No. 06-___

IN THE

Supreme Court of the United States

Jason Davis, Kevin McClain, and George Brandt,
Petitioners,

v.

United States of America.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When police use the fruits of an illegal search to secure a search warrant, is evidence seized pursuant to the warrant admissible under the "good faith exception" to the exclusionary rule?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jason Davis, Kevin McClain, and George Brandt respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-19a) is published at 444 F.3d 556 (republishing 430 F.3d 299). The Sixth Circuit's order denying rehearing and rehearing en banc, with accompanying dissent (Pet. App. 33a-68a), is published at 444 F.3d 537. The district court's order and memorandum granting petitioners' motions to suppress evidence (Pet. App. 20a-32a), dated May 24, 2004, are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2005. The court of appeals denied rehearing and rehearing en banc on March 31, 2006. On June 21, 2006, Justice Stevens extended the time to file the petition to and including July 28, 2006. App. 05A1179. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the U.S. 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, and the persons or things to be seized."

STATEMENT OF THE CASE

Police officers in this case searched a home in violation of the Fourth Amendment. They used the fruits of that illegal

search to secure a warrant to search the same premises a second time. The district court suppressed the evidence found in the second search as the fruit of the poisonous tree. Acknowledging a square circuit conflict, the court of appeals reversed, holding that the issuance of the warrant triggered the "good faith exception" to the exclusionary rule. Four judges dissented from the denial of rehearing en banc, explaining that the panel's decision was irreconcilable with this Court's precedents and with decisions of other circuits and state supreme courts.

1. On October 31, 2001, the Hendersonville, Tennessee police received a report that a light was on at 123 Imperial Point, a residence that had previously been vacant. Officer Michael Germany arrived at the scene and observed the house for several minutes, detecting no activity. He then "performed a complete inspection of the outside of the house and found no open or unlocked windows, doors or gates, and no sign of forced entry or illegal activity." Pet. App. 3a.

The officer did note that the wooden front door was slightly ajar. (The district court found that, "in all likelihood," a screen door to the house in fact was closed. Pet. App. 23a.) The officer secured backup from another patrolman and decided to "clear" the house, notwithstanding that he "had seen no movement in or around the house, or any signs of forced entry or vandalism, or any kind of criminal activity." *Id.* 3a. As one of the officers would later candidly acknowledge, their "hunch that a burglary could be occurring inside the residence was mere 'speculation.'" *Id.* 10a.

The officers opened the door and announced their presence. Hearing no response or any activity indicating criminality, they still proceeded to search the house. None of the rooms upstairs revealed anything suspicious or awry. Despite the absence of any evidence of illegality, the officers searched the basement, where they found electrical equipment that they believed was consistent with a marijuana growing operation.

Officer Brian Murphy, a member of the police drug task force, reviewed Officer Germany's report on the incident. On that basis, Murphy placed the residence under surveillance. He subsequently came to suspect that petitioners were growing marijuana in the residence and at other locations.

2. On November 27, 2001, Officer Murphy sought a warrant to search the 123 Imperial Point residence a second time. Murphy submitted an affidavit in support of the warrant, which – under Tennessee law (like federal law) – serves the role of establishing probable cause. Tenn. Code Ann. 40-6-103 to -105; Fed. R. Crim. P. 41. The affidavit provided some information on the circumstances of the initial search of the residence (although it omitted many material facts, such as the admissions that an inspection of the premises revealed no evidence of a break-in and that the basis for the entry was merely "speculation") and relied on the evidence that Officer Germany had found in that search.

The magistrate found that probable cause existed to search the residence a second time and issued the warrant. The ensuing second search of the residence uncovered further evidence of marijuana growing. Federal prosecutors then took over the case. On the basis of evidence seized in the two searches, the government indicted petitioners on charges of conspiracy and marijuana trafficking in violation of 21 U.S.C. 846 and 841(a)(1).

3. Petitioners moved to suppress the evidence. They argued that the initial warrantless search of the Imperial Point residence, which gave rise to all of the evidence in the case, violated the Fourth Amendment. Thus, the evidence derived from that search and the second search should be suppressed as fruit of the poisonous tree.

The district court granted the motion to suppress. It held that the initial warrantless search was unconstitutional, as it was not justified by any exigency. In addition, the court held that because the warrant application was based directly on the evidence seized in that illegal search, the evidence obtained

under that warrant was the fruit of the poisonous tree. Pet. App. 9a.

