

In the Supreme Court of the United States

—————
BARBARA E. STEFONEK,
PETITIONER,

v.

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

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

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PETITION FOR A WRIT OF CERTIORARI
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QUESTIONS PRESENTED

Federal agents in this case searched petitioner's business pursuant to a warrant broadly authorizing the seizure of any "evidence of a crime," and they seized certain business records. The court of appeals concluded that this was a "general warrant" in violation of the Fourth Amendment, because it failed to state with particularity the items to be seized. The court further determined that the constitutional error was not harmless and that the agents could not have relied in good faith upon a warrant with such a patent defect. It nevertheless declined to hold that the evidence used to convict petitioner should have been suppressed, because (1) the agent obtaining the warrant had provided an affidavit to the magistrate judge listing with specificity the items to be seized, and (2) the agent obtaining the warrant had also executed the search and done so in apparent compliance with the scope set forth in the affidavit. The court held that this case falls within a new exception to the exclusionary rule because the violation of the Fourth Amendment "had no causal relation to the scope of the search or the quantity or character of the evidence seized." App., *infra*, 6a.

This case presents two questions:

1. Whether evidence obtained pursuant to a general warrant broadly authorizing the seizure of any "evidence of a crime" may be admitted during a prosecutor's case in chief based on a new "causation" exception to the exclusionary rule.
2. Whether, or under what circumstances, evidence obtained pursuant to a warrant that fails to comply with the Fourth Amendment's particularity requirement can be admitted based on factual specificity in the affidavit used to secure the warrant.

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PETITION FOR A WRIT OF CERTIORARI

Barbara E. Stefonek respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 179 F.3d 1030. The opinions of the district court (App., *infra*, 9a-11a) and the magistrate judge (App., *infra*, 12a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1999. App., *infra*, 1a. On August 23, 1999, Justice Stevens granted an extension of time in which to file a petition for a writ of certiorari to and including October 1, 1999. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

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

In this case, the Seventh Circuit permitted the admission of evidence obtained pursuant to a warrant broadly describing the items to be seized only as “evidence of a crime.” The court acknowledged that such a “general warrant” was in direct contravention of the particularity requirement of the Fourth Amendment. It admitted, as well, that the constitutional error was not harmless, and it found that no federal agent could

have relied in good faith on a general warrant of the kind involved here, because the “defect in th[is] warrant was patent.” App., *infra*, 4a. Nevertheless, the court of appeals declined to suppress the fruits of the search conducted under the warrant because — it held — the constitutional violation did not directly cause harm to any interest it perceived as protected by the “policy” underlying the Fourth Amendment. Because the Seventh Circuit’s application of its new “causation” exception to the exclusionary rule is contrary to the decisions of this Court and threatens to eviscerate the express procedural commands of the Fourth Amendment, further review is plainly warranted.

In addition, this case presents an appropriate vehicle for this Court to resolve a deep and abiding conflict among the federal circuits and state appellate courts. The issue arises when a warrant fails to comply with the Fourth Amendment’s particularity requirement, but the affidavit submitted by the agent in support of the warrant enumerates the items to be seized with reasonable specificity. Federal and state appellate courts have adopted a variety of positions on the circumstances under which evidence obtained pursuant to such a warrant may be admitted against a defendant. This Court should grant review in this case to resolve that important and recurring question of federal constitutional law.

A. Factual Background

1. Petitioner Barbara Stefonek is a psychiatric nurse who, in conjunction with another nurse, Edith Polzin, created a series of small businesses that provided nursing and related health care services to Medicare and Medicaid beneficiaries. The businesses shared leased space at 3333 North Mayfair Road in Wauwatosa, Wisconsin. R. 26:17.^{1/}

^{1/} Record citations follow the abbreviation used in the court of appeals for documents in the clerk’s record (“R.”). The Appendix to petitioner’s brief in the court of appeals is referred to as “C.A. App.”

Based in part on information he received from a confidential informant, Special Agent Dennis Mastin of the Office of the Inspector General, United States Department of Health and Human Services, believed that Stefonek and Polzin had improperly placed personal housekeepers on the payrolls of their companies. According to the confidential informant, the housekeepers had been listed as maintenance workers, so the government would reimburse the cost of their salaries. App., *infra*, 30a.

Special Agent Mastin prepared an affidavit in support of an application for a warrant to search the premises at 3333 North Mayfair Road. App., *infra*, 30a-32a. In the affidavit, Mastin described the evidence he sought as “evidence in support of violations of Title 42, U.S. Code, Section 1320a-7b, in particular, payroll records, time cards, general ledgers, W-2 forms, 1099 forms, cost report preparation files, work papers used to prepare cost reports, personnel files, computer generated reports, memorandum regarding cost report preparations, handbooks, training books, invoices of credit card charges or statements of account, and other documentation used in the preparation of Medicare cost reports from the calendar years 1987 through the present.” App., *infra*, 32a. Those same items were specified in the application for the search warrant. *Id.* at 29a. After visiting the building to investigate the layout of the premises (R. 26:68-69), Mastin stated in the affidavit his belief that “there is probable cause that the items set forth in the application for a search warrant will be in the offices identified as 3333 North Mayfair Road, Units 101, 102, and 103, Wauwatosa, Wisconsin.” App., *infra*, 32a.

