No. 17-7042

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW JOSEPH WORKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the good-faith exception to the exclusionary rule may apply to evidence obtained in reliance on a warrant that is later found to violate the territorial limitations in Federal Rule of Criminal Procedure 41(b).

2. Whether the court of appeals correctly determined that the good-faith exception applied in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 863 F.3d 1313. The order of the district court is reported at 205 F. Supp. 3d 1256.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2017. On October 12, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 18, 2017. The petition for a writ of certiorari was filed on December 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the United States District Court for the District of Colorado returned an indictment charging petitioner with receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1); and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). The district court granted petitioner's motion to suppress evidence, and the United States appealed. The court of appeals reversed. Pet. App. 1a-6a.

1. In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum called "Playpen" that was distributing child pornography using the Tor network, which provides internet users with anonymity by masking their location and identifying information "without leaving a trail." Pet. App. 1a; Gov't C.A. Br. 2-3. The FBI determined that Playpen had more than 150,000 members and contained more than 95,000 posts and more than 9000 topics related to child pornography. Pet. App. 2a; Gov't C.A. Br. 2. Playpen users shared images and videos that were categorized according to victim age, gender, and type of sexual activity depicted. Gov't C.A. Br. 2.

In January 2015, the FBI obtained and executed a warrant authorizing it to seize control of the Playpen website and operate it for two weeks from a government-controlled facility in the Eastern District of Virginia. Pet. App. 1a; Gov't C.A. Br. 3. The FBI then obtained a warrant from an Eastern District of

Virginia magistrate judge authorizing it to deploy a "Network Investigative Technique" (NIT) to locate and identify the otherwise-anonymous individuals who accessed Playpen to view and share child pornography. Pet. App. 1a-2a; Gov't C.A. Br. 3-4.

A veteran FBI agent submitted an affidavit in support of the NIT warrant application, explaining that, given Playpen's obviously illegal content and the affirmative steps required to access it, probable cause existed to believe that any user who accessed the site by entering a username and password did so with intent to view child pornography. Gov't C.A. Br. 4. The affidavit explained that the computer code comprising the NIT would be added to the digital content on the Playpen website residing on the government-controlled server in the Eastern District of Virginia. Pet. App. 2a; Gov't C.A. Br. 4-5. Once a user entered a username and password to access the Playpen website, the server would send, and that user's computer would download, both the content of the website and the NIT instructions. Ibid. After the website content and the NIT traveled to the user's "activating" computer, the NIT would cause the activating computer to send specific location-identifying information back to the government, including the computer's Internet Protocol address. Pet. App. 2a; Gov't C.A. Br. 5. The FBI thus asked the court to issue a warrant authorizing the use of the NIT to "cause an activating computer -- wherever located -- to send" to a government-controlled computer "messages containing information that may assist in identifying" the activating computer and its location. Gov't C.A. Br. 5 (quoting warrant affidavit).

A federal magistrate judge in the Eastern District of Virginia issued the NIT warrant on February 20, 2015. Pet. App. 2a; Gov't C.A. Br. 5. This single NIT warrant executed in Virginia "led to the discovery of hundreds of viewers of child pornography," including petitioner, who accessed child pornography on the Playpen website several times in March 2015. Pet. App. 2a; see Gov't C.A. Br. 6-7.

2. A federal grand jury in the District of Colorado returned an indictment charging petitioner with receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1); and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1-2. The district court granted petitioner's motion to suppress the evidence obtained as a result of the NIT warrant. 205 F. Supp. 3d 1256. The court concluded that, as applied to the identification of petitioner's computer in Colorado, the warrant exceeded the Virginia magistrate judge's territorial authority under the version of Federal Rule of Criminal Procedure 41 in effect when the warrant was issued. The court rejected the government's argument that the NIT warrant was authorized under Rule 41(b)(4), which provides that "a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device" and that "the warrant may authorize use of the device to track the movement

of a person or property located within the district, outside the district, or both." Fed. R. Crim. P. 41(b)(4) (2015); see 205 F. Supp. 3d at 1262-1263. The court also concluded that the good-faith exception to the exclusionary rule did not apply, reasoning that it is inapplicable to evidence seized pursuant to a warrant that is later found to have been void at its inception. 205 F. Supp. 3d at 1265-1267.