The district court further rejected the government's reliance on the "good faith exception" to the exclusionary rule. That exception was announced in *United States* v. *Leon*, 468 U.S. 897, 919 (1984), which sustained the admission of evidence seized pursuant to a warrant that was later determined to have been issued without probable cause. Suppression in that circumstance, this Court concluded, "penaliz[es] the officer for the magistrate's error, rather than his own, [which] cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921. The Court held, however, that the good faith exception is nonetheless inapplicable, and suppression is required, if the officers should have recognized that the warrant was invalid, as when, for example, the warrant application is "'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable" or the warrant itself is "so 'facially deficient' that it could not reasonably be presumed valid." Pet. App. 12a (quoting *Leon*, 468 U.S. at 923).

The district court in this case concluded that the *Leon* good faith exception did not apply. The court explained that this was not "an instance in which the officers[] relied on a defective search warrant" issued by a *magistrate*. Pet. App. 28a. Rather, the evidence here was the direct fruit of an "objectively unreasonable" search *by police* in violation of the Fourth Amendment. *Ibid*.

3. The government appealed, representing that it otherwise "would have no choice but to file a motion to dismiss." No. 3:02-00126, Notice of Appeal 2 (June 21, 2004). The court of appeals reversed.

The panel majority agreed with the district court that the initial search of the Imperial Point residence was unconstitutional. The facts known to the officers, it concluded, did not establish probable cause to search, much less an exigency authorizing the warrantless entry of a home.

The officers "had no objective basis for their concern that a burglary was being committed" and "[b]oth officers testified that there was no emergency necessitating their entry into the home." Pet. App. 9a. To the contrary, "Officer Germany testified that upon inspecting the exterior of the home, he observed no movement in or around the home, no signs of forced entry or vandalism, and no suspicious noises or odors emanating from the house." *Ibid*. The officers' "mere speculation that a crime could be occurring, without more, simply does not suffice to overcome the presumption of unconstitutionality attached to a warrantless intrusion into the sanctity of the home." *Id.* 10a. The officers, "however good their intentions, had only an unparticularized hunch that a crime was being committed." *Ibid*.

With respect to the "good faith exception," the government represented that a magistrate is responsible for evaluating whether evidence in the warrant affidavit was secured consistent with probable cause. U.S. C.A. Br. 25. The panel accepted that representation and held that, although the warrant on which the officers relied to search 123 Imperial Point the second time was the fruit of the initial illegal search, the evidence seized in that second search was nonetheless admissible.

The majority described *Leon* as holding that the exclusionary rule generally "should not apply to evidence obtained by an officer who conducts a search in reasonable reliance on a search warrant that was issued by a neutral and detached magistrate, but is ultimately found to be unsupported by probable cause or otherwise defective." Pet. App. 11a. The panel concluded that *Leon* should be extended to apply to warrants that are "themselves the fruit of the poisonous tree." *Id.* 12a. The panel held that, as in *Leon*, the good faith exception applies if "an objectively reasonable officer could have believed the seizure valid." *Id.* 13a (quoting *United States* v. *White*, 890 F.2d 1413, 1419 (CA8 1989), cert. denied, 498 U.S. 825 (1990)).

Here, the panel concluded, Officer Murphy had no reason to doubt the validity of the first search once the magistrate had issued the warrant. The good faith exception applied, the court concluded, "[b]ecause the officers who sought and executed the search warrants acted with good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable." Pet. App. 14a.

The panel expressly recognized that its decision conflicts with the precedent of the Ninth and Eleventh Circuits. Those courts, the panel acknowledged, hold that "the good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search." Pet. App. 12a (citing *United States* v. *McGough*, 412 F.3d 1232 (CA11 2005); *United States* v. *Wanless*, 882 F.2d 1459 (CA9 1989); *United States* v. *Vasey*, 834 F.2d 782 (CA9 1987)).

4. Rehearing en banc was denied over the strongly worded dissent of four judges. The good faith exception, they explained, applies when "the police did not ever violate the law," but instead "simply relied in good faith on a *magistrate's* error." Pet. App. 40a (emphasis added). This case, by contrast, involves "a clear Fourth Amendment violation by *police officers*." *Ibid.* (emphasis in original). "*Leon* instructs us to pay 'close attention' to the 'remedial objectives' of the exclusionary rule, and apply it only in those cases where the purpose of deterrence can be furthered. This is precisely such a case." *Ibid.*

The dissenters also explained that the panel substantially understated the authority with which its ruling conflicts. In addition to the Ninth and Eleventh Circuits, numerous state courts and federal district courts hold that the good faith exception does not apply to a warrant that is itself the fruit of the poisonous tree. Pet. App. 54a-58a (collecting numerous

authorities). The dissenters would have adopted the rule of this "great weight of authority." *Id.* 62a.

