

In the Supreme Court of the United States

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BARBARA E. STEFONEK,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.
—————

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

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REPLY BRIEF FOR THE PETITIONER
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REPLY BRIEF FOR THE PETITIONER

In a brief that is more a grudging acquiescence than an opposition, the government offers only token arguments against review by this Court. On the first question presented, the government concedes (Opp. 7-8) that the search of petitioner's business was the product of a "general" warrant, and that the court of appeals adopted "a novel approach" (*id.* at 6) when it nevertheless declined to suppress the evidence seized. Indeed, the government fails even to address, let alone rebut, the arguments laid out in the Petition (at 13-21) demonstrating that the Seventh Circuit's new "causation" exception to the exclusionary rule conflicts with numerous decisions of this Court and other courts of appeals and guts the express procedural commands of the Fourth Amendment.

Rather than defend the court of appeals' decision on its own terms, the government retreats to the second question presented, which it describes as the "ultimate" issue in this case (Opp. 11): whether evidence seized under a general warrant should be suppressed where "a specific description of the evidence to be seized" is found in an affidavit supporting the warrant. On this question, the government candidly admits (*id.* at 12-14) that, as we demonstrated in the Petition (at 21-25), there is a sharp conflict in the circuits on whether factual specificity in a supporting affidavit can cure a Fourth Amendment defect in a general warrant. And the government agrees, as well, that this important question would ordinarily "merit this Court's review" (Opp. 14).

Even so, the government contends that this case is not the right vehicle to address the questions presented. In the government's view, the circuits that (like the court below) would find a Fourth Amendment violation on these facts would nevertheless, on good faith grounds, decline to suppress the

evidence. Thus, the government reasons, “petitioner cannot establish that any circuit would ultimately require suppression of the evidence seized under the warrant.” Opp. 14.

But far from justifying a denial of certiorari, the government’s rationale only highlights the conflict and confusion in the lower courts. In fact, the courts of appeals are squarely divided on the very legal issue that the government invokes in its rearguard effort to avoid further review: whether the good faith exception applies in the circumstances of this case. Thus, while it is true that a slim “majority” of the circuits (Opp. 15) would apply the good faith exception, it is also true that a strong minority — including the Seventh, Second, Ninth and Tenth Circuits — would not. In the end, even the government is constrained to admit that “there is tension in the approach to the good-faith exception in the circuits.” *Id.* at 19. In fact, as we explain below (at 5-10) and contrary to the government’s assertion (Opp. 14), the evidence admitted against petitioner in this case would be suppressed — and the good faith defense would be rejected — in at least three circuits. See *United States v. George*, 975 F.2d 72, 77 (2d Cir. 1992); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985); *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988).

In the final analysis, the government offers no principled basis for denying further review. It asserts, at bottom, that, although the circuits are in hopeless disarray on the important and recurring Fourth Amendment issues presented in this case, this Court should take a pass because criminal defendants like petitioner invariably lose their motions to suppress in every circuit — although (even in the government’s view) they lose on conflicting, confusing, and erroneous grounds: some courts find no Fourth Amendment violation where a supporting affidavit contains the particularity missing from a warrant; other courts rely on

the good faith exception; while the Seventh Circuit — in a “novel” approach that the government cannot bring itself to defend — applies its own “causation exception” to the exclusionary rule.

This area of Fourth Amendment law is, in short, an intolerable muddle of conflicting decisions. It is simply no answer to suggest, as the government does, that further review is unwarranted because criminal defendants generally lose, one way or the other. That is not true in any event — but more fundamentally, this Court’s role in deciding important issues of federal constitutional and criminal law has never been cabined by such a results-oriented approach. Further review is plainly warranted.

I. THE GOVERNMENT CANNOT AND DOES NOT DEFEND THE SEVENTH CIRCUIT’S “NOVEL” CAUSATION EXCEPTION TO THE EXCLUSIONARY RULE

The government no sooner introduces the Seventh Circuit’s decision than it disavows the court’s analysis (Opp. 6-11). To hear the government tell it, there was no Fourth Amendment violation in the first place (*id.* at 7-8), and, even if there were, the good faith exception would carry the day (*id.* at 8-10). Of course, the court of appeals expressly rejected both of those contentions, finding first that there was a Fourth Amendment violation, and second, that the good faith exception could not apply because the constitutional violation in this case was “patent.” Pet. App. 3a-4a.

