relevant uncontested findings of fact are contained in the Seventh Circuit's opinion (App. A, pp. 4-6).

In short, the FBI agent in this case sought to mislead the federal magistrate, District Court Judge Sara Darrow, by omitting the material fact that the basis for his search warrant application had already been ruled illegally obtained by a state court judge after a full Franks hearing. This constituted

a material omission that negated good faith on the part of the affiant, and precluded the application of the good faith exception under Leon, when the search warrant was found by the Seventh Circuit to have lacked a substantial basis for probable cause. The affiant exercised objective and subjective bad faith in seeking a defective warrant, and the exclusionary rule should have applied. The failure of motion and appellate counsels to argue bad faith constituted ineffective assistance of counsel, depriving Petitioner of his rights under the Sixth Amendment.

Since the bad faith argument was not made on direct appeal, the issue was not addressed, other than the Seventh Circuit noting with some puzzlement that "we cannot tell, and what Lickers has failed to offer any evidence of, is whether the agent knew that a state court prosecution followed and resulted in the suppression of evidence, including the child pornography found on Lickers's phone, and dismissal of charges." United States v. Lickers, 928 F.3d 609, 619 (7th Cir. 2019). (App. F, p. 9) In the absence of any showing or argument on bad faith by counsel, the Seventh Circuit found that "on this record then, the good faith of the FBI agents can be shown without delving into the propriety of their reliance on the fruit of an unconstitutional search as found by the state court." Id. at 620 (emphasis added).

Petitioner took the Seventh Circuit up on its implied invitation to claim that this failure by counsel deprived him of his Sixth Amendment rights, and filed the instant motion under Section 2255. In denying the motion, the District Court took the position that it would have been beyond the scope of the magistrate's

responsibility to have considered whether the underlying evidence was obtained in violation of the Fourth Amendment in deciding if such evidence could be the basis for probable cause in the search warrant application. As the District Court stated:

The FBI agent's inclusion of the state suppression ruling surely would have been the better practice, as the Seventh Circuit noted. However, because the state court did not address whether the search warrant had sufficient probable cause, the FBI agent would not have had any reason to believe the warrant application itself was lacking probable cause. And, while including the state suppression ruling might have made the Court aware of later issues likely to come up in the case, the state suppression ruling was not binding on the Court. At the warrant state, the Court must only determine whether the warrant itself had probable cause. Inclusion of the state suppression ruling would not have impacted the calculus in this case.

App. C, pp. 12-13. (emphasis added).

In other words, the reviewing magistrate must not consider whether the evidence underlying the search warrant request was illegally obtained, even when it is obvious. Knowingly withholding evidence of illegality does not preclude the application of the good faith exception, so long as the evidence is later held to have been legally obtained. This is an unwarranted view of the federal magistrate's power and responsibility and is based on a misunderstanding of Leon and its progeny.

On appeal of the denial of the motion under Section 2255, the Seventh Circuit perpetuated this error regarding good faith, and largely adopted the District Court's view of the magistrate's limited duty when reviewing a search warrant; in short, holding that counsel's failure to argue bad faith would have been fruitless since the magistrate had no business considering the legality of the underlying search that resulted

in the evidence that was the basis of the search warrant.

As the Seventh Circuit concluded:

At most then, the state court suppression ruling would have alerted the district court to the possibility that evidence described by [the FBI Agent] in his federal affidavit was the fruit of an unconstitutional search. Although this is no doubt generally important information, it is difficult on the actual facts of this case to see what legal bearing it would have had on the district judge's decision to issue the [search] warrant.

App. A. p. 16.

According to the Seventh Circuit, then, if the affidavit had contained an admission by the FBI Agent that a state court had suppressed the evidence that was the basis for his probable cause, this information would not (indeed, should not) have affected the judge's decision whether to approve the search warrant. Therefore -- in the panel's view -- there was no prejudice to Mr. Lickers. This is a dangerous precedent that undermines the entire concept of good faith: that objective bad faith can be "laundered" by a subsequent overruling of an earlier judicial decision. Furthermore, this view has been expressly rejected by the majority of Circuit Courts of Appeals that have considered this and similar issues and it is at variance with this court's decisions as explained in the argument below.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals Erred in Denying the §2255 Motion

Based on the Conclusion that the Magistrate May and Must
Not Consider in Deciding Whether There was a Substantial
Basis for Probable Cause that the Underlying Evidence was
Illegally Seized.

The FBI Agent in this case demonstrated objective and subjective bad faith in intentionally failing to disclose the fact that the evidence underlying his application for a search warrant had been previously been found illegally obtained by a state court judge after a Franks hearing. In applying the Good Faith Exception to save the defective warrant, the Seventh Circuit ignored the existence of bad faith and instead concluded that because the magistrate had no business considering the legality of the underlying evidence, the failure of motion and appellate counsels to raise the issue of bad faith was harmless under a Strickland analysis.