Finally, the dissenters explained that the district court's suppression order was supported by this Court's decision in *Murray* v. *United States*, 487 U.S. 533 (1988). See Pet. App. 48a-49a. In *Murray*, officers conducted an illegal search but, wholly independent of that illegality, secured a warrant to search the premises. This Court held that evidence seized pursuant to the warrant was admissible. But it held that "[t]his would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Murray*, 487 U.S. at 542.

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below conflicts with this Court's precedents. Although the majority below rested its decision on *Leon*, that ruling and other precedents make clear that the "good faith exception" to the exclusionary rule does not apply in a case, such as this one, in which the warrant on which officers rely was itself the fruit of an illegal search. That exception instead applies when officers do not themselves violate the law but instead reasonably rely on determinations by non-police officials – in *Leon*, the issuing magistrate. A case such as this one is different in both relevant respects: the officers did not rely on any other governmental official, for magistrates do not evaluate whether a search that gave rise to the evidence discussed in a warrant affidavit was constitutional; and it was the officers who violated the Fourth Amendment in the initial search, from which all of the subsequent evidence derives. Second, the question presented is the subject of a substantial and recurring conflict in the lower courts, as the panel below recognized. Although several courts of appeals agree that the good faith exception applies in these circumstances, two

circuits and the highest courts of four states hold the opposite. Certiorari should accordingly be granted.

I. The Sixth Circuit's Decision Conflicts with This Court's Jurisprudence.

1. This case arises from a warrantless search of a home, a search that the police conducted without probable cause and in the absence of any exigency. The officers admitted that their suspicion that a burglary might be ongoing was merely speculation. The district court held, and the court of appeals agreed, that this search flatly violated the Fourth Amendment. Pet. App. 20a; *id.* 10a. Both courts also held that the evidence later gathered in the case was the direct fruit of this initial unconstitutional search. *Id.* 7a, 12a. The unlawful searches involved were moreover of a residence; such an intrusion is the "chief evil" that gave rise to the adoption of the Fourth Amendment. *Segura* v. *United States*, 468 U.S. 796, 804 (1984); *Georgia* v. *Randolph*, 126 S. Ct. 1515, 1523 (2006) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."). Ordinarily, then, the evidence from both searches would be suppressed. See *Segura*, 468 U.S. at 804 (suppression required); *Wong Sun* v. *United States*, 371 U.S. 471, 484-85 (1963) (suppression of fruit of the poisonous tree required as well).

This Court reached that conclusion in the most analogous case to this one, *Murray* v. *United States*, 487 U.S. 533 (1988). In *Murray*, officers entered a warehouse without a warrant in violation of the Fourth Amendment and discovered marijuana. Wholly independent of their illegal observations, the police secured a warrant to search the warehouse. This Court looked to its prior decision in *Segura*, which was a companion case to *Leon*. In *Segura*, officers entered an apartment unlawfully while waiting for the issuance of a warrant to search the premises. This Court held that the evidence seized in the search pursuant to the warrant need not be suppressed. In reaching that conclusion, the Court

emphasized that the illegal search did not give rise to the subsequent warrant:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant.

468 U.S. at 814. See also *id.* at 815 ("[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant").

In *Murray*, this Court extended *Segura* to hold that the same marijuana that was seen in the initial unlawful intrusion, when discovered in the second search, was admissible. In reaching that conclusion, the Court carefully distinguished a circumstance in which a warrant is secured based on evidence secured in the first, illegal search. The Court confronted the following argument:

> Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry.

Id. at 539. The Court held that this concern was unfounded, extending *Segura* to specify that if the initial unlawful intrusion gave rise to the warrant, evidence seized under the warrant was inadmissible:

> An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause *the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it*. See Part III, *infra*. Nor would the officer without sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since *whatever he finds cannot be used to establish probable cause before a magistrate*.