As for the Seventh Circuit’s newly minted “causation” exception to the exclusionary rule — the actual rationale for the decision below — the government breathes hardly a word. In two short paragraphs, the government merely quotes from the Seventh Circuit’s opinion and concludes that “the court of appeals correctly declined to apply the exclusionary rule” because there was no “cognizable injury to the petitioner.”

Opp. 10. The government nowhere addresses the substantial flaws in the court’s analysis that we have identified (Pet. 13-21) and that mandate review by this Court.

In the end, even the government is constrained to characterize the decision below as “novel.” And how. The court of appeals’ decision conflicts directly with the decisions of this Court and of other courts of appeals on virtually identical facts (Pet. 13-16). It accords no significance to the established purpose of the particularity clause of the Fourth Amendment to allow those whose property is searched and seized by the government to monitor the scope of the search (*id.* at 16-18). And it finds no support in established exceptions to the exclusionary rule such as the inevitable discovery doctrine (*id.* at 18-21). For all of these reasons, review by this Court is necessary.

II. THE GOVERNMENT’S RATIONALE FOR DEFERRING REVIEW OF THE IMPORTANT AND RECURRING FOURTH AMENDMENT ISSUES PRESENTED IN THIS CASE CANNOT WITHSTAND SERIOUS SCRUTINY

The government freely admits that this case squarely presents no fewer than three issues of law on which the circuits are divided: (1) whether, and under what circumstances, a specific affidavit can render a general warrant compliant with the Fourth Amendment; (2) whether a federal law enforcement officer may rely in good faith on a general warrant in such circumstances; and (3) whether the Seventh Circuit’s “novel” causation exception to the exclusionary rule is a valid application of federal law. Nevertheless, the government opposes review in this case because it maintains that “there is no square conflict in outcomes.” Opp. 20. In other words, the government is content to allow the chaos in this area of the law to roil, so long as the government eventually prevails (for one reason or another) in every circuit.

The government's arguments cannot withstand serious scrutiny for two reasons. First, the government is simply wrong in claiming that petitioner would not prevail in other circuits. In fact, it is quite clear that the Second, Ninth, and Tenth Circuits would have ordered suppression of the evidence in this case, and it seems quite likely that the Third Circuit would also have done so. But more fundamentally, this area of law should not be awash in confusion, even were it true (as it is not) that the government always ends up winning suppression motions, one way or the other. Clarity is essential to Fourth Amendment jurisprudence, because federal law enforcement officers are expected to rely on established Fourth Amendment case law in conforming their conduct to the dictates of the Constitution. This Court's review is necessary to promote that clarity.

A. The Evidence Obtained By The Search In This Case Would Have Been Suppressed In Several Circuits.

After acknowledging that “the conflict on th[e] Fourth Amendment question [in this case] might otherwise merit this Court's review,” the government seeks to avoid review solely on the ground that “petitioner cannot establish that any circuit would ultimately require suppression of the evidence seized under the warrant.” Opp. 14. That claim is mistaken. The Tenth, Second, and Ninth Circuits would almost assuredly have suppressed the evidence in this case. And it seems highly likely that the Third Circuit would have done so as well.

The Tenth Circuit's decision in *United States v. Leary*, 846 F.2d 592 (1988), is completely irreconcilable with the government's position. There, the court made clear that “the Tenth Circuit requires both attachment and incorporation” before a specific affidavit can cure a general warrant. *Id.* at 603 n.20.

Plainly, under that rule, the search in the present case — where there was neither attachment nor incorporation — would have been unlawful. Indeed, the government admits as much. See Opp. 13 (citing *Leary*). Because there is also no reason to believe that the Tenth Circuit would adopt the “novel” exception to the exclusionary rule created by the court below, the government could prevail in the Tenth Circuit only if that court believed that federal law enforcement officers could rely in good faith on a general warrant. But the Tenth Circuit has definitively foreclosed that possibility as well. See *Leary*, 846 F.2d at 609 (“We find the warrant so facially deficient in its description of the items to be seized that the executing officers could not reasonably rely on it”). Petitioner would thus clearly have prevailed in the Tenth Circuit.

So, too, would the Second Circuit have suppressed the evidence on the facts of this case. As we have shown (Pet. 15-16), that court concluded that suppression was appropriate on facts identical to this case in *United States v. George*, 975 F.2d 72 (2d Cir. 1992), although it remanded to allow the government to pursue a “plain view” theory that it had not presented to the district court. The government suggests that it “did not argue in that case that the underlying affidavit was sufficiently specific to support the good faith exception.” Opp. 16. That suggestion is hard to square with the Second Circuit’s twin holdings that “[r]esort to an affidavit to remedy a warrant’s lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it” (975 F.2d at 76) and that the warrant in that case was “so unconstitutionally broad that no reasonably well-trained police officer could believe otherwise.” *Id.* at 77.

