No. 17-730

In the Supreme Court of the United States

ROBERTO CARLOS ORTIZ-CERVANTES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies to evidence seized by law-enforcement officials in objectively reasonable reliance on a facially valid search warrant signed by a federal magistrate judge, where only some of 28 U.S.C. 631(a)'s requirements for cross-designating that magistrate judge to exercise authority in the adjoining judicial district in which the warrant was executed had been satisfied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 868 F.3d 695. The order of the district court (Pet. App. 25-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2017. The petition for a writ of certiorari was filed on November 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted of possession with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). The district court sentenced petitioner to 156 months of imprisonment, to

be followed by five years of supervised release. Pet. App. 17-18. The court of appeals affirmed. *Id.* at 1-14.

1. From September 2013 to May 2014, members of a Drug Enforcement Administration (DEA) task force investigated individuals suspected of distributing methamphetamine in the Sioux City metropolitan area. See Pet. App. 2. That area includes Sioux City, Iowa (in the Northern District of Iowa), and, just across the Missouri River, South Sioux City, Nebraska (in the District of Nebraska).

Agents conducted ten controlled purchases of methamphetamine from Victor Gonzalez, who contacted Jose Orellana just before the purchases. Pet. App. 2. Further investigation revealed that petitioner supplied methamphetamine to Orellana, who then supplied it to Gonzalez. *Id.* at 2-3. Orellana visited petitioner's house in South Sioux City, Nebraska, shortly before two of the controlled purchases. *Id.* at 3. Another informant told agents that that he had purchased methamphetamine from petitioner at that house and that petitioner lived in the basement. *Ibid.*

In May 2014, a DEA special agent applied to the federal magistrate judge in Sioux City, Iowa (in the Northern District of Iowa) for a warrant to search petitioner's residence located across the Missouri River in South Sioux City, Nebraska. Pet. App. 2-3. Years earlier, in March 2000, the United States Judicial Conference had notified the District Court for the Northern District of Iowa that the Conference had voted to cross-designate the magistrate judge position at Sioux City, Iowa, to serve in the adjoining District of Nebraska. *Id.* at 9. The agents in this case had previously obtained search warrants from the magistrate judge for property located in the District of Nebraska and, at the time of the

2014 warrant application in this case, both the magistrate judge and the agents "believed in good faith [that] the magistrate judge was properly cross-designated" and had authority to issue a search warrant for the District of Nebraska. *Id.* at 13-14. The magistrate judge found probable cause and issued the warrant. *Id.* at 13. When officers executed the warrant, they discovered petitioner in the basement of the house with more than 500 grams of methamphetamine. *Id.* at 4.

2. After a federal grand jury in the District of Nebraska indicted petitioner, petitioner moved to suppress the evidence found in the search of his house. Pet. App. 4.

As relevant here, petitioner argued that the magistrate judge who had issued the warrant lacked the authority to approve the search of his home in the District of Nebraska. Pet. App. 4; see C.A. App. Ex. 2A, at 1, 32 (signed warrant application). Federal Rule of Criminal Procedure 41(b) governs venue for warrant applications. A "magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district." Fed. R. Crim. P. 41(b)(1).[1] In addition, "[w]here the [United States Judicial Conference] deems it desirable, a magistrate judge may be designated to serve in one or more districts adjoining the district for which he is appointed." 28 U.S.C. 631(a). "Such

[1] A magistrate judge may also "issue a warrant for a person or property outside the district," and authorize other activities outside of the district, in certain circumstances. Fed. R. Crim. P. 41(b)(2) and (4)-(6). A magistrate judge possesses even broader geographic authority in terrorism investigations. Fed. R. Crim. P. 41(b)(3).