Id. at 540 (emphases added and omitted). In the cross-referenced Part III of its opinion, the Court explained that the evidence in a second search is admissible if the "later, lawful seizure is genuinely independent of [the] earlier, tainted one." *Id.* at 541. "The ultimate question, therefore, is whether the search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Ibid.*

Under *Murray*, the district court's suppression order must be sustained. It was the unlawful search of 123 Imperial Point that not only led officers to seek a warrant to conduct a search, but also provided the evidence giving rise to probable cause to search. Because all of the evidence, *including* the evidence seized in the subsequent search pursuant to the warrant, is the direct fruit of that illegality, suppression is required.

2. The Sixth Circuit held to the contrary that the evidence discovered in executing the warrant must be admitted pursuant to the "good faith exception" to the exclusionary rule. That decision is not only irreconcilable with *Murray*, but it conflicts with this Court's "good faith"

precedents in two other respects. First, it profoundly misapprehends the role of the magistrate in the warrant process, who determines whether probable cause exists, *not* whether the evidence underlying the warrant application was secured in violation of the Constitution. There is accordingly no relevant determination by the magistrate to which officers can reasonably defer in these circumstances. Second, because the case arises from the illegal actions of police officers, rather than a mistake by the magistrate, suppression of the evidence is required in order to further the exclusionary rule's purpose of deterring police misconduct.

a. Preliminarily, it is important to recognize that the phrase "good faith exception" is somewhat misleading. This Court has never accepted the proposition that the exclusionary rule is inapplicable so long as officers believed in "good faith" that their conduct was lawful. To the contrary, the Court in *Leon* "adhered" to the settled proposition that "[g]ood faith on the part of the arresting officers is not enough." 468 U.S. at 915 n.13 (quoting *Henry* v. *United States*, 361 U.S. 98, 102 (1959)).

The "good faith exception" instead refers to circumstances in which officers conduct a search in reasonable reliance on some other, non-police actor. This Court has decided four such cases. In *United States* v. *Leon*, 468 U.S. 897 (1984), the police conducted a search based on a warrant that was later determined to be defective because the magistrate (rather than the officers) erred in finding probable cause. In *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984) – a companion case to *Leon* – although officers executed a defective warrant, they did so after a judge had advised them that he would correct the defects but failed to do so. In *Illinois* v. *Krull*, 480 U.S. 340 (1987), the unconstitutional search was conducted pursuant to a statute enacted by the legislature that was later deemed to violate the Fourth Amendment. Most recently, in *Arizona* v. *Evans*, 514 U.S. 1 (1995), officers executed a warrant that had been quashed,

because a court clerk, not a police officer, had erroneously failed to remove the warrant from a computer system.

Each of these precedents applying the "good faith exception" rests on the same ground: applying the exclusionary rule would not "deter *police* misconduct," *Leon*, 468 U.S. at 916 (emphasis added). As this Court explained in *Leon*, "penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921-23. By contrast, when it is instead police officers who "have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right," courts "refus[e] to admit evidence gained as a result of such conduct" in order to "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused." *United States* v. *Peltier*, 422 U.S. 531, 538 (1975).

b. The root of the Sixth Circuit's profound misapplication of the "good faith exception" is the court's complete misapprehension of the role of the magistrate in the warrant process. The government represented to the Sixth Circuit that "[i]t was the duty of the * * * magistrate to examine Officer Murphy's affidavits and determine whether the warrantless search on October 12 was illegal." U.S. C.A. Br. 25. According to the government, "[o]nce that examination was concluded and the warrants were issued, the officers executing the warrants were entitled to rely on them even if the October 12 search was illegal and the magistrate had erred in issuing the warrants." *Ibid.*

The court of appeals accepted that theory, holding that when the magistrate considered the warrant application to conduct the *second* search, he considered whether the *first* search had complied with the Fourth Amendment. On this view, his issuance of a warrant thus not only expressly informed Officer Murphy that there was sufficient probable cause to conduct the second search, but also implicitly

informed him that there had been sufficient probable cause (or sufficient exigency) to justify the first search as well. The Sixth Circuit accordingly held that the good faith exception applies, so long as the facts of the initial illegal search were disclosed to the magistrate. Pet. App. 14a. In these circumstances, according to the court of appeals, there is "nothing more that [the officer] 'could have or should have done * * * to be sure his search would be legal.'" *Ibid.* (quoting *United States* v. *Thomas*, 757 F.2d 1359, 1368 (CA2 1985)).