The government also contends (Opp. 16) that *George* was somehow overruled by *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993). That is not so. In *Bianco*, the Second Circuit declined to apply

the rule in *George* requiring attachment and incorporation — but only because “under the facts of this case, the functional purposes of those two requirements — to insure that *all parties involved* are informed of the scope of * * * the search — were fully satisfied.” 998 F.2d at 1116-1117 (emphasis added). The *Bianco* court took pains to emphasize the narrowness of this exception to *George*. As the court of appeals explained, the decision not to “adhere to [the] formal requirements of incorporation and attachment” depended upon the fact that it was “clear that both the federal agents and the defendant” were “aware of the scope of and limitations on the search.” *Id.* at 1117. By contrast, where “the scope of and limitations on the search” were *not* “clear” to the defendant, the rule in *George* continues to apply in the Second Circuit. In the present case, of course, the federal agents did not distribute the affidavit or application at any point during the search, and they never provided any indication that their search was limited in any way. See Pet. App. 17a. Accordingly, *Bianco* would be inapplicable in this case; *George* would control; and the Second Circuit would suppress the evidence.

The Ninth Circuit would also have suppressed the evidence on the facts of this case. Indeed, the government forthrightly admits (Opp. 13) that the Ninth Circuit would have found a Fourth Amendment violation, but it speculates that the court would nonetheless have applied the good faith exception and declined to suppress the evidence. But the government does not even cite — let alone attempt to distinguish — the Ninth Circuit case we have shown to be in conflict with the decision below. See Pet. 15-16 (citing *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985)).

Nor does the government successfully distinguish three other cases that also compel the conclusion that the Ninth Circuit would have suppressed the evidence in this case: *United States v. Spilotro*, 800

F.2d 959 (9th Cir. 1986); *Center Art Galleries — Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989); *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995). To the contrary, the government acknowledges that “[l]anguage in those cases suggests that the Ninth Circuit might have suppressed the evidence in this case.” Opp. 17. But it is more than just “language” in the Ninth Circuit that cuts against the government’s position — it is *holdings*. The government’s contrary view rests on a misreading of the case law. Thus, for example, the government distinguishes *Center Arts* on the ground that “in that case, unlike here, the searching officers did not limit the search and seizure to the subjects described in the affidavit.” Opp. 18. The government seems to suggest that the Ninth Circuit would apply the good faith exception where the federal agents limited their search to the scope of the affidavit. But that contention overlooks the fact that, in the Ninth Circuit, “th[e] ‘good faith exception’ is not available even when ‘the agents confine their search to the scope of the affidavit’ submitted in support of [the] application.” *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998) (quoting *United States v. McGrew*, 122 F.3d 847, 850 n.5 (9th Cir. 1997)).

The government also contends that the Ninth Circuit’s decision in *United States v. Luk*, 859 F.2d 667 (1988), demonstrates that, on the facts of this case, that court would apply the good faith exception. The government recognizes that “subsequent Ninth Circuit cases have given a considerably narrower application to the good-faith exception tha[n] did the panel in *Luk*” (Opp. 19), but it notes that “*Luk* has not been overruled.” *Ibid.* *Luk* is easily distinguishable, however, because it dealt with a search warrant that was considerably more particularized than was the warrant in the present case. Far from authorizing the seizure of “evidence of a crime,” the warrant in *Luk* called for the seizure of:

(1) export records including purchase orders, invoices, proforma invoices, commodity brochures, requests for price quotation, correspondence, export license applications, export licenses, export regulations, notes, air waybills, shipper's letters of instruction, shipper's export declarations, parcel-post receipts, and telexes relating to McCall Resources, Inc.; (2) financial records including letters of credit, or other payment records such as canceled checks, delivery receipts; (3) telephone and communications records and correspondence, including telephone message records and bills, and; (4) any and all other documents, books, and records relating to exports from the United States which are the fruits, instrumentalities and evidence of violation of Title 50, United States Code, Appendix, Section 2410(a), et seq., to include equipment destined for exportation in violation of U.S. law.