a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved." *Ibid.*

As noted, in March 2000, the Judicial Conference notified the District Court for the Northern District of Iowa that the Conference had voted to "[d]esignate the full-time magistrate judge position at Sioux City[, Iowa,] to serve in the adjoining District of Nebraska." Pet. App. 9 (brackets in original); see C.A. App. Ex. 1. In 2012, the District Court for the Northern District of Iowa appointed the magistrate judge who later issued the search warrant in this case as the full-time magistrate judge for the Northern District of Iowa in Sioux City "[i]n accordance with the authority conferred by 28 U.S.C. Section 631, *et seq.*, and the further authority and action taken by the Judicial Conference," C.A. App. Ex. 101, at 1 (order), thereby "fill[ing] the position the Judicial Conference had designated." Pet. App. 9. The record in this case, however, does not reflect that the District Court for the District of Nebraska concurred in the cross-designation of that magistrate-judge position under Section 631(a).[2]

The District Court for the District of Nebraska rejected petitioner's challenge and denied his suppression motion. Pet. App. 4; see *id.* at 25-26. Petitioner thereafter entered a conditional guilty plea, reserving his right to appeal the suppression ruling. *Id.* at 4.

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[2] By order dated September 12, 2017, the District Courts for the District of Nebraska and the Northern District of Iowa jointly authorized "the full-time magistrate judge at Sioux City in the Northern District of Iowa" to "serve in the adjoining District of Nebraska." *In re Exercise of Adjoining District Jurisdiction by United States Magistrate Judges*, Gen. Order No. 2017-03 (D. Neb.), and Pub. Admin. Order No. 117-AO-0010-P (N.D. Iowa).

3. The court of appeals affirmed. Pet. App. 1-14. As relevant here, the court concluded that the magistrate judge did not have authority to issue a search warrant for property located in the District of Nebraska, *id.* at 8-10, but determined that, under the good-faith exception to the exclusionary rule, a suppression remedy was not warranted, *id.* at 11-13.

a. The court of appeals explained that, under Section 631(a), the cross-designation of a magistrate judge to issue search warrants for property in an adjoining district requires both a designation by the Judicial Conference and "the concurrence of a majority of the judges in each of the district courts involved." Pet. App. 8 (quoting 28 U.S.C. 631(a)). It noted that "[n]o evidence of such a concurrence exists in the record" of this case. *Id.* at 9. The administrative order from the District Court for the Northern District of Iowa that designated the magistrate judge, the court observed, "does not mention whether the [district's] judges concurred" and, in any event, no "evidence [showed that] a majority of the district judges in the other affected district, the District of Nebraska, concurred." *Ibid.* In the absence of such evidence, the court of appeals concluded that the magistrate judge "plainly was not properly cross-designated under the requirements of [Section] 631(a)" and thus, under Rule 41(b)(1), the judge lacked "authority to issue a search warrant for property located in the District of Nebraska." *Id.* at 9-10; see *id.* at 8.

The court of appeals explained, however, that a violation of Rule 41 does not trigger a suppression remedy unless the violation "prejudice[s] [the] defendant" or reflects a "reckless disregard of proper procedure." Pet. App. 10 (citation omitted). In this case, the court determined, petitioner did "not claim to be prejudiced by the

technical violation" of Rule 41, because the "magistrate judge followed normal procedures and found probable cause" and because "the search was [then] executed within the bounds of the warrant." *Id.* at 10-11.

b. The court of appeals' Rule 41 analysis did not end its inquiry, because the court treated the search of petitioner's home pursuant to the warrant as not just a Rule 41 violation, but a Fourth Amendment violation, on the theory that "when a magistrate judge issues a search warrant outside his jurisdiction, that search warrant is 'invalid at its inception and therefore [renders a search based on the warrant] the constitutional equivalent of a warrantless search.'" Pet. App. 11 (citation omitted).

Even on that premise, however, the court of appeals determined that a suppression remedy was not warranted. Pet. App. 11-14. "Under the good-faith exception" to the exclusionary rule, the court explained, "evidence seized pursuant to a search warrant issued by a magistrate that is later determined to be invalid" will "not be suppressed if the executing officer's reliance upon the warrant was objectively reasonable." *Id.* at 11-12 (citation omitted).