This view of the magistrate's duties is erroneous, is a minority view among the Circuit Courts of Appeals, has been roundly criticized by the majority of Circuits, and is contrary to the rulings of this Court under Leon and its progeny. It also implicates a fundamental tenent of this Court's Good Faith jurisprudence and grossly expands the scope of cases where "good faith" saves a warrant to those where the officer in fact exhibited bad faith.

The unusual facts of this case place the question presented in stark terms. The state court found the warrantless search that formed the basis of the warrant application to be illegal. They then suppressed the evidence. The Eighth Circuit disagreed, finding that the underlying warrantless search was legal, but that the warrant itself -- even with the questionable evidence -- lacked a substantial basis for probable cause. The determination of the case therefore rests solely on the issue of good faith on the part of the agent seeking the search warrant. May his objective and subjective bad faith be "laundered" by a subsequent favorable ruling in federal court? If so, then every officer who fails in a state court suppression hearing will have every incentive to take the same facts to a federal magistrate -- and will intentionally withhold their knowledge that a previous judge found them to have acted illegally -- hoping for a more favorable result.

The First, Fifth, Sixth, Eighth, and Ninth Circuits have rejected the view taken by the Seventh Circuit in this case. Only the Fourth, Tenth, and Eleventh concur. The First Circuit concisely explains the basis of the split in United States v. Bain, 874 F.3d 1 (1st Cir. 2017). That case involved the situation where an officer had obtained a search warrant based on a critical piece of evidence that was discovered in an unlawful search. In finding bad faith and suppressing the evidence, the First Circuit followed

their previous decision in United States v. Diehl, 276 F.3d 32 (1st Cir. 2002), stating as follows:

In so ruling, we focused on the accuracy and completeness of the manner in which the information supporting the warrant was conveyed to the magistrate issuing the warrant. Placing the burden on the government, we asked whether the affiant's recitation of the facts was infected "with an intentional misrepresentation or one made with the reckless disregard of the truth," so as to mislead the magistrate. We asked as well whether, by omission or error, the description "[t]ook away from the issuing court the ability to decide" the curtilage for itself.

Bain, 874 F.3d at 21 (quoting Diehl, 276 F.3d at 42-43, internal citations omitted).

The First Circuit then put its finger precisely on the problem with the minority rule it rejected, a rule that ignores any bad faith in describing or failing to describe the manner in which potentially illegally obtained evidence is disclosed in an affidavit. This error is based on the theory of:

a few commentators, see, e.g., 1 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment §1.3(f)(5th Ed. 2016)(stating that "there is good reason to doubt" whether the plurality rule is correct); Craig M. Bradley, The "Good Faith Exception" Cases: Reasonable Exercise in Futility, 60 Ind. L.J. 287, 302 (1985) ("When the magistrate issued the warrant, he did not endorse past activity....[T]he function of the magistrate is to determine 'whether a particular affidavit establishes probable cause,' not whether the methods used to obtain the information in the affidavit were legal." (quoting Leon, at 468)).

This is the view adopted by the Seventh Circuit in this case. It ignores the everyday realities of search warrant practice and encourages police dishonesty and forum shopping. In continuing its discussion of these commentaries, the First Circuit concluded:

[T]he minority view takes too cramped a view of what magistrates do, and accords too much relevance

to a distinction that may have no bearing on the presence or absence of good faith. Under Diehl, good faith reliance on a warrant procured and issued in good faith saves the fruits of a warranted search from suppression.

Id. (emphasis added).

Bain was followed by Pagan-Gonzales v. Moreno, 919 F.3d 582, 612 (1st Cir. 2019) (concurring op. by Barron, J.) where the concurrence sharply criticized law enforcement because they "merely tricked the magistrate judge into believing that the evidence of probable cause was constitutionally acquired when law enforcement knew it was not." The opinion then continued, saying "reckless omissions that hide facts that would reveal such problematic means of acquiring such evidence...interfere with the magistrate judge's constitutional role as gatekeeper."

Id.

In a similar situation, the Second Circuit made this duty of the magistrate clear: "the officers never gave Judge Barrett a full account of what they did. And without such an account, Judge Barrett could not have possibly decided whether their conduct was sufficiently illegal and in bad faith to preclude a valid warrant. This fact, by itself, makes Leon inapplicable." United States v. Reilly, 76 F.3d 1271, 1280 (2nd Cir., 1996). The magistrate is indeed the gatekeeper responsible for deterring law enforcement wrongdoing. "[T]he data presented to the issuing judge did not allow him to decide whether the evidence of wrongdoing was itself obtained illegally and in bad faith by the officers seeking the warrant." Id. at 1281. Bad faith is not necessarily predicated only in situations

where the officers thought that there was a reasonable probability that their conduct was in fact illegal: "Indeed, they knew very well that large parts of their search were potentially illegal -- and yet they never told the judge about it." Id. at 1281-82 (emphasis added), citing United States v. Thomas, 757 F.2d 1359 (2nd Cir., 1985) (it is the magistrate's duty to "interpret the law"); followed by Simms v. Village of Albion, 115 F.3d 1098, 1108 (2nd Cir. 1997) (officers not protected immunity when they rely on evidence of probable cause that "they knew might be illegal and failed to disclose the details of that search").