On April 3, 1995, United States Magistrate Judge Patricia J. Gorence issued a warrant to search the premises at 3333 North Mayfair Road. App., *infra*, 28a. The search warrant described the place to be searched as “3333 North Mayfair Road, Units 101, 102, & 103, Wauwatosa, Wisconsin.” *Ibid.* In stark contrast to the affidavit — which specified particular items to be seized — the warrant broadly au-

thorized the seizure of any “evidence of a crime.” *Ibid.* The warrant did not in any way incorporate the affidavit or any other portion of the warrant application that had been submitted to the magistrate. *Ibid.*

2. Armed with this warrant, Special Agent Mastin and 22 other federal agents searched the premises at 3333 North Mayfair Road. R. 26:64. Prior to executing the warrant, Mastin briefed 10 or 11 agents about the nature of the documents they were seeking. *Ibid.* Mastin told each agent to review a document and, if the agent thought it was covered by the search warrant, to allow Mastin to confirm that belief. R. 26:64-65.

Edith Polzin, who was present for the execution of the warrant, estimated that the search lasted a couple of hours. R. 26:16. Although Mastin had the supporting affidavit and application with him, he provided Polzin with only the warrant itself. R. 26:66. Federal agents seized numerous materials in the search. C.A. App. 98-102. Most of the materials seized by the agents were located in Unit 104 of 3333 North Mayfair Road, an area not mentioned in the warrant as a place to be searched. App., *infra*, 3a.

Based almost entirely on the documentary evidence seized from 3333 North Mayfair Road, a grand jury returned an eleven-count indictment against petitioner Stefonek and Polzin on March 25, 1997. R. 1. Nine of the counts pertained to petitioner. The indictment charged her with one count under 18 U.S.C. § 371 of conspiracy to defraud the government by listing the salaries of personal housekeepers as business expenses and by failing to report the housekeepers’ salaries as personal income; three counts under 18 U.S.C. § 1001 of wilfully filing materially false home office cost statements; two counts under 26 U.S.C. § 7206(1) of wilfully filing materially false personal income tax returns in 1991 and 1992; two counts of wilfully failing to collect and pay over payroll taxes for fourth quarter 1994 and first quarter 1995; and one

count under 26 U.S.C. § 7212(a) of corruptly obstructing an IRS investigation of unpaid payroll taxes. R. 1; C.A. App. 68.

B. Proceedings Below

1. Before trial, petitioner filed a motion to suppress the fruits of the search at 3333 North Mayfair Road, claiming both that the warrant was defective for failing to specify with particularity the items to be seized and that the search had impermissibly exceeded the places specified in the warrant. On August 12, 1997, a magistrate judge conducted an evidentiary hearing on the motion to suppress. R. 26.

On September 19, 1997, the magistrate judge issued a recommendation that petitioner's motion to suppress be denied. App., *infra*, 12a-26a. The magistrate concluded that the "evidence of a crime" description contained in the warrant "was not overly general in light of the fact that the warrant, as well as the more specific application and affidavit, were all presented to the issuing magistrate and taken to the location of the search." App., *infra*, 26a. The magistrate characterized as "[u]nfortunate[]" Special Agent Mastin's failure to provide Polzin or other occupants with the application, affidavit, or any other indication that the search was limited in any way, but declined to recommend the suppression of the evidence on that basis because "[a]ny questions the occupants had regarding the scope of the search could have been directed to" Special Agent Mastin. *Id.* at 17a.

The magistrate also declined to recommend the suppression of the evidence on the grounds that the federal agents had exceeded the scope of the warrant by seizing items from Suite 104, a place not specified in the warrant. Assuming for the sake of his decision that the disputed materials were clearly located in Suite 104, the magistrate nevertheless found that the search "was tantamount to a search of an

undisclosed multi-unit structure” and therefore valid “because * * * [Stefonek and Polzin] had access to and control over the entire premises.” App., *infra*, 24a-25a. The magistrate concluded that “even if Mastin knew the records were in 104,” and even if it should have been clear that the records were in a Suite that was separate and distinct from the area specified in the warrant, “Mastin was still correct in searching Suite 104.” *Id.* at 25a.