Luk, 859 F.2d at 670 n.4. The Ninth Circuit found even this warrant to violate the particularity clause; nevertheless, it found that — when construed in conjunction with a more specific affidavit — an officer could rely on such a description in good faith. Plainly, however, the *Luk* case offers cold comfort to officers who claim to rely, in good faith, on a warrant that purports to authorize the wholesale seizure of all “evidence of a crime.” Pet. App. 28a. Indeed, the court in *Kow* recognized that the holding in *Luk* was limited on precisely that basis (see 58 F.3d at 429), a fact that the government notes (Opp. 19), but to which it has no response. It is therefore clear that the Ninth Circuit would suppress the evidence obtained as a result of the search in this case.

The Third Circuit would also likely suppress the evidence in this case. Again, the government concedes that the Third Circuit would conclude that the facts of this case give rise to a Fourth Amendment violation. Opp. 13. And although the Third Circuit appears never to have addressed the good-faith issue on facts like these, certainly the government has provided no reason why that court would disregard this Court's express command that “[s]uppression * * * remains an appropriate remedy” when a warrant

“fail[s] to particularize the place to be searched or the things to be seized.” *United States v. Leon*, 468 U.S. 897, 923 (1984).

At the end of the day, the government has failed to support its one argument against further review here. If petitioner’s business had been located in Denver, New York, San Francisco, or Philadelphia (rather than Milwaukee), the evidence obtained in the search of her business would have been suppressed. Thus, the “square conflict in outcomes” that the government denies (Opp. 20) is in fact present. Nevertheless, as we next show, further review would be appropriate here even in the absence of a square conflict in outcomes because in the Fourth Amendment area especially, legal principles, not simply outcomes, must be clear and uniform.

B. Review Of The Circuit Splits Presented In This Case Would Be Appropriate Even If There Were No Square Conflict In Outcomes.

Even if, contrary to the wall of authorities cited above from circuits across the country, the government were correct that there is no square conflict in the *dispositions* of suppression motions in cases where the government relies on a supporting affidavit to cure the constitutional defect in a general warrant, review by this Court is still plainly necessary. The fact that the federal courts of appeals are in sharp conflict over whether the Constitution is violated on the facts of this case is intolerable — particularly in the Fourth Amendment context, where this Court’s decisions on the exclusionary rule are intended principally to guide law enforcement officers.

As this Court has explained many times, “[t]he primary justification for the exclusionary rule * * * is the deterrence of police conduct that violates Fourth Amendment rights.” *Stone v. Powell*, 428 U.S.

465, 486 (1976); see *United States v. Leon*, 468 U.S. 897, 916 (1984) (“the exclusionary rule is designed to deter police misconduct”). The judicial guidance to law enforcement officers across the nation on the issues presented in this case, however, is a jumbled mix of confusing decisions. An FBI agent working on a case spanning two circuits may be subject to two different constitutional rules governing her conduct in executing search warrants. In one circuit, a general warrant supported by a particularized affidavit may be constitutional. In the other circuit, executing the same warrant and affidavit may be unconstitutional. Even if *neither* circuit would ultimately suppress the evidence, that may provide little guidance to the agent for at least two reasons.

First, even if the evidence is admissible under the good faith exception to the exclusionary rule in a circuit that would find a constitutional violation, the agent may still be liable for damages in a civil action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), by the person whose Fourth Amendment rights were violated. Second, even if the agent were concerned solely about the admissibility of the evidence in a criminal prosecution and not about her own liability, she could have no confidence that a circuit that has applied the good faith exception in the past will continue to do so in case after case presenting the same constitutional violation. At some point, the court would be forced to conclude that the same continued violations of the Fourth Amendment — in the face of judicial decisions declaring the underlying search to be unconstitutional — could not have been undertaken in good faith.

Thus, it is the *legal principles* — the meaning of the Fourth Amendment and the contours of the exclusionary rule — that matter, and not whether suppression motions are ultimately granted or denied. Petitioner and the government agree that the state of the law on the important questions presented in this

case — whether the Fourth Amendment was violated and whether the good faith exception or the “causation” exception to the exclusionary rule applies — is a shambles. This Court should grant the Petition to resolve these questions definitively. There are no procedural impediments or factual anomalies cluttering the record. All of the issues are presented cleanly on a factual record that is recurring. The only rationale offered by the government for deferring review of these issues — that petitioner would not win her suppression motion in any circuit — is plainly wrong as a matter of law, and in any event is not a persuasive basis for withholding this Court’s certiorari jurisdiction. Review is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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