The government's representation regarding the legal role of the magistrate in the warrant process, and the court of appeals' holding accepting that characterization, is simply wrong. In the Tennessee court system and the federal courts (indeed, in any other court system with which petitioners are familiar), it is *not* the magistrate's "'neutral and detached' function," *Leon*, 468 U.S. at 914, to evaluate whether the evidence invoked by police in support of a probable cause determination was itself secured consistent with the Constitution. The magistrate evaluates whether the affidavit establishes probable cause, as required by the text of the Fourth Amendment, which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. CONST. amend. IV. As the Ninth Circuit has explained, "[a] magistrate's role * * * is to weigh the evidence to determine whether it gives rise to *probable cause*," not to "evaluate the *legality of [the initial] search*." *United States* v. *Vasey*, 834 F.2d 782, 789 (CA9 1987) (emphases added). Accord *State* v. *Dewitt*, 910 P.2d 9 (Ariz. 1996).

Under Tennessee law, the affidavit thus simply "set[s] forth facts tending to establish the grounds of the application, or probable cause for believing that they exist." Tenn. Code Ann. 40-6-104. As the Tennessee Supreme Court has recently explained, "an affidavit contains the information that a magistrate considers when determining whether probable cause exists to support issuance of the requested warrant."

State v. *Davis*, 185 S.W.3d 338, 344 (2006). So long as the magistrate determines "that there is probable cause," he "*shall* issue a search warrant." Tenn. Code Ann. 40-6-105 (emphasis added).

Thus, in this case, the affidavit to the Tennessee state magistrate set forth Officer Murphy's view "that there is probable cause to believe" that "evidence of [certain] crimes will be found at the location 123 Imperial Point." C.A. J.A. 335. The factual recitation was set forth as a "Statement of Facts In Support of Probable Cause." *Id*. 336. The warrant issued by the magistrate in turn parroted that assertion, setting forth the magistrate's conclusion "that there is probable cause to believe" that "evidence of [those] crimes will be found at the location of 123 Imperial Point." *Id*. 331. Nothing in the governing rules, established practice, or materials relating to the warrant suggests in the slightest that the magistrate considered for even a second the constitutionality of the underlying search.

Similarly, under the Federal Rules of Criminal Procedure, a warrant "must" issue if the magistrate finds "probable cause." Fed. R. Crim. P. 41(d)(1). This Court thus explained in *Leon* that "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." 468 U.S. at 921. This inquiry is a forward-looking one that focuses on "whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). "[T]he presence of the warrant" thus merely "assures that a neutral magistrate has determined that probable cause exists to search the home." *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

Similarly, in *Murray*, the Court understood that the role of the magistrate in the warrant process is to determine

whether "there is probable cause," and the Court specifically contrasted that role with the trial court's role of determining whether a warrantless search comported with the Fourth Amendment. 487 U.S. at 547. *Murray* moreover concludes that when evidence seized in the course of the illegal search gives rise to the warrant, nothing in the warrant process excuses the underlying Fourth Amendment violation. See *supra* at 9-10.

Indeed, a "magistrate evaluating a warrant application based in part on evidence seized in a warrantless search is simply not in a position to evaluate the legality of that search." *Vasey*, 834 F.2d at 789. First, the magistrate frequently will not have complete information. The warrant application process "has never required an officer to explain with specificity how the evidence in the affidavit was obtained." *United States* v. *Gray*, 302 F. Supp. 2d 646, 653 (S.D.W. Va. 2004). See also *Commonwealth* v. *D'Onofrio*, 488 N.E.2d 410, 412 (Mass. 1986) ("Neither this court, nor any other appellate court of which we are aware, has ever required an affidavit that sets forth a police officer's personal observations in support of a search warrant to contain information showing that the officer made those observations without violating the defendant's rights guaranteed by the Fourth Amendment."). In addition, the warrant application process generally takes place "under severe time constraints" and in ex parte proceedings "without the benefit of an adversarial hearing in which the evidentiary basis of the application might be challenged." *Vasey*, 834 F.2d at 789. This "ex parte inquiry is likely to be less vigorous" – because "[t]he magistrate has no acquaintance with the" underlying information – and the "urgency" of the warrant application process "will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses." *Franks* v. *Delaware*, 438 U.S. 154, 169 (1978); see also John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 223 (2005) ("the casual, ex parte

character of the warrant application process is ill-suited to produce searching reviews of warrant applications"). The question whether a Fourth Amendment violation occurred in the conduct of a prior search, however, requires thoughtful inquiry into fact-specific issues such as consent, the permissible bounds of the search, and exigent circumstances. "[N]o reliance by the police [is] justified" in cases – such as this one – in which "the error was made by the police officer and [was] not shared by – or ratified by – the magistrate." Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures That Serve as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697, 706 (1995).