2. Petitioner Stefonek noted her objections to the decision of the magistrate, but on October 22, 1997, the district court “adopt[ed] the conclusions and reasoning of the Magistrate as its own.” App., *infra*, 9a. With respect to the lack of particularity of the warrant, the district court held that “the Magistrate was correct in concluding that the warrant was rehabilitated by the supporting affidavit and application.” *Ibid.* Regarding the violation of the scope of the warrant, the district court simply “adopt[ed] the Magistrate’s Recommendation as its decision and rationale therefor.” *Id.* at 10a.

At Stefonek’s trial, the government introduced the seized evidence.^{2/} On November 25, 1997, the jury found her guilty on all counts. R. 115. The district court thereafter sentenced her to fifteen months in prison and three years of supervised release. *Ibid.*; C.A. App. 11-12.

3. A panel of the Seventh Circuit (per Posner, C.J.) affirmed Stefonek’s conviction. App., *infra*, 1a-8a. The court first disposed of the issue concerning the scope of the search. In response to Stefonek’s claim “that the search exceeded the bounds described in the application and warrant” (*id.* at 3a), the court agreed that “it did — the warrant listed only suites 101, 102, and 103 in the building in which

^{2/} Petitioner’s co-defendant, Edith Polzin, pleaded guilty to the first count of the indictment. See App., *infra*, 3a.

[Stefonek's] businesses were located and most of the evidence that she seeks to suppress was found in adjacent suite 104." *Ibid.* Nevertheless, the court declined to reverse the district court's order denying suppression on this basis because "the match was close enough to satisfy the Fourth Amendment" and because, in the Seventh Circuit's view, "the division of the interior into separately numbered suites" was "obscure." *Ibid.*

As for Stefonek's particularity challenge, the court agreed that a warrant authorizing agents in sweeping fashion to seize any "evidence of a crime" failed to "satisfy the Fourth Amendment's requirement that a search warrant 'particularly describ[e] * * * the things to be seized.'" App., *infra*, 3a. Indeed, the court recognized that "[s]o open-ended is the description that the warrant can only be described as a general warrant, and one of the purposes of the Fourth Amendment was to outlaw general warrants." *Ibid.*

The court of appeals also rejected the government's argument — and the district court's holding — that the "general warrant" was cured by the specificity of the agent's affidavit. The court stated that it would have accepted that contention "if the warrant had incorporated the affidavit by reference, * * * but it didn't. The Fourth Amendment requires that the warrant particularly describe the things to be seized, not the papers presented to the judicial officer * * * asked to issue the warrant." App., *infra*, 3a-4a.

Nor, the court of appeals added, was the admission of the evidence at trial harmless. Admitting the seized evidence "was not a harmless error in the sense that we can be confident that [Stefonek] would have been convicted anyway; the evidence was important to the government's case." App, *infra*, at 6a. Indeed, the court recognized that the challenged evidence may have been "essential to proving [Stefonek's] guilt." *Id.* at 4a.

Having rejected all of the government's reasons for approving the search, the Seventh Circuit observed that "[a]ny evidence seized when the constitutional limits were exceeded would have to be suppressed, unless the officers were able to squeeze themselves into the exception that the Supreme Court created in *United States v. Leon*, 468 U.S. 897 (1984), for unconstitutional searches conducted in good-faith reliance on a warrant." App., *infra*, 4a. But the court found that escape route blocked as well. Applying the good-faith exception in this case "would be difficult to do * * * because the defect in the warrant was patent." *Ibid.*

The court nevertheless declined to suppress the evidence. To reach that result, the court crafted a new "causation" exception to the exclusionary rule. App., *infra*, 4a-6a. Because the exclusionary rule is "a rule of federal common law (that is, of judge-made law) rather than a part of the Fourth Amendment itself," the Seventh Circuit understood it to be "amenable to judge-made adjustment." App., *infra*, 5a. In fashioning its own unique "adjustment," the court began with the premise that "exclusion of the evidence seized under the warrant would be a disproportionate sanction." *Ibid.* Critical to the court's conclusion that applying the exclusionary rule here would be "disproportionate" was its estimation of the costs and benefits of applying the rule. It observed generally that "[e]vidence that the exclusionary rule might require judges to suppress could be essential to the conviction of a criminal, while the violation of the Fourth Amendment that has led to the suppression might have imposed a cost on the criminal that was trivial in relation to the social cost of allowing a guilty criminal to walk." *Ibid.* The court felt that "[i]n this case the cost was zero." *Ibid.*