The Fifth Circuit summarized that court's previous rulings on this issue by stating that:

What is important is that the officer presenting the information to a magistrate be objectively reasonable in concluding that the information being used to support the warrant is not tainted. It is not the awareness of the existence of the conduct that is later found to be improper that is important..., but awareness at the time of presenting the affidavit that the conduct violated constitutional rights that would affect the application of the good faith exception.

United States v. Massi, 761 F.3d 512, 528 (5th Cir. 2014), following United States v. Woerner, 709 F.3d, 534 (5th Cir. 2013).

The Sixth Circuit made it clear that the good faith exception to the warrant requirement is based on the objective good faith of the officers seeking the warrant, limiting it to cases where there was "no evidence that the officers knew they were violating the Fourth Amendment by performing a protective search of the home" that was later found to be illegal. United States v. McClain, 444 F.3d 556, 560

(6th Cir. 2005), citing United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (good faith shown when officers possessed an objectively reasonable belief that the initial (illegal) detention was authorized).

All of the majority Circuits discussed above have also adopted the rule in White that if even if the evidence underlying a search warrant is later found to be illegally obtained, Leon will save the fruits of the warrant if the officer had objective good faith in seeking and executing the warrant. The other Circuits that have adopted the rule applied by the Seventh Circuit in this case -- that good faith depends solely on the officer's belief that the facts in the warrant affidavit, howsoever obtained, constitute probable cause -- have also adopted a "categorical" rule that good faith may never exist when any material evidence in support of probable cause was illegally obtained. See United States v. Mowatt, 513 F.3d 395, 405 (4th Cir. 2008), United States v. Loera, 923 F.3d 907, 927 (10th Cir. 2019), and United States v. McGough, 412 F.3d 1232, 1240-41 (11th Cir. 2005).

There is one exception which proves that the categorical rule, that illegal evidence (even if the officer was objectively unaware of its illegality) always negates good faith, need not result in the adoption of the Seventh Circuit's rule that good faith is unrelated to whether the officer knew that evidence underlying a search warrant application may have been illegally obtained. In United States v. Vasey,

834 F.2d 782, 789 (9th Cir. 1987), the Ninth Circuit said "we encourage magistrates to make all possible attempts to ensure that a warrantless search was legal before relying on the fruits of that search...." The Ninth Circuit further enumerated various parts of the affidavit at issue where the officer "was less than candid," and concluded that:

The district court's finding of intentional misrepresentation by Officer Jensen in his affidavit and Officer Jensen's lack of candor in describing the pills spotted in the vehicle preclude this court from analyzing the actions of Officer Jensen under Leon's good faith exception.

Id. at 790 n. 4.

In short, the Ninth Circuit adopted the categorical rule that does not recognize good faith if illegally seized evidence was essential to probable cause in the warrant application, but it rejected the narrow view of the magistrate's duties that was advocated by LaFave and Bradley.

In conclusion, there is a split among the Circuits on this issue of national importance: Can an officer have objective bad faith but still take advantage of the good faith exception?

2. The Seventh Circuit's Decision in this Case is Contrary to Supreme Court Precedent.

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court declared that "the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." Leon, 468 U.S. at 914. In so doing, the Supreme Court extended the rule announced in Franks v. Delaware, 438 U.S.

154 (1978) that described the consequences of search warrant affidavits that contained "reckless disregard" for the truth. Id. at 155-156. Although neither Leon or Franks discussed whether the intentional or knowing omission of a material fact from a search warrant affidavit would incur the penalty of the exclusionary rule, the Circuit Courts quickly came to a consensus that they should. See United States v. Ferguson, 758 F.2d 843, 848 (2nd Cir. 1985) ("Omissions from an affidavit that are claimed to be material are governed by [Franks]"), cert. denied 474 U.S. 841 (1985), and Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990) (collecting cases).

Although Leon involved a case where the search warrant affiant had a good faith belief that the warrant contained probable cause, there was no particular focus on the probable cause aspect of good faith in the opinion. Instead, the focus was almost entirely on deterring police misconduct, specifically "the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth." Leon, 468 U.S. at 900 (internal quotation omitted). Leon also emphasized the importance of the role of the magistrate's gatekeeper role: "Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer

engaged in the often competitive enterprise of ferreting out crime, we have expressed a strong preference for warrants...."
Id. at 913-14.