This case perfectly illustrates both that the warrant process is unsuited to the determination whether a search underlying the application violated the Constitution, as well as that the officer submitting the affidavit in this case could not have reasonably believed that the magistrate was undertaking such an inquiry. The warrant affidavit was seriously incomplete on the circumstances surrounding the initial search. It states, for example, that "Officer Germany began to check the security of the home, and did find a front door open." C.A. J.A. 336. But it *omits* most of the facts that the district court and court of appeals found material in determining that the search was unlawful. It thus does not mention that the officer observed the house for several minutes but detected no activity inside. It does not advise the magistrate that the officer conducted a complete inspection of the home and found no evidence of illegality. Pet. App. 3a. And it makes no mention of the fact that the officers entered based on mere "speculation." *Id.* 10a.

Unlike in *Leon* – in which officers reasonably relied on the magistrate's determination of probable cause – in these circumstances there is thus no determination by the magistrate to which the police may defer. *Leon* instead explained (see 468 U.S. at 914) that the good faith exception applies with respect to determinations made by the magistrate when

performing the "neutral and detached function" described in *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), which is the "determination of probable cause."

The leading criminal procedure treatise confirms that in the ordinary case in which "the warrant-issuing process leaves totally unresolved the lawfulness of the prior police activity, then there is *no reason* why that process should, via *Leon*, shield that activity from full scrutiny at the suppression hearing." 1 Wayne R. LaFave, SEARCH & SEIZURE § 1.3(f), at 80 (4th ed. 2004 & Supp. 2006) (emphasis added).[1] The treatise quotes with approval the following observations by another commentator:

> The good faith exception should not preclude consideration of the pre-warrant evidence-gathering techniques of the police. The questioned police activity * * * was not performed pursuant to a warrant. When the magistrate issued the warrant, he did not endorse past activity; he only authorized future activity. As *Leon* makes clear, the function of the magistrate is to determine "whether a particular affidavit establishes probable cause," not whether the methods used to obtain the information in that affidavit were legal. The illegal [activity] is a warrantless act which cannot be protected by incorporating the information thus obtained into a warrant application. Despite the police's good faith belief in its validity, the warrant is simply the fruit of a (warrantless) poisonous tree and the deterrent purpose of the exclusionary rule would be advanced by excluding [the evidence].

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[1] In an unusual case, a magistrate obviously *could* evaluate the lawfulness of the underlying search. This is not such a case, and it accordingly does not present the question whether the good faith exception applies in such a circumstance.

Id. at 79-80 (quoting Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302 (1985)) (third alteration in original).

The Sixth Circuit's decision in this case thus does no more than permit police to "launder" the fruits of an unlawful search through the warrant process. Officer Murphy here did nothing more than take evidence acquired from an unlawful search, submit it to the magistrate in the form of an affidavit, and then search the exact same residence a second time. The evidence seized in the second search is thus properly suppressed as the fruit of the poisonous tree.

It accordingly makes no difference that the Sixth Circuit limited its decision, see Pet. App. 13a-14a, to those circumstances in which the initial illegality was sufficiently "close to the line of validity" that the officer conducting the second search could objectively rely on the warrant's validity. That standard reflects the court of appeals' acknowledgment that the good faith exception should not apply when an objective officer executing a warrant should know that the magistrate made an error. But there is no error to make, for as discussed, the magistrate does not consider the lawfulness *vel non* of the underlying search. Not only is it the police who committed the illegality (even in such close cases), but the magistrate has done *nothing* on which the second officer could rely. The "closeness" of the Fourth Amendment question has no bearing on how a reasonable officer should view the warrant, which reflects merely the magistrate's determination that it was issued on a showing of probable cause, *not* that the evidence underlying the warrant application was lawfully obtained.

It is also worth noting that the Sixth Circuit's decision – despite the court's reference to the supposedly special circumstances of this case, see Pet. App. 13a – does not in fact genuinely limit the class of cases to which it illogically extends the good faith exception. The panel majority in this case found that the officers had *no* objective basis for their

entry into the home. Pet. App. 10a. Notwithstanding that the police committed the most basic violation of the Fourth Amendment, the majority proceeded to deem the question whether the entry was permissible "close." The court's decision instead merely recognizes that the good faith exception does not apply when the underlying Fourth Amendment violation was so blatant that the magistrate issuing the warrant obviously must have made a mistake. See *infra* at 22 & n. 3.