The court fixed the costs to petitioner as “zero” as a result of its new “causation” exception to the exclusionary rule. The Seventh Circuit relied by analogy on the “inevitable discovery” exception to the exclusionary rule, which the court understood to permit the admission of evidence obtained pursuant to a recognized Fourth Amendment violation “if it is shown that the evidence would ultimately have been seized legally if the constitutional violation had not occurred.” App., *infra*, 5a. In this case, the court concluded that “if the warrant had complied with the Fourth Amendment, the very same evidence would have been seized as was seized, because we know that Magistrate Judge Gorence intended to permit the search and seizure that occurred: it was the very search and seizure specified in the application for the warrant that she issued.” *Id.* at 6a. Confident “that no lawful interest of [petitioner’s] was harmed by the constitutional error, and equally that the taxpaying public will be harmed if her conviction is thrown out because of the error” (*ibid.*), the court announced its new “causation” exception to the exclusionary rule: “Where a violation of the particularity requirement of the Fourth Amendment can be shown to have had no causal relation to the scope of the search or to the quantity or character of evidence seized, suppression of the evidence is not a proper sanction.” *Ibid.*

The court justified its new exception on the ground that the unconstitutional search in this case “caused no harm to the policy that underlies the requirement that a search warrant describe with particularity what is to be seized.” App., *infra*, 4a. The “purpose” of the particularity requirement, the court explained, is “to make sure that a search pursuant to a warrant does not invade the property and privacy of the individual whose premises are to be searched, and property seized, beyond what is necessary to achieve a valid law enforcement purpose as determined by a judicial officer.” *Ibid.* The court

noted in passing the conclusion of many other courts — including this Court — that a central purpose of the particularity requirement is to “inform[] the person whose premises are to be searched of the scope of the search, so that he (or, as in this case, she) can monitor the search while it is being conducted and make sure it stays within bounds.” *Id.* at 4a-5a. It ultimately concluded, however, that such a purpose “has no relevance to this case” because “[petitioner] was not present when the search was conducted.” *Id.* at 5a.

Applying its new rule, the court affirmed the district court’s denial of Stefonek’s motion to suppress. App., *infra*, 4a. Although it affirmed Stefonek’s conviction, the court vacated her sentence and remanded for a redetermination by the district court. *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

As it pertains to the particularity of search warrants, the text of the Fourth Amendment is clear and exacting: warrants must “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. Const., amend. IV. This Court has diligently enforced that constitutional command, explaining that “[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, **nothing** is left to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196 (1927) (emphasis added).

Because of the clarity of the constitutional text, “[t]he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.” *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). And the principal means of effectuating the particularity requirement is suppression of all evidence seized pursuant

to an overbroad, general warrant. See, e.g., *United States v. Christine*, 687 F.2d 749, 757 (3d Cir. 1982); *People v. Roccaforte*, 919 P.2d 799, 802 (Colo. 1996).

The court of appeals had no quarrel with the conclusion that the general warrant issued in this case did not satisfy the Fourth Amendment, or that the search conducted pursuant to the warrant was in plain violation of petitioner's constitutional rights. But the court nevertheless affirmed petitioner's conviction, which had been secured solely on the basis of evidence obtained through the unconstitutional search. The court justified that result by explaining that the Constitution provided no remedy for the wrong that the government had concededly inflicted upon petitioner.

To reach that result, the court of appeals created a dramatic new exception to the exclusionary rule. The court characterized its new rule as relying on the lack of causation between the admitted constitutional violation and the harm to petitioner (App., *infra*, 6a), but the court's application of its rule departed from any existing precedent. A lack of causation can, under certain limited circumstances, provide the basis for a court to decline to apply the exclusionary rule; that is the basis for the recognized "independent source" and "inevitable discovery" exceptions to the rule. See generally *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Nix v. Williams*, 467 U.S. 431 (1984). The court of appeals did not rely on either of those doctrines, although it found the inevitable discovery exception "most pertinent." App., *infra*, 5a.

Further review by this Court of the decision in this case is necessary because the new exception to the exclusionary rule — as articulated and applied by the court below — threatens to destroy the rule itself. The Seventh Circuit’s decision directly conflicts with this Court’s precedents and with the decisions of other courts of appeals. It completely fails to recognize one of the central rights protected by the particularity requirement of the Fourth Amendment: the right of those whose property is searched to monitor the search and to ensure that it remains within constitutional bounds. And it finds no support — even by analogy — in the “inevitable discovery” doctrine. Because the Seventh Circuit’s novel exception to the exclusionary rule is unworkable in practice and unfounded in theory, this Court’s review is needed.

Further review is also necessary to address a deep conflict among the federal and state courts regarding the circumstances under which a specific affidavit can cure a defect in a warrant lacking sufficient specificity. Although virtually every other court has addressed this issue in the context of determining whether a search violates the Fourth Amendment, the court of appeals in this case — assuming that a Fourth Amendment violation had occurred — relied upon the exact same considerations in holding that application of the exclusionary rule was not an appropriate remedy. This case therefore presents the question whether specificity in an affidavit can be the basis for allowing the admission of evidence obtained pursuant to a general warrant. This Court should grant review to resolve that important and recurring question of federal constitutional law.