The court of appeals recognized that the good-faith exception does not apply if, for instance, the issuing judge "wholly abandoned his judicial role" in issuing the warrant, but the court rejected petitioner's contention that such an abandonment occurred here. Pet. App. 12-13. The court explained that a judge abandons his judicial role when the judge acts "as a rubber stamp for the police and an adjunct law enforcement officer" and thereby fails to "serve as a neutral and detached actor." *Id.* at 12 (citations omitted). The court found that the magistrate judge here did not act as a rubber stamp,

but instead "evaluated a 32-page affidavit" containing "sufficient detail to identify the property and provide the required probable cause" and properly "determined [that] sufficient probable cause existed to issue the warrant." *Id.* at 13; see *id.* at 5-8 (upholding that probable-cause determination).

The court of appeals further explained that the exclusionary rule is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." Pet. App. 13 (quoting *United States* v. *Leon*, 468 U.S. 897, 916 (1984)). The court found no law-enforcement misconduct to deter in this case. It explained that "[t]he Judicial Conference of the United States had approved the cross-designation [of the magistrate judge] and notified the Northern District of Iowa"; the agents involved "had previously gone to [the same Northern District of Iowa] magistrate judge to obtain search warrants for property located in the District of Nebraska"; both "the magistrate judge and the [agents] * * * believed in good faith [that] the magistrate judge was properly cross-designated"; and they thus "believed in good faith [that] the magistrate judge was authorized to issue a search warrant" for petitioner's home "in an adjoining district." *Id.* at 13-14. The court added that "[t]he exclusionary rule does not exist to require or even encourage law enforcement officers to second guess the authority of judges to issue warrants." *Id.* at 13. The court accordingly determined that the evidence obtained through the agents' search was admissible. *Id.* at 14.

ARGUMENT

Petitioner contends (Pet. i, 7-10) that the good-faith exception recognized by this Court in *United States* v. *Leon*, 468 U.S. 897 (1984), can never apply when officers

rely on a warrant signed by a magistrate judge who turns out to lack authority to authorize the search in an adjoining district. Petitioner further contends (Pet. 10-12) that the court of appeals' decision conflicts with one decision by another court of appeals. The decision of the court of appeals here is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The exclusionary rule is a "'judicially created remedy'" designed for the sole purpose of "deter[ring] police misconduct" that violates the Fourth Amendment. *Leon*, 468 U.S. at 906, 916 (citation omitted); see *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011). Cf. *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998) (recognizing that this Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution"). The rule "applies only where it 'result[s] in appreciable deterrence,'" *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 909) (brackets in original), and therefore permits "the harsh sanction of exclusion only when [police practices] are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Davis*, 564 U.S. at 240 (quoting *Herring*, 555 U.S. at 144) (second set of brackets in original); see *Herring*, 555 U.S. at 140 ("[E]xclusion 'has always been our last resort.'") (citation omitted).

Suppression therefore is warranted "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Leon*, 468 U.S. at 919 (citation omitted). If "law

enforcement officers have acted in objective good faith," the exclusionary rule does not apply because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 908, 919-920; accord *Davis*, 564 U.S. at 238-241.

This Court has applied the good-faith exception "across a range of cases," including cases like *Leon*, which "held that the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." *Davis*, 564 U.S. at 238-239 (quoting *Leon*, 468 U.S. at 922). The officer in *Leon* submitted an affidavit in a warrant application that served as the basis for the magistrate judge's search warrant, but a court later determined (after the search) that the officer's affidavit was insufficient to establish probable cause. 468 U.S. at 902-903. Although the officer had himself submitted the insufficient affidavit, this Court concluded 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." *Id.* at 921. A law-enforcement officer, the Court reasoned, "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Ibid.* Thus, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations" if the officer's reliance on the warrant is "objectively reasonable." *Id.* at 921-922.