Furthermore, Leon notes the historical separation between the Supreme Court's treatment of probable cause issues and knowing or reckless falsity issues:

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to magistrate's finding of probable cause does not preclude inquiry into the knowing and reckless falsity of the affidavit on which that determination was based. Franks v. Delaware, 438 U.S. 154 (1978) ... Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S. 213, 239 (1983).

Id. at 914-915.

In other words, lying to the magistrate and concerns about the warrants sufficiency are separate considerations. In any event, suppression is not intended to "cure the invasion of the defendant's rights which he has already suffered." Id. at 906, quoting Stone v. Powell, 428 U.S. 465, 540 (1976). Instead, the exclusionary rule "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Id. (internal quotation omitted).

This explicit separation of the Supreme Court's concerns about deterring officer's lying to the magistrate and warrants that lack probable cause highlight the Seventh Circuit's critical mistake in limiting their inquiry of bad faith to only bad faith that relates to the officer's belief that the affidavit lacked

probable cause. In the ruling for which certiorari is sought, the Seventh Circuit sees the issues of probable cause and material omissions as a single unit of analysis, when in fact they are separate and divisible wrongs to be deterred.

Our court has long assessed materiality under Franks using the so-called "hypothetical affidavit test...." "We eliminate the alleged false statements, incorporate any allegedly omitted facts, and then evaluate whether the resulting "hypothetical" affidavit would establish probable cause. If it would not, the information is material.... Why? Because, in the aggregate, the inclusion or omission from the bundle of information contributed to an erroneous finding of probable cause. (App. A at pp. 17-18).

The facts of this case certainly compel a finding that under this rule, the omission of the fact that a prior judge had ruled the underlying facts illegally obtained is material. No federal magistrate, when presented with an affidavit that the Seventh Circuit later ruled lacked a substantial basis for probable cause, would have approved the warrant knowing also that the underlying facts had been ruled obtained in violation of the Fourth Amendment after a full Franks hearing in state court. This was undoubtedly a close call for the magistrate in light of the warrant's later invalidation. But given the Seventh Circuit's strictly narrow view of the role of the magistrate, such an omission was found to be immaterial:

Applying that test is difficult in a case like this, where the affidavit lacks probable cause even before it is corrected to remove the taint of the alleged falsehoods or deceptive omissions. Nonetheless, it is not abundantly clear how the omission of a state court suppression ruling having no logical connection with the task before an issuing magistrate could be deemed material under our precedent -- particularly where, as here, the merits of that ruling are erroneous as a matter of law.

App. A, p. 18 (emphasis in original).

In fact, it is abundantly clear how the omission is material. If the information about the prior suppression order had been included, the magistrate would have denied the request for the already insufficient warrant. The FBI agent forum shopped the defective affidavit and intentionally omitted the fact that it had been soundly rejected by a state court. This is exactly the type of officer misconduct that Leon wished to deter.

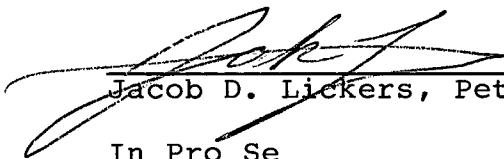
If the Seventh Circuit's narrow view of the magistrate's role is allowed to continue, much confusion on the part of both law enforcement officers and magistrates will ensue. What of the affidavit that contains facts that were blatantly illegal? For example, "the subject admitted that contraband was located at the premises after I put a gun to his head and asked him the question repeatedly." According to the Seventh Circuit, this description of how the evidence was obtained has "no logical connection with the task before" the magistrate. The warrant should issue. After all, this information "at most...would have alerted the district court to the possibility that evidence...was the fruit of an unconstitutional search." Id. at p. 16. Yes, the warrantless search was later found to have been constitutional in federal court. But this "no harm no foul" approach does not excuse the foul -- police withholding information essential for an informed decision by the magistrate as to whether to issue the warrant, not just decide probable cause without considering other potential illegalities. Certiorari should be granted and the majority rule among the Circuits be mandated.

CONCLUSION

The judgment below is a departure from the decisions of this Court that declare the purpose of the Exclusionary Rule, notwithstanding the Good Faith Exception to it, are to deter police misconduct such as that which occurred in this case. It also perpetuates a split among the United States Circuit Courts of Appeal, and will sow confusion on the part of magistrates. Furthermore, it sanctions and encourages police misconduct, and will result in affiants routinely submitting cases based on illegal warrantless searches to the federal courts in hopes that they will get a better result and thereby "launder" an previously adverse ruling in state court.

This Petition for a writ of certiorari should, therefore, be granted.

Respectfully Submitted,



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In Pro Se

8-26-24

DATE

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