3. The court of appeals reversed. Pet. App. 1a-6a. The court assumed without deciding that the magistrate judge lacked authority to issue the NIT warrant under Rule 41(b)(4) or the Federal Magistrates Act, 28 U.S.C. 636, and that the resulting search was unconstitutional or a prejudicial violation of federal law. Pet. App. 3a. But the court determined that those assumed violations did not require the suppression of the fruits of the NIT warrant. Id. at 3a-6a. The court explained that, under the good-faith exception to the exclusionary rule, "evidence is ordinarily excluded only to deter official misconduct." Id. at 4a (citing Herring v. United States, 555 U.S. 135, 144-148 (2009)). The court concluded that the good-faith exception applies to evidence obtained in objectively reasonable reliance on a warrant "even if [the court] were to conclude that the warrant had exceeded [the] geographical constraints" in Rule 41(b). Ibid. And the court determined that the requirements for the good-faith exception were met here. Id. at 4a-6a. Among other things, the court noted that reliance on the NIT warrant was objectively

reasonable because a plausible argument existed that the warrant was authorized under Rule 41(b)(4) and because at least eight federal judges had "held that the same warrant complied with [the then-effective version of Rule 41(b)] even though data was being extracted from computers outside the Eastern District of Virginia." Id. at 5a.[1]

ARGUMENT

Petitioner renews his contentions (Pet. 10-19) that the good-faith exception to the exclusionary rule can never apply to a warrant that violates Rule 41(b)'s territorial limitations and, in the alternative, that the requirements for the good-faith exception were not met here. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. To the contrary, four other circuits have also applied the good-faith exception to admit evidence obtained under the same warrant. See United States v. Werdene, No. 16-3588, 2018 WL 988893, at *8-*11 (3d Cir. Feb. 21, 2018); United States v. McLamb, 880 F.3d 685, 689-691 (4th Cir. 2018); United States v. Levin, 874 F.3d 316, 321-324 (1st Cir. 2017); United States v. Horton, 863 F.3d 1041,

[1] In December 2016, Rule 41 was amended to add a provision authorizing a magistrate judge "in any district where activities related to a crime may have occurred" to issue a warrant "to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district" if the location of the information "has been concealed through technological means." Fed. R. Crim. P. 41(b)(6)(A).

1049-1052 (8th Cir. 2017), petition for cert. pending, No. 17-6910 (filed Nov. 21, 2017). In addition, the issues petitioner raises have limited prospective importance because Rule 41 has been amended to provide express authority for warrants like this one. The petition for a writ of certiorari should be denied.[2]

1. The court of appeals correctly determined that the good-faith exception can apply to evidence obtained in objectively reasonable reliance on a warrant that is later held to have violated Rule 41(b)'s territorial limitations.

a. The exclusionary rule is a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). "By refusing to admit evidence" obtained through the investigating officers' violation of Fourth Amendment rights, "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." Id. at 919 (citation omitted).

This Court has emphasized, however, that suppression is an "extreme sanction," Leon, 468 U.S. at 916, and that the "exclusion of relevant incriminating evidence always entails" "grave" societal costs, Hudson v. Michigan, 547 U.S. 586, 595 (2006). Most obviously, it allows "guilty and possibly dangerous defendants

[2] A similar question is presented in the petition for a writ of certiorari in United States v. Horton, No. 17-6910 (filed Nov. 21, 2017).

[to] go free -- something that 'offends basic concepts of the criminal justice system.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 908). This Court has thus held that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. at 144.

Consistent with that principle, this Court's decision in Leon recognized a "good-faith exception to the Fourth Amendment exclusionary rule." 468 U.S. at 913. Leon held that when officers act pursuant to a warrant that is later held to be invalid, "the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant." Herring, 555 U.S. at 142 (quoting Leon, 468 U.S. at 922). The Court reasoned that evidence should not be excluded "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 919. Indeed, mandating suppression of evidence obtained in objectively reasonable reliance on a warrant "can in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty." Id. at 919-920 (citation omitted).

This Court's decision in Leon identified only four situations in which the good-faith exception does not apply to evidence obtained in reliance on a warrant: (1) if the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless disregard of the truth"; (2) if "the issuing magistrate wholly abandoned his judicial role"; (3) if the supporting affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) if the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923 (citation omitted).

b. Petitioner asserts (Pet. 13-18) that the good-faith exception does not apply to evidence obtained in objectively reasonable reliance on a warrant that is later deemed to be "void ab initio." That assertion contradicts both this Court's holdings setting forth the general principles governing the good-faith exception and the Court's specific application of the exception to evidence obtained under warrants that had been recalled or quashed.

First, this Court has repeatedly instructed that the fundamental principle animating the good-faith exception is that exclusion is a "harsh sanction" that "'should not be applied[] to deter objectively reasonable law enforcement activity.'" Davis v. United States, 564 U.S. 229, 241 (2011) (quoting Leon, 468 U.S. at 919). Instead, the rule's proper function is limited to deterring "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." Herring, 555

U.S. at 144. The Court has thus held that suppression is not appropriate "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful" -- even when the officers are not relying on a warrant at all. Davis, 564 U.S. at 238 (citation omitted); see id. at 241 (declining to suppress evidence obtained in "a search conducted in reasonable reliance on binding precedent").