II. The Federal Courts of Appeals and the Highest Courts of Several States Are Intractably Divided With Respect To the Question Presented.

Certiorari is also warranted to resolve the conflict in the lower courts over whether evidence seized pursuant to a warrant that is the fruit of an illegal search is admissible under the good faith exception.

1. The Sixth Circuit's decision in this case is consistent with the precedent of five circuits. See *United States* v. *Diehl*, 276 F.3d 32, 43-44 (CA1 2002); *United States* v. *Adames*, 56 F.3d 737, 747 (1995), cert. denied, 517 U.S. 1250 (1996); *United States* v. *White*, 890 F.2d 1413, 1419 (CA8 1989), cert. denied, 498 U.S. 825 (1990); *United States* v. *Carmona*, 858 F.2d 66, 68 (CA2 1988); *United States* v. *Thornton*, 746 F.2d 39, 49 (CADC 1984). For example, the Sixth Circuit in this case relied on the Eighth Circuit's decision in *White*. There, officers conducted an unjustified canine sniff of the defendant's luggage and, on the basis of the dog's alert, secured a warrant to search the luggage, which contained drugs. The Eighth Circuit held that the good faith exception applied to the second search because the executing officers did not have a reason to doubt the warrant: the facts were "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable." 890 F.2d at 1419.

2. By contrast, the Sixth Circuit's decision is in direct conflict with the precedent of two circuits and the highest

courts of four states. The Ninth Circuit has repeatedly held that the good faith exception categorically does not apply to searches pursuant to warrants that were secured on the basis of a violation of the Fourth Amendment, without regard to how "close to the line" of validity the initial search was. That court's rule is simple: "When the warrant was secured in part on the basis of unlawfully seized evidence, the good-faith defense does not apply." *United States* v. *Bishop*, 264 F.3d 919, 924 (2001).

In *United States* v. *Vasey*, 834 F.2d 782 (CA9 1987), for example, the police used the fruits of an illegal inventory search of a car to secure a warrant to search the vehicle, finding cash and cocaine. Rejecting the government's invocation of the good faith exception, the Ninth Circuit distinguished *Leon* – in which the error was the *magistrate's* mistaken determination of probable cause – from the case before it – in which "[t]he constitutional error was made by the *officer*." *Id.* at 789 (emphasis added). Because the magistrate is not responsible for evaluating the lawfulness of the underlying search, the case thus fell squarely within the purpose of the exclusionary rule: "conducting an illegal warrantless search and including evidence found in this search in an affidavit in support of a warrant is an activity that the exclusionary rule was meant to deter." *Ibid.*

Subsequently, the Ninth Circuit confirmed that its decision in *Vasey* applies in cases in which the illegality of the first search was unclear. *United States* v. *Wanless*, 882 F.2d 1459 (1989), involved another inventory search, but the panel divided on whether that search violated the Fourth Amendment. See *id.* at 1467-69 (Wright, J., dissenting). The court nonetheless held that its determination that the initial search was unconstitutional precluded reliance on the good faith exception. *Id.* at 1466-67. See also *United States* v. *Meza*, No. 92-35461, 1993 U.S. App. LEXIS 10424 (CA9 May 5, 1993).

The Eleventh Circuit similarly rejects application of the good faith exception in these circumstances. In *United States* v. *McGough*, 412 F.3d 1232 (2005), police arrested the defendant in front of his home and, on the basis of the "community caretaking exception," entered the residence to get shoes for his barefoot daughter. Inside, they observed a gun and marijuana, based on which they secured a warrant to search the residence again. The Eleventh Circuit held not only that the initial entry was illegal, but also that the good faith exception did not save the subsequent search pursuant to the warrant. *Id.* at 1239-40. See also *United States* v. *Gray*, 302 F. Supp. 2d 646 (S.D.W. Va. 2004); *United States* v. *McQuagge*, 787 F. Supp. 637, 657 (E.D. Tex. 1991), aff'd sub nom. *United States* v. *Mallory*, 8 F.3d 23 (CA5 1993).