Leon's teachings apply even when no warrant exists. In *Herring*, for instance, officers mistakenly relied on an arrest warrant that had been recalled five months

before they arrested Herring. 555 U.S. at 138-139. The Court explained that, as *Leon* taught, the good-faith inquiry asks the "'objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances,'" which "frequently include [the] particular officer's knowledge and experience." *Id.* at 145 (quoting *Leon*, 468 U.S. at 922). The arresting officer in *Herring* "testified that he had never had reason to question information about [such a] warrant" and other police officials involved had not previously seen such an error "on their watch." *Id.* at 147. As a result, this Court held that, even though the warrant no longer existed by the time of Herring's arrest and even though police officials had negligently failed to remove information about the warrant from the relevant law-enforcement database, suppression was inappropriate because the arresting officer reasonably relied on the (inaccurate) information indicating that the warrant was still outstanding. *Id.* at 145-148; see *id.* at 138, 140 n.1.

Arizona v. *Evans*, 514 U.S. 1 (1995), reached a similar conclusion. In *Evans*, a police officer arrested Evans based on a warrant that had been quashed (and, thus, no longer existed) but that was still listed in a law-enforcement database because a court clerk had failed to inform the sheriff's office that the warrant had been quashed. *Id.* at 4-5. This Court held that evidence seized pursuant to the nonexistent warrant should not be suppressed, because the officer reasonably relied on the police computer record (erroneously) showing that a warrant was outstanding. *Id.* at 15-16. Thus, in *Evans*, as in *Herring* and *Leon*, suppression was unjustified because it could not "be said that the [relevant] law enforcement officer had knowledge, or may properly be

charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Leon*, 468 U.S. at 919 (citation omitted).

b. The same holds true here. In 2014, the agents involved reasonably believed that the Sioux City magistrate judge in the Northern District of Iowa had been cross-designated to issue search warrants for property in the District of Nebraska. Pet. App. 13-14. More than a decade earlier, the Judicial Conference had informed the District Court for the Northern District of Iowa that the Conference had voted to "[d]esignate the full-time magistrate judge position at Sioux City to serve in the adjoining District of Nebraska." C.A. App. Ex. 1 (Mar. 23, 2000 letter). The Chief Judge of the Northern District of Iowa subsequently ordered the appointment of the magistrate judge in question pursuant to Section 631 and "the further authority and action taken by the Judicial Conference." *Id.*, Ex. 101, at 1 (order). The magistrate judge was himself unaware of any problem with the cross-designation of his position; he believed he was "properly cross-designated" and had authority to issue warrants to search in the District of Nebraska. Pet. App. 13-14. The agents at issue had previously obtained such warrants from the same magistrate judge, and they too "believed in good faith [that] the magistrate judge was properly cross-designated." *Ibid.*

Petitioner's recognition (Pet. 9) that it would have been "difficult to determine" whether the cross-designation was "proper" without "delving into records of judicial conferences in years past" underscores the reasonableness of the agents' reliance on the warrant in this case. As the court of appeals recognized, "[t]he exclusionary rule does not exist to require or even encourage [such] law enforcement officers to second guess the

authority of judges to issue warrants." Pet. App. 13. As with the probable-cause determination in *Leon*, "[i]t is the magistrate's responsibility to determine" that the magistrate has authority to issue a warrant; the officers here "cannot be expected to question the magistrate's * * * determination" in that regard; and "[p]enalizing the officer[s] for the magistrate's error" would not logically contribute to the deterrence required to justify the harsh sanction of exclusion. See *Leon*, 468 U.S. at 921.

c. Petitioner appears to argue (Pet. 7-9) that this case is different because the magistrate had "no jurisdiction or authority * * * to issue the warrant" and thus "wholly abandoned his judicial role when he issued a search warrant in a jurisdiction wherein he had no authority," Pet. 8. But "[t]he error in [this] case rests with the issuing magistrate, not the police officer, and 'punish[ing] the errors of judges' is not the office of the exclusionary rule." *Davis*, 564 U.S. at 239 (quoting *Leon*, 468 U.S. at 916); see *id.* at 246 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges.") (citation omitted). This Court has found "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment"; that "lawlessness among these actors requires application of the extreme sanction of exclusion"; or that "exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Leon*, 468 U.S. at 916.