I. THE SEVENTH CIRCUIT'S NEW "CAUSATION" EXCEPTION TO THE EXCLUSIONARY RULE IS A RADICAL DEPARTURE FROM THIS COURT'S PRECEDENTS

In crafting its new "causation" exception to the exclusionary rule, the court of appeals was required to depart significantly from existing law. Indeed, the court's holding conflicts directly with the decisions of this Court and of other courts of appeals on virtually identical facts. 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. And it finds no support in established exceptions to the exclusionary rule such as the inevitable discovery doctrine. For all of these reasons, further review by this Court is necessary.

A. The Seventh Circuit's New "Causation" Exception To The Exclusionary Rule Conflicts With Decisions Of This Court And Of Other Courts Of Appeals

1. Under this Court's longstanding precedents, the primary purpose of the exclusionary rule is to deter those who execute searches from violating the Fourth Amendment. See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."). But the Court has also clarified that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). For that reason, this Court refuses to suppress evidence obtained by the police in good-faith reliance on a defective warrant. *United States v. Leon*, 468 U.S. 897 (1984). The Court found that result appropriate because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id.* at 916.

The Court in *Leon* noted that the deterrence goals underlying the exclusionary rule would be served whenever “a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” *Leon*, 468 U.S. at 923 n.23. One example of such a situation, the Court observed, is where the searching officer relies on a warrant that “fail[ed] to particularize the place to be searched or the things to be seized.” *Id.* at 923. The deterrence rationale of the exclusionary rule was fully satisfied in such a case, the Court explained, because reliance on such a warrant is objectively unreasonable; accordingly, “[s]uppression * * * remains an appropriate remedy.” *Ibid.*

The court of appeals in this case ruled that the good-faith exception, as articulated in *Leon*, could not be applied on the facts here, because “the defect in the warrant was patent.” App., *infra*, 4a (citing *Leon*, 468 U.S. at 923). Inexplicably, however, the lower court simply ignored this Court’s teaching that the exclusionary rule was appropriately applied in this situation.

Of course, the facts of this case (and of the patent-defect exception in *Leon*) are entirely consistent with the exclusionary rule’s assumption “that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.” *Tucker*, 417 U.S. at 447. Given the patent invalidity of the search warrant issued in this case, Special Agent Mastin must have either (1) failed to read the document granting him the power to search and seize petitioner’s property, or (2) knowingly executed a general warrant. Viewed most favorably to Special Agent Mastin, his conduct was at least reckless, and the deterrence rationale of the exclusionary rule is therefore fully appropriate here. Costs are imposed on society when law enforcement officers are encouraged to overlook the limitations imposed by the terms

of a warrant. For that reason alone, the court of appeals was wrong when it asserted that “the cost” of the Fourth Amendment violation in this case “was zero.” App., *infra*, 5a.

2. In abandoning this Court’s consistent understanding of the exclusionary rule, the decision below necessarily conflicts with the decisions of other courts of appeals that have followed the law on strikingly similar facts. For example, in *United States v. George*, 975 F.2d 72 (1992), the Second Circuit considered a warrant that, after enumerating certain items, authorized the seizure of “any other evidence relating to the commission of a crime.” *Id.* at 74. As in the present case, the court of appeals concluded that such a warrant was a general warrant. *Id.* at 76 (“authorization to search for ‘evidence of a crime,’ that is to say, any crime, is so broad as to constitute a general warrant”). As in the present case, the government argued that the general warrant could be cured by a specific affidavit. See *ibid.* As in the present case, the officer swearing out the affidavit was one of many officers who executed the search. See *id.* at 74-75. As in the present case, the court concluded that the affidavit could not cure the constitutional violation. *Id.* at 76. And, as in the present case, the court rejected *Leon*’s good-faith exception to the exclusionary rule because no officer could reasonably have relied in good faith on a general warrant. *Id.* at 77-78. But unlike the present case, the *George* court did not create a new exception to the exclusionary rule. Rather, it applied existing law and determined that the evidence had to be suppressed, although it remanded to allow the government to pursue a “plain view” theory that the district court had not considered. *Id.* at 80. See also *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985) (suppressing evidence where a specific affidavit was submitted in support of an application for a warrant, the magistrate

issued a general warrant, and the agent executing the search was familiar with the content of the affidavit and believed that he was bound by its terms).

B. The Seventh Circuit’s New Exception To The Exclusionary Rule Trivializes Petitioner’s Recognized Interest In Monitoring The Scope Of A Search

Relying on its understanding of the “policy that underlies the requirement that a search warrant describe with particularity what is to be seized” (App., *infra*, 4a), the court of appeals reasoned that — although the **text** of the particularity clause of the Fourth Amendment was indisputably violated here — its underlying “policy” was not. *Id.* at 4a-5a. In the court of appeals’ view, the sole “policy” underlying the Fourth Amendment’s prohibition on general warrants is “to make sure that a search pursuant to a warrant does not invade the property and privacy of the individual whose premises are to be searched, and property seized, beyond what is necessary to achieve a valid law enforcement purpose as determined by a judicial officer.” *Id.* at 4a.