Numerous state court decisions hold that the good faith exception does not apply when a warrant rests on evidence secured in violation of the Fourth Amendment. Illustrative is *State* v. *Dewitt*, 910 P.2d 9 (Ariz. 1996), in which police (consistent with the Fourth Amendment) initially entered a home based on suspicion of a burglary. The officers then violated the Fourth Amendment by expanding the search more broadly than the exigency justified. Based on evidence found in the unconstitutionally broad search, they secured a warrant to search the residence again. The Arizona Supreme Court held that the good faith exception did not apply to evidence seized pursuant to the warrant, recognizing that magistrates do not evaluate whether the acts that produced the evidence supporting a warrant application were consistent with the Constitution. *Id.* at 15. The highest courts of California, Idaho, and Ohio have similarly held that the good faith exception does not apply in these circumstances. *People* v. *Machupa*, 872 P.2d 114 (Cal. 1994); *State* v. *Johnson*, 716 P.2d 1288 (Idaho 1986); *State* v. *Carter*, 630 N.E.2d 355 (Ohio 1994) (per curiam).[2]

[2] The decision below thus gives rise to an intra-jurisdictional conflict between the state and federal courts in Ohio.

The decisions of the Ninth and Eleventh Circuits and various state courts described above cannot be distinguished on the basis that they conceivably involve more egregious underlying Fourth Amendment violations. As a factual matter, as noted, the cases on petitioners' side of the conflict were easily as "close" as this one, in which the court of appeals concluded that the officers had no objective basis to enter the residence. It is thus clear that they necessarily rejected the Sixth Circuit's rule. As a legal matter, the root of the conflict is the courts' fundamentally different understandings of the role of the magistrate in the warrant process. That disagreement does not in any way turn on the "closeness" of the constitutional violation. Moreover, as discussed above, the Sixth Circuit's inquiry into how "close" the predicate Fourth Amendment violation was does not exclude from the good faith exception a category of "egregious" cases to which it would otherwise apply. Rather, it simply parrots the holding of *Leon* that officers cannot be held to rely on determinations by magistrates that are objectively unreasonable.[3]

3. The conflict is intractable and can only be resolved through this Court's intervention. The circuit split has been repeatedly acknowledged, see Pet. App. 12a (panel majority); *United States* v. *Reilly*, 76 F.3d 1271, 1283 (CA2 1996), and has persisted for nearly two decades. Compare *United States*

[3] Put another way, there can be no argument that the courts which have rejected application of the good faith exception have merely rejected the proposition that the good faith exception *always* applies to warrants, even in cases in which the warrant is the direct fruit of an egregious illegal entry. No court could *ever* reasonably adopt such a proposition, because the issue of good faith would simply not arise in cases involving egregious illegal entries: in such cases, the officer could never reasonably rely on the fact that the magistrate issued a warrant – even on the false assumption that the magistrate considered the constitutionality of the predicate search.

v. *White*, 890 F.2d 1413, 1419 (CA8 1989) (applying good faith exception), cert. denied, 498 U.S. 825 (1990) with *United States* v. *Vasey*, 834 F.2d 782 (CA9 1987) (rejecting the exception). In that time, the disagreement has widened substantially. No court has ever reversed its position on this fundamental question. To the contrary, the circuits have recognized their obligation to adhere to their prior precedents. *E.g.*, *United States* v. *Kiser*, 948 F.2d 418, 422 (CA8 1991), cert. denied, 503 U.S. 983 (1992); *United States* v. *O'Neal*, 17 F.3d 239, 242-43 n.6 (CA8), cert. denied, 513 U.S. 960 (1994).

The importance of the question presented is moreover beyond reasonable dispute. Officers here violated the Constitution by entering the single most important sphere of personal privacy – the home – without probable cause and in the absence of any exigency. The government's position is that despite this illegality the subsequent search is valid because the officers conveniently used the fruits of the first, illegal search to secure a warrant to search the same premises a second time. Whether such a maneuver can vitiate the initial illegality is a basic and recurring question under the Fourth Amendment that plainly merits this Court's attention. The fact that the court of appeals' decision rests on a stark misapprehension of the role of a magistrate – a misapprehension that arose from the government's representations in its brief – heightens the importance of the case.

This case is moreover the ideal vehicle in which to resolve the conflict. The question presented was the only basis for the decision below and the government expressly represented in its notice of appeal that the prosecution cannot go forward in the absence of the evidence in question. The district court held an evidentiary hearing that fully explicated the facts surrounding the initial warrantless search of 123 Imperial Point, the warrant's application and issuance, and the second search. The panel opinion and dissent from the denial of rehearing en banc carefully explore the legal issue

presented and the many conflicting federal and state decisions that have considered the question. Certiorari should accordingly be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 2006