That the error here involved the magistrate judge's authority to issue the warrant does not distinguish this case from other cases in which the good-faith exception applies. Both *Herring* and *Evans* concluded that the

good-faith exception prevented a suppression remedy where law-enforcement officers reasonably, but mistakenly, relied on what they believed to be valid arrest warrants, even though *no* relevant warrant by any judge with authority to issue such a warrant existed at the time of the arrests. It follows *a fortiori* that the agents' reliance on the warrant they directly obtained from the magistrate judge does not call for suppression.

2. Petitioner contends (Pet. 10-12) that review is warranted because the court of appeals' decision in this case conflicts with the Tenth Circuit's decision in *United States* v. *Krueger*, 809 F.3d 1109 (2015). Petitioner is incorrect.

In *Krueger*, the government appealed from a district court's suppression of evidence that had been obtained under a warrant from a magistrate judge in Kansas who authorized the search of a home in Oklahoma. 809 F.3d at 1111. The government limited its appeal to the question whether the district court applied the wrong standard for evaluating "prejudice" from a clear Rule 41 violation. *Id.* at 1113 & n.5. The Tenth Circuit rejected that particular contention, *id.* at 1115-1117, which is not at issue in this case. See Pet. App. 10 (noting that "[petitioner] does not claim to be prejudiced by the [Rule 41] violation" here).

Krueger emphasized that, "consistent with the fundamental rule of judicial restraint," it did *not* decide whether the Rule 41 violation at issue resulted in a Fourth Amendment violation. 809 F.3d at 1114-1115. And because the government did not raise the issues on appeal, it also had "no occasion to consider whether" "the good-faith exception" should apply, *id.* at 1113 n.5, or whether suppression would be warranted if it was "genuinely unclear [when the warrant issued] whether

the federal magistrate judge ha[d] authority to issue an outside-of-district warrant," *id.* at 1113 n.4. As such, nothing in *Krueger* conflicts with the panel's decision based on the good-faith exception in the Fourth Amendment context presented here. Indeed, like the court of appeals in this case, the Tenth Circuit has subsequently held that, even assuming *arguendo* that a search warrant issued for property outside Rule 41(a)'s geographical limitations results in a Fourth Amendment violation, the good-faith exception applies if law-enforcement officers relied in objectively reasonable good faith on the warrant. *United States* v. *Workman*, 863 F.3d 1313, 1317-1321 (2017), petition for cert. pending, No. 17-7042 (filed Dec. 5, 2017); see *id.* at 1319 ("How can [one] say that an agent is unable to rely on a warrant exceeding a magistrate judge's reach if the agent"—as "[i]n *Herring* and *Evans*"—"is able to rely on a warrant that doesn't even exist?").[3]

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[3] Then-Judge Gorsuch's separate opinion in *Krueger* expressed the view that a magistrate judge's warrant exceeding Rule 41's limitations will result in a Fourth Amendment violation if the (effectively) warrantless search that ensues is unreasonable. 809 F.3d at 1123-1125 (Gorsuch, J., concurring in the judgment). But Judge Gorsuch explained that, even if a Fourth Amendment violation results, that "doesn't quite finish the story" because, in light of this Court's good-faith-exception jurisprudence, "suppression [is not] the right remedy" unless suppression can appreciably deter "police misconduct." *Id.* at 1125. Like the *Krueger* majority, Judge Gorsuch did not reach the good-faith-exception question because the government did not present it on appeal. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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