The court of appeals was certainly correct that one important purpose of the Fourth Amendment’s requirement of particularity is to ensure that any searches executed pursuant to a warrant also comport with the Amendment’s general requirement of reasonableness. But the court was wrong to view this as the **only** purpose of the particularity requirement. This Court and others have consistently recognized that the particularity requirement also protects the individual’s right to monitor official compliance with the terms of the warrant. Only by trivializing this established purpose of the particularity clause — and the associated harm to the petitioner resulting from the violation of that purpose — could the court justify the admission of the evidence obtained pursuant to the general warrant in this case.

This Court has repeatedly stated that individuals have an interest in monitoring the scope of government searches conducted under warrants. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (“[T]he possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring ‘the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.’”) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977), reversed on other grounds, *California v. Acevedo*, 500 U.S. 565 (1991)); *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967).

Courts have uniformly recognized that purpose of the particularity clause when permitting specific affidavits to cure general warrants. Thus, “[t]he rule requiring affidavits to accompany warrants lacking particularity serves not one, but two aims: ‘The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer’s discretion and **to inform the person subject to the search what items the officers executing the warrant can seize.**’” *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997) (quoting *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986) (emphasis added)). Other courts are in agreement. See, e.g., *United States v. Bianco*, 998 F.2d 1112, 1116-1117 (2d Cir. 1993); *United States v. Beaumont*, 972 F.2d 553, 561 (5th Cir. 1992); *State v. Riley*, 846 P.2d 1365, 1369 (Wash. 1993); *State v. Schmitz*, 474 N.W.2d 249, 253 (N.D. 1991). Thus, to give some meaning to that critical function of the Fourth Amendment’s particularity requirement, “[i]t is the government’s duty to serve the search warrant on the suspect, and the warrant must contain, either on its face or by attachment, a sufficiently particular description of what is to be seized.” *McGrew*, 122 F.3d at 850.

The decision below, while acknowledging that “[t]he cases do mention this as being an additional purpose of the requirement” (App., *infra*, 5a), completely trivialized that purpose of the particularity requirement in its legal analysis. Indeed, only by trivializing it could the court conclude that “the violation of the Fourth Amendment in this case did no harm to any of the interests that the amendment protects.” *Ibid.*^{3/}

The court dismissed the monitoring purpose of the particularity clause as having “no relevance to this case” because petitioner “was not present when the search was conducted.” App., *infra*, 5a. But it cannot possibly be the law that the police can eviscerate petitioner’s monitoring interest by the simple expedient of waiting until she leaves the premises before executing the search. And the court completely ignored the fact that, although petitioner was not present at the time of the search, her business partner and other of her agents were. The court of appeals did not even purport to explain why petitioner’s interest in monitoring the search of her business records could not be vindicated by her business agents.

C. The Seventh Circuit’s New Exception To The Exclusionary Rule Finds No Support In The “Inevitable Discovery” Doctrine

As support for its causation exception to the exclusionary rule, the court below observed that “the exception that is most pertinent to this case goes by the name of ‘inevitable discovery’ and refuses to

^{3/} This Court has disagreed in the past with the Seventh Circuit’s narrow conception of the interests protected by the Fourth Amendment. In *Soldal v. County of Cook*, 942 F.2d 1073, 1080 (7th Cir. 1991) (en banc) (Posner, J.), the Seventh Circuit concluded that no “seizure” had occurred for Fourth Amendment purposes when a mobile home was physically disconnected and forcibly removed from its location in a mobile home park because “no interest protected by the Fourth Amendment is involved.” In a unanimous opinion, this Court reversed, rejecting the “narrow reading of the [Fourth] Amendment” adopted in the court of appeals. 506 U.S. 56, 62 (1992). While finding the Seventh Circuit’s approach “both interesting and creative” (*id.* at 69), the Court was constrained to reverse the “novel holding below.” *Id.* at 62.

suppress evidence seized in an unconstitutional search if it is shown that the evidence would ultimately have been seized legally if the constitutional violation had not occurred.” App., *infra*, 5a. But the inevitable discovery doctrine can provide no support — by analogy or direct application — for the court’s new rule.

In support of its analogy to the inevitable discovery doctrine, the court of appeals cited three cases. See App., *infra*, 5a. But what those three cases have in common is the critical element that prevents this case from falling within the doctrine. Far from assuming that the results of a given unconstitutional action would have been the same in the absence of the illegality, the inevitable discovery rule permits the admission of evidence only where a source **independent of the illegal source** would inevitably have obtained the evidence.