Under that well-established framework, the good-faith exception to the exclusionary rule applies to evidence obtained in objectively reasonable reliance on a search warrant even if that warrant is later held to be "void." As in other contexts, exclusion "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 919. And as in other contexts, "[e]xclusion exacts a heavy toll on both the judicial system and society at large" by requiring courts "to ignore reliable, trustworthy evidence." Davis, 564 U.S. at 237. As in other contexts, therefore, the exclusionary rule is inapplicable because "the deterrence benefits" of suppression do not "outweigh its heavy costs." Ibid.

Second, this Court has applied the good-faith exception in analogous circumstances. Herring, for example, involved an arrest pursuant to a warrant that had been "recalled five months earlier." 555 U.S. at 137-138. This Court nonetheless held that suppression was inappropriate where "an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong." Id. at 137. Similarly, in Arizona v. Evans, 514 U.S. 1 (1995), the Court applied the good-faith exception to an arrest made in objectively reasonable reliance on a "police computer record" that incorrectly indicated the existence of a warrant that had in fact been quashed. Id. at 15-16.

As the court of appeals explained, petitioner's argument is "foreclosed" by Herring and Evans. Pet. App. 3a. In those cases, "law enforcement officers had based the searches on warrants that were no longer in existence. How can we say that an agent is unable to rely on a warrant exceeding a magistrate judge's reach if the agent is able to rely on a warrant that doesn't even exist?" Id. at 4a; see Werdene, 2018 WL 988893, at *9-*10 (rejecting a similar argument); McLamb, 880 F.3d at 691 (same). Although petitioner asserts (Pet. 17) that the situations are distinct, he fails to identify any reason why the judicially crafted exclusionary rule would serve any greater deterrent function in the former situation than in the latter.

c. The court of appeals' conclusion that the good-faith exception applies here does not conflict with any decision of another court of appeals. To the contrary, four other circuits have also applied the good-faith exception to admit evidence obtained under the very same warrant. Like the court of appeals here, the First and Fourth Circuits assumed without deciding that the NIT warrant violated the territorial limits of Rule 41(b) and that the violation could potentially justify a suppression remedy.

McLamb, 880 F.3d at 689-690; Levin, 874 F.3d at 321. The Third and Eighth Circuits held that the warrant violated Rule 41(b) and that the violation also contravened the Fourth Amendment. Werdene, 2018 WL 988893, at *5-*8; Horton, 863 F.3d at 1049. But all four courts agreed that the evidence obtained under the warrant was admissible under the good-faith exception, reasoning that "the deterrent effects on law enforcement do not outweigh the great cost to society of suppressing the resulting evidence." Levin, 874 F.3d at 324; see Werdene, 2018 WL 988893, at *8-*11; McLamb, 880 F.3d at 689-691; Horton, 863 F.3d at 1049-1052.

d. Even if the application of the good-faith exception to warrants later held to be "void" were a question that otherwise warranted this Court's consideration, this case would not be an appropriate vehicle in which to consider it. That question is presented here only because the court of appeals assumed without deciding that a violation of Rule 41(b)'s territorial limitations also constitutes a violation of the Fourth Amendment, or that a violation of Rule 41(b) or the Federal Magistrates Act, 28 U.S.C. 636, could support a suppression remedy. But this Court has never addressed those antecedent issues.

Neither Rule 41 nor Section 636 prescribes exclusion as the remedy for a violation of their requirements, and this Court has generally instructed that courts should not "lightly" infer a suppression remedy for non-constitutional violations. Sanchez-Llamas v. Oregon, 548 U.S. 331, 347-348 (2006). Nor has this Court held that a violation of Rule 41 or Section 636 could give rise to a Fourth Amendment violation, a proposition that the court of appeals "assume[d]" for purposes of its decision. Pet. App. 3a; see Werdene, 2018 WL 988893, at *6-*8 (finding a Fourth Amendment violation); Horton, 863 F.3d at 1049 (same); see also United States v. Krueger, 809 F.3d 1109, 1123-1124 (10th Cir. 2015) (Gorsuch, J., concurring in the judgment) (similar).

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. "Finding these words to be 'precise and clear,' this Court has interpreted them to require only three things." Dalia v. United States, 441 U.S. 238, 255 (1979) (citation omitted). "First, warrants must be issued by neutral, disinterested magistrates." Ibid. "Second, those seeking the warrant must demonstrate * * * probable cause." Ibid. Third, "warrants must particularly describe the things to be seized, as well as the place to be searched." Ibid. (citation and internal quotation marks omitted). The NIT warrant satisfied each of those requirements. And that would remain true even if, as the court of appeals assumed, the warrant exceeded Rule 41(b)'s territorial limitations. The Fourth Amendment itself imposes no territorial limits on federal magistrates, and it is thus unclear why a violation of Rule 41(b)'s non-constitutional venue rules would create a Fourth Amendment violation.