The first case cited by the court of appeals is this Court’s decision in *Nix v. Williams*, 467 U.S. 431 (1984). In that case, the constitutional violation resulted from improper police interrogation. As a result of the interrogation, the police had discovered the location of the body of a murder victim. The Court permitted the admission of evidence concerning the condition of the body because the body would inevitably have been discovered by a team of volunteers whose search was already nearing the location of the body at the time it was found. *Id.* at 449-450. Thus, it was an independent lawful means of discovery that permitted the admission of the evidence. *Id.* at 444.

The Seventh Circuit also cited the Second Circuit’s decision in *United States v. Cabassa*, 62 F.3d 470 (2d Cir. 1995), in support of its inevitable discovery analogy. App., *infra*, 5a. Far from supporting the decision below, however, *Cabassa* conclusively demonstrates its novelty. First, in *Cabassa*, the government argued for application of the inevitable discovery exception because — at the time federal

agents unconstitutionally entered the defendant’s apartment — a **separate** team of agents was working on obtaining a warrant. 62 F.3d at 471-472. It therefore complied with the requirement of discovering the evidence through a source independent of the underlying constitutional violation. Second, the *Cabassa* court emphasized that the independence of the alternative source of discovery was not just a factual fortuity — it was a necessary condition for the application of the inevitable discovery exception: “For inevitable discovery to be demonstrable, it must be the case that the evidence would have been acquired **lawfully through an independent source** absent the government misconduct.” *Id.* at 473 (quoting *United States v. Eng*, 997 F.2d 987, 990 (2d Cir. 1993) (emphasis added)). Finally, the *Cabassa* court **reversed** the district court’s application of the inevitable discovery doctrine, finding on the record before it — as is equally true here — that “no one can say with any certainty” precisely what would have occurred had the federal agents complied with the Constitution. *Cabassa*, 62 F.3d at 474.^{4/}

* * * * *

For over eighty-five years, this Court has recognized that “[i]f * * * private documents can * * * be seized and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.” *Weeks v. United States*, 232 U.S. 383, 393 (1914). The court of appeals acknowledged that in this case — as in *Weeks*

^{4/} The final case cited by the court of appeals as support for application of the inevitable discovery exception was *United States v. Jones*, 149 F.3d 715 (7th Cir. 1998). *Jones* also involved a **lawful** independent source, because the group of officers discovering the evidence was wholly separate from the group of officers committing the constitutional violation. See *id.* at 715-716. The case therefore provides no support for the rationale of the decision below.

— the evidence in question was “taken from * * * the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant.” *Id.* at 398. If, as the decision below holds, a general warrant can be used to obtain evidence that is crucial to the conviction of a criminal defendant, the Fourth Amendment’s express command that warrants “particularly describ[e] * * * the things to be seized” “might as well be stricken from the Constitution.” For that reason, further review in this case is plainly warranted.

II. FEDERAL AND STATE COURTS DIFFER WIDELY ON THE IMPORTANT AND RECURRING QUESTION WHETHER EVIDENCE OBTAINED PURSUANT TO A GENERAL WARRANT IS NEVERTHELESS ADMISSABLE IF AN AFFIDAVIT SUPPORTING THE WARRANT SATISFIES THE FOURTH AMENDMENT’S PARTICULARITY REQUIREMENT

This case also presents an important and recurring issue of federal constitutional law that has sharply divided the federal and state courts. Where, as here, a magistrate issues a general warrant supported by an affidavit enumerating the items sought with sufficient specificity, the courts are in broad-ranging disagreement on the circumstances under which evidence seized by authority of the general warrant may be admitted against a defendant. To provide a definitive resolution of this important question of constitutional law, this Court should grant review here.

Here, the district court adopted the recommendation of the magistrate and denied petitioner’s motion to suppress on the ground that the specificity of the affidavit cured any constitutional deficiency in the warrant itself. *App., infra*, 9a, 26a. On appeal, the government attempted to defend the search on that basis. Under the government’s theory (and the district court’s holding), Special Agent Mastin’s affidavit was sufficiently specific that it was able to cure the violation of the Fourth Amendment that would

otherwise have resulted from the issuance of the general warrant. Under that theory, petitioner's Fourth Amendment rights were not violated in this case.

But the court of appeals could not affirm the district court's conclusion that there was no Fourth Amendment violation in this case, because the Seventh Circuit will uphold a general warrant only when an affidavit that includes the necessary specificity is "attached to the warrant or incorporated into it." *United States v. Jones*, 54 F.3d 1285, 1291 (7th Cir. 1995). Although that was not true here, the Seventh Circuit held that the evidence was admissible because the officer preparing the specific affidavit had also executed the search in compliance with the scope of the affidavit. In other words, the Seventh Circuit determined that although the Fourth Amendment had been violated, exclusion of the illegally obtained evidence was an inappropriate remedy. App., *infra*, 5a. It thereby joined several courts in determining that — under the circumstances of this case — admission of the evidence was appropriate. But while most courts have reached this result by analyzing the scope of the Fourth Amendment, the court of appeals in this case reached the result by analyzing the scope of the exclusionary rule.

The decision of the court of appeals on the admissibility of evidence obtained in reliance on a general warrant is in direct conflict with the decisions of numerous other federal and state courts. This Court should grant review to resolve this longstanding conflict.

A. The Lower Courts Are Deeply Divided On The Circumstances, If Any, Under Which Specificity In An Affidavit May Result In The Admission Of Evidence Obtained Pursuant To A General Warrant

The federal and state courts have adopted at least five different approaches to determining when specificity in an affidavit supporting a warrant application may result in the admission of evidence obtained under a general search warrant.

Many courts have held that evidence obtained pursuant to an insufficiently particular warrant may be admitted only where (1) the warrant expressly incorporates the affidavit by reference, and (2) the search warrant and the affidavit are physically attached. See, e.g., *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992); *United States v. Beaumont*, 972 F.2d 553, 561 (5th Cir. 1992); *United States v. Leary*, 846 F.2d 592, 603 & n.20 (10th Cir. 1988); *State v. Riley*, 846 P.2d 1365, 1369 (Wash. 1993); *State v. Schmitz*, 474 N.W.2d 249, 253 (N.D. 1991); *Bloom v. State*, 283 So.2d 134, 136 (Fla. App. 1973).

Other courts will admit evidence seized under a general warrant where (1) the affidavit is incorporated by reference, and (2) the affidavit accompanies the warrant during its execution. See, e.g., *United States v. Towne*, 997 F.2d 537, 547-548 (9th Cir. 1993); *United States v. Morris*, 977 F.2d 677, 682 n.3 (1st Cir. 1992); *United States v. Blakeney*, 942 F.2d 1001, 1024 (6th Cir. 1991); *United States v. Curry*, 911 F.2d 72, 77 (8th Cir. 1990); *United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982); *People v. Staton*, 924 P.2d 127, 132 (Colo. 1996); *State v. Moorman*, 744 P.2d 679, 684 (Ariz. 1987). A variant of this rule also exists, requiring the affidavit to be made available at the time of the search and the same officer who obtained the warrant to execute the search. See, e.g., *State v. Dallmann*, 441 N.W.2d 912, 919 (N.D. 1989); *State v. Peterson*, 741 P.2d 392, 394 (Mont. 1987).

One circuit has taken the position that incorporation by reference is alone sufficient, whether or not the affidavit is attached to the warrant or accompanies the officer conducting the search. See, e.g., *United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993).

The least restrictive interpretation of the Fourth Amendment is that a warrant does not need to incorporate the affidavit if the affidavit was available to provide guidance to the officers executing the

search. See *United States v. Gahagan*, 865 F.2d 1490, 1497 (6th Cir. 1989); *United States v. Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982).

The state of confusion is such that, even within many circuits, there is considerable ambiguity as to the proper rule. See, e.g., *United States v. Jones*, 54 F.3d 1285, 1291 (7th Cir. 1995) (“The case law is not in agreement with respect to whether the affidavit supplying the requisite specificity must be appended physically to the warrant. * * * [O]ur own cases have been somewhat less than precise on the matter.”); *Towne*, 997 F.2d at 547 (“There is, obviously enough, a degree of confusion in our decisions.”).

B. Whether Evidence Obtained Under A General Warrant Supported By A Particularized Affidavit Is Admissible Is An Important And Recurring Question Of Federal Constitutional Law

Courts are quite frequently confronted with the situation presented in this case in which officers have seized evidence under a warrant that fails to meet the Fourth Amendment’s particularity requirement, but have submitted a description in an affidavit that does describe the evidence sought with sufficient particularity.

To see how frequently this issue arises, one need look no further than *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993). The Ninth Circuit there provided a brief overview of the different positions it had taken on this issue, citing nine cases decided during the years 1979-1989 in that circuit alone. See *id.* at 544-547 (citing *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988); *United States v. Brock*, 667 F.2d 1311, 1323 (9th Cir. 1982); *United States v. Marques*, 600 F.2d 742 (9th Cir. 1979); *In re Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317 (9th Cir. 1981); *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982); *United States v. Hayes*, 794 F.2d 1348 (9th Cir.

1986); *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986); *United States v. Fannin*, 817 F.2d 1379 (9th Cir. 1987); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989)). Small wonder, then, that the leading treatise on the Fourth Amendment observes that “[t]he question of whether a defective description in the warrant may be saved by an adequate description in the affidavit arises with some frequency.” 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 4.6(a), at 558 (1996).

The issue presented here is also an important question of constitutional law. It implicates not only the substantive scope of the particularity clause of the Fourth Amendment, but also the remedy appropriate for violating the express requirements of that constitutional provision. This Court should therefore grant review in this case to provide a definitive resolution of a question that has long divided the federal and state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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