Like the court of appeals, the First and Fourth Circuits specifically declined to reach that question. Levin, 874 F.3d at 321 (assuming without deciding that "a Fourth Amendment violation occurred"); McLamb, 880 F.3d at 689-690 (same). This Court has never addressed the interaction between Rule 41(b)'s territorial limitations and the Fourth Amendment. And it would be inadvisable for the Court to take up a question about whether and under what circumstances the good-faith exception applies to violations of those limitations when it has not resolved the logically antecedent question whether such violations can give rise to a suppression remedy in the first place.

2. In the alternative, petitioner contends (Pet. 18-19) that the court of appeals "was incorrect to conclude" that the good-faith exception "applied" to the particular facts of this case. Such an asserted "misapplication of a properly stated rule of law" does not warrant this Court's review. Sup. Ct. R. 10. In any event, petitioner's factbound arguments lack merit -- as five courts of appeals have recognized.

a. As the court of appeals explained, the FBI agents "acted with an objectively reasonable belief in the validity of the warrant." Pet. App. 4a. "Faced with the novel question of whether an NIT warrant" was authorized under the prior version of Rule 41(b) -- a question on which "there was no precedent" -- "the government turned to the courts for guidance." Levin, 874 F.3d at 323. "The government presented the magistrate judge with a request for a warrant, containing a detailed affidavit from an experienced officer, describing in detail its investigation, including how the NIT works, which places were to be searched, and which information was to be seized." Ibid.; see Pet. App. 4a. The magistrate judge then exercised independent judgment in determining to issue the warrant. The government proceeded to execute the NIT warrant as authorized, identifying hundreds of distributors and possessors of child pornography who otherwise would have escaped detection. Pet. App. 1a-2a. As every court of appeals to consider the question has recognized, there is "no benefit in deterring such conduct." Levin, 874 F.3d at 323; see Werdene, 2018 WL 988893, at *11; McLamb, 880 F.3d at 690-691; Horton, 863 F.3d at 1052.

The federal courts' subsequent analysis of the NIT warrant reinforces the conclusion that law enforcement officers' reliance on the warrant was objectively reasonable. Pet. App. 5a. Several district courts have held that the NIT warrant was authorized by Rule 41(b)(4). See, e.g., United States v. Austin, 230 F. Supp. 3d 828, 833-834 (M.D. Tenn. 2017); United States v. Jones, 230 F. Supp. 3d 819, 824-826 (S.D. Ohio 2017); United States v. Sullivan, 229 F. Supp. 3d 647, 653-656 (N.D. Ohio 2017); United States v. Jean, 207 F. Supp. 3d 920, 942-943 (W.D. Ark. 2016). And although the Third and Eighth Circuits held that the NIT warrant was not authorized by the prior version of Rule 41(b), Judge Fenner, concurring in part and dissenting in part in Horton, would have found "no violation of Rule 41" because he concluded that the NIT qualified as a tracking device under Rule 41(b)(4). 863 F.3d at 1052-1053. The fact that so many judges have upheld the NIT warrant confirms that it was, at minimum, objectively reasonable for law enforcement officers to rely on it.

b. Petitioner asserts (Pet. 18) that even though many federal judges have concluded that the NIT warrant was valid under Rule 41(b)(4), the good-faith exception is inapplicable because (in his view) the warrant was "sought and authorized under Rule 41(b)(1)" rather than Rule 41(b)(4). Even if that were an accurate characterization of the subjective beliefs of the FBI agents and the authorizing magistrate judge (but see Gov't C.A. Reply Br. 5-7), it would not be relevant to the good-faith analysis. As this Court has instructed, 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." Herring, 555 U.S. at 145 (quoting Leon, 468 U.S. at 922 n.23) (emphasis added). Here, an objectively reasonable officer could have concluded -- as many judges have in fact concluded -- that the NIT warrant was authorized under Rule 41(b)(4).[3]

3. Finally, the 2016 amendment to Rule 41 provides further reason to deny the petition for a writ of certiorari because it

[3] In addition, petitioner failed to raise his Rule 41(b)(1) argument in the district court, and neither the district court nor the court of appeals addressed it. Petitioner identifies no sound reason for this Court to depart from its usual practice by considering that factbound argument in the first instance. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

makes clear that the core issues in this case have very limited prospective importance. Rule 41(b)(6) provides that "a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media * * * located within or outside that district" if "the district where the media or information is located has been concealed through technological means." Fed. R. Crim. P. 41(b)(6). As petitioner acknowledges (Pet. 13-14), that provision unambiguously authorizes the issuance of warrants like the NIT warrant. That means that the type of Rule 41(b) violation at issue here (if it was a violation at all) is "unlikely to recur." Werdene, 2018 WL 988893, at *11. Secondary questions about the application of the good-faith exception to such violations therefore do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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